



Lawsuit Woes

What to do if you find yourself in litigation

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You just received “the phone call,” the one we all dread and try to head off with training, education, and our yearly insurance premiums paid in full. But still, you or your organization is being sued. Or, you have been asked to testify as an expert witness in your field of study or experience. Either situation will involve attorneys and possibly testifying in court. What to do and how to handle this stressful event? Regardless of the type of case, ALL cases go through a similar process. Although the public thinks there are too many frivolous lawsuits, most conflicts or disagreements do not reach the courtroom, so take heart—the odds of being in the witness chair are slim. But, if you do find yourself in the hot seat, it is good to know how the process works.

Once a civil lawsuit has been filed, one of the first steps in the litigation process is a deposition, the discovery phase of the trial,

that allows the attorneys for each side to find out what happened and question the parties or witnesses involved. After the depositions have been completed, the litigants will more than likely go through the next phase, which is mediation, to see if both parties can reach an agreement. Mediation can be court ordered or voluntary. If this phase is unsuccessful, the case will be scheduled for trial. However, most cases settle or get dismissed, with only a minority making it to the courtroom. No matter if the case involves a minor incident or involves million-dollar damages, the process is the same.

Litigation regarding dog bites, however, is on the rise. Below are some statistics of four states, their rankings, and the number of lawsuits filed. The states are ranked by the amount of money awarded per claim.

Rank	State	Number of Claims
#5	Arkansas	137
#6	Oklahoma	229
#7	Hawaii	62
#8	California	2,396

The average dog bite claim for 2019 was \$43,653 with 17,856 claims totaling \$802 million (source: <https://quotewizard.com/news/posts/dog-bite-claims-by-state>). If you find that you are one of these statistics, then it is important to understand the different categories of witnesses, in which you may find yourself.

- The plaintiff—the person bringing the lawsuit who has the burden of proof. This burden is not, “beyond a shadow of a doubt” but only a “preponderance of the evidence.” In other words, the plaintiff has to tip the scale of justice by only 51 percent in their favor to “prove” their case.
- The defendant—the person being sued. It could be the owner, the veterinarian, the trainer, a boarding facility, the property owner, etc. or any combination.
- The eyewitness—which is self-explanatory.
- The expert witness—Some people are under the misconception that the expert witness is an “advocate” for the side that has hired them. Not so. An expert reviews the history of the case and takes the case only if they feel that they can legitimately support their theories and withstand cross-examination. The expert is a person hired by one party whom the attorney feels can contribute information to help the fact finder understand the facts of the case. If one party has hired an expert, then they had better be prepared that the other side will have one as well.

How to testify as a plaintiff

The plaintiff is the injured party suing the owner of the dog(s), a veterinarian, a boarding facility, a trainer, or anyone they feel is responsible for causing them harm. They can seek monetary compensation for their damages, which may include medical expenses for dog or human, property damages, or mental anguish. The plaintiff has the burden of proof, not the defendant. However, they may have some responsibility for their own damages; if so,

how negligent were they? Be prepared for the defense attorney to put the plaintiff on the defensive during cross-examination for his possible role in the incident. Both parties’ attorneys will be pointing fingers of blame at their opposition.

For example

- Was the plaintiff trespassing?
- Was he provoking or teasing the dog?
- Did he try to pet the dog without asking permission?
- Did running and screaming cause a prey drive attack?
- Did the plaintiff intervene in a dogfight?

Remember, as the plaintiff, you were there; you witnessed the incident firsthand, and the attorneys did not. Do not backtrack on something you feel strongly about. For example, if you generally felt surprised or afraid, don’t let the attorney influence your answer. You know what you know, and they have to accept it. Keep this foremost in your mind as it will give you confidence.

How to testify as a defendant

If you are the defendant in the trial, remember the following:

- Was there a history of aggressive or reactive behaviors regarding the dog(s) in question? If not, focus on the dog’s excellent training and temperament or the plaintiff’s negligence.
- Had the dog(s) been properly socialized, trained, managed, and supervised appropriately? Who can substantiate this?
- Do not let the opposing attorney put words in your mouth or make you doubt yourself. Remember your key points and stick to them!
- If you don’t understand, ask them to repeat or clarify.
- If you don’t know, you don’t know. Don’t be afraid to say so.
- If you don’t remember, say so. Don’t answer if you really don’t remember.
- Is there a chance for better management, supervision, training, or rehabilitation for the dog(s) in question in the future?
- Do not become argumentative or defensive. If answering the question is going to harm your case, it’s better to answer quickly and not draw attention to your avoidance. Your attorney will be able to clean up any mess through a redirect examination.

