

The Dog Days of Justice: Using Courthouse Dogs to Comfort Testifying Witnesses with Minimal Prejudice to Criminal Defendants

Courthouse dogs can provide excellent support to vulnerable child witnesses and help facilitate testimony in stressful courtroom settings. These dogs are facility service dogs that are graduates from service dog organizations that are members of Assistance Dogs International and are handled by criminal justice professionals. They have the same degree of training as a guide dog for the blind or a service dog. But defense attorneys have concerns that their presence during a trial may have a prejudicial impact on criminal defendants. Defense attorneys argue that prejudice could arise if a dog elicits sympathy from a jury, or makes a witness seem more credible. However, the use of courthouse dogs may be the best way to provide support to witnesses while minimizing possible prejudice to defendants rather than the use of other measures that are currently authorized by law.

There is already precedence for the use of courthouse dogs in courtrooms. Evidence Rule 611 (a) gives courts wide latitude to control the presentation of evidence and witness testimony to make trials efficient and effective, and to reduce trauma to witnesses. In addition, state statutes and case law authorize the use of support persons and comfort items by vulnerable witnesses while giving testimony. A support person is someone who sits in the vicinity of a testifying witness to provide emotional support to the witness. Courts also allow vulnerable children to hold comfort items such as teddy bears, toys, blankets, or dolls while testifying.ⁱ Some of these statutes do not limit a judge to use only these means.ⁱⁱ Before permitting their use, the court should weigh these measures against the possibility of prejudice to the defendant.

The use of a courthouse dog is analogous to these measures, and if done properly, their presence can be less prejudicial than a support person or comfort item. A support person, such as a family member of the witness, may be emotionally involved in the particular case.ⁱⁱⁱ This person could convey emotions to the jury through nonverbal communication, albeit unintentionally, while accompanying a witness. In contrast, a courthouse dog can accompany a vulnerable witness while acting as a passive companion, sitting quietly or lying at the feet of a testifying witness. A dog is completely neutral; it obviously has no stake in a case. There is no doubt in a juror's mind that a dog has nothing to gain or lose from the disposition of a case, whereas a support person may be very concerned with the outcome of a case.

Courthouse dogs can also provide familiarity and comfort to testifying witnesses, while invoking less sympathy than typical comfort items. People are accustomed to seeing dogs provide support for people in various ways. A dog may accompany a person for a myriad of reasons — from being a family pet to a service dog for a person with a disability. People of all ages and walks of life own dogs; being accompanied by a dog does not signify any vulnerability. However, items such as dolls and teddy bears are generally recognized as articles enjoyed primarily by children to entertain, console, or provide companionship; consequently, these items may invoke sympathy as they symbolize the innocence and vulnerability of children.^{iv} Since a dog is not exclusively associated with children the way a doll or teddy bear is, a courthouse dog can be an even more effective means to provide support to a testifying witness with minimal prejudice to a defendant.

Even if courthouse dogs are preferable to support persons and comfort items, there still may be defense concerns about prejudice to their clients. Below are some options to further reduce this possible concern:

- First, ensure that the dog accompanying a witness into the courtroom is a professionally trained facility service dog, not a pet therapy dog with a volunteer handler. There are no national standards for therapy dogs. It is very rare for a pet therapy dog to have the training and discipline to lie or sit quietly for up to two hours without disrupting the trial

proceedings. Pet therapy dogs are also required to be attached to their owners by a leash; the presence of a person in addition to a dog beside a witness can significantly increase the prejudice to the defendant. If the dog is disruptive or interacts with the witness, or if the owner conveys nonverbal communication to the jury, prejudice could further increase.

- Not all vulnerable witnesses require the dog be in close physical proximity with them when testifying; merely looking at the dog lying down in the courtroom can have a calming effect for many. In this circumstance, the dog could be lying in view of the witness under counsel table or in the front spectator's bench with a handler. Because there is not that close physical connection to the witness, the dog's presence in court could have far less impact on the jury.
- If a dog is going to accompany a witness to the witness box, it should be positioned out of the jury's view as much as possible. The dog could enter the courtroom while the jury is on recess, and should remain on the floor of the witness box at all times. The dog should not be held in the witness's lap because the dog could be very distracting to the jury in that position.
- In any case, if a dog is in the courtroom, the jury should receive an instruction regarding the presence of the dog, so the jurors are aware that the dog is present. It should be made clear to the jury that no significance should be attributed to the dog's presence, nor does it suggest the court's endorsement of the testifying witness.
- Finally, courthouse dogs should be available to anyone who requires support when testifying in the courtroom. This includes the defendants and/or their witnesses. This philosophy does a great deal to reduce prejudice to the defendant, because it would be clear to the jury that the prosecution witnesses are not receiving any special treatment or endorsement of their testimony. Under these circumstances, the National Crime Victim Law Institute recommends that the following instruction be delivered to the jury:

"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."^v

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ⁱSee, e.g. ARK. CODE ANN. § 16-43-1202 (West 2011); MO. ANN. STAT. § 491.725 (West 2011).

ⁱⁱSee, e.g. N.Y. CRIM. PRO. LAW § 65.10(3) (McKinney 2007) ("Nothing herein shall be construed to preclude the court from exercising its power to close the courtroom or from exercising any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant.").

ⁱⁱⁱSee *Czech v. State*, 945 A.2d 1088, 1093-94 (Del. 2008) (support person was mother of child witness).

^{iv}*C.f.* *State v. Powell*, 318 S.W.3d 297, 303-04 (Mo. Ct. App. 2010) (holding that when there is a defense objection to a witness using a comfort item, the court must balance the needs of the witness with possible prejudice to the defendant, requiring an inquiry into the particularized need of the witness); *See also State v. Palabay*, 844 P.2d 1, 5-6 (Haw. Ct. App. 1992) (holding that absent a compelling need, a testifying witness may not use a comfort item).

^vTerry Campos, *J.D. Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying*, 10 NAT'L CRIME VICTIM LAW INST. NEWS 12, 12-15 (2008).