

ARTICLES

USING DOGS FOR EMOTIONAL SUPPORT OF TESTIFYING VICTIMS OF CRIME

By
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Courts and prosecutorial offices around the nation have started using service dogs to support emotionally frail child witnesses who are unwilling to testify but for the calming presence of a dog. Proponents claim that this new type of therapeutic jurisprudence helps bring criminal defendants to justice in cases where the testimony of the complaining witness is crucial to the prosecution's case. Opponents fear the infringement of the defendants' rights to a fair trial because of the dogs' potential to prejudice a jury to come out in favor of the witnesses.

This article analyzes the legal foundations supporting the use of service dogs for emotional support of complaining witnesses in open court. Currently, the Federal Rules of Evidence give trial judges wide discretion to allow evidence presentation methods deemed effective for the ascertainment of the truth. Other federal law allows child witnesses to give testimony with the emotional support of an adult attendant or through alternative methods such as closed-circuit television or recorded statements. However, a defendant's Sixth Amendment confrontation rights may be held violated by such alternative methods, especially after the recent landmark case Crawford v. Washington. In contrast, this is less likely to be the case if a witness gives live testimony, even with the potentially prejudicial presence of a service dog. Case precedent demonstrates that defendants' right to a fair trial and the protection of the confrontation right have been upheld in similar cases where minor witnesses used comfort objects for support.

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This article concludes that legally sound reasons exist for allowing the use of service dogs in court, but only in cases where the witness can demonstrate a truly compelling need for the emotional support and only where the proper balancing with defendants' rights is performed.

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I. INTRODUCTION

Human use of service dogs is not new. Prehistoric man discovered the advantages of the exceptional sensory systems of canines to warn of potential danger and to track prey during hunts.¹ Tens of thousands of years later,² people still use dogs when their own physical abilities may fall short. Seeing eye dogs help the visually impaired gain new levels of mobility and self-sufficiency,³ hearing dogs alert their partners to certain sounds,⁴ and service dogs⁵ assist adults facing physical

¹ Dog.com, *The History of the Dog*, <http://www.dog.com/dog-articles/the-history-of-the-dog/> (last accessed Apr. 11, 2009).

² Some trace the origins of the man/dog relationship to be at least 100,000 years old. CNN, *Experts: Dogs Originated in Ancient Asia*, <http://edition.cnn.com/2004/US/West/02/14/evolving.fido.ap/index.html> (last accessed Nov. 5, 2008) (site no longer available), whereas others believe it to be less than 15,000 years old, Christine McGourty, *Origin of Dogs Traced*, BBC News World Edition, <http://news.bbc.co.uk/2/hi/science/nature/2498669.stm> (Nov. 22, 2002) (last accessed Apr. 11, 2009).

³ The Seeing Eye, *About Us, Our Mission & History*, http://www.seeingeye.org/aboutUs/default.aspx?M_ID=88 (last accessed Apr. 11, 2009).

⁴ Canine Companions for Indep., *Hearing Dogs*, http://www.cci.org/site/c.cdKGIRNqEmG/b.4011125/k.830C/Hearing_Dogs.htm (last accessed Apr. 11, 2009).

⁵ The term "service dog" has been defined for legal purposes in some jurisdictions such as California, where it refers to "any dog individually trained to the requirements of the individual with a disability, including, *but not limited to*, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items." Cal. Civ. Code Ann. § 54.1(b)(6)(C)(iii) (West 2008) (emphasis added). Pursuant to the Americans with Disabilities Act, a service animal is defined as "any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability." 28 C.F.R. § 36.104 (2008); see also *Baughner v. City of Ellensburg*, No. CV-06-3026-RHW, slip op at 10-11 (E.D. Wash. filed Mar. 19, 2007) (holding that the definition of service animal turns upon whether the animal is trained to do specific work or perform specific tasks). The term is also generally used to refer to dogs assisting humans in a relatively wide range of services and will thus be used in this article for dogs assisting emotionally weak witnesses in legal proceedings.

disabilities with daily tasks such as picking up dropped items, pushing buttons, turning on and off lights, and opening doors.⁶ Skilled companion dogs add another dimension by serving as a social bridge to people who are not used to relating to a person with a disability.⁷

Institutions have discovered the usefulness of canines as well. Some hospitals, nursing homes, assisted living facilities, and other care facilities employ dogs to help patients in need of more social contact, which has proven medically beneficial even if “only” given by or acquired through a dog.⁸ Police departments and other law enforcement agencies have for years used dogs to sniff out illegal substances and explosives, assist in searches and rescues, prevent escapes, and restore order among unruly crowds.⁹ Even prisons, not usually known for their soft and fuzzy qualities, have found that inmates who are given the responsibility of caring for a dog learn or improve much needed life skills such as tolerance, patience, and responsibility. These skills in turn can help the inmates function in a socially acceptable manner upon release from incarceration.¹⁰ Now, courts are barking up

⁶ Canine Companions for Indep., *Service Dogs*, http://www.cci.org/site/c.cdKGIRNqEmG/b.4011119/k.890D/Service_Dogs.htm (last accessed Apr. 11, 2009).

⁷ Canine Companions for Indep., *Skilled Companion Dogs*, http://www.cci.org/site/c.cdKGIRNqEmG/b.4011123/k.67D8/Skilled_Companion_Dogs.htm (last accessed Apr. 11, 2009).

⁸ See e.g. Furry Friends Pet Assisted Therapy Serv., *Visit Site Descriptions*, <http://www.furryfriends.org/siteDesc.html> (last accessed Apr. 11, 2009) (providing a list of site descriptions of facilities which offer pet assisted therapy services); DoveLewis, *DoveLewis Animal Assisted Therapy & Education Program*, <http://dovelewis.org/programs/DLAATE.aspx> (last accessed Jan. 20, 2009) (providing information about the DoveLewis' animal assisted program); BBC News, *Dog-owners 'Lead Healthier Lives'*, <http://news.bbc.co.uk/2/hi/health/6279701.stm>. (last accessed Apr. 11, 2007); Heidi Di-Salvo et al., *Who Let the Dogs Out? Infection Control Did: Utility of Dogs in Health Care Settings and Infection Control Aspects*, 34 *Am. J. Infection Control*, 301, 301–02 (2006).

⁹ See United States Police Canine Assn., *Case Law*, <http://www.uspcak9.com>; *select Case Law* (last updated Jan. 2009) (last accessed Apr. 11, 2009) (listing various uses of police dogs); see also North American Police Work Dog Assn., <http://www.napwda.com>; *select Workshops* (last accessed Feb. 5, 2009) (training Workshops for, among other things, “problem solving, legal updates, [and] new techniques in various phases of police work dog use.”); A. Maureen Rouhi, *Detecting Illegal Substances*, *American Chemical Socy.*, <http://pubs.acs.org/cen/hotarticles/cenear/970929/detect.html> (Sept. 29, 1997) (last accessed Apr. 11, 2009) (a special report on dogs as explosive detectors).

