

What the Prosecutor Needs From Veterinarians to Support Legal Consequences

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In animal cruelty prosecutions involving equines, the equine veterinarian is the prosecutor's most important resource and witness. An understanding of what the prosecutor needs from the veterinarian will make the equine veterinarian an effective and indispensable resource in animal cruelty prosecutions. Author's address: Pine County Courthouse, 635 Northridge Drive NW, Suite 310, Pine City, MN 55063; e-mail: reese.frederickson@co.pine.mn.us. © 2016 AAEP.

1. Introduction

In prosecutions against individuals who have committed criminal animal cruelty against equines, the most important witness is the equine veterinarian. Equine veterinarians are essential in charging and proving a case. This paper will describe what the prosecutor needs from the veterinarian. Specifically, this article will provide an overview of what the prosecutor has to prove, the importance of submitting a good veterinarian report, the basics of expert witness testimony, and how to be an effective witness. This paper references Minnesota law; however, the laws are similar in most jurisdictions and based upon the same constitutional requirements; the concepts presented are applicable in nearly every courtroom.^a

2. An Overview of What a Prosecutor Has to Prove

After a case of animal cruelty is investigated, the investigative materials are sent to a prosecutor for review for criminal charges. The investigative materials typically consist of law enforcement reports, veterinarian or veterinary pathologist reports, humane agent reports, photographs, audio of interviews, and video of the scene. Once the prosecutor

believes that there is a sufficient amount of materials, he/she must determine whether there is probable cause to charge a crime. "Probable cause" requires that there are sufficient facts such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed."¹

A prosecutor must also determine what crime to charge, as well as the corresponding penalty. In Minnesota, there are three chapters with numerous sections that detail various crimes and penalties involving the treatment of animals.² For instance, the general crime of animal cruelty in Minnesota "is every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death."³ The prosecutor must prove that the abuser knew or should have known that his/her actions caused the cruelty. In other words, a person cannot be found guilty of animal cruelty if it was due to an unforeseeable or unpreventable accident.

In addition to the crime, many states have different levels of penalties depending on the type of harm. For instance, if the animal cruelty caused great bodily harm or death in Minnesota, the crime

NOTES

is a felony.⁴ “Great bodily harm’ means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily harm to a service animal or a pet or companion animal.”⁵ A felony may result in a prison sentence. If the act caused substantial bodily harm, the crime is a gross misdemeanor.⁶ “Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member to a service animal or a pet or companion animal.”⁷ Harm less than great or substantial is a misdemeanor.⁸ Testimony from an equine veterinarian is necessary in determining the difference between a gross misdemeanor or felony based on level of harm, and a cause of death.

After a case is charged, the prosecutor has to prove the case beyond a reasonable doubt, which is the highest legal burden of proof. Minnesota law defines this burden as: “Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.”⁹

Essentially, all the evidence presented by the prosecutor has to be consistent with the guilt of the defendant, and inconsistent with any other possibility. If the state and the defendant do not settle the case with a plea agreement (i.e., an admission of guilt from the defendant), the case is presented to either a jury or a judge. Proving a case requires testimony from witnesses and evidence.

An equine veterinarian is essential at every step of the prosecutor’s case to help prove animal cruelty.

3. The Importance of a Good Report

An important aspect of the prosecutor’s charging decision is the medical report received from an equine veterinarian. The report aids a prosecutor in determining whether the acts were intentional or due to a disease, the level of penalty based on the type of harm (e.g., whether it’s great, substantial, or something less), and the strength of the case based on the findings in the report. The completeness of the report also helps the prosecutor determine the strength of the equine veterinarian as a witness. For instance, a complete and thorough report indicates that the veterinarian will be a methodical and knowledgeable witness. It is also beneficial if the equine veterinarian familiarizes himself/herself with the local animal cruelty laws and levels of harm so that a report may be written to address the level of harm.

If the equine veterinarian’s findings, opinions, conclusions, results, or other materials are used as

evidence in a criminal trial, he/she must testify. Simply submitting a report into evidence without testimony violates the defendant’s right to confrontation and has been repeatedly held impermissible by the United States Supreme Court and state courts.^b In other words, if an equine veterinarian provides any sort of expertise during an animal cruelty investigation, he/she can expect to be called to the witness stand if a case proceeds to trial. The rare exception is if an equine veterinarian is hired as a consulting expert during case preparation simply to help the state prepare its case, and is providing no testimony or evidence.^c

If an equine veterinarian prepares a report as part of the investigation or testifies for the state in a trial, the state must provide the defense “a written summary of the subject matter of the expert’s testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert’s qualifications.”¹⁰ The state must also provide the defense with reports of examinations, experiments, and scientific tests.¹¹ Likewise, if the defense hires an expert, they must disclose the same materials to the state.¹² The disclosure requirements gives each side time to study the opposing expert’s materials, prepare for cross examination, and find weaknesses in the expert’s results.

