The Proper Use of Animal References in Law

BY MARK COHEN

The practice of law is replete with animal references. Lawyers routinely employ animal references in argument and writing. We say, "That dog don't hunt" to refer to a flawed theory. A person we don't trust is a "snake in the grass." Even accomplished jurists use animal references. Oliver Wendell Holmes once described the Supreme Court as "nine scorpions in a bottle." More recently, in *Koons Buick Pontiac GMC, Inc. v. Nigh*,[1] Justice Scalia's dissent accused the majority of creating a "Canon of Canine Silence" in considering the legislative history of a statute. Using animal references to paint opposing counsel or parties as untrustworthy is common.[2] A few lawyers even adopt animal nicknames. For instance, an injury lawyer in Texas obtained a federal trademark registration on "Injured? Get the Gorilla!"[3]

Of course, animal references are unavoidable when considering laws pertaining to animals. For example, it is a federal offense to import a "mongoose of the species Herpestes auropunctatus."[4]

But when lawyers use animal references in other ways, we lack uniform guiding principles. This article seeks to remedy that. Below are five best practices for using animal references in your legal practice.

1. Select an Animal Appropriate for Your Reference

The most common mistake in using an animal reference is selecting an animal that does not possess the traits or character you seek to portray. One example of this is a speech in which Al Gore reportedly said (referring to President George H.W. Bush's attempt to portray himself as an environmentalist), "A zebra cannot change its spots."[5] For an example of the correct way to do it, see *People v. Larson*,[6] in which the prosecutor referred to a 66-year-old man charged with illegal use of fireworks as a "sly fox" for asserting an entrapment defense.

Even Supreme Court justices get it wrong now and then. In *Spano v. New York*,[7] Justices Douglas, Black, and Brennan concurred in the judgment, and in their concurrence used the term "kangaroo court" to describe a procedure police used to obtain confessions while effectively denying the accused the right to counsel. Justice Douglas's reference to a marsupial is puzzling. Aside from the fact that kangaroos are not native to America, kangaroos are not known for being unfair, rushing to judgment, or being otherwise averse to due process. The reference to an Australian animal with powerful hind legs, a muscular tail, a small head, and good boxing skills simply does not work.

This principle also holds true in selecting an animal nickname. For reasons beyond this article's scope, the public came to see aggression as a good trait in lawyers. This led some lawyers to adopt animal nicknames. In the days before the Internet, when lawyers advertised in telephone books, it was common to see law firm ads featuring snarling dogs or angry bears. But is a grizzly really the animal you want associated with your practice? Few potential clients seek lawyers that eat dozens of pounds of salmon each day and sleep five to seven months per year. Today, there is a greater emphasis on civility in the law, so fewer lawyers boast aggressive animal nicknames such as "Pitbull" and "T-Rex." However, animal nicknames remain possible. You just must put more thought into what type of animal truly represents you. Given the eclectic nature of my practice, I am considering adopting "the Platypus." Doing litigation and transactional work, I am a legal monotreme.[8]