¹⁰ Pathways to Hope, *Prison Dog Project*, <http://www.pathwaystohope.org/prison.htm> (last accessed Apr. 11, 2009) (Most prison dog programs involve their inmates in training dogs that will eventually be adopted by members of the general community. For example, in Wisconsin, inmates adopt unwanted dogs from animal shelters, then groom and train them to be “good canine citizens” after which the dogs are placed back into the community as “paroled pets.” In Washington and several other states, prisoners train future service dogs for the elderly and disabled.); see also Shannon J. Osborne & Renee Bair, *Healing Inmates' Hearts and Spirits with Man's Best Friend*, <http://www.allbusiness.com/public-administration/justice-public-order/1143301-1.html> (Apr. 1, 2003) (last accessed Apr. 11, 2009); Patricia Kelley, *Prison Dog Programs in Men's Prisons*, <http://www.prisondogsbook.com/2008/09/02/prison-dog-programs-in-mens-prisons/> (Sept. 2, 2008) (last accessed Apr. 11, 2009); Hugh Jones, *OK PetGazette*, *Prison Dogs: Hard Time, Soft Hearts*, <http://www.okpetgazette.com/prison.html> (last accessed Jan. 25, 2009) (site no longer available).

the same tree. In about half a dozen communities across the country,¹¹ both courts and prosecutorial offices use dogs to help meet the emotional needs of crime victims who—but for the calming presence of a dog—would be too emotionally distraught to function as witnesses in the trials of their alleged perpetrators.¹²

This article examines the budding use of this type of therapeutic jurisprudence¹³ in the criminal justice system. It describes the development of current pilot programs and why canine involvement serves both testifying witnesses and the litigation process in general. This article also explains the benefits canine support programs grant to defendants. Recognizing that such programs have yet to find clear recognition under the law, this article analyzes the existing legal foundations supporting the use of service dogs in open court when the dogs assist emotionally traumatized witnesses giving testimony.

In doing so, this article first examines statutory provisions, the objectives of which may be furthered by canine support programs. Next, this article analyzes relevant case law in which courts permitted witnesses to testify using comfort items. Further, because trial judges have wide discretion over the examination of witnesses, this article summarizes the opinions of some judges who have already allowed the use of dogs in their courtrooms. The article also identifies certain practical considerations that proponents of such programs should take into account.

As the law in this area concentrates on the special needs of child witnesses, this article focuses on examples involving children. This is not an indication of the dearth of legal support in favor of using dogs for emotional support of adult witnesses, especially the elderly. Rather, it simply reflects the fact that the law in this area is evolving, and the present posture is most likely to favor the use of canines to support child witnesses. Finally, the article concludes that sound legal and public policy reasons exist for allowing the use of canines for emotional support in cases in which a witness can present a truly compelling need for such support.

¹¹ Pierre Thomas & Jack Date, *Victims Find a 'Buddy' at the Courthouse*, <http://abcnews.go.com/TheLaw/story?id=5244356> (June 25, 2008) (last accessed Apr. 11, 2009).

¹² Courthouse Dogs, *Using a Courthouse Facility Dog in the Courtroom*, <http://www.courthousedogs.com/courtroom.html> (last accessed Apr. 11, 2009).

¹³ Therapeutic jurisprudence focuses on the law's influence on the psychological welfare of human beings. It suggests the recognition and study of the role of the law as a possible therapeutic instrument, rather than suggesting that therapeutic concerns are more important than other consequences or factors. International Network on Therapeutic Jurisprudence, *Welcome*, <http://www.law.arizona.edu/depts/upr-intj> (last accessed Apr. 11, 2009).

II. USING CANINES TO ASSIST EMOTIONALLY TRAUMATIZED WITNESSES

A. *The Budding System*

The use of courtroom technology, visuals, and other aids to present evidence is a widely accepted and common litigation practice.¹⁴ Examples include A/V and videoconferencing equipment, photos, diagrams,¹⁵ and even the infamous glove demonstration in the murder trial of O.J. Simpson.¹⁶ But dogs? Not a problem, at least in King County, Washington, where a program using dogs to lend emotional support to traumatized witnesses started nearly four years ago.¹⁷ At that time, Senior Deputy Prosecutor Ellen O'Neill-Stephens began bringing her disabled son's skilled and certified companion dog Jeeter with her to work on days when her son did not need the dog to avoid the animal being home alone all day.¹⁸

One day, Jeeter's career path changed drastically when a fellow prosecutor asked O'Neill-Stephens if the dog might be able to help calm down 7-year-old twin girls. An emotionally charged sexual abuse case against the girls' father relied upon their testimony.¹⁹ Testifying in court is an intimidating situation for most victims of abuse, let alone a little child.²⁰ Not surprisingly, the girls who were, "terrified in the courtroom," initially refused to testify.²¹ Running out of options, the prosecutor asked the judge to allow Jeeter on the stand with the girls, who had taken a liking to the dog.²² The defense did not object, the judge granted the request, and the girls finally agreed to testify.²³ When the dog "sensed the girls getting tense" during trial, he would place his head on their laps.²⁴ One girl petted the dog's back during the entire cross-examination.²⁵ "Even the prosecutor patted the dog when the trial got tense."²⁶ The result: guilty verdicts on two counts of assault.²⁷ According to the girls' mother: "Without Jeeter, they never

¹⁴ Fredric I. Lederer, *Technology Comes to the Courtroom, And . . .*, 43 Emory L.J. 1095, 1096 (1994); 71 Am. Jur. *Trials* §§ 111, 132 (1999); 58 Am. Jur. *Trials* §§ 481, 502 (1995).

¹⁵ *Id.*

¹⁶ See *U.S. v. Williams*, 461 F.3d 441, 444 n. 1 (4th Cir. 2006) (describing the glove demonstration in the O.J. Simpson trial).

¹⁷ Jenny B. Davis, *At This Prosecutor's Office, a Furry Soft Spot for Kids*, 93 ABA J. 18 (July 2007).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Thomas & Date, *supra* n. 11.

²¹ Casey McNerthney, *Dogs Give Prosecutors a Hand in Difficult Cases*, Seattle Post-Intelligencer, http://seattlepi.nwsourc.com/local/330093_kcdogs03.html. (last updated Sept. 2, 2007) (last accessed Apr. 11, 2009).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ McNerthney, *supra* n. 21.

would have testified.”²⁸ She further related, “It’s hard to explain, [but he] just had a tenderness about him that helped them find the strength they needed to tell the story they couldn’t.”²⁹

After this success story, a handful of prosecutors began lobbying the King County Prosecutor’s Office for a full-timer who could take over Jeeter’s moonlighting duties.³⁰ Initial lobbying efforts met resistance with both the prosecutor’s office and the service dog organization that trained the dogs. The service dog organization was afraid that the unique skills of their dogs would not be fully utilized.³¹ Eventually, a new service dog named Ellie came on board as “one of the nation’s first service dogs to be officially matched with a prosecutor’s office or any other governmental agency.”³² In addition to assisting reluctant witnesses during interviews and in the courtroom, “Ellie’s duties include . . . cuddling, doing tricks, . . . and lovingly placing her head on the laps” of the younger participants of the criminal justice system.³³