The disclosure requirement also highlights the necessity for a good report. Whether a case goes to trial is based on a calculation of risk, especially by the defense. For instance, a defense attorney or his/her consulting expert will review an equine veterinarian’s report from the state prior to determining whether to go to trial. If they find that the report is thorough, reasonable, and objective, they may conclude that trial is too risky and convince their client to plead guilty based upon the strength of that report and the state’s expert. If they find that the report is biased, unprofessional, lacking in detail, or failing to dispose of alternative theories, they may find trial an acceptable risk given the numerous holes that can be exploited in that report. In other words, spending the time to write a clear, professional, objective, and thorough report will lessen the chance that an equine veterinarian will have to spend a considerable amount of time testifying and preparing for court.

4. The Equine Veterinarian as an Expert Witness

If a case clears all the legal hurdles and is not settled with a plea agreement, the matter is tried before a jury or a judge (both are called the “trier of fact”). The prosecutor has the burden to present evidence and witnesses to the trier of fact, and prove the case beyond a reasonable doubt. In an equine cruelty case, a prosecutor will typically call law enforcement officers, humane agents, representatives of rescue organizations, and lay witnesses. The most important witness a prosecutor will call is the equine veterinarian. A veterinarian is a strong witness because he/she can be qualified as an expert wit-

ness—a status that gives the veterinarian more power and leeway than what is afforded to a lay witness.

5. Legal Basics of Expert Testimony

Rule 702 of the Minnesota Rules of Evidence is the gateway rule that permits expert testimony in certain circumstances (the rule is similar to rules used in other jurisdictions). The rule states:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.”

The rule is broadly phrased to include any area of specialized knowledge, whether it was gained through formal training, skill, or experience.¹³ “The rule also contemplates expert testimony in the form of lecture or explanation.”¹³ “The expert may educate the jury so the jurors can draw their own inference or conclusion from the evidence presented.”¹³

When compared with lay witnesses, expert witnesses have more flexibility in the courtroom. Lay witnesses are typically prohibited from offering opinions, or may only offer opinions in limited circumstances.¹⁴ Expert witnesses may offer an opinion on the ultimate issue to be decided by the trier of fact.¹⁵ Lay witnesses are typically prohibited from “lecturing” or offering broad explanations.^e Expert witnesses also bring authority. Therefore, given the additional powers of an expert witness, a threshold must be met before they are allowed to testify.

6. Threshold for Expert Testimony

Before an equine veterinarian’s expert testimony is allowed in a trial, the judge must make three preliminary determinations:

1. Is the subject matter of the testimony outside the realm of common knowledge so that expert testimony can assist the trier of fact in reaching its decisions?
2. Does the expert, by way of education or experience, possess sufficient expertise or specialized knowledge so that opinions on this subject matter can assist the trier of fact?
3. Is the foundation for the opinion sound so that the opinion can assist the trier of fact?¹⁶

Assisting the Trier of Fact

Judges will allow an equine veterinarian’s testimony when it assists the trier of fact.¹⁷ According to the Minnesota Supreme Court, “A reasonable test to be applied is whether the members of the jury,

having the knowledge and general experience common to every member of the community would be aided in the consideration of the issues by the offered testimony.”¹⁸ The court also noted that, “We think . . . that such evidence should be received only where the subject matter is complicated or its operation difficult and embracing matters either in construction or operation not of common knowledge.”¹⁹ In other words, if the testimony relates to matters of common knowledge, it will be of no use to a jury.^g

Expert testimony from an equine veterinarian will typically meet this threshold, especially in animal cruelty cases.^{h20} Equine veterinarians have the medical training to describe to a jury how an act, omission, or neglect affected a particular animal, or produced unjustifiable pain, suffering, or death. Such matters are outside the scope of common knowledge, especially considering that animals cannot verbally describe the act, omission, or neglect, nor its effect.