How to testify and prepare as an expert witness

If you are asked to testify as an expert, then the following can be a checklist in preparing for this process. A case can involve something as simple as neighbors feuding over a barking dog or as tragic as a bite to a child’s face; again, the rules for the process are the same. The goal of the expert witness is to assist the trier of the facts, i.e., a jury or judge, in understanding the key issues of the case as they relate to the dog(s) and its behavior.

- First, the potential expert will have to be qualified in the courtroom by their party’s attorney and accepted as an expert

witness by the judge. They will be questioned in the witness stand throughout this process.

- Expert witnesses come from varied backgrounds and are examined by attorneys for both the plaintiff and defense and possibly the judge.
- The expert witness may be qualified based on their academic, scientific, specialized training, or extensive practical experience relative to the specific issues of the case.
- The attorney for the party for whom the expert has been hired will question them about their education, training, certifications, licenses, experience, professional membership, publications, and presentations.
- After this questioning, the attorney will ask the judge to accept them as an expert.
- Then, the opposing attorney will either accept or disagree. If they disagree, they will conduct a cross-examination of the potential expert witness to discredit their qualifications. Don’t worry—if this happens the potential expert’s attorney has the opportunity to clarify their answers and resubmit them to the judge to be accepted as an expert.
- If the judge accepts that they are sufficiently qualified to give expert testimony, they will then be sworn in.

Functional analysis and the report

As an expert, the first thing you will need to do is to conduct a functional analysis, which is a recognized tool in the scientific community. This will include the ABC’s and be the basis of the report and testimony.

- What history do you have of the incident; dogs, victims, witnesses? A thorough description of the incident (i.e., type of aggression: offensive, defensive, warning or no warning/ type of injuries etc.)
- Obtain the dog’s background and basic information (breed, age, sex, if neutered or spayed, name of rescue, date of adoption, etc.), including the following:
 - o Medical
 - o Social
 - o Past behavior regarding similar incidents
 - o Bite history
 - o Triggers
 - o Training and type
 - o History of the human-canine relationship
 - o Personal observation
 - o Eyewitness reports
 - o Medical records
 - o Police report
 - o Animal control report
- Interview the dog’s caretakers or anyone who has had contact with the dog(s), such as the neighbors and any professionals, i.e., the veterinarian, vet tech, dog sitter, shelter, rescue,

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groomer, etc. These opinions and observations can be included in the history section of the report.

- If this is a first offense, focus on the history of the dog rather than focusing on the incident. If there was a prior history of aggression, focus on the positives such as the owner's ability to manage and rehabilitate.
- The expert witness should conduct a one-on-one evaluation of the dog(s) as that will carry more weight with the judge or jury, than just basing the testimony on the accident report and witness statements.
- There is no better fodder for an attorney during cross-examination than to have an expert who has not personally evaluated the party, i.e., the dog(s) in question.
- If possible, administer a standardized and accepted temperament test, such as SAFER or Sternberg's Assess-A-Pet. A test that is accepted across the profession gives the expert the support of a third-party authoritative source.
- Administering a temperament test more than once would be ideal. Although you will never know the dog's emotional state at the time of the incident, administering multiple temperament tests will give you information over a given period of time regarding both the dog's temperament and his personality. If the results are consistently positive, that will bode well for the dog.
- If the trainer or behavior consultant feels it is safe, they can take the dog to a public location. Is he emotionally balanced or fearful? Could he handle the stress of a new situation, or did the outing have to be cut short?
- This type of information can prove invaluable in helping the judge or jury understand if the dog(s) is emotionally balanced, manageable and/or trainable. This can help the fact finder have confidence to find in favor of the dog(s). After all, that is the ultimate question: "is this dog safe?"
- If deemed safe, and if permitted by the shelter or court, taking the dog to the original location or to one that is similar can prove to be a useful tool for the expert in supporting his or her opinion, especially if videotaped.

Before you testify, ask yourself if you would feel comfortable working with this animal in a class or private training session? Would you be comfortable taking this dog to a public area? Would you walk this dog in a park around other dogs and children? If not, why? Can the dog(s) be managed? Are the owners capable of management, rehabilitation, training, and supervision; what is their level of commitment? Remember, no matter the particulars of the case in which you are asked to testify, or which side has engaged your services, both sides are working for the overall welfare of the dog(s) and the safety of the community.