The use of service dogs in prosecutors’ offices was once seen as a radical idea, but it is now gaining acceptance around the nation.³⁴ Prosecutors’ offices in Texas, Georgia, Montana, and Florida have used the King County program as a model for starting similar programs.³⁵ Officials in Carroll County, Maryland, have recently added Buddy, a therapy dog, to their prosecution team to help interview fragile witnesses and victims, especially children.³⁶ The dogs serve in out-of-court forensic and prosecutorial interviewing and accompany witnesses to the stand during trial.³⁷ In court, the dogs help along the process in ways humans sometimes cannot. According to Judge Laura Inveen of the King County Superior Court in Washington, dogs act as a “bridge” between the system and the juveniles attending her drug court.³⁸ Says Judge Inveen: “In a situation where there might be a witness who is anxious . . . and . . . is a dog person, . . . having access to the dog during the proceeding could be very calming . . . and allow [him or her] to be more comfortable and be more forthcoming in giving testi-

²⁸ *Id.*

²⁹ Christine Clarridge, *Dogs Lend Comfort to Kids in Court*, The Seattle Times, <http://community.seattletimes.nwsourc.com/archive/?date=20050514&slug=courtdogs14m> (last updated May 14, 2005) (last accessed Apr.11, 2009).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Christine Clarridge, *Dedicated Service Dogs Recognized at Courthouse Function*, http://seattletimes.nwsourc.com/html/localnews/2003767349_courtdogs29m.html (last updated June 29, 2007) (last accessed Apr. 11, 2009).

³⁵ McNerthney, *supra* n. 21.

³⁶ Thomas & Date, *supra* n. 11.

³⁷ Ellen O’Neill-Stephens, *Courthouse Canines Reach Out to Those in Need*, King Co. B. Assn., <http://www.kcba.org/scriptcontent/KCBA/barbulletin/archive/2006/06-11/article8.cfm> (last accessed Apr. 11, 2009); Thomas & Date, *supra* n. 11; Clarridge, *supra* n. 29; McNerthney, *supra* n. 21.

³⁸ *Courthouse Canine Companions* (Seattle Police Dept. Video Unit 2008) (DVD) (on file with author).

mony.”³⁹ She continues, “these service dogs almost pick up on . . . emotional neediness and . . . can almost anticipate the user’s needs.”⁴⁰ King County, Washington, Superior Court Judge Wesley Saint Clair concurs after his positive experience with a service dog assisting two trial witnesses: “The dog’s presence dissipates tension for everyone when dealing with difficult issues and provides a sense of normalcy.”⁴¹

Beyond tension dissipation, canine emotional support during the presentation of testimony serves the crucial purpose of protecting the welfare of child witnesses.⁴² 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.⁴³

One example of attempts to alleviate this problem is the Uniform Child Witness Testimony by Alternative Methods Act (UCWTAMA).⁴⁴ To fill a gap created in the 1999 Uniform Rules of Evidence which eliminated a provision that provided for alternative methods for taking the testimony of child victims, the UCWTAMA was promulgated in 2002.⁴⁵ The Act sets forth an applicable state procedure giving local officials authority to allow children to testify using alternative methods in criminal, civil, and administrative matters.⁴⁶ Further, it pro-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Courthouse Dogs, *Home*, <http://www.courthousedogs.com/> (last accessed Apr. 11, 2009). Judge Saint Clair has since applied for his own service dog to assist him with drug-addicted offenders. O’Neill-Stephens, *supra* n. 37.

⁴² This purpose has been recognized by the Unif. Child Witness Testimony by Alt. Methods Act § 5 cmt. (2002), discussed *infra* nn. 45–47; 81 Am. Jur. 2d *Witnesses* § 694 (2004).

⁴³ Heather L. Cartwright, *Including Victims in the American Criminal Justice Process* 198, http://www.unafei.or.jp/english/pdf/PDF_rms/no56/56-16.pdf (last accessed Apr. 11, 2009).

⁴⁴ Unif. Child Witness Testimony by Alt. Method Act (2002).

⁴⁵ 188 Am. Jur. 2d *Witnesses* § 188 (2004). According to the Uniform Law Commissioners, the UCWTAMA is effective because it is “an applicable state procedure” for the purposes of the Uniform Rules of Evidence. Unif. R. Evid. 807(a)(2) (2005) provides that a child witness must either testify at the proceeding or pursuant to an applicable state procedure for the giving of testimony by a child. The rule allows a statement of a child to be introduced through an alternative method recognized under applicable state law without complicating the Rule 807 exception to the hearsay rule. The UCWTAMA provides just such an alternative method. Uniform Law Commissioners, *Why States Should Adopt the Uniform Child Witness Testimony by Alternative Methods Act*, http://www.nccusl.org/update/uniformact_why/uniformacts-why-ucwtbama.asp (last accessed Apr. 11, 2009).

⁴⁶ UCWTAMA § 3-5; 188 Am. Jur. 2d *Witnesses* § 188 (2008). An example of the application of such authority can be found in section 642-a(4) of the New York Executive Law which directs the judge presiding at a sexual abuse trial involving a child to “be sensitive to the psychological and emotional stress a child witness may undergo when

vides standards for determining whether testifying by an alternative method is appropriate as well as the factors to be considered in making this determination.⁴⁷ 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.⁴⁸ Currently, two common alternatives are videotaped testimony or testimony by means of closed-circuit television (CCTV).⁴⁹ These methods are typically allowed in criminal sex offense cases involving child witnesses where presenting the testimony these ways is considered to be in the child’s best interest.⁵⁰ However, this raises the issue of whether a defendant’s Sixth Amendment right to confront witnesses against him or her is violated if a complaining witness is not physically present in the courtroom. Dogs may prove to be the previously missing link that would enable some children and other emotionally frail witnesses to be present and testify in open court while protecting them from the emotional trauma the law seeks to avoid. Live testimony is arguably better for both the prosecution, who will be able to benefit from the jury observing the actual victim, and the victim, who may additionally prove to be an “attractive witness.” No less important, testimony in open court by the complaining witness is legally preferable to the defendant whose confrontation rights are less likely to be impeded if the witness is present. This will be examined below after a brief analysis of why dogs are considered useful in legal settings.

B. *Why Going to the Dogs is Not a Bad Idea*

Dogs have a natural ability to calm humans as well as a positive effect on our emotional and psychological states.⁵¹ In ways unavailable to a human, dogs also have the ability to elicit specific human responses.⁵² “As most people are generally deferential to the interests of a dog, its presence helps divert [conflict mediation] participants’ atten-

testifying.” McKinney’s Executive Law § 642-a (2009); *People v. Gutkaiss*, 614 N.Y.S.2d 599, 602 (N.Y. App. Div. 1994) (affirming trial court’s finding that defendant was not prejudiced by the complaining witness holding a teddy bear while testifying).

⁴⁷ UCWTAMA §§ 3–5; *see also* 81 Am. Jur. 2d *Witnesses* § 694 (2004) (also setting forth factors weighing on the decision to permit an alternate method of testifying).

⁴⁸ 81 Am. Jur. 2d *Witnesses* § 694 (2004).

