

# THE MARYLAND ANIMAL LAW ADVOCATE

Opinions, News and Commentary from The Animal Law Section

Gary C. Norman, *Chair*  
Jan Berlage, *Vice-Chair*  
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## Message From The Chair

By Gary C. Norman, Esq.

This is to furnish a brief note to the members of the Section. I am pleased to serve as your Chair. As the winter months encroach, which naturally implicates the forth-coming legislative session in Annapolis, the state of animal law is on the minds of all.

In Maryland, animal law and policy is palpable in a myriad of venues, including, in educational and scholastic settings, as well as in the realm of politics.

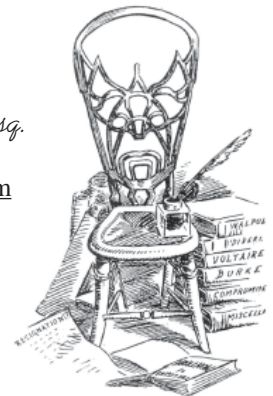


In October, Jan Berlage, the Chair Elect of the Section hosted a successful panel discussion at the Elkridge Furnace Inn. By all accounts, he deserves commendation for the degree of aplomb with which he hosted our annual October kick-off dinner. In the winter, my law partner, Joshua L. Friedman, Esq., and I will publish a law review article in *Law Forum*, a publication of the University of Baltimore School Of Law, which argues, in favor, of legislation advocated by this Section during three sessions. Efforts are underway to host, in conjunction with the University Of Maryland School Of Law and its Animal Legal Defense Fund Student Group, another panel discussion in February 2010. Details about that panel will be forth-coming in a future issue of *Bar Briefs*.

Notably, planning for the regional animal law symposium is underway. By the time of the receipt of this instant newsletter, the program should be progressing towards finalization. For more details about the symposium, consult the article published in the 2009 issue of the *Bar Bulletin*. I am

honored to lead this Section, and to be collaborating with myriad fine individuals on the board of directors. Please do not hesitate to telephone me or contact me via e-mail if there is something that can be improved about the Section, or if there is a program you believe we should offer.

Gary C. Norman, Esq.  
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# Maryland's New Animal Trust Act

By Kathleen (Kate) J. Masterton, Esq.

Maryland animal owners who wish to provide for lifetime animal care even if the owner predeceases the animals have lacked reliable options in the past. A common technique was bequeathing the animal and a cash sum to an individual, with a mere hope that the beneficiary would care for the animal. Others preferred the creation of a trust in favor of a human beneficiary with a requirement that the trustee make distributions to the human beneficiary to cover the animal's expenses; the actual beneficiary is a human for the purposes of determining the measuring life, standing, inheritance, and income tax, et al. There was, however, no enforcement mechanism under such an arrangement.

This year Maryland became the forty-first state to enact a law authorizing the establishment of a trust for the care of one or more animals. The new statute is based on Section 408 of the Uniform Trust Act. While the law has been wrongly referred to as a "pet trust" law, its genesis lay in an effort to benefit not domestic pets, but livestock: horses. It was first introduced in 2006 as SB 235 in 2006 by Sen. Leo Green on behalf of someone who wished to provide post-mortem for the expensive care of her horses, but learned that Maryland courts would not enforce of such a trust.

In hearings before the Senate Judicial Proceedings Committee, there was significant prejudice based on the misconception that this was a trivial bill that would bring ridicule upon Maryland; that there was something inherently wrong in elevating animals to the status of trust beneficiaries over, presumably, people or charities who "should" be the natural object of a decedent's bounty; and that an animal trust was a tax avoidance device. Committee members were shocked to learn that horses may live thirty five years or more, and that minimal care for an older horse may cost fifteen thousand dollars or more annually. SB 235 received a favorable vote out of the Committee and passed the full Senate, only to die in committee on the House side.

The 2009 legislation was re-introduced by Delegates Kach and Olszewski as HB 149 and signed by the Governor on April 14, 2009, effective October 1, 2009. The new law is quite simple, affecting only Md. Code, Estates and Trusts Article ("ET") § 11-102 (excepting animal trusts from the rule against perpetuities) and adding a new section, 14-112.

