LEGAL BEAGLES, A SILENT MINORITY:

Therapeutic Effects of Facility Dogs in the Courtroom

ABSTRACT
Ellie, Molly, Rosie, and Jeeter are just a few of the hard working staff that we are beginning to see around the country’s courthouses. Although they do not speak a word or make a sound these working dogs silently provide emotional support to the fearful witness as they testify. Facility dogs, as they are called, are being brought into the courtroom to assist the prosecution and reluctant witnesses bring the defendants to justice. This form of therapeutic jurisprudence is proving to be an enhancement of the psychological wellbeing of clients of the prosecution.

Lorie Gerkey, J.D. Candidate
Comprehensive Law Practice
Professor Michael Jones
Arizona Summit Law School
Fall 2014
Legal Beagles, A Silent Minority:
Therapeutic Effects of Facility Dogs in the Courtroom

Ellie\textsuperscript{1}, Molly\textsuperscript{2}, Rosie\textsuperscript{3}, and Jeeter\textsuperscript{4} are just a few of the hard working staff that we are beginning to see around the country’s courthouses. Although they do not speak a word or make a sound these working dogs silently provide emotional support to the fearful witness as they testify. Facility dogs, as they are called, are being brought into the courtroom to assist the prosecution and reluctant witnesses bring the defendants to justice. This form of therapeutic jurisprudence is proving to be an enhancement of the psychological wellbeing of clients of the prosecution.

This article will examine the emotional and psychological effects of testifying in the court. It will give a brief overview of therapeutic jurisprudence. It will outline the emotional stress some child witnesses can face when testifying in court. A review of past strategies courts used to minimize the stress in children who were testifying will be presented. This article will discuss the use of facility dogs and how this practice can minimize the traumatic effects of testifying in children. A legal foundation for the use of facility dogs in the courtroom will be presented, along with

\textsuperscript{1} Ellie was one of the first courthouse dogs used in the King County Washington Prosecutors office, available at http://www.seattlepi.com/local/article/Dogs-give-prosecutors-a-hand-in-difficult-cases-1248466.php (last visited Dec. 1, 2014).
\textsuperscript{2} Molly B is the courthouse dog at the King County Courthouse. She was trained by Canine Companions for Independence, available at http://courthousedogs.com/ (last accessed Dec. 1 2014).
an outline of some of the constitutional arguments Defendant’s claim against their use, and it will offer a variety of options to reduce the possible prejudice with the jury. And finally, this article will present some “best practices” for courtrooms when considering the use of facility dogs to support apprehensive victims.

**Therapeutic Jurisprudence Defined**

Therapeutic Jurisprudence “focuses on the law's impact on emotional life and psychological well-being.” In 1987, the term “Therapeutic Jurisprudence” was first used by Professor David Wexler and Professor Bruce Winick when together they suggested “the need for a new perspective” in how the current legal process and options are viewed. Our legal practices and roles of primarily lawyers and judges either produce “therapeutic or anti-therapeutic consequences for the individuals

---

6 Id. at 125 n.1 (2000), David Wexler is a Lyons Professor of Law and Professor of Psychology at the University of Arizona. He is also a Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico, available at http://www.law.arizona.edu/depts/upr-intj/intj-o.html# (last visited Nov 2, 2014).
7 Bruce J. Winick was a Professor of Law and Professor of Psychiatry and Behavioral Sciences at the University of Miami Miller School of Medicine. The co-founder of the school of social enquiry known as therapeutic jurisprudence, Winick was Director of the University of Miami School of Law Therapeutic Jurisprudence Center. He was the first the recipient of the Laurie Silvers & Mitchell Rubenstein Distinguished Professorship during the 2009-2010 academic year, available at http://www.law.miami.edu/faculty-administration/in-memoriam/bruce-winick.php?op=1 (last visited Nov 2, 2014).
involved.” TJ, as it is now known, focuses on “humanizing the law and concerning itself with the human, emotional, psychological side of law and the legal process.”

