

## REPRESENTING AGRICULTURE PRODUCERS AT THE SPEED OF CHANGE

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### I. INTRODUCTION

The practice of agricultural law is undergoing a revolution. Although not always welcomed, lawyers expect an increase in complexity and scope of the practice of law for many types of representation. Most businesses and their lawyers have accepted increasing regulatory oversight and some consumer advocacy as part of the price of doing business.<sup>1</sup> But in agriculture, the impact of increased bureaucracy and criminal penalties for traditional agricultural and ranching practices presents a cause of concern.<sup>2</sup> The fines and penalties now being threatened under the current legal and regulatory scheme can be substantial.<sup>3</sup> It is incomprehensible that a farmer or rancher would need to hire a lawyer for merely engaging in traditional methods of agriculture. For many, agriculture is a culture and a way of life,

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1. See, e.g., Clyde Wayne Crews Jr., *New Trump Executive Order Seeks to Boost Agriculture and Rural America*, FORBES (Apr. 25, 2017, 3:51 PM), <https://perma.cc/K6XM-QR2A?type=image>.

2. See, e.g., 7 U.S.C. §§ 136j, 136l (2012) (enacted in 1972, the Federal Insecticide, Fungicide, and Rodenticide Act imposed both civil and criminal penalties for various violations, including refusal to submit proper paperwork or destruction of a required label); 33 U.S.C. § 1319(c)-(d) (2012) (the Clean Water Act allows criminal sanctions for anyone who knowingly negligently discharged a pollutant or operated a new source in violation of the standard of performance). See generally Zippy Duvall, Opinion, *Regulations, Farmers and the Law*, HILL (May 8, 2017, 8:10 AM), <https://perma.cc/CJ92-TY5M>.

3. See *United States v. Lucas*, 516 F.3d 316, 350 (5th Cir. 2008). The district court found the defendants guilty and sentenced one to 108 months in prison and another to 87 months. The court also fined one of the companies \$4.8 million and ordered \$1,407,400 in restitution.

not just another occupation. Many of the farming practices now being targeted have been in place for generations. Now, these practices can result in fines and even jail time. Effective lawyers must understand this background and how it colors the clients' responses and perceptions of their legal needs.

The culture of agricultural law is rapidly changing. Representing agricultural entities used to be a routine, predictable mix of property law, contract law, probate law, tax law, and perhaps an occasional tort claim. In the past, laws changed slowly because many state legislative sessions only met biennially.<sup>4</sup> A significant cultural shift has also occurred: farmers and ranchers were once a respected and desired business connection for small towns. The pace of life was slower. Everybody knew everybody and the lawyers and the judge all met for coffee at the restaurant on the square before court started each day. Environmental law was not a controversial topic.

Then, the development of technology, the expansion of government regulations, and the urban cultural shift from appreciation of agriculture to apprehensiveness changed everything.<sup>5</sup> Change to law and policy for both grain and animal production created a new demand for lawyers with agricultural experience and expertise.<sup>6</sup> Activists became the most disruptive change for producers—as they sought to force farmers to cease using the traditional production practices they had used for generations or face criminal charges. For example, in February 2017, the owner of Hohberg Poultry Ranches in Ontario, California, was charged with a thirty-nine-count violation of California's Prevention of Farm Animal Cruelty Act.<sup>7</sup> The farm was investigated after Inland Valley Humane Society and the On-

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4. *Annual Versus Biennial Legislative Sessions*, NAT'L CONF. ST. LEGIS., <https://perma.cc/4THT-6ETG> (archived Apr. 14, 2018).

5. *Why People Fear Agriculture: The Cycle of Misinformation*, PROTECT HARVEST (Jan. 28, 2016), <https://perma.cc/R9Z4-FRVP> (explaining how many Americans no longer have a connection to farming, which causes mistrust between consumers and farmers).

6. Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 ARK. L. REV. 503, 511 (1990) (explaining how the farm crisis in the 1970s increased the need for agricultural lawyers).