Expert testimony in animal cruelty cases is also helpful with other aspects of proving the crime. For instance, the state has to prove that the act of cruelty was intentional. An equine veterinarian may distinguish between intentional acts and accidental acts.²¹ An expert may also link injuries to a weapon or suspect, or offer an opinion on how acts could have reasonably been prevented.²¹

Qualifications of an Expert

Before an attorney can obtain expert opinions from an equine veterinarian, he/she must elicit evidence or statements from the expert to distinguish the expert from a lay witness. Although education, training, and knowledge are factors, courts have often viewed practical experience as the most important qualification.¹²² The determination is whether the witness’ “knowledge of the matter in relation to which his opinion is sought is such that it will probably aid the trier of the question to determine the truth.”²³

Sometimes, the lawyers are able to stipulate that a witness is qualified as an expert. In most cases, however, the proponent of the expert has to lay a foundation with testimony from the witness. In general, an equine veterinarian called as an expert witness should be able to discuss his/her education, licensure requirements, occupation, past employment, duties and responsibilities, internships, number of similar cases, membership and leadership in professional organizations, professional lectures and presentations, professional publications, and awards and recognitions. A good practice point is for a witness to explain the minimum qualifications in his/her field, and then explain how he/she exceeds those qualifications.²⁴

Foundation for the Expert Opinion

The facts or data establishing an expert opinion must be sufficient for an adequate foundation.²⁵ This determination is subject to a two part test:

Table 1. Examples of Qualifying Questions

Please state your name.

What is your current occupation?

Are you a licensed veterinarian?

 What are licensure requirements?

 In which state are you licensed?

Do you have any certifications?

 Do you have any subspecialties?

What are your responsibilities and duties as an equine veterinarian?

Describe your educational background.

Describe any special training or continuing education.

 What are your continuing education requirements?

What is your professional employment experience?

How many cases have you handled involving alleged animal cruelty?

Are you a member of any professional organizations?

 Do you hold or have you held any leadership positions in these organizations?

Have you authored articles on your field and related topics?

 Have these articles been subject to peer review?

Have you taught or delivered presentations to other equine veterinarians?

Have you testified as an expert witness in the past?

“1. are these facts and data of a type relied upon by experts in this field when forming inferences or opinions on the subject; 2. is this reliance reasonable?”²⁶ These requirements provide “a check on the trustworthiness of the opinion and its foundation.”²⁶ Basically, the judge has to be satisfied that the facts or data the expert is using as the basis of his/her opinion is trustworthy and helps guarantee the validity of the opinion.²⁶ An expert may rely on facts or data that is inadmissible in evidence, such as hearsay, “including conversations with other expert witnesses, professional literature, personal observations, or lectures.”^{26k}

With regard to reliability of the opinion with medical experts, Minnesota courts are flexible and defer to the expertise of the expert.²⁶ The Minnesota Supreme Court has noted that “It is not necessary that medical opinion be capable of demonstration or that an expert speak with confidence excluding all doubt; it is enough that he state his opinion as true in his judgment.”²⁷

When the proponent establishes the basis for an equine veterinarian as an expert, that expert should be able to explain the facts and data underlying the opinion, and describe how it is customary to rely upon those facts and data in the field. For example, an equine veterinarian should be able to explain how he/she would typically examine an equine, how the examination relies on the findings of other individuals such as laboratory technicians, and the reasonableness of relying on personal observations, education, experience and scientific literature.

7. How to Be an Effective Witness In Court

Understanding Your Audience: The Jury

In jury trials, the trier of fact is the jury. An effective expert witness understands the science behind jury decision making and can tailor his/her communication style to the jury.

Prior to the start of trial, the parties undergo jury selection. In Minnesota, jurors are chosen from a list of registered voters and licensed drivers.²⁸ Jury selection is conducted via a process of elimination from the jury pool. For instance, each side is given a number of preemptory strikes,¹²⁹ and the court may strike an unlimited number of prospective jurors for cause.^{m30} Lawyers on each side have an idea of the type of juror they want, and can guess the type of juror the other side wants. For instance, prosecutors will use preemptory strikes to remove jurors favorable to the defense, and the defense will use preemptory strikes to remove jurors favorable to the state. The panel left after the strikes often represents a typical cross section of the population.

Decades of social science and jury research “has shown that most people are affective, not cognitive, thinkers.”³¹ “Most people are emotional, symbol-oriented, selective perceivers of information who base their decisions largely on previously held attitudes about people and events.”³¹ The typical person is also a deductive reasoner—using only a few premises to arrive at a decision, and then accepting, rejecting, or distorting “other information to fit their already determined conclusions.”³¹ In contrast, a scientific expert witness is a cognitive thinker—basing decisions on evaluation, synthesis, and analysis. Given a jury panel with a typical cross section of the population who will most like be affective thinkers, veterinarians who are typically cognitive thinkers need to understand how to bridge that chasm between affective thinkers and cognitive thinkers.