The concept of TJ is recognizing that the law and its processes do create consequences that are either therapeutic or non-therapeutic, both having lingering effects for those who are involved. Recognizing these polar effects, TJ asks to make a conscious effort to apply the law and its processes in a more therapeutic manner ensuring that other core values of the law, justice and due process, are fully respected. In doing so, this will provide a “richer way” of looking at the law and allowing creative curative solutions that may have “previously gone unnoticed.” Therapeutic Jurisprudence “regards the law as a social force that produces behaviors and consequences” that will serve to promote justice and protect victims when “law is a therapeutic agent; positive therapeutic outcomes are important judicial goals; and the design and operation of the courts can influence therapeutic outcomes.”

9 Id.
11 David B. Wexler, supra note 5, at n.5.
12 David B. Wexler, supra note 5, at n.10.
13 David B. Wexler, supra note 5, at n.9.
14 David B. Wexler, supra note 5, at n.4.
Emotional Stress for Child Witnesses

All individuals, including crime victims have a constitutional right to access the courts.16 “See eg., Chappell, 340 F.3d at 1282 (“Access to the courts is clearly a constitutional right grounded in the First Amendment, Article IV Privilege and Immunities Clause, the Fifth Amendment and/or the Fourteenth Amendment.”).17 The Crime Victims’ Rights Act,18 affords crime victims the rights ... “to be treated with fairness . . . respect . . . dignity and privacy.”19 “To be reasonably protected from the accused.”, 20 and to be present at any public criminal proceedings where the defendant has the right to be present.21

However, “Courts can be hazardous to the psychological safety of crime victims” or witnesses “especially children”22, when providing those constitutional rights. “Children who have been impacted by sexual assaults or violent offenses either as victims or witnesses have experienced emotional trauma that is especially difficult for them to mentally process given their tender years.”23 Typically children are reluctant to disclose this type of emotional injury even under the best

17 Id.
19 Id. (a) (8).
20 Id. (a) (1).
21 Id. (a) (3).
circumstances. But when they do reveal the ordeal, it is usually to a family member or counselor they feel safe and trust. In order to avoid re-traumatizing the child when they re-tell their story, “trauma –informed, experienced therapist(s)” know that sensitivity to timing and pacing is essential.

Now imagine the victim/witness reliving this traumatic event by telling their story “in a courtroom full of strangers, with an authority figure in a black robe looking down at them, having the defendant just a few feet away, staring at them, answering questions from a prosecutor trying to extract this information from them in excruciating detail, and a defense attorney challenging their veracity and hoping to confuse them.”

“Needless to say these are hardly the conditions that foster complete and accurate testimony.” Testifying in court under these circumstances could “create long lasting psychological damage to the child or” even “re-traumatize the child.” Judith Herman a child trauma authority stated, “Indeed, if one set out intentionally to design a system for provoking symptoms of posttraumatic disorder, it might look very much like a court of law.”

---

24 Id. at Why This Happens.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Judith Lewis Herman is a contemporary psychiatrist who studies trauma and posttraumatic stress (PTSD). She developed the diagnosis of Complex PTSD. Herman is seen as an expert in the treatment of trauma and is an advocate for victims of traumatic crimes. Herman uses her experience and education to enlighten professional and legal communities and the public to the sensitivity of victims after traumatic events, available at http://www.goodtherapy.org/famous-psychologists/judith-herman.html#. (last visited Nov. 2, 2014).
According to the United States Department of Justice,

Too often in the past, the criminal justice system has not paid sufficient attention to the needs and welfare of child victims and witnesses, causing serious consequences. Contact with the system aggravated the trauma that the child had already experienced, making it more difficult for the child to participate in the investigation and prosecution of the case and ultimately, making it more difficult to prosecute the case.32

Having to face the defendant, research has consistently noted, is the cause of distress most often cited by child witnesses.33 “Lab studies have found that children’s responsiveness declines when they are questioned in a courtroom environment”34

A study in 1993, by Saywitz KJ35, Nathanson R36, set out to examine the affects courtrooms can produce on children’s testimony, specifically details of events.37 The

35 Karen J. Saywitz, Ph.D., is a professor at the UCLA, School of Medicine, Department of Psychiatry and a developmental and clinical psychologist. For over 20 years, she has directed programs providing mental health services to children and families in the public sector and taught normative child development to students in medicine, law, psychology, social work, and nursing, available at http://people.healthsciences.ucla.edu/institution/personnel?personnel_id=46360 (last visited Dec. 5, 2014).
36 Dr. Rebecca Nathanson received her Ph.D. in Special Education from the University of California, Santa
study took “thirty-four 8 to 10-year olds” and had them participate in an “event involving body-touch play between an unfamiliar adult male and small groups of children.” Two weeks later, the same interviewer, interviewed half of the children in a courtroom, and the other half in their schoolroom. The interviewer asked the children to recall details of the activity they participated in two weeks earlier. The findings were that “children questioned at court showed impaired memory performance when compared with agemates questioned at school.” “As a society, we have a responsibility to create an environment that maximizes the completeness and accuracy of children’s testimony and minimize the stress placed on children in the process.”