New ET Section 14-112 reads as follows:

- (a) A trust may be created to provide for the care of an animal alive during the lifetime of the settlor.
- (b) A trust authorized by this section terminates:
  - (1) if created to provide for the care of one animal alive during the lifetime of the settlor, on the death of the animal; or
  - (2) if created to provide for the care of more than one animal alive during the lifetime of the settlor, on the death of the last surviving animal.
- (c) (1) a trust authorized by this section may be enforced by a person appointed under the terms of the trust or, if no person is appointed, by a person appointed by the court.
  - (2) a person having an interest in the welfare of an animal the care for which a trust is established may request the Court to appoint a person to enforce the trust or to remove a person appointed.
- (d) (1) except to the extent that the court may determine that the value of a trust authorized by this section exceeds the amount required for the use intended by the trust, the property of the trust may be applied only to the intended use of the trust.
  - (2) except as otherwise provided under the terms of the trust, property not required for the intended use of the trust shall be distributed:
    - (i) to the settlor, if living; or
    - (ii) if the settlor is deceased, to the successors in interest of the settlor.

An amendment provides that the Act applies "only prospectively and may not be applied or interpreted to have any effect on or application to a trust created before the effective date of this Act."

A threshold issue for the would-be trust settlor is whether to establish an inter vivos or testamentary trust. Where a decedent's estate is likely to be subject to the Federal estate tax or the Maryland estate tax, the establishment of an irrevocable inter vivos trust has the advantage of reducing the decedent's taxable estate by the amount settled upon the trust. Non-tax advantages of an inter vivos trust

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## Animal Trust Act. . .

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include (1) the trust is effective immediately and already operating at the owner's death, without waiting for probate; (2) funds are immediately available for animal care and needs; and (3) the trust can be nominally funded and an account created which names the trustee as the beneficiary to provide pet funds upon the owner's death.

The Act only applies to animals "alive" during the lifetime of the settlor. There is no provision for the care of animals in gestation at the time the settlor dies. To reduce the possibility of a challenge by greedy heirs, detailed identification of the subject animal(s) is critical, when possible.

The Act gives trust settlors some security by including provisions for the enforcement of the trust. The language of the trust instrument may appoint an enforcer in addition to a trustee (such a person is sometimes referred to as a "trust protector"). If none is appointed, a court may appoint an enforcer; the law gives standing to request such an appointment to a "person having an interest in the welfare" of the animal trust beneficiary. It is unclear how broadly courts may construe such language.

The Act requires that the trust property be used only for the purpose intended by the trust, but—in an apparent invitation to litigants—allows other uses to the extent that the court finds that the value of an animal trust exceeds the amount required for the use intended by the trust. Any such "excessive value" is to be distributed to the successors in interest of the settlor. Prudent settlors will avoid transferring an unreasonably large amount of property to the trust, as such a gift may encourage heirs and beneficiaries to contest the trust, allowing the court to reduce the trust to what it considers to be a reasonable amount. The larger the sum, the more explanatory language should be included to justify it (e.g., replacing pasture fencing over the life of a horse; putting residence in trust so that geriatric dogs needn't be displaced from familiar surroundings). Consider language authorizing the trustee to use the funds of trust to defend any challenge to it, thereby diminishing the incentive to greedy heirs. To buttress a correct construction of the purpose intended by

the trust and justify the reasonableness of its funding, the prudent drafter should describe the level of care intended and health care choices; when euthanasia permitted or mandated; food and diet; expected daily routines; toys/cages/pasture/stall; grooming/socialization/training; veterinarianian care; level of caregiver compensation; any accountancy/documentation requirements for caregiver and trustee; insurance issues (major medical, mortality, et al. plus liability insurance); how to monitor caregiver; and disposition of remains. Finally, having a remainder beneficiary (perhaps a charity dedicated to animal welfare) minimizes the incentive of heirs to try to break the trust.<sup>1</sup>

Many uncertainties exist as to the taxation of animal trusts because many tax laws do not adequately address unique circumstances of an animal trust.<sup>2</sup> Most authorities believe a settlor is liable for any gift tax for an inter vivos transfer to a trust above the annual exclusion amount. However, this view is inconsistent with the IRS position on Charitable Remainder Annuity Trusts; IRC

§2503(b) creates an exclusion for certain gifts "made to any person," and animals are not included in the pertinent definition of "person."