A way to bridge that chasm is for the equine veterinarian to think of themselves as a teacher.ⁿ³¹ Consider ways to take complicated testimony and make it simple and interesting for the students (the jurors).³¹ A good exercise is for the expert witness to think back on his/her best teachers, and what qualities made them good teachers.³¹ Consider the ways in which those teachers made learning fun and understandable, and translate them into the testimony.³¹ Equine veterinarians should also employ different ways to get across the testimony, including visual aids.³¹ Expert witnesses should delve into the natural enthusiasm and passion they have for their subjects. This is an equine veterinarian’s chance to discuss and share an area that they love and have spent years mastering. That enthusiasm will be noticed and appreciated by jurors, and make the expert likeable (likeability reaches the core of an affective thinker).

Additional complications include a juror’s preconceived notions about an expert. When a jury hears the terms “expert witness” or “equine veterinarian,”

Table 2. Difference Between Direct and Cross Examination

Direct Examination	Cross Examination
Open-ended questions Example: “Based upon the examination, what were your conclusions?”	Leading questions (a question that suggests the answer) Example: “Your opinion is that the animal died from a combination of blunt force trauma and asphyxiation?”
Questioning by the lawyer who called the expert Leading questions are generally prohibited	Questioning by the lawyer attacking the expert Open-ended questions are generally discouraged

they may expect complicated and confusing testimony, or a boring lecture.³¹ They may also have questions about whether the expert is truly an expert; a belief that the expert is biased; or a notion that the expert is a condescending intellectual.³¹ An expert can counter these expectations by using clear, non-technical language; using visual aids; giving a thorough explanation of experience and education (e.g., an expert should discuss what sets him/her apart from others in the field); demonstrating fairness and objectivity; and showing that he/she is a normal person who is there to help the jury with a decision.³¹

8. General Tips on Being an Effective and Prepared Expert Witness

There are a number of ways an equine veterinarian can be a prepared and an effective expert witness. First, the expert should always meet with the lawyer who chose him/her as the expert before giving any testimony. Of the tips discussed, this is the most important. This gives the expert a chance to explain to the lawyer his/her testimony, practice direct examination, discuss the order of what will be covered, and what exhibits will be introduced. Expert testimony is typically organized as follows: 1) introduction, 2) education and experience, 3) opinions, and 4) basis for the opinions.³¹ Meeting with the lawyer ahead of time will also give the expert a chance to put together testimony in a meaningful way, and prepare for cross examination by the opposing party. A meeting prior to court also helps the lawyer and the expert to come to a “meeting of the minds” with the proposed testimony and the manner in which the testimony will be used.

Second, an equine veterinarian should visit the courtroom when it is empty to familiarize himself/herself with the layout of the witness stand, the location of the jury box, and the location of the attorneys.^o An expert who knows the layout of the room beforehand can enter the courtroom with confidence.

Third, an equine veterinarian should listen to the questions, but speak to the jury. An equine veterinarian should think about the testimony as a conversation with the jury. The expert should look at the jury when answering, and be polite and friendly with responses to questions.

Fourth, prior to trial, an equine veterinarian should provide the attorney with everything he/she

has published, a résumé or CV, and transcripts of any previous expert testimony in other trials, if available.

Fifth, the equine veterinarian should bring all documents and notes related to the expert opinion in the case. It is permissible for an expert to refer to these documents and notes while testifying if the expert cannot recall something during their testimony (the best practice is to ask the attorney if it is permissible to refer to the notes before answering in order to refresh recollection).

Sixth, an equine veterinarian should be confident in his/her testimony, but he/she should never make up an answer. It is permissible to admit when the expert does not know the answer to a question.

9. How to Handle Cross Examination

An expert should prepare for cross examination. The opposing attorney will typically attack an expert’s bias, the basis of the opinion, and lack of or reasonableness of alternative explanations.^p Cross examination from an opposing party is meant to destroy the credibility of the expert witness, reduce the expert’s likeability, or bolster the narrative of their case. For instance, a defense attorney in an animal cruelty case will often argue disease as a defense, not negligence of care; they may attempt to get the equine veterinarian for the state to admit that disease could have been a factor in order to bolster their theory of the case.