Past Strategies to Minimize Stress to Child Witnesses

Throughout the 1980’s and 1990’s there was a flurry of innovative ideas on how to protect and minimize trauma to the child that resulted from confronting the defendant who had harmed them. Common strategies used to “shield” the witness from their alleged perpetrator were tried.

Barbara, and came to UNLV in 2000 from Texas Tech University. She is an Associate Professor and holds a joint faculty appointment in the Boyd School of Law, available at http://education.unlv.edu/ephe/faculty/nathanson/ (last visited Dec. 5, 2014).


Id. at 1.
Id. at 3.
Id. at 1.
Id. at 7.
Id. at 9.

Dorothy F. Marsil et al., Child Witness Policy: Law Interfacing with Social Science, 65 LAW AND
The term "shielding procedure" encompasses a number of methods by which child witnesses may avoid direct contact with the defendant while testifying. The child’s testimony could be videotaped outside of the courtroom, or transmitted through a closed-circuit television, (CCTV), into the courtroom or even a screen could be erected between the victim witness and the accused. All of these strategies raised issues of constitutionality; do these practices violate the defendant’s constitutional rights under the Confrontation Clause under the Sixth Amendment? The use of a screen placed in front of the witness while on the stand testifying, came under review to the United States Supreme Court on appeal of Coy v. Iowa. Here, the defendant claimed that his constitutional right under the Confrontation Clause was violated. Judge Scalia, who delivered the opinion of the 6-2 ruling, held that the Confrontation Clause provides a defendant the right to “confront” his or her
accuser at trial. The opinion went on to say that if there is to be an exception given to the “face to face” confrontation it would “be allowed only when necessary to further an important public policy”. In another case where the Supreme Court ruled on the constitutionality of using alternative methods for child testimony came in the appeal of Maryland v. Craig. Here, it was determined that the use of CCTV for the child victim’s testimony “did not violate the defendant’s right to confrontation.” However, “before one-way CCTV could be used to shield child victims from direct confrontation with defendants, it must be shown that the child will suffer trauma “beyond de minimus,” and further, that this trauma is caused by fear of the defendant and not by a generalized fear of the courtroom itself.”

Also, the Supreme Court of Florida, held in Glendening v. State the three and one half year old child’s videotaped testimony against her father, the sexual abuser, as it was shown to the jury, did not violate the defendant’s constitutional rights, because the defendant was allowed to conduct full cross-examination of the witness and observe the given testimony through a two-way mirror. The State Supreme court agreed with the trial court in determining the child would suffer at least

50 Id. at 1012.
51 Id. at 1021.
53 Casey Holder, All Dogs Go to Court: The Impact of Court Facility Dogs As Comfort for Child Witnesses on A Defendant’s Right to A Fair Trial, 50 Hous. L. Rev. 1155, 1162, (2013), (citing Craig at 842-43, 857).
55 Glendening v. State, 536 So. 2d 212 (Fla. 1988).
56 Id. at 213.
moderate “emotional and mental harm had the child been forced to testify in court”.

In a most recent Supreme Court decision, Crawford v Washington, the Court “fundamentally reinterpreted the federal [C]onstitution’s Confrontation Clause.” The Court held that “[t]estamomial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” But testimonial “hearsay” is excluded unless the declarant testifies at trial.

With these and other cases, it is clear that “A child witness may testify by alternative methods where—by clear and convincing evidence—an adequate showing has been made of the child witness’s vulnerability to severe mental and emotional harm, or where the court makes a specific finding of a substantial likelihood that the child witness and sex-abuse victim would suffer at least moderate emotional or mental harm if required to testify in open court”.

