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THE USE AND ABUSE OF DOGS IN THE WITNESS BOX

John J. Ensminger, Sherri Minhinnick, James Lawrence Thomas, and Itiel E. Dror

ABSTRACT

The movement to allow dogs to accompany children and vulnerable adult witnesses during testimony has led to an increasing number of judicial decisions and statutes across the United States. Courts must balance the fact that certain witnesses find testifying less traumatic when accompanied by a dog with the possibility that allowing a dog beside the witness may prejudice the jury. Judges may too easily accept that they can overcome such a bias through specific cautions and instructions given to jurors, but research on the implicit biases of juries arising from the presence of dogs in the courtroom is only the beginning. Statutes are meant to assure that dogs can be comfort items, like dolls and teddy bears, just as previous statutes assured that support persons could be available for certain witnesses. An additional concern, however, is that of monopoly; legislation in some states has resulted in one national organization becoming the sole source for courtroom comfort dogs in those states.

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I. INTRODUCTION

For many decades, psychologists and other mental health professionals have investigated the advantages of dogs to enhance the communication skills of ordinary children, mental patients, special-needs children, prisoners, and other groups. There is considerable research on the difficulties that children face while testifying in the presence of those who may have abused them, as well as the difficulties of testifying in open court in general. Studies have shown that the presence of a dog makes it more likely that a child will be able to recount frightening experiences, even in difficult environments. Measurements of stress biomarkers in children during forensic interviews regarding sexual abuse situations determined that children accompanied by a therapy dog maintained lower heart rates and cortisol levels than children describing the situations without such a dog. These benefits have also been verified to apply to adults with various disabilities.

Increasingly, courts are permitting children and other vulnerable witnesses to be accompanied by dogs when taking the stand for difficult testimony. At least thirty-one states have implemented courthouse dog

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2 See John J. ENSMINGER, SERVICE AND THERAPY DOGS IN AMERICAN SOCIETY: SCIENCE, LAW AND THE EVOLUTION OF CANINE CAREGIVERS 73–86 (Charles C. Thomas 2010) (discussing service dog support of individuals with mental disabilities); Lorie Fike, Cecilia Najera, and David Dougherty, Occupational Therapists as Dog Handlers: The Collective Experience with Animal-Assisted Therapy in Iraq, U.S. ARMY MED. DEP’T J. 51, 53 (Apr. – June 2012) (describing how, in the presence of a therapy dog, “service members appeared more likely to share their concerns, fears, and goals, and to let down their guard for a short time,” and that such dogs, when incorporated into classes, helped soldiers “assist with self-esteem, anger management, or communication skills.”).


4 See Novine Bardill & Sally Hutchinson, Animal-Assisted Therapy with Hospitalized Adolescents, 10 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 17, 18 (1997) (recounting research showing pets “serve as catalysts for positive social interactions”).


7 See Marianne Dellinger, Note, Using Dogs for Emotional Support of Testifying Victims of Crime, 15 LEWIS & CLARK L. REV. 171, 175–77 (2009) (discussing early examples of dogs being used effectively during witness testimony). Although both the popular press and peer-reviewed publications generally favor the use of dogs in courtrooms, this position is far from universal. A student Note focused on New York law and argued that therapy dogs should not be permitted to assist children testifying during criminal trials. See Abigayle L. Grimm, Note, An Examination of Why Permitting Therapy Dogs to Assist Child-Victims When Testifying During Criminal Trials
programs. Decisions concerning the use of dogs on the witness stand have been issued by courts in Arizona, California (including one federal habeas), Connecticut, Idaho, Indiana, Michigan (one federal habeas),

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11 See State v. Devon D., 138 A.3d 849, 865 (Conn. 2016) (trial court may exercise discretion to permit dog for witness’s comfort).


New York, Ohio (one federal habeas), Tennessee, Texas, and Washington. Fifteen states and the territory of Guam passed legislation allowing the use of dogs (variously denominated) during witness testimony.  