Income earned by an animal trust is treated under traditional trust income taxation laws: if the trust is revocable, its income is taxable to the settlor; if irrevocable, the trustee must file Form 1041 if the trust's income exceeds \$600. The IRS taxes income to a statutory animal trust at the rate of a married individual filing separately (*compare traditional pet trust, which is taxable at higher trust income tax rate*). Rev. Rul. 76-486. It appears there is no deduction for distributions made to a trust beneficiary. The transfer to a statutory animal trust is not counted as income for trustee or caregiver. Funds paid from trust to caregiver *for services rendered* are taxable income to caregiver; funds paid to caregiver to purchase goods and services for the trust beneficiary are not.

Problematically, the Act did not amend Maryland Tax-General Code Ann. ("TG") Title 7, which governs death taxes.

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# Member is Power That Causes Baltimore City to Enact Animal Legislation

*~A Personal Legislative Journey~*

*By Donna Bernstein, Esq.*

Trap Neuter Return (TNR) has long been recognized by those involved in the “hands on” animal rescue population as the only way to manage feral cat populations. Municipalities generally have a short term approach to dealing with stray/feral/free-roaming cats because citizens expect an immediate response to their calls for help. Therefore, most municipalities use the Trap and Kill approach when responding to citizen’s calls about “stray” cats, rather than explaining TNR and requiring that citizens work with their local animal control organization to implement a TNR program.

I have been practicing TNR for more than 20 years. In most locales, TNR still is not legal. The R in TNR stands for “return”- as in return to the colony the cat came from after it has been vaccinated, ear-tipped and altered. However, returning the cat is considered “dumping” the animal and is therefore illegal. Colony caretakers practice TNR and care for their colonies at great financial and emotional risk. The people who actually abandoned the cats that started the colonies most often are not found and cited, but the caretakers who are spending their own money to TNR and feed and obtain veterinary care for their colony often receive citations for hundreds or thousands of dollars for violating laws that are meant to manage the care of pets. (Feral cats, by definition cannot be owned and therefore are not “pets”.) The caretakers, who are actually improving the quality of life in their communities, are punished for their work.

Scientific evidence shows that TNR is best for the health and well-being of communities and their animals. Municipalities should therefore implement the program that best serves their community. To do otherwise can jeopardize the health and safety of a community. We as attorneys must therefore do the research for these often overtaxed municipal organizations and present to them information that otherwise is rarely seen or studied. In my campaign, we were able to show that TNR will make the community healthier and safer, will save the city money, and will allow it to harness the efforts and money already being spent by their own citizens who are already doing TNR.

There is a fair amount of in-depth scientific and statistical research that has been conducted on the success of

TNR as well as case studies of the approaches various municipalities have used to manage their feral cat populations. Furthermore, there are a number of TNR organizations around the country (including a highly successful one in New York City), which are run by people who are more than happy to support efforts to implement a TNR program. I used this information and made contact with these groups.

Once I had familiarized myself with the scientific research and the laws regarding cats in Baltimore City, I contacted and gained the support of organizations doing TNR in other municipalities. I put together a presentation to a small coalition of animal rescue organizations that, as it turns out, were familiar with TNR. Most were completely in favor of TNR but so overworked that they did not have time to devote to this matter. I volunteered my time and energy to research changing the law in order to make TNR legal and assist with implementing a TNR program in Baltimore City. I was able to join forces with BARCS (Baltimore Animal Rescue and Care Shelter) which had recently hired a young and energetic director in favor of TNR and who was highly regarded by the Baltimore City Health Department, as well as a number of other organizations interested to seeing this new law passed.

The next step was to obtain any statistics kept by the City and local TNR groups on TNR that had gone on in Baltimore, and to see how my research pertained to those statistics. Once the information was evaluated and we were able to show that TNR would be beneficial to Baltimore - BARCS, Animal Control and a number of local shelters and animal rescue organizations were eager to set up a meeting with the Health Department to discuss TNR.

