



Support for the Use of a Courthouse Facility Dog* to Assist Crime Victims and Others in the Courtroom: Evidence Rule, Case Law, Statutes, Public Policy, ABA Standards and Jury Instructions

A. Court's Authority- Evidence Rule 611

A trial judge is responsible for the control and management of the trial and is vested with wide discretion to perform this function. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

1. make the interrogation and presentation effective for the ascertainment of the truth,
2. avoid needless consumption of time, and
3. protect witnesses from harassment or undue embarrassment.

B. Typical Defense Objections to Use of Courthouse Facility Dog in the Courtroom

One standard objection to the use of a courthouse facility dog to assist a witness is based upon potential prejudice to the defendant because of increased sympathy for the witness. The argument is that because the dog is so appealing, it makes the witness look more likable or vulnerable.

If the judge or the prosecuting attorney refers to the courthouse facility dog as a “therapy dog” then the defense can object that the use of a therapy dog is a comment on the evidence implying that the witness is in fact a victim in need of therapy. This is an issue that the jury must decide.

If the dog is referred to as an “advocate dog” then the defense can make the argument that the appearance of the dog enhances the credibility of the witness.

C. Analogous Case Law in Support of the Use of a Courthouse Facility Dog with Witnesses

Because there is no case law regarding the use of a courthouse facility dog to provide emotional support to witnesses testifying in court, we must rely upon the use of case law and statutes regarding support persons and comfort items to justify the use of the dog in this manner.

Support Persons Case Law

The presence of a support person increases some children's capacity to testify and enhances the child's direct and cross-examination.

- Holmes v. United States, 171F.2d 1022 (D.C. Cir. 1948) (allowing 9-year old to sit on mother's lap)
- State v. Johnson, 528 N.E.2d 567 (Ohio 1986) (allowing 8-year old to sit on aunt's lap)
- Baxter v. State, 522 N.E.2d 362 (Ind. 1988) (allowing 9-year old to hold hand of support person)
- Soap v. State, 562 P.2d 889 (Okla. Crim. App. 1977) (allowing 7-year old to hold hands with support person).

Comfort Items Case Law

It is generally accepted that a court has discretion to permit the child to hold a comfort item such as a doll or teddy bear while testifying if it makes findings that there is a "particular" or "compelling" need for the comfort item.

- Smith v. State, 119 P.3d 411 (Wyo. 2005) (15-year old allowed to hold teddy bear);
- State v. Cliff, 782 P.2d 44 (Idaho Ct. App. 1989) (8-year old holding doll upheld)
- State v. Hakimi, 98 P.3d 809 (Wash.Ct. App. 2004) (7-year old allowed to carry a doll).

D. State Statutes governing support person procedures

Several states have specific statutes governing support person procedures. For example, Connecticut law reads, "an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact." Conn. Gen. Stat. Ann. §54-86g (b).

See also: Ark. Code Ann. § 16-42-102 (West 2008); Cal.Penal Code § 868.5; Haw. Rev. Stat. § 621-28; Idaho Code Ann. §19-3023; Mich. Comp. Laws Ann. § 24.275a (4); Minn. Stat. Ann. § 631.046; N.Y. Exec. Law § 642-a (McKinney 2008); Okla. Stat.tit. 12, § 2611.2 (F); Wash. Rev. Code Ann. §§ 7.69.030 (10), 030A (3).

E. Public Policy

The protection of children from undue trauma when testifying is an important public policy goal.

- Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (holding an exception to Confrontation Clause must further important public policy (O'Connor, J., concurring))
- State v. Smith, 158 N.J. 376, 385, 730 A.2d 311 (1999). (In support of child victim testifying via closed circuit television) The record before us establishes that face-to-face confrontation between the nine-year-old child and the defendant and or the jury may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself. Such fears by a nine-year-old sexual assault victim should not be allowed to subvert the truth which in turn frustrates the underlying truth-seeking principles of the Confrontation Clause.

F. Courthouse Facility Dogs are for Everybody

“The duty of the prosecutor is to seek justice, not merely convict.”