Facility Dogs can minimize the traumatic effects of testifying.

So what happens now? A child witness is faced with testifying against her perpetrator in court. What can the courts do to minimize the expected trauma?

---

57 Id. at 216.
60 Crawford, 541 U.S. at 59.
Well, allowing a dog to accompany the witness during testimony is one welcome step in the direction of making the court system more sensitive to its traumatic effects. “Facility dogs that are present during various stages of criminal justice proceedings are among the most recent efforts to assist victims in obtaining meaningful access to justice and exercising their rights, while minimizing the secondary harm that frequently accompanies participation in the justice system.”

Currently, the preferred term for a dog of this stature is “facility dog”. A facility dog is a graduate from an assistance dog organization that is accredited by Assistance Dogs International (ADI). “These expertly trained facility dogs specialize in assisting individuals with physical, psychological, or emotional trauma due to criminal conduct.” These courtroom dogs “provide calm and comfort to the vulnerable child witness when testifying”. “The presence of a courthouse dog, because of its temperament and extensive training, can . . . soothe and calm children and anchor them back to safety after exposure to traumatic stress.” The use of facility dogs promotes “justice with compassion”, a premise of Therapeutic Jurisprudence. “[R]esearch discloses that animals are particularly

64 Crenshaw, supra note 22 at 2.
66 Ensminger, supra note 63 at Terminology.
68 Id.
69 Crenshaw, supra note 22 at 2.
70 Crenshaw, supra note 23 at 3.
encouraging for children suffering from stress or trauma.”

“Dr. Gail Melson, professor emeritus of developmental studies at Purdue University...found that with only five minutes of contact with an unfamiliar dog, 76% of children studied between the ages of 7 and 15 believed that a dog knew how they felt. Another 84% indicated they would confide secrets to a dog.”

“A court facility dog enables a child witness to speak without added stress or tension.”

A facility dog in the courtroom can ease the child’s fears and stress, “resulting in more efficient and accurate testimony and less trauma to the child.”

“To obtain the information effectively, efficiently and thoroughly” is the goal of any testimony.

**“Service Dogs”, “Therapy Dogs” and “Facility Dogs”, is there a difference?**

“The use of dogs in the courtroom has expanded rapidly in the United States and is now spreading worldwide, as a mechanism for calming and supporting individuals involved in courtroom proceedings.”

As of September 24, 2014, there were 70 facility dogs in 25 States in the United States and three other countries using

---


75 Id. at 15.

76 Phillips, *supra* note 73.

courthouse facility dogs by governmental agencies and nonprofit organizations.\textsuperscript{78} With the expanded use of dogs in the courtroom to minimize trauma in witnesses, the need for a clear understanding of the differences between terms becomes critical.\textsuperscript{79} Although facility dogs provide a “service” to the witness they are different than a service animal defined by the Americans with Disability Act (ADA).\textsuperscript{80} A service animal is defined as “… any dog [or miniature horse]\textsuperscript{81} that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”\textsuperscript{82} “The work or tasks performed by a service animal must be directly related to the individual's disability.”\textsuperscript{83} Here, a facility dog is not being used to support the witness because of a documented disability but is providing support to the witness to minimize the possible trauma associated with testifying. Because of this, a facility dog does not qualify as a service animal under the ADA.\textsuperscript{84}

\textsuperscript{80} Americans with Disability Act, Definitions, 28 C.F.R. § 36.104, (2011).
\textsuperscript{81} Americans with Disability Act, Modifications in policies, practices, or procedures, 28 C.F.R. § 36.302 (c) (9) (2011).
\textsuperscript{82} Americans with Disability Act, Definitions, 28 C.F.R. § 36.104, (2011).
\textsuperscript{83} Id. (Note: Facility dogs are not considered services animals under the ADA and therefore are not protected under the Act.).
Therapy animals are not legally defined by federal law and “they do not fall under the regulations provided by the ADA.” Therapy dogs are family pets that are trained and registered or certified through therapy organizations. Therapy dogs are used to support therapy and rehabilitation in others. The dogs and their therapists go into a variety of healthcare and educational settings to provide support through speech, occupational and/or physical therapy. “Activities involving therapy animals are usually classified as AAA (Animal Assisted Activities) or AAT (Animal Assisted Therapy).” The animals are used to “assist the therapist in an informal manner without explicitly trying to help a person cope with a particular . . . situation.” Although the facility dog does work with a variety of individuals, the dog in the courtroom is not being used to support a therapy or rehabilitation. Therefore, using the term ‘therapy dog’ to identify courtroom dogs would be inappropriate.