⁴⁹ *Id.* at § 694; *Leggett v. State*, 565 So. 2d 315, 316 (Fla. 1990); *Spoerri v. State*, 561 So. 2d 604, 605 (Fla. 3d. Dist. App. 1990); *State v. Marquez*, 951 P.2d 1070, 1072 (N.M. App. 1997). Requirements for the use of CCTV and videotaped depositions of child victims have been codified at 18 U.S.C. § 3509(i) (2006).

⁵⁰ 81 Am. Jur. 2d *Witnesses* § 694 (2004); *Id.* at § 692.

⁵¹ Andrew Leaser, *See Spot Mediate: Utilizing the Emotional and Psychological Benefits of “Dog Therapy” in Victim-Offender Mediation*, 20 Ohio St. J. on Dis. Res. 943, 955 (2005).

⁵² *Id.* at 962.

tion away from the negative forces that are consuming them.”⁵³ Particularly noteworthy is the “sixth-sense” capacity of dogs to sense peoples’ emotions and alleviate their tension.⁵⁴ Adds interim county prosecutor Dan Satterberg of King County: “The dogs help us break down the barriers of fear, distrust, and anxiety so we can get to the truth.”⁵⁵ Scientific studies have shown that dogs help people by reducing blood pressure, stress and anxiety, improving feelings of self-worth and decreasing loneliness.⁵⁶ Judge Julie Spector of the King County Superior Court in Washington described her personal experiences by stating, “[the] bond that exists between us and our dog companions is rule-free; it allows adults to get down on the floor and be a little kid. When Ellie comes by chambers and we have our moment, I take off my robe and enter that wonderful world where I can once again be a child and receive that unconditional love.”⁵⁷

Common sense indicates that such benefits would be more pronounced for those who consider themselves animal lovers than those who do not. Still, dogs have been found to add unexpected value to non-litigation contexts as well. Explains O’Neill-Stephens: “[The] dogs help to improve the work environment for many courthouse employees. . . . During the course of the day, staff, lawyers, police officers, court administrators and probation officers seek out the dogs for a quick hug, a pat or whisper in their ears. Our dogs always accommodate these requests for comfort and affection.”⁵⁸ O’Neill-Stephens co-founded the organization Courthouse Dogs to help provide information about the practicalities of employing a full-time or visiting facility dog to assist in prosecutorial or defense interviews and actual courtroom procedures.⁵⁹

III. LEGAL FOUNDATIONS FOR ALLOWING SERVICE DOGS TO HELP

Two statutory authorities provide the chief support to proponents of service dog assistance for emotional support of witnesses testifying in open court. The first is Federal Rule of Evidence 611(a), or state-enacted variants of this rule. Second, a United States Code provision applicable to child witnesses may be used to argue for allowing the use of service dogs in court.⁶⁰ Additionally, some judges have spoken out in favor of the canine support programs, which indicates a certain will-

⁵³ *Id.*

⁵⁴ *Id.* at 962–63.

⁵⁵ McNerthney, *supra* n. 21.

⁵⁶ O’Neill-Stephens, *supra* n. 37; Leaser, *supra* n. 51, at 961; BBC News, *supra* n. 8.

⁵⁷ O’Neill-Stephens, *supra* n. 37.

⁵⁸ *Id.*

⁵⁹ Courthouse Dogs, *FAQs About Courthouse Dogs*, <http://www.courthousedogs.com/faqs.html> (last accessed Apr. 11, 2009).

⁶⁰ 18 U.S.C. § 3509 (2006).

ingness on the part of the judiciary to think outside the box in this area.⁶¹

A. Federal Rules of Evidence

Federal Rule of Evidence 611 (FRE 611) provides as follows:

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.⁶²

The standard of review for alleged violations of FRE 611 is abuse of discretion.⁶³ FRE 611 can support the use of service dogs in court because the truth of testimony may be construed more easily from a relatively composed witness rather than from a distraught one.⁶⁴ Furthermore, the use of dogs to emotionally support witnesses may preclude time-consuming breaks otherwise needed to let upset witnesses recompose themselves. The third objective of the rule is met when witnesses feel less intimidated about the situation in the calming presence of a service dog.⁶⁵ In this context, it should be noted that the advisory committee to the drafters of the Rules emphasized the flexibility of FRE 611: "Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain."⁶⁶ The plain language of this statement and the rule itself lend support to using canines in court where it can be shown that this would help meet the goals of FRE 611, where the witness can demonstrate a compelling need for emotional support and where contrary factors do not outweigh the ben-

⁶¹ *Infra* nn. 121–35.

⁶² Several states have similar evidentiary rules. *See e.g.* Wash. R. Evid. 611(a) (identical to the federal rule).

⁶³ *Geders v. U.S.*, 425 U.S. 80, 86–87 (1976); *see also U.S. ex rel. Nelson v. Follette*, 430 F.2d 1055, 1059 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971) (finding a trial judge exercises broad discretion in controlling the conduct of trial); *Skogen v. Dow Chemical Co.*, 375 F.2d 692, 704 (8th Cir. 1967) (rejecting claim that the court abused its broad discretion and deprived party of right to cross-examination); *Smith v. State*, 119 P.3d 411, 419 (Wyo. 2005) (applying abuse-of-discretion standard to review trial court's ruling).

⁶⁴ This argument was used in *Marquez*, 951 P.2d at 1073, where a witness was allowed to hold a teddy bear while testifying.

⁶⁵ *See e.g. id.* Advocates can demonstrate this in pre-trial hearings, using a neutral expert, out of the presence of the jury.

⁶⁶ Fed. R. Evid. 611 advisory comm. n.; *see also Gable v. Kroger Co.*, 410 S.E.2d 701, 703 (W.Va. 1991) (using the advisory committee note to support a holding allowing judicial discretion).

official effects of the testifying witness using a dog for emotional support.⁶⁷

Opponents may argue that a “cute dog,” assisting a young or emotionally frail complaining witness would be too prejudicial towards defendants because it sends a message of the witness’s innocence and need for protection. Defendants in precedential cases raised this argument in connection with the use of comfort items for witness support. Opponents may further argue that because service dogs deplete valuable time, they should be excluded due to the time-efficiency concerns under Federal Rule of Evidence 403 (FRE 403).⁶⁸ However, FRE 403 arguments focused on prejudice or waste of time neglect the plain language of FRE 403, which only addresses the substantive content of evidence, not the means of presenting it. For that reason, courts should discount such arguments.

Currently, no case law exists allowing a service dog or other service animal to accompany a witness to the stand.⁶⁹ However, courts have found that “[the] trial judge should exercise [his/her] discretion with wide latitude to assure an atmosphere in which a witness will feel at ease in telling the truth.”⁷⁰ Accordingly, some courts have allowed vulnerable witnesses to bring a comfort item with them while they testify.

In *State v. Cliff*, an 8-year-old victim of sexual assault entered the courtroom carrying a doll as she walked to the witness stand.⁷¹ At the defendant’s request, the jury was excused, and the defendant registered his objection to the 8-year-old appearing with a comfort item.⁷² The court allowed the state to produce evidence for allowing the complaining witness to possess a doll while she testified.⁷³

The court-appointed guardian *ad litem* for the child testified that during a preliminary hearing the victim started to have dry heaves while on the stand and had to be taken to a restroom. The guardian also testified that when the victim was upset she wrung her hands, put her hands on her face, and chewed her nails. It was the guardian’s opinion that being able to hold the doll would give the child something to do with her hands.⁷⁴

The trial court concluded that the doll could have a calming effect on the witness and that the benefit of having coherent testimony from

⁶⁷ The two requirements stem from existing case law allowing witnesses to use comfort items in court, which will be discussed *infra*.