The expert should ask the prosecutor beforehand about the anticipated defenses that will be raised by the opposing party so that he/she can prepare for cross examination. The best way to prepare is to obtain a copy of the materials that the prosecutor received from the defense through the disclosure process. If the defense intends to question the expert using other scientific sources, those sources have to be disclosed, which gives the expert a chance to prepare. For example, a common technique is to attack the basis of the expert’s underlying opinion by using an alternative explanation found in a scientific treatise. Having a copy of this treatise beforehand will give the expert time to formulate a response and be prepared for questions concerning that treatise during cross examination.

Another common cross-examination technique is for the attorney to “box in the expert” by gaining only “yes” or “no” answers without clarifying explanations. The expert should remember that the

attorney offering the expert gets redirect (i.e., additional open-ended questioning after cross examination), and will allow an expert to clarify or expound on answers that were elicited during cross examination.

Overall, the equine veterinarian must maintain confidence in his/her expert opinion. If the equine veterinarian is confident, then the trier of fact will be confident in relying upon that opinion in making a decision; otherwise, the trier of fact may ignore the substance of the entire testimony. Many cross-examining attorneys will try to shake the expert's confidence by getting the expert angry or flustered. An agitated witness appears confused, biased, or not forthcoming. This technique is also intended to make the witness defensive and argumentative, which reduces likeability. The best way to combat this technique is to remain calm and exceedingly polite; this will make the cross-examining lawyer look like a bully (which reduces the lawyer's likeability).

10. Conclusion

The equine veterinarian is often the most vital witness in an animal cruelty case. Understanding the basics of the veterinarian's role before and during the prosecution of an animal cruelty case will give the equine veterinarian a deeper understanding of legal procedures and confidence in the courtroom.

Acknowledgments

Declaration of Ethics

The Author has adhered to the Principles of the Veterinary Medical Ethics of the AVMA.

Conflict of Interest

The Author declares no conflicts of interest.

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^aWhere there is no citation, the information is based on the author's 8 years of experience as a trial attorney and having used expert witnesses in numerous cases, including during animal cruelty prosecutions involving equines.

^bThe Sixth Amendment to the Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." See also *Crawford v. Washington*, 541 U. S. 36 (2004); *State v. Caulfield*, 722 N. W. 2d 304 (Minn. 2006) (scientific analysis of controlled substances only admissible if the defense had an opportunity to cross-examine the analyst).

^cHowever, if the consulting expert discovers exculpatory evidence, then that information has to be given to the defense and may subject that expert to being a trial witness. *Crawford v. Washington*, 541 U. S. 36 (2004).

^d"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

^eA basis for the narrative objection.

^fJudges are afforded a great degree of discretion in allowing expert testimony, and appellate courts often respect their decisions with regard to admissibility. *Gross v. Victorian Station Farms, Inc.*, 578 N. W. 2d 757, 760–61 (Minn. 1998). However, certain types of expert testimony are subject to limitations, such as probability evidence in criminal cases (e.g., DNA test results, blood tests, paternity tests), and opinions about syndromes (e.g., battered woman syndrome, rape trauma, conduct of sex assault victims).

^gFor instance, in *State v. Saldana*, 324 N. W. 2d 227 (Minn. 1982), a rape counselor's opinion on whether a rape occurred was not admitted because the trier of fact could assess whether a rape had occurred.

^hVeterinarian testimony was admitted where the veterinarian had more than 15 years of experience, focused on dairy cows, worked with stray voltage, focused on literature, and understood the external stresses in milk production.

ⁱ"[The medical expert] must have had basic education and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians... that is of controlling importance."

^j"Foundation," when used as a legal term means, "The basis on which something is supported; esp., evidence or testimony that establishes the admissibility of other evidence."

^k*Id.* The United States Supreme Court Advisory Committee sheds some light on this: "[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life and death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Supreme Court Advisory Committee Note.

¹In a typical criminal case, the State gets three strikes and the defense gets five.

^mReasons include if the potential juror is partial, has a felony conviction, has a physical or mental disability rendering him/her incapable of performing a juror's duties, knows the accused, etc.

^aAs noted earlier, expert witnesses are given leeway to instruct and educate.

^oWitnesses who are expected to testify are typically sequestered during the pendency of a trial, and cannot enter the court-

room unless the jury is out of sight. An expert should discuss this beforehand with the lawyer.

^pFor instance, in a horse neglect case tried by the author, the defense claimed that the horses were not neglected, but rather had "Strangles." Expert witnesses in these trials were prepared ahead of time to explain why neglect was the cause, not a disease (e.g., the experts were able to separate the symptoms of Strangles from the signs of neglect).