According to the standards set by Assistance Dogs International, a dog, who works with a professional handler to serve multiple individuals, is termed a Facility Dog.

---

86 Id.
88 Id.
89 Id.
91 Assistance Dogs Int’, available at http://www.assistancedogsinternational.org/, (“Assistance Dogs International (ADI) is a coalition of not for profit assistance dog organ[i]zations. The purpose of ADI is to improve the areas of training, placement and the utilization of assistance dogs, as well as staff and volunteer education . . . “).
A facility dog is trained to “to comfort and nurture a victim-witness in varying degrees.”93 “Dogs properly label “facility dogs” . . . are graduates of assistance dog organizations and are handled by professional facilitators.”94 The dogs go through approximately two years of training from an accredited service dog organization.95 They are trained in basic obedience and skill tasks, and they must “maintain a calm manner and good social behavior in a variety of environments.”96 Facility dogs in the legal systems have a handler that is a working professional in the justice field, such as victim advocates, forensic interviewers, or assistant prosecutors.97 The term facility dog is “the preferred term for a dog accompanying a witness during testimony.”98

**Case Law Impacting the Use of Facility Dogs**

As with the constitutional issues raised by defendants on the utilization of alternative methods used to allow a child witness to avoid direct contact with the defendant while testifying, the same objections arise when a facility dog is presented. “[C]ourt facility dogs incite objections based on undue prejudice before the jury, increase perceived credibility of the witness, and distraction in the

---

94 Brief, *supra* note 65.
98 Ensminger, *supra* note 63 at Terminology.
courtroom.”

“The [following] decisions involving facility dogs . . . used for the testimony of children or vulnerable witnesses are summarized”. This summary includes the constitutional arguments made by the defendant, the courts holding, and the efforts made by the court to minimize jury prejudice.

**California v Spence (2012)**

“In this California case, a jury convicted James Spence of two counts of sexual offenses against a child 10 years old or younger (his housemate’s daughter).” “He was sentenced to a total term of 55 years to life.” “Among other issues on appeal, Spence argued the court erred by allowing a therapy dog or support canine to be present at the child’s feet while she testified, and contend this was “overkill” with the additional support person present on the witness stand.” Spence, claimed the procedures “interfered with his due process rights to a fair trial and confrontation of witnesses”. He claimed that by labeling the victim as someone who “required the support not only of a “victim advocate,” but also a therapy dog”, unduly prejudiced the jury. And that “a furry friend in the court will cast the witness in

---


100 Ensminger, supra note 63 at Tubular Summary. (Note: Although cases State v Dye and State v Devon both preferred the term “facility dog” to define the support dog, not all cases made reference to a preferred term and used “support dog”, “therapy dog”, and ‘comfort dog” interchangeably.).


102 People v Spence, Animal Legal & Historical Center, Summary, available at https://www.animallaw.info/case/people-v-spence.

103 Id.

104 Id.

105 Id. at IV, Presence of Victim Advocate and Therapy Dog on Witness Stand.

106 Id.
even a more sympathetic light”.107 “With respect to the use of the therapy dog, the court referred to the discretion granted to it under Evidence Code section 765,108 to control court proceedings in the search for truth, and commented that there would be no prejudice in allowing the therapy dog to be present in the courtroom.109 The Court of Appeals affirmed the trial court’s holding.110 The efforts made by the court to minimize the jury prejudice were “[the] jury [was] cautioned, [the] trial court took care to ensure [the] dog mainly [was] unnoticeable, and [the] trial judge stated that improper activity of therapy dog would result in its removal from courtroom.”111

**Washington v Dye**112

In this case, the “[d]efendant was convicted in the Superior Court, King County, . . . of residential burglary.113 The victim “was an adult man with significant developmental disabilities.”114 The trial court allowed the victim-witness to be