ABA Criminal Justice Standard 3-1.2 (c)

A courthouse facility dog should be able to assist anyone during stressful stages of criminal justice proceedings. They should not only be reserved to assist the State's witnesses. During a trial it is a prosecutor's duty to search for the truth. Scientific research demonstrates that the presence of a calm, friendly dog reduces tension in people.

- Barker, Sandra B. "Therapeutic Aspects of the Human-Companion Animal Interaction." *Therapeutic Aspects of the Human-Companion Animal Interaction* 16 (1999).
- Nagengast, Sunny L., Mara M. Baun, Mary Megel, and J. M. Leibowitz. "The effects of the presence of a companion animal on physiological arousal and behavioral distress in children during a physical examination." *Journal of Pediatric Nursing* 12 (1997): 323-30.
- Odendaar, J.S. J., and R. A. Meintjes. "Neurophysiological Correlates of Affiliative Behaviour between Humans and Dogs." *The Veterinary Journal* 165 (2003): 296-301.

Sample Jury Instruction Provided by the National Crime Victim Law Institute:

Testifying in court is an unfamiliar and stressful event for most people; these dogs are used in a courthouse setting to help reduce witness anxiety and are available to any witness who requests one.

Terry Campos, J.D. Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying (NCVLI News 10th Edition), 2008 p. 12-15.

G. The Court's Balancing Test

(The case of *State v. T.E.*, 342 N.J. Super. 14, 775 A.2d 686 (N.J. 2001) contains a thorough analysis on the use of an adult support person providing emotional support to child by sitting in close proximity to the child during testimony. The appellate court's balancing test, modified below in ***bold italics*** to allow a courthouse facility dog to fulfill that role, was modeled on this case.)

A balancing process is required to minimize potential prejudice to defendant while advancing the interest of the State in presenting the testimony of critical witnesses. There is also a public interest that testimony be presented in a manner likely to result in ascertainment of the truth. Measures designed to put at ease a reluctant child-witness, traumatized by the underlying event and further traumatized when called upon to recount that event in the courtroom, serve this purpose.

Upon a showing of substantial need, with appropriate safeguards imposed, a trial judge's discretion is not abused in permitting a ***courthouse facility dog*** to sit in close proximity to a young child while the child is testifying before a jury. The safeguards must assure that ***the dog*** will not distract the jury nor disrupt the trial. Factors to guide the trial judge's discretion in determining whether to permit this procedure, and, if so, its implementation should include the following:

(1) A preliminary showing must be made to establish a substantial need for the procedure. It must be demonstrated that without ***the dog's*** accompaniment, the child is likely to be substantially non-responsive, and that with ***the dog's*** accompaniment, the child is likely to provide meaningful, probative testimony. The court may consider the age of the witness, the nature of the testimony, evidence of fear, embarrassment or inability to testify, and the degree of trauma experienced by the witness in the underlying event and by the courtroom experience.

(2) The defense should be given the opportunity to suggest alternatives, such as a recess to enable the witness to regain composure or testimony by closed-circuit television.

(3) The logistics should be only as intrusive as necessary to accomplish the purpose of the procedure. Placing ***the courthouse facility dog*** in the front row of the gallery or at counsel table, for example, would be minimally intrusive. Permitting ***the courthouse facility dog*** to sit alongside the witness is moderately intrusive. Very close contact, such as ***the dog*** placing his head on the child's lap is highly intrusive and should be considered only as a last resort. The view of the child by the defendant and the jury should not be obstructed.

(4) An appropriate instruction should advise the jurors that the purpose of ***the courthouse facility dog*** is to attempt to place the child at ease while testifying and that the presence of ***the courthouse facility dog*** should not affect their assessment of the credibility of the child's testimony. The standard "passion, prejudice or sympathy" charge should also be given.

*The ideal courthouse facility dog (also known as a courthouse dog) is one that has been trained by an assistance dog organization that is a member of Assistance Dogs International. Assistance Dogs International (ADI) is the professionally accepted accrediting body for service dog schools throughout the United States, setting standards for the selection, training, and use of service dogs. ADI is also responsible for standards for the training and testing of the handlers of the dogs. Due to legal and confidentiality concerns, dogs used in the court system should be handled by criminal justice professionals such as victim advocates, law enforcement officers, deputy district attorneys and forensic interviewers.