⁶⁸ Fed. R. Evid. 403.

⁶⁹ See Fed. R. Evid. 611 (granting the courts flexibility in gathering testimony. “The court shall exercise reasonable control over the mode and order of interrogating witnesses . . .”).

⁷⁰ *Goings v. U.S.*, 377 F.2d 753, 762 (8th Cir. 1967); accord Fed. R. Evid. 611 (instructing the court to “make the interrogation [of witnesses] . . . effective for the ascertainment of truth”).

⁷¹ 782 P.2d 44, 46 (Idaho App. 1989).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

her “outweighed any possible prejudice to the defendant.”⁷⁵ The witness was thus allowed to take the stand while carrying the doll.⁷⁶ The defendant appealed, raising two legal issues: an alleged violation of his due process right to a fair trial and an alleged violation of his constitutional right of confrontation.⁷⁷ As for the former, the defendant argued that by allowing the child to hold a doll, the trial court allowed the prosecution to prejudice the defendant by highlighting the vulnerability of the witness and increasing the jurors’ pity toward her.⁷⁸ When issuing its holding, the appellate court emphasized the lower court’s finding that carrying the doll had a calming effect on the child witness.⁷⁹ The court said,

In cases, such as this, where it is necessary to receive testimony from young children, the court must strike a balance between the defendant’s right to a fair trial and the witness’s need for an environment in which he or she will not be intimidated into silence or to tears. The trial judge felt that allowing the child to possess a doll on the stand was a less stringent measure than some that had been accepted by the United States Supreme Court, or required by some state statutes.⁸⁰

As for the confrontation issue, the court noted that the Confrontation Clause of the United States Constitution grants a defendant two positive rights: “the right physically to face those who testify against [him/her], and the right to conduct cross-examination.”⁸¹ In *Cliff*, the defendant contended that his right to cross-examine the witness was hampered by the court allowing the witness to use the doll as a “psychological security blanket.”⁸² However, the appellate court rejected this argument from the defendant, stating the Confrontation Clause is satisfied “if defense counsel receives wide latitude at trial to question witnesses.”⁸³ The court noted the difference between opportunity and effect when it wrote that the Confrontation Clause grants only “an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”⁸⁴ The appellate court thus upheld the trial court’s decision to allow the child to hold her doll while testifying.⁸⁵

In *State v. Marquez*, the defendant claimed that a 12-year-old sexual assault victim’s testimony while holding a teddy bear was prejudicial and deprived him of a fair trial.⁸⁶ He claimed that the use of the

⁷⁵ *Id.* at 47.

⁷⁶ *Id.* at 46.

⁷⁷ *Cliff*, 782 P.2d at 46.

⁷⁸ *Id.*

⁷⁹ *Id.* at 47.

⁸⁰ *Id.* (referencing *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988)).

⁸¹ *Id.* at 46 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)).

⁸² *Id.*

⁸³ *Cliff*, 782 P.2d at 46 (citing *Pennsylvania v. Ritchie*, 480 U.S. at 53).

⁸⁴ *Id.* (citing *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985)) (emphasis in original).

⁸⁵ *Cliff*, 782 P.2d at 45.

⁸⁶ *Marquez*, 951 P.2d at 1072.

teddy bear created a prejudicial impact because the toy was a “visual signal” to the jury representing the child’s innocence, thus making the victim appear “more vulnerable and more appealing as a child than she already was.”⁸⁷ The trial court recognized that 12-year-olds possess varying levels of maturity and that some 12-year-olds would have a need for a comfort item while others would not.⁸⁸ The court also stated that it did not find the presence of a teddy bear to be a signal to the jury in itself, but regardless, the court would ask the girl questions about her alleged need to use a comfort item.⁸⁹ The court allowed the girl to have the doll during her testimony after verifying the witness’s need and finding a negligible prejudicial effect on the jury outweighed the calming effect of the teddy bear on the child witness.⁹⁰ The appellate court subsequently upheld this decision, finding the use of the item to be a less stringent measure than videotaped testimony.⁹¹ In addition, the appellate court concluded that the trial court had “properly balanced the prejudicial effect of the teddy bear against the necessity of the teddy bear’s calming effect.”⁹² Thus, the appellate court clearly found that even if a comfort item presents a somewhat prejudicial effect on the jury, this might be outweighed by the benefits of having a calm and composed complaining witness at trial.

In *State v. Hakimi*, a similar child sexual molestation case, two 7-year-old girls were allowed to hold a doll while testifying at trial.⁹³ The defendant argued at trial and on appeal that the doll was a strategy to “engender sympathy and empathy in the jury.”⁹⁴ The appellate court ruled that the trial court did not abuse its discretion in permitting the girls to hold a doll while testifying.⁹⁵ In doing so, the court emphasized the fact that the defendant had provided no evidence suggesting that the girls did not hold the doll simply to “endure the ordeal of testifying” in the presence of the defendant.⁹⁶ The court also emphasized that the trial court heard argument by both defense counsel and the state prior to permitting the girls to carry the doll to the witness stand.⁹⁷ Said the court: “The record thus shows that the trial judge weighed the interests of [the defendant’s] two victims and any potential prejudice to [the defendant] in allowing the girls to testify while holding a doll.”⁹⁸

Finally, *Smith v. State* involved a 15-year-old girl holding a teddy bear while testifying.⁹⁹ The defendant first raised the issue upon ap-

⁸⁷ *Id.* at 1072, 1074.

⁸⁸ *Id.* at 1074.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Marquez*, 951 P.2d at 1074.

⁹³ 98 P.3d 809, 810, 812 (Wash. App. 2004).

⁹⁴ *Id.* at 812.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 119 P.3d 411, 418 (Wyo. 2005).

peal, and it was therefore subject to review under a plain error standard.¹⁰⁰ This standard meant that the defendant had to demonstrate the trial court's error in applying a precedential rule of law.¹⁰¹ The court held that because the defendant could not show "the existence of a clear and unequivocal rule of law that the use of a prop such as a teddy bear or doll is a due process violation absent a compelling reason for the testifying witness to need a prop,"¹⁰² the defendant's due process right to a fair trial was not violated.¹⁰³

On the other hand, a few courts have disapproved of the use of comfort items during trial. In *State v. Gevrez*, the defendant was on trial for the murder of his wife.¹⁰⁴ The couple's fifth-grade daughter was allowed to take the witness stand while carrying a doll, which she testified belonged to her mother.¹⁰⁵ However, the state presented no argument that the doll was used to comfort the witness.¹⁰⁶ Instead, the court found the state to have "prearranged" that the girl would carry the doll to the stand in an attempt to influence the jury in favor of the prosecution.¹⁰⁷ According to the court, this "very strong appeal" had the tendency to arouse the sympathy of the jury and was found to have deprived the defendant of his right to a fair and impartial trial.¹⁰⁸ Because of this scheme and, perhaps, because the doll did not belong to the child witness, this case is factually distinguishable from others allowing the use of a comfort item. Notably, this court worded its holding in such a way that the door to using a comfort item for legally acceptable reasons was kept open:

So, we have an instance of where a girl in the fifth grade carried her mother's doll in the trial of the case and the influence on the jury was not fair to the appellant, and it was a very strong appeal to the jury put forward by the prosecution, *and while no error can be claimed by reason of it, [] it has the great tendency . . . to arouse the sympathy of the jury.*¹⁰⁹

In contrast, *State v. Palabay* presents what at first glance appears to be a more categorical rejection of the use of comfort items during trial.¹¹⁰ In this case, the defendant complained that a teddy bear bestowed on complainant an "unwarranted aura of vulnerability, naivetè, ingenuousness, purity, and credibility" and prejudicially caused the jury to infer that complainant was so afraid of defendant that she

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 418, 420.