Preparing your testimony as an expert witness

How to handle direct examination

- You will be asked to testify and commit to an opinion based on your experience and education, as well as any testing or observations of the dog(s) you've been called in to testify about. This is where your report will come in. It will be subject to both direct and cross-examination.
- Remember to have clear criteria; i.e., what are your three main points and stick to them!
- The expert should never say anything that cannot be backed up by an authoritative third party. In other words, once an opinion has been given, both attorneys' will question how do they know and why?
- Even though an expert is testifying for one side their focus should be on the facts; with the goal being as objective and professional as possible.

How to handle cross-examination

- The opposing attorney conducts a cross-examination after your attorney has completed the direct examination.
- This can be the most stressful part of your testimony. If you are prepared with a thorough functional analysis under your belt and have a solid report with third-party authorities, you should be fine.
- Do not be defensive or argumentative! Remember, you are the expert, not the attorney! You have an understanding of the facts that the attorney does not. But you must be humble and professional, answering the questions without reservation.

- Do not look to your attorney for help!
- Do NOT avoid answering questions that will hurt your side. Go ahead and answer them. Your attorney will have a chance to clarify any questions that you were asked during cross. This is called redirect.
- The opposing attorney will be looking for hesitations in your testimony, so be prepared and absolutely sure before you answer. Besides, you will get grilled to a pulp on cross if the attorney senses any hesitancy.
- If you are under cross-examination as an expert, be ready for hypothetical questions. For example, "Isn't it possible that if these dogs got out, they could harm a child?" or "We don't really know what these dogs will do, do we?" Be willing to readily agree regarding obvious questions. However, if you rely on a recognized authority, the dog(s) history and your observations, you can give an informed and justified opinion.
- Under cross-examination, you may feel pushed to give a definite, categorical opinion one way or another; remember to stay objective and stick to the facts.

Know the difference between testifying in a deposition vs. testifying in court

Being deposed and testifying in court require two different strategies. The witness needs to be prepared on how to handle these very different scenarios.

- The first thing you'll be asked to do is to give a deposition, which is a fact-finding mission for both sides. It is given under oath with both parties present, along with their attorneys and a court stenographer, but with no judge present. It is generally done in one of the attorney's offices and in an informal atmosphere.
- Because of this, be careful not to let the other side make you feel too safe or too comfortable. Remember, their goal is to get as much information as possible to discredit you and your side of the case later in court. Whatever you say can and will most likely be used against you in open court.
- Don't be defensive or argumentative; just answer the questions as succinctly as possible. The time to elaborate on your answers is in open court. Let me repeat that, the time to elaborate on your answers is in open court but be succinct in your answers during a deposition.
- Be open about answering the questions, but don't give away the farm! It's up to the attorney to figure out which questions to ask; don't help him out.
- Be aware of being asked two questions in one. Listen carefully, and if you are asked this type of question, respond "I will be happy to answer that; let's take the first question first." Think about your answers, as they most likely will come back to haunt you.
- Make sure you understand the questions, and if you are unsure, ask the attorney to repeat or clarify.

- You should always give honest answers (you are under oath!) but keep them short and concise.
- Don't volunteer information. Telling the story should be saved for the actual courtroom testimony for the judge or jury.
- Your attorney will schedule a witness preparation session regarding the kinds of questions you may face during examination.

On the day

Once the court date arrives, you will be sequestered in a small room outside the courtroom. These are the witness rooms. Courtrooms are open to the general public, so you can bring a friend or family member as support when you testify. They won't be able to accompany you to the witness room, but they can watch your testimony and be there for you afterward. Be prepared to bring your own coffee and something to read, as there may be a long wait. Dress as if you are going to a place of worship or business meeting, i.e., your attire should be conservative and professional.

From the moment you leave your car, you are not allowed to talk with anyone—they don't want you to even say good morning in passing, as that person might be a potential juror. Upon arriving, the bailiff for the designated courtroom will direct you to a witness room; be sure to tell them if you are testifying for the plaintiff or the defendant. Then you wait.

Whether you are a plaintiff, the defendant, an expert or eyewitness, you will have your attorney there to guide you. Stay focused on your three key points, be prepared, and remember you know more about dogs than anyone else in the courtroom!



Melissa McMath Hatfield, MS, CBCC-KA, CDBC, earned a master's in counseling psychology and is a retired licensed psychological examiner. She owns McMath Trial Consultants (www.mcmathtrailconsultants.com) where she has assisted attorneys for 43 years in jury profiling, jury selection and witness preparation in high profile cases. Melissa has been an APDT conference speaker and her articles are featured often in APDT's Chronicle of the Dog. Those articles have received numerous nominations in the Dog Writers Association of America's writing competition. Currently, she has a private behavior consulting practice where her main focus is performing temperament assessments and behavior evaluations of dogs who are exhibiting mental health issues