7. Veronica Rocha, *Ontario Egg Farm is Charged After Thousands of Hens are Found in 'Inhumane' Conditions*, L.A. TIMES (Feb. 7, 2017, 3:10 PM), <https://perma.cc/5CN8-T5AX>.

tario Police Department received reports of poultry being kept in inhumane conditions.<sup>8</sup> Local police, along with Humane Society investigators, served a search warrant on the farm.<sup>9</sup> A plea agreement was eventually reached.<sup>10</sup>

California is not the only state criminalizing traditional animal production: recently, Massachusetts approved a law that will criminalize farmers who do not provide adequate room for livestock such as hogs, cattle, and chickens.<sup>11</sup> Massachusetts farmers worry such government overregulation will increase the cost of production—a cost ultimately passed onto the consumer.<sup>12</sup>

How might an agricultural lawyer prepare to best represent clients engaged in animal production when such clients face opposition from activist groups? Below is a check list that might be useful for the representation of animal producers.

## II. CHECKLIST FOR THE REPRESENTATION OF ANIMAL OWNERS AND PRODUCERS

A rule of thumb for good representation of any client is to have a solid grasp of their business. An understanding of business basics is essential to competent representation of a client who engages in agriculture or animal production. This checklist may seem rudimentary—lawyers must customize it pursuant to the facts of each case—but the basic concepts remain the same.

### A. Issues to Consider Regarding Humans

1. What is the ownership structure?
2. Are there multiple companies involved in the business?
3. Where are the business domicile(s)?
4. Where are the facilities' locations?
5. Who are key personnel and what are their responsibilities and qualifications?
6. What is the contact information for the key personnel?

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8. *Id.* It was reported about 28,000 chickens were kept in cages that didn't allow them to spread their wings.

9. Ali Tadayon, *Ontario Chicken Rancher Facing 39 Counts of Animal Cruelty*, DAILY BULL. (Feb. 7, 2017, 6:47 PM), <https://perma.cc/CQ9X-PK6W>.

10. Case Information, *State v. Hohberg Properties, L.P.*, No. MWV17004213 (D. Cal. Feb. 7, 2017).

11. See Joshua Miller, *Question 3 is Approved in Massachusetts*, BOS. GLOBE (Nov. 8, 2016), <https://perma.cc/E32A-TDR8>; see also Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support, *Indiana v. Massachusetts*, No. 220149 (2017).

12. Abby Elizabeth Conway, *Mass. Voters Approve Question 3, Banning Certain Farm Animal Confinement Practices*, POLITICKER (Nov. 8, 2016), <https://perma.cc/EDE6-GXVH>.

7. What are the state and local jurisdictions that may have regulatory authority over business operations? What are the key agencies? Who are the key staff?
8. Is there federal oversight? What agencies? Who are the key staff?

B. Issues to Consider Regarding Animals

1. What are the species and breeds involved?
2. What are the likely issues to confront your client that will require legal advice?
3. How will you advise your client to deal with potential allegations of animal abuse and neglect?
4. What is the role of the state veterinarian with respect to your clients' animals?
  - a. Review the state statutes and regulations regarding the relevant state animal health authority.
  - b. Obtain contact information for the agency with such authority. You might attend any education or outreach activities conducted by that agency.

C. Issues Regarding a Lawyer's Limitations

1. Animal care and production are constantly evolving, especially regarding improvement of animal welfare. Even if a lawyer has a background in veterinary medicine or a degree in animal science, that does not make the lawyer an expert in animal or veterinary care.
2. Every time a law is passed or a regulation is promulgated, a lawyer has a duty to stay current and consider how this may affect the clients' businesses. The same is true for the science regarding the care of the animals.
3. Do you have a list of experts who are current and can advise on the interrelationship between regulations, compliance, and promotion of animal welfare?
4. What universities have specialized research strengths for the types of animals your client owns?
5. What are the trade associations for this type of animal enterprise? What services or expertise do they provide?