¹⁰⁴ 148 P.2d 829, 833 (Ariz. 1944), *rev'd in part on other grounds by Smith*, 119 P.3d 411.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ 844 P.2d 1, 6 (Haw. App. 1992).

needed the extra measure of comfort to testify.¹¹¹ Emphasizing the need to balance the defendant's right to a fair trial against "the witness's need for an environment in which he or she would not be intimidated into silence or to tears,"¹¹² the intermediate appellate court found that because there was no evidence on the record indicating the "compelling necessity" for the complaining witness to hold the teddy bear, it was error for the trial court to allow the use of the teddy bear.¹¹³ However, the court also found this error to be harmless and affirmed defendant's conviction.¹¹⁴

Finally, one appellate court expressed concern about an 11-year-old girl holding a teddy bear while testifying by stating that "[it] is unlikely, on retrial, that other alleged errors will recur, particularly the child victim's carrying a 'Teddy Bear' onto the witness stand while testifying."¹¹⁵ However, this statement was only dictum, and at least one other court has refused to use this case to prevent witnesses from using comfort items in court.¹¹⁶

In sum, when appellate courts review the use of comfort items, they look for clear evidence from the record that the witness truly had a compelling need for such an item. This could, for example, be presented by a forensic interviewer or a neutral expert. Second, trial courts must strike the proper balance between protecting the defendant's due process rights to a fair and impartial trial and the witness's need for a courtroom environment in which he or she will not be intimidated when giving testimony. This is a case-specific inquiry, but if these rights have been properly balanced, courts appear reluctant to hold that the mere use of a comfort item is a violation of a defendant's confrontation or due process rights.

So far, only toys have been allowed as comfort items in published court cases. However, because service dogs would be used for the same purposes and in similar circumstances, courts would likely analyze cases presenting disputes about the use of service dogs under the same legal framework. Whereas future attempted abuse of the system in the form of overzealous prosecutors seeking to unduly influence the jury is not unthinkable with dogs, it is also not unthinkable in the case of toys, and nothing so far has indicated that using dogs in lieu of toys as emotional support would be done out of anything else than precisely the "compelling need" with which courts are concerned. Proponents of canine support programs thus have reasonable grounds to rely on existing analogous case and statutory law in those instances where using a dog would serve useful purposes in the presentation of evidence and where the witness has a compelling need for canine assistance. This

¹¹¹ *Id.*

¹¹² *Id.* (quoting *Cliff*, 782 P.2d at 47).

¹¹³ *Id.* at 7.

¹¹⁴ *Id.* at 11.

¹¹⁵ *State v. Harper*, 670 P.2d 296, 301 (Wash. App. 1983).

¹¹⁶ *Hakimi*, 98 P.3d at 812.

would help maintain the advantage of ensuring that a defendant's right to confront witnesses against him or her would be safeguarded.

B. Child Victims' and Child Witnesses' Rights Codified

The United States Code may be of further, albeit more indirect, use for advocates of canine-based emotional support programs. One provision specifically allows for the use of adult attendants to accompany a child on the witness stand in federal trials:

A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding.¹¹⁷

Courts have even upheld as not being prejudicial error, and therefore not reversible, the use of prosecutors as support persons, despite being somewhat critical of the practice.¹¹⁸ For example, the Alabama Court of Criminal Appeals and the Eleventh Circuit upheld a rape conviction even though the 5-year-old victim sat on the prosecutor's lap during the direct, cross-examining, and redirect testimony.¹¹⁹ While the appellate court did not condone this conduct, the decision was left to the trial court because it "was in the best position to determine what, if any, probable effect this action would have on the jury."¹²⁰ The appellate court stated that considering the totality of evidence of defendant's guilt, any trial error was harmless.¹²¹

Allowing a dog to assist a testifying child is less prejudicial and has a lesser effect on a jury than an adult accompanying the child to the stand. While dogs may signal the innocence of a witness, any signal from a dog will be much weaker than that emitted from an adult attendant. An adult, especially one who can understand the entirety of the case, including its legal underpinnings, may be seen by a jury to add credibility to the arguments of the plaintiff's witness. In contrast, a dog is "neutral" and does not understand any of the legal and factual arguments. It serves the limited function of physically and emotionally standing by the testifying witness.

Furthermore, awareness of victims' rights appears to be increasing in legal circles; with this comes an interest in modern solutions that help victims yet still respect the bounds of the traditional legal

¹¹⁷ 18 U.S.C. § 3509(i); *see also Marquez*, 951 P.2d at 1073 ("Courts in several states have allowed a parent, relative, friend, guardian ad litem, school employee, clergyman, prosecutor or others to accompany the victim on the witness stand.")

¹¹⁸ *Id.*

¹¹⁹ *Sexton v. State*, 529 So.2d 1041 (Ala. Crim. App. 1988); *Sexton v. Howard*, 55 F.3d 1557 (11th Cir. 1995).

¹²⁰ *Sexton v. State*, 529 So. 2d at 1044.

¹²¹ *Sexton v. Howard*, 55 F. 3d at 1560.

system. Canine emotional support programs are such a solution. Ideally, the support from canine “attendants” would be codified, as is the support from human attendants, to provide greater clarity about the instances in which canines would be allowed in court. Clear guidelines in this area are called for by the judiciary.

C. Judicial Comments

The examination of witnesses is a matter resting largely within the discretion of the trial judge,¹²² who rules on questions such as the propriety of the methods that the prosecuting attorney uses in examining or cross-examining his or her witnesses.¹²³ Accordingly, the trial judge has discretion whether to allow testimony by alternative methods or the use of emotional support systems, such as service dogs or toys. So what do judges have to say about these new canine-based emotional support programs?