---

108 Id. Evidence Code section 765 provides in relevant part that the trial court shall exercise reasonable control over the mode of interrogation of a witness, to expedite it and to protect the witness from undue harassment or embarrassment. With respect to witnesses under the age of 14, subdivision (b) requires the court to “take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to insure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. The court, may in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness.” Trial courts have inherent and statutory discretion to control the proceedings to ensure the efficacious administration of justice. (*People v. Cox* (1991) 53 Cal.3d 618, 700, 280 Cal.Rptr. 692, 809 P.2d 351.).
110 Id.
111 Ensminger, supra note 63 at Tubular Summary.
113 Id.
accompanied by a “comfort dog” named Ellie while testifying. On appeal, the defendant argued “that [the dogs’] presence violated his right to due process and a fair trial.” He argued “[d]ue to the unique relationship that exists between canines and humans, a witness bringing a support dog to the stand violates a defendant’s rights to a fair trial by creating prejudice that cannot be cured by a jury instruction.” He argued the dog “compromises a jury’s ability to determine the honesty and accuracy of that witness”, and undermines the presumption of innocence by bolstering a witness’s image as a vulnerable victim in need of protection and sympathy.” The Supreme Court of Washington found the “defendant failed to establish his fair trial rights were violated or that jury instructions largely mitigated prejudicial effect.”, and therefore affirmed the trial court holding. The efforts made by the court which minimized the jury prejudice were the jury was instructed not to consider the dog’s presence, and it was stated, if the dog “played with the victim or growled at defendant,[the] trial court could have removed her from courtroom.”

New York v Tohom

---

115 Id. at ¶ 8.
116 Id. at ¶ 13.
118 Id. at 4.
119 Id. at 4 and 5.
120 Ensminger, supra note 63 at Tubular Summary.
121 Ensminger, supra note 63 at Tubular Summary.
123 Ensminger, supra note 63 at Tubular Summary.
Here, the “defendant was convicted in the County Court, Dutchess County, of predatory sexual assault against a child and endangering the welfare of a child.”\textsuperscript{125} He was sentenced to 25 years to life.\textsuperscript{126} “[T]he People sought, [and were granted] to allow “Rose,” a Golden Retriever therapy assistance animal, or “comfort dog,” to accompany [the witness] on the witness stand while she testified at the defendant’s trial.\textsuperscript{127} The defendant opposed the use of the therapy dog stating that “Rose's presence would “clearly prejudice the jury against” him.”\textsuperscript{128} He maintained the jury would be more “sympathetic” to the witness should she be allowed to be accompanied by the dog.\textsuperscript{129} The Defendant appealed his conviction arguing “that Rose's presence during [the victims] testimony deprived him of a fair trial, and violated his right to confront and cross-examine witnesses against him.”\textsuperscript{130} He also argued that there was no statutory authority allowing the use of a “therapy assistant animal” for when a trial witness testifies.\textsuperscript{131} This issue of allowing a facility dog at trial was one of first impression\textsuperscript{132} and the Appellate Court found the “Executive Law § 642–a\textsuperscript{133} applie[d] in this case.”\textsuperscript{134} The Court also found the “defendant failed to show the comfort- therapy dog impaired his right to a fair trial,

\textsuperscript{125}Id.
\textsuperscript{126}People v. Tohom, Animal Legal & Historical Center, Summary, available at https://www.animallaw.info/case/people-v-tohom.
\textsuperscript{127}Id.
\textsuperscript{129}Id.
\textsuperscript{130}People v. Tohom, supra note 126 at Trial/Sentence/Motion to Vacate Conviction.
\textsuperscript{131}Id.
\textsuperscript{132}People v. Tohom, supra note 126 at Discussion Executive Law § 642–a.
\textsuperscript{134}People v. Tohom, supra note 132.
or compromised his right of confrontation and cross-examination”. 135 The Court stated “although the dog may have engendered some sympathy for the victim in the minds of the jurors, there was no indication that such sympathy was significantly greater than the normal human response to a child's testimony about her sexual abuse at by an adult.” 136 The Appellate Court upheld the trial courts holdings. 137 The efforts made by the court which minimized the jury prejudice were that the instructions given to the jury minimized prejudice and the dog’s presence in courtroom was described as unobtrusive. 138