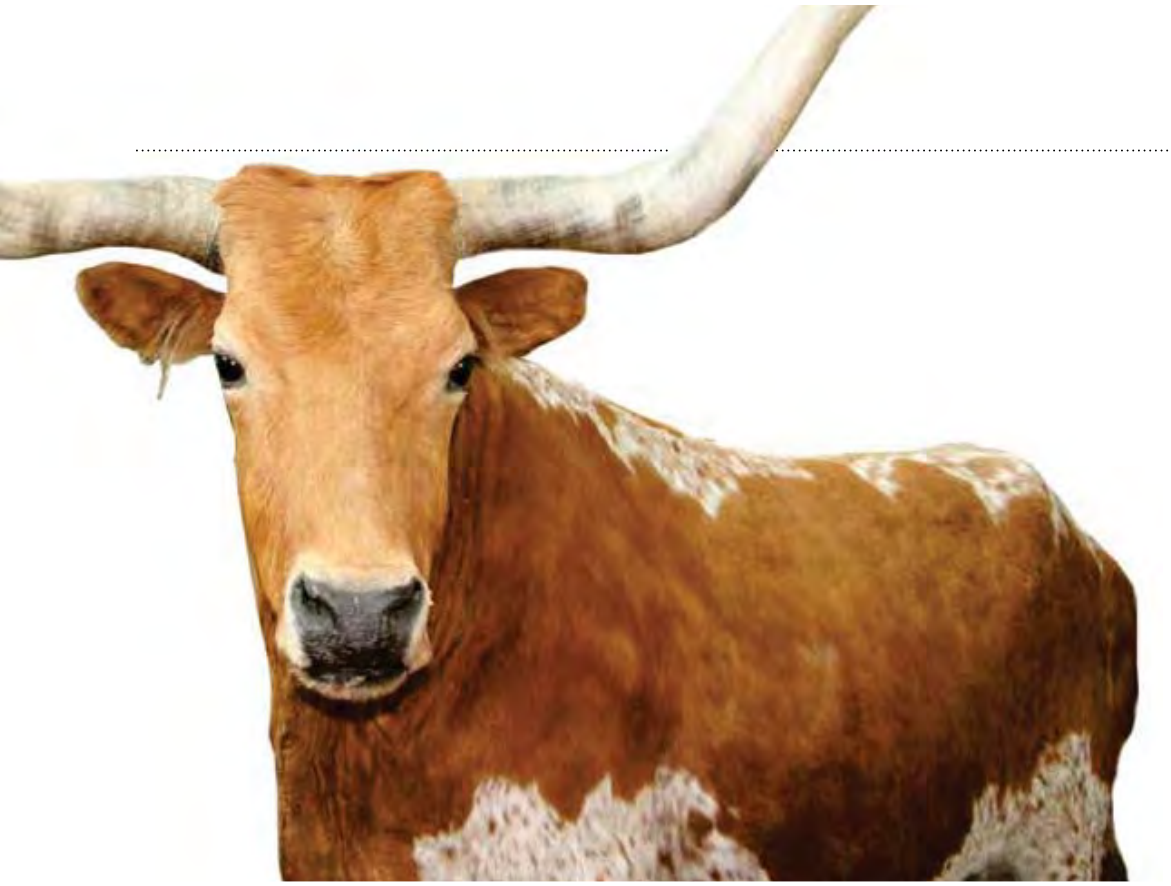
To paraphrase Johnny Cash, before using an animal reference, you must "Understand Your Animal."[9]

2. Recognize that Judges Dislike Foraging Animals, Especially Ferrets

The case law is clear that judges do not like foraging animals. In *U.S. v. Dunkel*,[10] the court observed, "Judges are not like pigs, hunting for truffles buried in briefs." Similarly, in *Nicholas Acoustics & Specialty Co. v. H&M Construction Co. Inc.*,[11] the Court declared, "Judges are not ferrets!" This principle is so widely accepted that respected treatises acknowledge it. For example, Wright and Miller's *Federal Practice and Procedure* states: "Unnecessary prolixity in a pleading places an unjustified burden on the district judge and the party who must respond to it because they are forced to ferret out the relevant material from a mass of verbiage."[12] And, per *Balles v. Harvey*,[13] federal district court "does not sit as a super-appellate tribunal to review and ferret out all possible errors committed by the courts of the Commonwealth of Pennsylvania in interpreting their own law."