Over the next few months I put together a presentation to the Health Department which provided statistical and financial information to prove that TNR should be the City’s approach of choice. The Health Department Director was persuaded by the research and the success of other cities comparable to Baltimore. Therefore, the Health Department agreed to sponsor legislation that would

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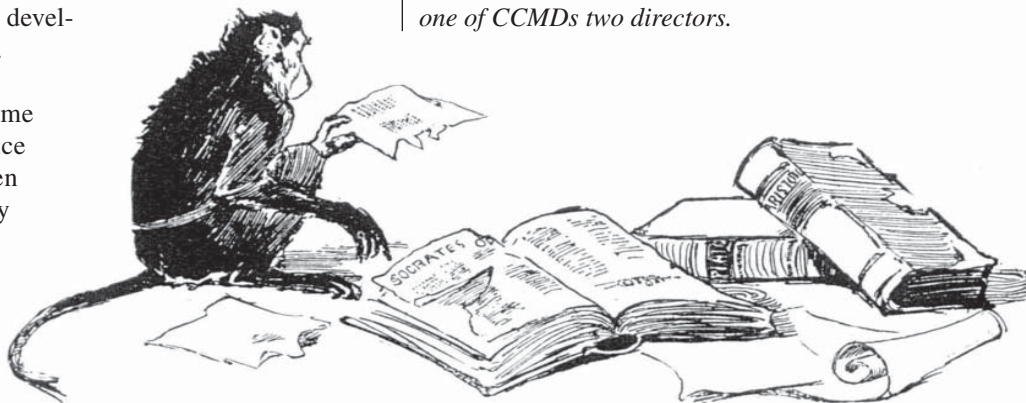
## Significant Legislation. . .

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make TNR legal and agreed to work with this “coalition” to draft the legislation.

The animal rescue groups put out the word to the many people in the City who supported TNR, and we discussed the legislation with various members of the City Council, supplying them with the research and financial information that proved that TNR worked and would save many animal lives and save the City money. It was a win-win, especially since the animal rescue groups, including my newly formed non-profit, Community Cats Maryland, Inc. (CCMD), were eager and willing to assist the City with developing a TNR program.

The legislation became law in 2007 and since then CCMD has been working with the City to implement a vibrant TNR program. This was my first attempt at changing legisla-



tion. I have learned that in order for a TNR program to grow and thrive, it is best to work on gaining the municipalities’ support and working together to develop legislation that will allow the program to be developed and implemented. It is also imperative that once the new law gets passed, time and effort must continue so that the municipality has support and information to continue to fine tune the TNR program.

*Donna Bernstein works in the Consumer Protection/Housing Unit of the Legal Aid Bureau in Baltimore. She formed Community Cats Maryland, Inc., in 2009. Ms. Bernstein is one of CCMDs two directors.*

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## Animal Trust Act. . .

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“A tax is imposed on the privilege of receiving property that passes from a decedent and has a taxable situs in the state,” TG §7-202, and “property that passes from a decedent includes...property that passes...at or after the death of a decedent, in trust or otherwise, to or for the use of another person....” TG §7-201. Here, the property passes in trust for the use of tangible personal property—an animal. While it can be argued that animals are therefore excluded from the inheritance tax, I think the correct view is that the definition language is language of illustration and not language of limitation, and that inheritance tax will be levied on such transfers. Compare that to contracting with/bequeathing an animal to a 501(c)(3) organization for lifetime care of animal and naming the organization as trust beneficiary can gain inheritance tax exemption.

While the Act leaves some issues unresolved, it nevertheless brings welcome certainty and new opportunities to those concerned about what will happen to animals after the owner dies.

*Ms. Masterton is a former horse trainer who currently operates the Law Office of Kathleen J. Masterton, P.C. in Towson, Maryland, where she practices in the areas of estates and trusts, equine law, and business law. She may be reached at [kmasterton@verizon.net](mailto:kmasterton@verizon.net).*

### Footnotes:

<sup>1</sup> The amount passing to an animal trust for lifetime benefit of an animal does not qualify for a charitable deduction. Because the animal beneficiary is not a person, a trust’s remainder which transfers to a charitable beneficiary is not eligible for a charitable remainder deduction, making this type of trust inappropriate as a primary vehicle to benefit the charity in question. Rev. Rul. 78-105:

<sup>2</sup> For in-depth discussion of tax issues related to animal trusts, please see Gerry W. Beyer and Jonathan P. Wilkerson, 2009, “Max’s Taxes: A Tax-Based Analysis of Pet Trusts” (unpublished) available at: [http://works.bepress.com/gerry\\_beyer/1](http://works.bepress.com/gerry_beyer/1).