See ALA. CODE § 12-21-148 (2017) (defining and permitting certified facility dog to reduce witness stress); ALA. CODE § 12-21-147 (identifying requirements for emotional support dog training and appearance in courtroom); ARIZ. REV. STAT. ANN. §§ 8-422, 13-4442 (2016) (permitting victims under eighteen access to qualifying assistance dog for court testimony); ARK. CODE ANN. § 16-43-1002 (West 2015) (defining and permitting use of certified facility dog and certified handler in courtroom); CAL. PENAL CODE § 868.4 (2018) (permitting therapy or facility dogs that meet credentials for criminal or juvenile hearings); COLO. REV. STAT. § 16-10-404 (West 2019) (providing procedural guidance for use of service dog in proceeding); FLA. STAT. § 92.55 (2017) (indicating service dog use permitted for minor, intellectually disabled, or victims of sexual assault); HAW. REV. STAT. § 621-30 (2019) (allowing court discretion for use of facility dog in testimony of vulnerable witness); IDAHO CODE § 19-3023 (2017) (permitting service dog for child witnesses in criminal matters); 725 ILL. COMP. STAT. § 5 / 106b-10 (West 2015) (identifying circumstances where facility dog use in testimony is permissible and its limitations); LA. STAT. ANN. § 15:284 (2018) (providing requirements for use of facility dog and jury instructions when necessary); MICH. COMP. LAWS § 600.2163a (West 2019) (defining permissible tools for vulnerable witness testimony including courtroom support dog); MISS. CODE ANN. § 99-43-101(2)(C) (West 2019) (defining and permitting trained facility animal, category of support animal, including dog or miniature horse under Miss. Code Ann. § 43-6-153(e)); OKLA. STAT. ANN. tit. 12, §§ 2611.2(F), 2611.12 (2014) (recognizing need for support dog and where it may replace “support person”); WA. CODE ANN. § 18.2-67.9.1 (West 2018) (providing circumstances in which court may enter order and authorize facility dog for witness); WASH. REV. CODE §10.52.110 (2019) (permitting use of facility dog in any judicial proceeding for minor or disabled witness); 10 GUAM CODE ANN. § 34401(i)(1) (2018) (defining therapy dog, courthouse companion dog, and facility dog training).
Case law in various states has established that it is within the discretion of the trial court judge to permit vulnerable or adolescent witnesses to use dogs to aid in their testimony. Not all courts have accepted this practice, and some have set limits. For instance, a Michigan judge presiding over a federal prosecution for sex trafficking allowed a seventeen-year-old witness to use a dog in the lobby area and attorney conference rooms, but not in the witness box. A New York appellate court reversed a conviction on multiple grounds, including the trial court’s allowance of a victim to testify accompanied by a therapy dog, without any analysis concerning why the use of a service dog was deemed an error. A Michigan appellate court reversed a trial court decision that allowed a dog to accompany an adult witness without a disability during testimony, requiring a new trial. A Michigan federal court specifically denied a motion by the government to allow a “canine advocate” to accompany minor victims at trial, noting that the Child Victims’ and Child Witnesses’ Rights statute “does not provide for a support animal to accompany a child in addition to the adult attendant.” Although excluding the support animal from the courtroom, the Michigan court accepted that the witnesses could be with the dog before and after testimony, and during breaks “in the hallway outside of the courtroom or in the attorney conference room being used by the Government.” Courts have generally rejected a requirement of necessity—that the witness needed the dog to be able to testify reliably and completely.


26 See id. at *4.

27 See People v. Chenault, 175 Cal. Rptr. 3d 1, 11 (Ct. App. 2014) (stating trial court should “determine whether the presence of a support dog would assist or enable that witness to testify without undue harassment or embarrassment and provide complete and truthful testimony.”); State v. Devon D., 138 A.3d 849, 865 (Conn. 2016) (concluding compelling need not required as “the pivotal question is not whether the special procedure is necessary but whether it will aid the witness in testifying truthfully and reliably.”); People v. Shorter, 922 N.W.2d 628, 634 (Mich. Ct. App. 2018) (declaring use of dog should not be granted merely because witness will “be ‘more
Some courts have referred to "implicit" findings of necessity. A Connecticut appellate court reversed a trial court on the grounds that a showing of necessity had not been made at trial, but that ruling was then reversed by the Connecticut Supreme Court. In a federal habeas petition, the magistrate judge said that the state trial court should have required a showing of specific need as to particular witnesses. Hawaii's statute requires a determination that a compelling necessity exists that calls for the use of a facility dog. Washington's statute requires that the party seeking to use a courthouse facility dog provide "reasons why the courthouse facility dog is necessary to facilitate a witness's testimony," and the statute provides that the witness may use the dog on the finding of such a necessity.