3. Be Careful with Animal Clichés

A cliché is an overused phrase that betrays a lack of original thought.[14] Good legal writing avoids clichés, but an animal cliché may sometimes be useful in simplifying concepts for a client or a jury. For instance, in explaining the possible advantages of settlement to a client, a lawyer might say, "A bird in the hand is worth two in the bush" to explain that having something, even if it is not what is desired, is better than taking the chance of losing it to attain something more desirable. However, even when an animal cliché may be useful, lawyers must be careful to ensure the cliché is based on accurate



Still another problematic animal expression is "taking the bull by the horns." Very few people who take the bull by the horns achieve their desired outcome.

assumptions. For example, lawyers sometimes refer to a powerful person or organization as the "800-pound gorilla." The problem is that a full-grown adult male Eastern gorilla typically weighs 309 to 453 pounds.[15] The heaviest gorilla recorded weighed only 586 pounds.[16] Thus, as one legal scholar pointed out, referring to an 800-pound gorilla is like referring to an 800-pound hamster —it doesn't exist.[17]

Another troublesome expression is that of rats leaving a sinking ship. To the extent this is intended to imply that rats are selfish or disloyal, this reference fails completely. Every rational creature leaves a sinking ship; it is not a decision unique to rats. Properly used, this reference means you can tell something is about to fail when large numbers of people begin to leave it. For example, in *Pennichuck Corp. v. City of Nashua*,[18] the court noted that tenants "began to leave the premises like rats deserting a sinking ship" when it became known that a municipality intended to take the property through eminent domain.

Still another problematic animal expression is "taking the bull by the horns." Very few people who take the bull by the horns achieve their desired outcome. See, for example, *Zurich Reinsurance (London) Ltd. v. Westville Riding Club, Inc.*,[19] in which the court held that the policy did not cover injuries sustained by a member of the public who accepted a rodeo announcer's challenge to win money the hard way by removing a ribbon from a bull's horns.

4. Don't Use Dogs to Make Negative References

In *Gaddy v. Cirbo*,[20] counsel referred to the defendants as "cowardly dirty, low down dogs." Similarly, in *Miller v. State*,[21] the district attorney referred to a defendant as a "mad dog who did not deserve to live." The problem with using dog references to attempt to paint someone in a bad light is that people like dogs. The American Veterinary Medical Association estimates that 36.5% of all households in America include a dog and that there are 69,926,000 pet dogs in the United States.[22] Moreover, far from being considered cowardly and dirty, many see dogs as noble, loyal, and heroic. Think *Lassie* and *Rin Tin Tin.*

5. Consult the Bottom of the Evolutionary Scale for Insults

When attempting to portray others in a negative light, it is best to avoid mammals altogether. Prosecutors have called defendants dogs, hogs, hyenas, rats, rattlesnakes, skunks, vultures, wolves, and worms. However, as noted above, dogs are likeable. The same holds true for many other mammals. As Mark Twain noted in the introduction *to Pudd'nhead Wilson*:

> Observe the ass, for instance: his character is about perfect, he is the choicest spirit among all the humbler animals, yet see what ridicule has brought him to. Instead of feeling complimented when we are called an ass, we are left in doubt.

Generally, if you really want to convey disgust, you should stick with animals that are lower than mammals on the evolutionary scale. James Gorman suggests we use an evolutionary scale to assess the level of disgust an animal reference carries, noting the difference, for example, between calling former Attorney General Ed Meese a "dirty rat," an "insect," and a "slug." He suggests part of the answer may lie in evolutionary biology:

> Evolutionarily, slugs are pretty distant from us, what with all our limbs and our clearly defined ears. And the further things get from us, in evolutionary terms, the creepier they seem. Other mammals may be fearsome, but they're seldom disgusting. Birds are cute; Reptiles at least aren't gooey. Amphibians

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are pushing it. And once you move outside of the vertebrates, it's yuck city. Insects, spiders, worms, grubs, slugs.[23]

Conclusion

The legal professional depends on precision in written and oral communications. Properly used, an animal reference can add spice to an argument or legal writing. Too often, though, lawyers employ animal references without thinking them through. Before using an animal reference, consider the message you want to convey and ask whether you have chosen an animal appropriate for the reference. If that reference doesn't work, there is more than one way to skin a cat. CL

Mark Cohen has practiced law for 34 years. He earned his law degree at the University of Colorado and an LLM at the University of Arkansas, where he also taught legal writing. His practice emphasizes business litigation and corporate veil issues. He also enjoys helping lawyers and organizations improve legal documents by translating them from legalese into plain English. His many publications include "How to Draft a Bad Contract," published in *Colorado Lawyer* in August 2015—mark@cohenslaw.com.