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# Proposed Federal Bill Could Help Make Pet Owners HAPPY

By Susan J. Hankin

In another potential legislative nod to the role of animals in our lives, Congressman Thaddeus McCotter (R-MI) has introduced a bill that would make some pet care expenses tax deductible. H.R. 3501, The Humanity and Pets Partnered Through the Years (HAPPY) Act, proposes to amend the Internal Revenue Code to allow up to a \$3500 tax deduction for “qualified pet care expenses.” According to the bill’s definitions, deductions would be allowed for expenses associated with providing care – which would include but not be limited to veterinary care – for a “legally owned, domesticated, live animal.” Expenses for acquiring a companion animal would not be deductible. The bill has been referred to the House Ways and Means Committee.

Despite its aims of helping the pet-owning population, The HAPPY Act has received some expected criticism. One argument claims that allowing pet care expenses to be deductible would elevate the needs of animals above that of people; this is not, the critique continues, where we should be devoting our resources. Another criticism levied at this bill is the claim that if pet health care expenses become tax deductible, animals would be put legally “on par” with people. Viewed in a broader context, however, the proposed bill is in line with a number of recent laws that recognize the status of companion animals as somewhere between that of inanimate property and of persons.

As the bill’s language makes clear, it is actually meant to assist the people who benefit from having companion animals in their lives. The bill’s congressional findings cite the proportion of American households that include pets (63% as of the 2007-2008 National Pet Owners Survey) and the positive physical and emotional effects on people that come from the human-animal bond.

This bill is consistent with many other laws that are recognizing the human-animal bond and the role of pets in our lives. Maryland law, for example, includes up to \$7500 in “reasonable and necessary cost of veterinary care” as part of the compensatory damages one can recover when a pet is negligently injured – even if that pet has little or no “market value.” Several other states have laws with similar allowances for veterinary care expenses. A number of states now include pets in domestic protection orders, and almost all of the states have enacted laws authorizing enforceable trusts for pets. While none of these laws grant legal personhood to animals, they all recognize that our companion animals are fundamentally different from other forms of “personal property.”

Other critics have expressed concern that such a bill, if passed, would somehow adversely affect the overall well-being of animals. In fact, just the opposite is likely to be true. The bill not only encourages people to take on reasonable pet care expenses, it also makes such care more financially feasible. The bill has the potential of reducing “economic euthanasia,” which occurs when animals with treatable conditions are euthanized because their owners cannot afford (or chose not to pay for) needed treatment. To the extent that the bill makes pet care more affordable, or makes money more likely to be spent on pets, it is liable to have a positive effect on the overall well-being of both animals and the people who care for them.

*Susan J. Hankin is a Law School Associate Professor at the University of Maryland School of Law, where she teaches Legal Analysis and Writing; Introduction to Torts; and a seminar on Animals and the Law. She is also Secretary of the MSBA’s Animal Law Section.*

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# Dog Exercise Areas

*By Robert Moore, Esq.*

“How did the child’s head come to be in the Pit Bull’s mouth?”

Mary argued that Frank’s dog was too aggressive to have been allowed in the dog exercise area, pointing to her child’s head wound as evidence. Frank countered that the child was screaming, jumping about, causing his dog to bark; that the child stumbled backward, into his dog’s mouth which was open because the dog was justifiably barking at the screaming child. And besides, Frank added, four-year old children have no business inside an area fenced off for the sole purpose of allowing unleashed dogs to play!

The idea of providing dedicated green space for our canine companions was an inevitable reaction to the promulgation of leash laws. Leash laws had been a necessary response to humans who failed to properly train and control their dogs. As society evolved, the need for playgrounds for our best friends to enjoy themselves, unleashed, was recognized. Dog exercise areas (DEAs) are now fairly common in most urban areas of the United States.

A DEA, or dog park, is typically a fenced area enclosing sufficient legroom for a number of dogs to cavort, chase balls and do whatever dogs might do in sufficient space to freely express themselves. When situated in settings where barking isn’t objectionable to nearby residents, DEA’s provide a place for dogs to socialize with other dogs while their people visit amongst themselves. Such parks spawn little societies and groups of their own, where people and their dogs look forward to hanging out with their familiar counterparts.

The City of Gaithersburg sponsors such a facility; city residents need only provide proof of residence and a current rabies vaccination certificate. In addition, approximately 100 tags are presently issued to non-resident, Montgomery County folks who pay an annual \$60.00 fee, in addition to proof of current rabies vaccination, for each dog using the facility.

Chapter 15 of the City Code establishes rules for DEA use including limiting any individual to two dogs at any time and barring female dogs in estrus. Rules and regulations governing usage are posted onsite.