Three judges of the King County Superior Court in Washington have commented on the pilot program that they have seen in action in their courtrooms. First, Judge Laura Inveen states that she is “fairly comfortable that a judge would be on solid legal grounds if the judge chose to allow the companion dog or service dog to be present” in the courtroom during legal proceedings.¹²⁴ Judge Inveen also emphasizes that the proper training of such service dogs is very important, noting that dogs should “be quiet and be respectful in the court proceedings . . . as people [in court] should be.”¹²⁵

Judge Julie Spector takes a slightly more critical approach to the issue. On one hand, Judge Spector notes that the canine support program is one of the most innovative initiatives she has seen in years and that there is no question about the ameliorating effects dogs have on people in court, even the lawyers.¹²⁶ On the other hand, she is also concerned about the unintended signal emitted by a dog supporting a complaining witness in the presence of a jury as this may help sway jurors.¹²⁷ Judge Spector is further concerned about the backlash this may create in the form of an issue for appeal as well as about the potential for diminished respect for courts if these are perceived as a place where dogs are taken for purposes that some may argue to be questionable.¹²⁸ But, states Judge Spector, this area of the law is al-

¹²² 35A C.J.S. *Federal Civil Procedure* § 585 (2008); 23A C.J.S. *Criminal Law* § 1699 (2008).

¹²³ 23A C.J.S. *Criminal Law* § 1699 (2008); *Brown v. U. S.*, 222 F.2d 293, 298 (9th Cir. 1955).

¹²⁴ *Courthouse Canine Companions*, *supra* n. 38. Judge Inveen does not elaborate further on her basis for this statement, but her comment provides a valuable indicator of the judicial support for these programs.

¹²⁵ *Id.*

¹²⁶ Telephone Interview with Hon. Julie Spector, King Co. Super. Ct. J. in Seattle, Wash. (Nov. 17, 2008) (notes on file with Author).

¹²⁷ *Id.*

¹²⁸ *Id.*

ready changing and will undoubtedly continue to do so in the immediate future, especially with the current increased focus on victims' rights.¹²⁹ Judge Spector calls for clearer guidelines in this area to help the judiciary decide whether to allow dogs for emotional support in contested cases.¹³⁰ Judge J. Wesley Saint Clair, also of King County Superior Court, explains that in one case where he allowed the use of a service dog for emotional witness support, both the prosecution and defense were very active in their support or opposition to the presence of the animal, respectively.¹³¹ Judge Saint Clair thus comments that next time this issue comes up in his court, he will use the potential presence of a service dog as a very robust topic of *voir dire*.¹³²

It remains to be seen how broader segments of the judiciary view this issue and how pertinent case law develops, but it is noteworthy that several courts are already allowing the use of service dogs for emotional support in appropriate and compelling circumstances.

IV. PRACTICAL OBSTACLES AND OBJECTIONS

In addition to defendants potentially raising confrontation or due process issues, a few practical problems may also appear in connection with using canines for emotional support in legal proceedings. For example, Judge Spector notes that allergies, fear, and delay of jury selection may stand in the way of the expansion of the canine initiative.¹³³ Judge Inveen adds that canines in court may have a "gimmicky" effect.¹³⁴ Such a perception may result in some judges—especially those who are not fond of dogs to begin with—simply excluding this type of procedure from their courts. Some judges may find canine support programs to be similar to "courtroom experiments," which some, albeit not all, courts reject.¹³⁵

O'Neill-Stephens further acknowledges that for canine support programs to be successful, it is very important that the dogs not only be extremely well-trained, but also insured to prevent and mitigate po-

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ E-mail from Hon. J. Wesley Saint Clair, King Co. Super. Ct. J., to Marianne Delinger, Author (Nov. 10, 2008, 9:37 a.m. PST) (copy on file with Author).

¹³² *Id.*

¹³³ McNerthney, *supra* n. 11.

¹³⁴ *Courthouse Canine Companions*, *supra* n. 38.

¹³⁵ See e.g. *U. S. v. Michelena-Orovio*, 702 F.2d 496, 500 (5th Cir. 1983) (rejecting courtroom experiment because of its dissimilarity to real-life conditions); *Cormier v. Rowan Drilling Co.*, 549 F.2d 963, 967 (5th Cir. 1977) (judge similarly refusing to allow demonstration to take place as it would be misleading since field conditions could not be duplicated); but see *U. S. v. Cork*, 69 Fed. Appx. 733, 739 (6th Cir. 2003) (pointing out that demonstrations are not always prejudicial); *Taylor v. Reo Motors, Inc.*, 275 F.2d 699, 701–02 (10th Cir. 1960) (citing with approval to the use of courtroom experiments by appellant's expert witness); *TC Mfg. Co., Inc. v. Polyguard Products Inc.*, 2000 U.S. Dist. WL 876913, at *4–5 (N.D. Ill. 2000); *Burriss v. Texaco, Inc.*, 361 F.2d 169, 175 (4th Cir. 1966) (holding that the decision to allow courtroom experiments is within the sound discretion of the district court).

tential liability issues against the handlers, sponsors, and jurisdictions “employing” the dogs.¹³⁶ For this reason and to help convince judges that canines may perform a valuable courtroom function, her organization points out the critical need for a best practices model.¹³⁷ Under this, service dogs would undergo extensive training and testing by recognized organizations.¹³⁸ They would also be able to consistently display calm, predictable behavior in a wide range of circumstances.¹³⁹ Additionally, both O’Neill-Stephens and Judge Spector emphasize the importance of the dogs being certified by a certified organization.¹⁴⁰

As described, local court rules could alleviate some of the uncertainty in this area. Under these, jurors suffering from allergies to or fear of dogs could be excused. Further, the use of dogs could simply be prohibited where one or more jurors raise such a concern and where this would cause unacceptable jury selection delays. With such rules in place, no significant delays should occur in the jury selection process beyond the many other issues that commonly present themselves in this connection. Insurance policies could and should be taken out on service dogs working in court. This would alleviate the risk of civil liability on handlers or others within the legal system. Clearly, a best-practices model promoting the exclusive use of dogs from experienced, quality service dog associations should be in place. It is important to remember that although most people agree that dogs, in general, should not be present in hospitals, restaurants, businesses, homes for the elderly, and other public facilities, the use of *service* dogs and other service animals in such facilities has now become widely accepted.¹⁴¹ There is no reason why dogs could not and should not also be used in courts in legally appropriate circumstances.

V. ENSURING PROGRAM SUCCESS

Thus far, the advantages of using dogs for emotional support in court have proven to outweigh the disadvantages. This is especially so seen from the point of view of prosecutors. According to one prosecutor, “the dogs help us break down the barriers of fear, distrust[,] and anxiety so we can get to the truth.”¹⁴² As shown, judges have found the

¹³⁶ Courthouse Dogs, *Philosophy and Best Practices in the Use of Courthouse Dogs*, http://www.courhousedogs.com/best_practices.html (last accessed Apr. 11, 2009).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*; Telephone Interview, *supra* n. 126.

¹⁴¹ DiSalvo, *supra* n. 8, at 301-302; Rebecca Skloot, *Creature Comforts*, N.Y. Times Mag., <http://www.nytimes.com/2009/01/04/magazine/04Creatures-t.html?scp=3&sq=&st=nyt> (Jan. 4, 2009) (last accessed Apr. 11, 2009); Judith S. Lederman, *Tyler Takes a Job at a Hospital*, in *Pet Therapy*, N.Y. Times, <http://www.nytimes.com/2002/01/20/nyregion/tyler-takes-a-job-at-a-hospital-in-pet-therapy.html?scp=1&sq=&st=nyt> (Jan. 20, 2002) (last accessed Apr. 11, 2009).