6. Are there voluntary standards for the breed or industry that are applicable to the operation?
7. Review the case law for the jurisdiction, especially regarding the right to deny entrance to the clients' facilities.
8. What are the activists' groups most likely to interfere with the clients' operations?
  - a. What interference methods do they use?
  - b. Are they registered to conduct activities in the jurisdiction? Are they registered as a charity and allowed to fundraise?
9. Have you discussed the plans for addressing activists with local law enforcement agencies and the prosecutors or district attorneys near the clients' facilities?
10. Have you reviewed the National Sheriffs' Association's partnership with the Humane Society of the United States<sup>13</sup> and the training from the American Society for Prevention of Cruelty to Animals (ASPCA)?<sup>14</sup>
11. Have you reviewed the current and pending Federal Motor Carrier Safety Administration Regulations with your client to adjust the hauling of live animals?<sup>15</sup>
12. Do clients have a protocol and training for their drivers who haul live animals or insects?

Another planning strategy is to reach out and foster a relationship with local law enforcement officers, prosecutors, and district attorneys before problems arise. This approach could prevent lack of understanding between agricultural producers and law enforcement from becoming a roadblock to dealing with activist groups. Historically, law enforcement engaged agriculture only in crimes of theft or physical injury. Traditionally, the sheriff was the chief law enforcement officer in the county, and chances were he or she had some kind of farming or ranching background. However, as law enforcement agencies have adopted higher educational requirements and as the rural-urban divide has expanded, law enforcement officers

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13. See *National Law Enforcement Center on Animal Abuse*, NAT'L SHERIFFS' ASS'N, <https://perma.cc/8MTX-V2H3> (archived Apr. 14, 2018).

14. See *Field Investigations and Response Course Series*, ASPCA PRO, <https://perma.cc/6PLQ-HQKS> (archived Apr. 14, 2018).

15. See generally Tom Lutey, *Feds Tap the Brakes on New Driving Rules for Livestock Haulers*, BILLINGS GAZETTE (Dec. 1, 2017), <https://perma.cc/M8DS-XXBE>.

are much less likely to have any animal agriculture background or experience.

Furthermore, some farm and ranch groups erroneously dismiss the increased ferocity of animal rights activists—believing activists are aimed chiefly at pet owners, hoarders, criminals, and exotics. In reality, activist groups see farm animals as a large part of their mission.<sup>16</sup> The ASPCA’s mission, as stated by founder Henry Bergh, is “to provide effective means for the prevention of cruelty to animals throughout the United States.”<sup>17</sup> In order to fulfill that mission for farm animals, ASPCA provides free training to law enforcement, prosecutors, and district attorneys in a purposeful effort to urge law enforcement to protect the rights of farm animals, often at the cost of the producers’ rights.<sup>18</sup> ASPCA also provides free legal support such as research and brief writing, among other resources.<sup>19</sup>

### III. CONCLUSION

Indeed, lawyers that represent animal producers need to be prepared for confrontation from well-resourced advocacy groups advancing extreme views that oppose animal production; it is vital that agricultural lawyers stay up-to-date on the latest regulations and laws. Representing livestock producers also comes with an added layer of consumer misunderstanding, due in part to the divide between rural and urban populations. One might say it is a brave new legal world for agriculture and its lawyers.

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16. See Press Release, Am. Soc’y for the Prevention of Cruelty to Animals, The ASPCA Announces Brand-New Web Content on Farm Animals (Sept. 7, 2007), <https://perma.cc/NX2W-GT2J>. In 2007, the ASPCA launched a new website focusing on farm animals.

17. *About Us*, ASPCA, <https://perma.cc/S8M7-KU5P> (archived Apr. 14, 2018).

18. *Legal Advocacy*, ASPCA, <https://perma.cc/4US7-QJ37> (archived Apr. 14, 2018).

19. *Id.* (“The legal assistance provided to prosecutors and law enforcement officials includes: [p]roviding legal guidance to prosecutors and investigators on relevant animal cruelty laws and procedures, drafting motions, jury instructions, bonding/forfeiture petitions, appellate briefs and other legal documents; [c]onnecting prosecutors and investigators to resources integral to success in the criminal case, including forensic, behavioral and legal experts; [i]dentifying cases likely to impact large numbers of animals or with potential for significant legislative change in the field; and [i]ntervening as *amicus curiae* (“friend of the court”) in appropriate cases.”).