**Connecticut v Devon** 139

In this case, the defendant was convicted of “multiple counts of sexual abuse against his three minor children.” 140 The defendant was the father of the three children ages, 6, 8, and 10. 141 The Defendant was convicted and sentenced to forty years in prison. 142 On appeal, the defendant argued, among other things, that “the court improperly permitted the state to use a dog to comfort one of the victims while she testified.” 143 The defendant claimed his rights to a fair trial and confrontation were violated 144, however he “specifically told the trial court that he was not making a

---

135 Ensminger, *supra* note 63 at Tubular Summary.
137 Id. at 253.
138 Ensminger, *supra* note 63 at Tubular Summary.
140 Id.
141 Id. at 517-519.
142 Id. at 521.
143 Id. at 538.
144 Id. at n 9.
confrontation clause claim related to the dog issue.”  

“Accordingly, [the court] consider[ed] that claim waived.” However, the Appellate Court found the trial court did over step its discretion by allowing the dog to accompany the youngest witness. The court stated “although the court has the inherent discretion to allow the use of comfort tools, under the facts of this case, the court abused its discretion because there was no proper prior showing that [the witness] needed the presence of the dog when she testified.” The Appellate Court reversed and remanded. The Trial Court made efforts to minimize the prejudice by providing caution to the jury, however the “appellate court did not discuss issue of instructions because [the] showing of necessity was not established before [the] dog’s presence [was] allowed.”

**Washington v. Moore**

Here in this case, the defendant was convicted of “second degree assault [and] domestic violence for choking his wife during an argument.” In his appeal he argued, among other things, “the trial court erred when it allowed a witness to

---

145 Id. at n 9.  
146 Id. at n 9.  
147 Id.  
148 Id. at 541.  
149 Id.  
150 Ensminger, supra note 63 at Tubular Summary.  
152 Id. at 1.
testify with a service dog".153 “He [also] posits his confrontation and due process rights were violated by the dog’s presence.”154 Because his argument about the use of the therapy dog was initiate during the appeal, and not during his trial, the appellate court would not review the claim unless it was found on the record to be a “constitutional error.”155 In this unpublished opinion of the Court of Appeals,156 the court found “there [was] no evidence in the record that the dog’s presence made the witness appear traumatized or victimized, and thereby violat[ing] [the defendant’s] due process rights.”157 The Court of Appeals of Washington, rejected the defendant’s argument and affirmed the trial courts holding.158

**California v Chenault**159

In this final case, the defendant “was convicted on 13 counts of lewd acts on a child under 14 years of age, and sentenced to 75 years to life in prison.”160 On appeal, the

---

153 Id. at 1.
154 Id. at 3.
155 Id. at 3, citing Rules of Appellate Procedure, RAP 2.5(a)(3), ((a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional Right.).
156 Id. at 1.
157 Id. at 3, citing See State v. Dye, 178 Wn.2d 541, 555, 309 P.3d 1192 (2013) (holding that the court’s decision to allow a service dog was reasonable and that there was no evidence on the record that the dog made the victim witness appear “pitiful to the jury and ‘presupposed the victimhood of the complainant’ ”).
158 Id. at 3.
160 People v. Chenault, Animal Legal & Historical Center, available at https://www.animallaw.info/case/people-v-
defendant argued by “allowing the support dog to be present during the testimony of [the] two child witnesses,”161 “the trial court abused its discretion”162 without showing individualized necessity.163 He also contended “the presence of the dog was inherently prejudicial and violated his federal constitutional rights to a fair trial and to confront the witnesses against him.”164 “He argues “ the one[-]sided deployment of a universally beloved animal distracts the jury from a dispassionate review of the evidence and unfairly bolsters the prosecution’s case by aligning witnesses with a powerful symbol of trustworthiness and vouching for their credibility as victims.”165 The Appellate court disagreed with the defendants assertion the jury would consider the witness “more credible” when accompanied by a support dog “than if the witness [was] not accompanied by a support dog.”166 The court went on to state there is no “significant differen[ce] from the presence of a support person . . . and conclude a case-specific finding that an individual witness needs the presence of a support dog is not required by the federal Constitution.”167 The California Court of Appeals held “the presence of a support dog for a witness is not inherently prejudicial; [the] court properly exercised its discretion when it determined that two victims could have a support dog present during their testimony; and any error by trial court in allowing support dog to be present was