NOTES

1. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004).

2. *See, e.g.*, *Landry v. State*, 620 So.2d 1099 (Fla.Dist.Ct.App. 1993) (prosecutor referred to defense counsel as "maggots"); *Simmons v. State*, 466 S.E.2d 205 (Ga. 1996) (prosecutor's characterization of defendant as an "animal" and "snake" were not grounds for a new trial); *Florida Bar v. Mooney*, 49 So.3d 748 (Fla. 2010) (attorney reprimanded for calling opposing counsel a "bottom feeding/scum sucking/loser lawyer.").

3. USPTO Trademark Registration No. 4214820.

4. 18 USC § 42(a).

5. The Congressional Record has Gore using the term "stripes" rather than "spots." Sept. 18, 1991, 102nd Cong. 1st Sess., 137 Cong. Rec. S13202, Vol. 137 No. 129. However, members may alter the Congressional Record before it is made public. Sen. Gore was quoted as using the term "spots" in various other publications. *See, e.g.*, *The Toronto Sun* (Nov. 19, 1995); 1999 calendar for "365 Stupidest Things Ever Said" at May 13 page.

6. *People v. Larson*, 308 N.E.2d 148 (Ill.App. 1974).

7. *Spano v. New York*, 360 U.S. 315, 325 (1959).

8. Just as the public traditionally divided lawyers into two categories—litigators and transactional lawyers—biologists traditionally divided vertebrates (animals with a spine) into five categories—mammals, fish, birds, amphibians, and reptiles. Mammals have fur and give birth to their offspring rather than laying eggs. Reptiles lay eggs. Amphibians can live on land or in water. Then along comes the platypus. It has fur. It lays eggs. It lives on land and in water. Is it a mammal, a reptile, or an amphibian? Biologists got tired of debating this and gave up. They created a new class of vertebrates—monotremes (egg-laying mammals).

9. Johnny Cash, "I Walk the Line" (Columbia Records 1964).

10. *U.S. v. Dunkel*, 927 F.2d 955, 756 (7th Cir. 1991).

11. *Nicholas Acoustics & Specialty Co. v. H&M Constr. Co. Inc.*, 695 F.2d 839, 846–47 (5th Cir. 1983).

12. Wright et al., 5 *Federal Practice and Procedure, Wright &Miller*, Civ. § 1281 (3d ed. Thomson West).

13. *Balles v. Harvey,* 248 F.Supp. 778 (U.S.D.C. PA 1965).

14. www.merriam-webster.com/dictionary/clich%C3%A9.

15. *See* Butynski, ed., *The Mammals of Africa* vol. 6 (Elsevier Press 2013); Burnie and Wilson, eds., *Animal: The Definitive Visual Guide to the World's Wildlife* (DK Adult 2005).

16. Wood, *The Guinness Book of Animal Facts and Feats* (Sterling Pub. Co. Inc. 1983).

17. Bleich, "Feathers and Fur: A Different Kind of Animal Law," *Oregon State Bulletin* (June 2006).

18. *Pennichuck Corp. v. City of Nashua*, Civ. No. 04-187-JD, 2004 WL 2030282 (D.N.H. Sept. 13, 2004).

19. *Zurich Reinsurance (London) Ltd. v. Westville Riding Club, Inc.,* 82 F.Supp.2d 1254 (D.Okla. 1999).

20. *Gaddy v. Cirbo,* 293 P.2d 691 (Colo. 1956).

21. *Miller v. State*, 177 S.E.2d 253 (Ga. 1970).

22. www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx.

23. Gorman, "Does Creepiness Recapitulate Phylogeny?" *Discover* 30–31 (Oct. 1987), as quoted in Jarvis et al., eds., *Amicus Humoriae: An Anthology of Legal Humor* (Carolina Academic Press 2003).