While Gaithersburg’s overall experience has been positive, the biting incident above was an actual case involv-



ing a child in the DEA who was bitten, raising the issue whether young children should be allowed in the unleashed dedicated area. Since existing regulations state no age limit, noting only that children must be accompanied by responsible adults, we ruled that the dog owner, knowing that children might be present at any time, was at fault, and “Frank’s” dog, who had consulted canine psychiatrists for aggression issues, was barred. Unfortunately, as with many such animal matters, arguments often are born out of issues between the human groups socializing in the DEA as they exercise mutual animosities through their dogs.

Montgomery County, through the county’s planning board, has established guidelines for a Dog Owner’s Group (DOG) to assist in planning, sponsoring and maintaining dog exercise areas, subject to specific established rules.

Interestingly, Montgomery County, like Gaithersburg, places no age limit on children allowed in the DEA, only mandating that children must be “strictly supervised” by a person “at least 13 years old.” Most jurisdictions, including Gaithersburg, require children to be supervised by an “adult.”

Age limits are universally recognized as worthy of some mention in rules and regulations, though usually defining no specific age. At least one jurisdiction, the City of Eden Prairie, Minnesota requires that anyone under 12 must be “closely supervised” by an adult, and prohibits children under six from entering an Off Leash Use Area (OLA).

Space dedicated for our dogs to play, be it designated as a dog park, dog exercise area, off leash area or otherwise, is a concept whose time has come. These settings provide a crucible to observe behavior, canine and human alike.

*Robert Moore has a general law practice and has been practicing law for 30 years. He is the Chair of the Gaithersburg Animal Control Board.*

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# MEMBER HIGHLIGHTS

**Gary Norman** was honored by being selected by The United States Jaycees as being one of the 10 Outstanding Young Americans for 2009. Those chosen best exemplify the finest attributes of America's youthful achievers. Nominee's accomplishments are judged in relation to the Jaycee Creed: "[T]hat earth's great treasure lies in human personality, and that service to humanity is the best work of life." Notable past Outstanding Young Americans include Orson Wells, Nelson Rockefeller and Presidents Kennedy, Nixon, Ford and Clinton.

Governor O'Malley appointed **Kathleen Tabor** to the Maryland Horse Industry Board to serve as the representative of Equine Trade and Support Industries. The Board advises local, state, federal and private entities on the status of the industry. Ms. Tabor's solo practice in Howard County focuses on equine business, activities and ownership, among other civil matters. Ms. Tabor is one of the founding members of the Animal Law Section's Equine Committee. She is also a member of the Maryland Horse Council, in addition to many more equine-related committees and groups. Ms. Tabor has had a life-long passion for horses and currently owns a Morgan gelding.



*Left: Kathleen Tabor is seen here with "Statesman Midnite Cowboy", her four-year old Morgan gelding.*

## Section's Annual Dinner Event, Notable Again

In October, 2009, the Section's annual dinner event was held at the Furnace Inn in Elkridge, Maryland. After a splendid dinner, a panel of animal law experts discussed their practice and provided tips on establishing an animal law practice. The speakers were Amy Samman, a lobbyist with the Maryland Horse Council; Alan Foreman, CEO of the Thoroughbred Horsemen's Association, Inc, who is also one of the foremost race horse litigators in the United States; Kathleen Tabor, Esq., who has an equine law practice and Cheryl Leahy, general counsel for Compassion Over Killing, an advocacy organization which focuses on cruelty to animals in agriculture.

All of the presenters agreed that it was their singular passion for animal law that spurred them into successful careers in animal law. Often, luck and timing are also a part of establishing a successful practice. Joining groups and associations that focus on the type of law that one would

like to practice is essential. For instance, Ms. Tabor joined the Maryland Horse Council, and also put an advertisement about her practice in a horing industry magazine. Another panelist approached a large humane organization to ask about potential jobs in animal law. Being involved in state and national bar associations is important. If you are passionate about a particular area of animal law, seek out legislative bills that interest you and volunteer to lobby in the state legislature. Create a brochure and distribute it to a target audience to attract potential clients. Volunteer at animal law organizations and provide pro bono legal services to these organizations.

All the panelists agreed that conveying a sense of passion about animal law, being flexible and demonstrating a willingness to commit to animal law issues will enable you to distinguish yourself when seeking to establish an animal law practice.