chenault.
161 Id. at Summary.
162 Id. at Summary.
163 Id. at Summary.
164 Id. at Summary.
165 Id. at Discussion, C.
166 Id. at Discussion, C.
167 Id. at Discussion, D, citing (Tohom, 109 A.D.3d at p. 266, 969 N.Y.S.2d at p. 133 [rejecting argument that trial court was required to make a finding of necessity).
harmless error.” The trial court made efforts to minimize jury prejudice by bringing the dog in and out without the jury present, keeping the dog as inconspicuous as possible, and instructed the jury to “disregard the dog’s presence and decide the case solely on the evidence presented.”

As these cases demonstrate, the constitutional claims of defendants when the prosecution uses facility dogs during trial are similar. Due process, Confrontation Clause, fair trial claims seem to be the most prevalent. And although, as in all cases, the courts find on the individual facts of each case, these constitutional claims against the use of facility dogs has continued to be unfounded.

**What Can Be Done to Counter the Objections?**

What can prosecutors and courts do to minimize the defenses’ objections to the use of facility dogs? Below is a chart outlining the possible objections and the responses to those objections.

<table>
<thead>
<tr>
<th>Potential Objection</th>
<th>Potential Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The presence of the therapy animal and handler in the witness stand will be prejudicial.</td>
<td>The prosecutor should take steps to conceal as best as possible the therapy animal and move the handler as far from the witness stand as possible, but still allow leash control and a visual of the animal to ensure the animal’s safety. Just as children in many states are allowed to have a comfort item (such as a doll or blanket) or a support person with them during testimony, the therapy animal fulfills both roles and is less suggestible than a concerned adult.</td>
</tr>
</tbody>
</table>

---

169 Ensminger, supra note 63 at Tubular Summary.
171 Phillips, supra note 73 at 18, (objections and responses 1-4). This in no way outlines all of the possible objections or responses.
2. The presence of the therapy animal and handler in the witness stand conveys that the child is fragile and needs protection from the defendant, which conveys a negative image of the defendant. This is not a valid objection and does not reach the legal level of “extreme prejudice” or “overly prejudicial.” The demeanor of the witness, whether strong or fragile during testimony, is not an objectionable factor since all witnesses react differently when testifying. Therapy animals help to calm children; thus, the child will provide more efficient and accurate testimony during questioning. This could actually help protect a defendant from inaccurate testimony (Mathews & Saywitz, 1992).

3. It's just inappropriate to have an animal in the courtroom. More courts are allowing therapy animals outside the courtroom (to comfort witnesses, family members, etc.) and inside the courtroom to aid in testimony. Contact American Humane to obtain a list of courts that allow therapy animals.

4. The defendant or other court observers are allergic to the therapy animal. Depending on the size of the courtroom, usually the therapy animal will sit at the feet of the child witness and any allergic reaction will be minimized. Generally, an allergic reaction requires touching the animal and touching one’s hands to one’s face or eyes.

5. The dog will interfere with the defendant’s constitutional rights (fair trial, confront, cross-examine, jury prejudice).172 If possible use a neutral title for the dog, like facility dog. Ask the Judge to give jury instructions that caution drawing of any inferences to the dog’s presence. Take steps to ensure the dog is mainly unnoticeable and unobtrusive. Use a dog that has been properly trained as a facility dog. Ask the Judge to give instruction that the dog will be removed if there is any display of inappropriate behavior from the dog.173

### Conclusion

---

172 As seen in the presented cases.
There are many judicial practices that promote justice in a therapeutic manner. However, using facility dogs in the courtroom to assist and comfort children as they testify is a judicial practice that is rapidly growing. “Participating in [a] courtroom or other legal proceeding . . . is arguably one of the most stressful events that most people [can] experience.” Now imagine you are a child required to testify in court against your abuser. How comforting will it be for you to have the support and warm nuzzle of a specially trained facility dog to sit by your side while you recite the traumatic event you are called to recount? “It is clear that the presence of an appropriately . . . trained dog can significantly reduce the anxiety associated with these experiences, thereby improving the efficiency and quality of the legal process.” Many child witnesses have been afforded the support of these legal beagles, these silent minorities, while bringing the criminal defendant to justice.


175 Id.