¹⁴² Seattle Post-Intelligencer, *Dogs Give Prosecutors a Hand in Difficult Cases*, http://seattlepi.nwsource.com/local/330093_kcdogs03.html (last updated Sept. 2, 2007) (last accessed Apr. 11, 2009).

programs to render favorable experiences as well. Even from the defendant's point of view, canine support programs may be preferable to the presentation of evidence by alternative methods such as CCTV or videotape through which the defendant's confrontation clause rights are more likely to be violated than if the witness is present to give testimony before the defendant. This is a particularly important consideration after *Crawford v. Washington*,¹⁴³ which cements the importance of safeguarding a criminal defendant's confrontation clause rights.

Steps could be taken to remedy the potential negative effects of and concerns about dogs being used for emotional support in open court. During voir dire, lawyers or judges could ask jurors about their willingness to disregard the presence of a service dog assisting a witness. A defendant could raise the concern that dogs lending support to a testifying witness may prejudice a jury. Judges could alleviate this concern by using limiting jury instructions. Such instructions are already used to prevent other types of improper jury interpretation. For example, the Manual of Model Criminal Jury Instructions of the Ninth Circuit Courts of Appeal proposes an instruction that certain evidence—such as statements, arguments, questions, and objections of the attorneys, and anything that jury members may see or hear when the court not in session—is not testimony and should be disregarded.¹⁴⁴ Similarly, the section of these model instructions that addresses the credibility of witnesses suggests informing jurors that “[in] considering the testimony of any witness, you may take into account: . . . 3. the witness's manner while testifying; 4. the witness's interest in the outcome of the case and any bias or prejudice; . . . 7. any other factors that bear on believability.”¹⁴⁵

Judges could use these instructions in their current form to address situations in which support dogs were present. Alternatively, a judge could use an additional instruction to address the improper prejudice concern. This is exemplified by one case in which an appellate court found no error in the trial court allowing the child victim to hold a teddy bear while testifying because, among other things, the court instructed the jury to disregard the toy.¹⁴⁶ This case shows the viability of emotional assistance cases where properly tailored jury instructions are used.

Similarly, state laws or local court rules could include guidelines for when using canines in court is permissible. For example, the use of canines could be limited to child witnesses or to child and elderly wit-

¹⁴³ 541 U.S. 36 (2004).

¹⁴⁴ 9th Cir. Model Crim. Jury Instr. 1.4 (Comm. on Model Crim. Jury Instr. 9th Cir. 2003).

¹⁴⁵ *Id.* at 1.8.

¹⁴⁶ *Gutkaiss*, 614 N.Y.S.2d at 602. The county court informed the jury that the teddy bear had “nothing to do with the truth or falsity of this [witness's] testimony . . . you should [not] consider and evaluate the witness on [the] basis . . . he had a teddy bear in his possession.”

nesses. Contemporary society often glorifies youth, but it is equally important to remember that in elder abuse cases, the alleged victims often face the same problem of intimidation and tyranny as are seen in cases of child abuse.¹⁴⁷ The use of canines could and arguably should be further limited to compelling need cases to support severely traumatized witnesses, as determined by a neutral expert.¹⁴⁸ Judge Spector, who has allowed the use of canines in court proceedings and is familiar with the use of canines in drug court, explains the clear need to create criteria delineating when service dogs may be used for emotional support.¹⁴⁹ Such criteria could call for proof that the witness would not testify without the presence of the service dog.¹⁵⁰ Additional proof of a history of control by the alleged perpetrator over the witness,¹⁵¹ as may be the case in sexual assault cases of children, may also be required. All such proof could be presented in pre-trial hearings away from the presence of the jury, leaving the ultimate determination of allowing the service dog in the court proceedings to the judge.

Similarly, other steps could be taken. For example, the dog and the witness could be required to enter the courtroom before the jury, and the dog would remain out of the jury's sight.¹⁵² This would help alleviate the fear of any inappropriate and potentially prejudicial signals to the jury resulting from the presence of the dog. While courtroom service dogs are extensively trained and are unlikely to create a spectacle, barking may still be an issue. Should this occur, the judge could immediately provide a limiting jury instruction regarding the dog's presence and repeat it at the end of the trial.

In short, the existing concerns about the problems presented by allowing service dogs in open court could be alleviated by taking relatively easy legal and practical steps.

VI. CONCLUSION

Service dogs can be very useful in securing testimony from emotionally traumatized witnesses who otherwise refuse to testify. Such testimony provides an obvious boon to the criminal justice system by potentially bringing more criminals to justice. For the defense, allowing the use of service dogs may be advantageous because a defend-

¹⁴⁷ Telephone Interview, *supra* n. 126.

¹⁴⁸ Such a rule would be similar to the "compelling reasons" requirement set forth by the United States Code for competency examinations. 18 U.S.C. § 3509(c)(4). Under the code, "[a] competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason." *Id.*

¹⁴⁹ Telephone Interview, *supra* n. 126. Judge Spector explains that in Washington State, drug court is a non-adversarial therapeutic court program focused on assisting persons with substance abuse problems in finding appropriate care programs. The participants give up their right to a jury trial, and include both juveniles and adults.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

ant's confrontation rights are better safeguarded through live, in-court testimony by the complaining witness as contrasted with current alternative testimony methods such as CCTV or videotaped testimony.

Nevertheless, some will contest the use of service dogs in court for the emotionally traumatized. Proponents can argue that a service dog will help protect the testifying witness from experiencing undue embarrassment and make the presentation of evidence more effective and thus less time-consuming, all important objectives under federal and certain state evidentiary rules. Opponents could argue that the presence of a dog assisting a witness in court prejudices the jury's perception of the witness. The use of a dog may signal that the witness is frail and weak and result in undue jury sympathy that then interferes with the defendant's right to a fair trial.

Courts will likely turn to precedential case law on witnesses' use of comfort items for resolution of the issue of whether and when to allow service dogs for emotionally traumatized witnesses. Courts have emphasized the importance of striking the right balance between the defendant's due process right to a fair trial and the witnesses' right to testify in an environment that is not unduly intimidating. In balancing these rights, the majority of courts have allowed the use of a comfort item, holding that the calming effect on the witness outweighs the possible prejudicial effect on the jury. Thus far, existing cases have involved child witnesses with a compelling need for emotional support, though the need may be broadened to extend to further segments of the population. Future courts are likely to allow the use of service dogs for emotional support to those with similar truly compelling emotional support needs, such as the elderly or battered women.

Any perceived negative aspects of allowing service dogs in open court could be reduced or eliminated by taking relatively easy legal steps. For example, stringent voir dire or limiting jury instructions could be used to address undue influence issues. State rules or local court rules could establish guidelines for the types of cases allowing the use of service dogs emotional support as well as procedural rules on how to do so.

The law is not and should not be static. Court service dogs provide important benefits to both the prosecution and defense, allowing witnesses that otherwise could not testify to come forward and present evidence. The courts should recognize this benefit and therefore allow the use of service dogs for emotionally traumatized witnesses in appropriate situations. Not long ago, institutions such as hospitals and long-term care facilities started using service dogs, when appropriate, for the benefit of their constituents. Courts should do so as well.