At present, the predominant judicial and legislative term for a dog accompanying a witness during testimony is "facility dog," and that is the term that will be the default for this Article. Cases, statutes, and both legal

comfortable' or because 'this is something she wants.'”); People v. Johnson, 889 N.W.2d 513, 528 (Mich. Ct. App. 2016) (stating no requirement of necessity if Confrontation Clause not violated); People v. Tohom, 969 N.Y.S.2d 123, 126–27 (App. Div. 2013) (finding defense’s argument that showing of necessity should have been required was “without merit”; court was obligated to consider procedures “to protect [the witness’s] mental and emotional well-being while testifying”); State v. Jacobs, No. 27545, 2015 WL 6180908, at *12 (Ohio Ct. App. Oct. 21, 2015) (holding trial court is to “protect witnesses from harassment or undue embarrassment” under Ohio R. Evid. 611(A)); Smith v. State, 491 S.W.3d 864, 874 (Tex. App. 2016) (accepting dog’s presence for “child’s comfort and anxiety and mental well-being”).

28 See Chenault, 175 Cal. Rptr. 3d at 7–8; People v. Spence, 151 Cal. Rptr. 3d 374, 403 (Ct. App. 2012) (quoting Dye that “necessary balancing was implicit in the court’s ruling . . . ”); State v. Dye, 309 P.3d 1192, 1199 (Wash. 2013) (ruling that prosecution had burden “to prove that a special dispensation for a vulnerable witness is necessary”).


31 See HAW. REV. STAT. § 621-30(b) (2019) (“[C]ourt may permit the use of a facility dog in a judicial proceeding involving the testimony of a vulnerable witness if the court determines that there is a compelling necessity for the use of a facility dog to facilitate the testimony of a vulnerable witness.”).


and scientific literature have also called them courthouse dogs, facility dogs, companion dogs, courthouse companion dogs, courtroom support dogs, therapy dogs, canine therapy dogs, service dogs, comfort dogs, therapeutic comfort dogs, therapy assistance animals, support dogs, support canines, canine advocates, and in one case a dog was described as a comfort item. Although dogs performing certain public functions, such as tracking, are often chosen from a limited number of breeds, no breed preference has been demonstrated for facility dogs; however, occasionally a court describes the breed of the dog used, of which many are Labradors.

34 See People v. Johnson, 889 N.W.2d 513, 531 n.6 (Mich. Ct. App. 2016). The term is used by the Courthouse Dogs Foundation, the principal institutional advocate for the use of dogs in courthouses. Id.


38 See Mich. Comp. Laws § 600.2163a(1)(a) (West 2019).


42 See Johnson, 889 N.W.2d at 525.


44 See id. at 125.


46 See People v. Chenuault, 175 Cal. Rptr. 3d 1, 7 (Ct. App. 2014).

47 See Johnson, 889 N.W.2d at 521.


II. CRIMES, WITNESSES, AND DOGS

A. Crimes in Which Dogs are Commonly Used by Witnesses

While the most frequent use of a dog with a witness in a courtroom has been to accompany a child while testifying about a sexual crime,50 other types of crimes in which dogs have accompanied witnesses include murder,51 child abuse,52 aggravated assault (against the mother of the child witness),53

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aggravated theft and residential burglary, second degree assault with domestic violence, and sex trafficking of children.

Statutes generally provide that facility dogs may be present in criminal matters; such provisions are often contained in a state’s criminal procedure laws. Arizona specifies that a facility dog may accompany “the victim while testifying” and presumably would be restricted to the victim of a crime. However, the Hawaii and Washington statutes refer only to a judicial proceeding, without restricting this to criminal matters. Mississippi’s statute provides for the use of a “properly trained facility animal” in any proceeding in which a child (an individual under 18) testifies. The statute does not define a facility animal though it describes a proceeding for the section’s purposes as a “criminal hearing, criminal trial or other criminal proceeding in the circuit or county court in which a child testifies as a victim of a crime or as a witness as to a material issue” or a “youth court proceeding in which a child testifies as a victim of a crime or a delinquent act or as a witness to a crime or delinquent act.” Guam refers to the use of “courthouse companion dogs” in a “court room setting,” but requires the territory’s Attorney General to develop policies and practices on the issue.

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56 See United States v. Gardner, No. 16-cr-20135, 2016 WL 5404207, at *7 (E.D. Mich. Sept. 28, 2016) (noting adult was child at time of offense, but dog was not allowed on witness stand).
57 See ARK. CODE ANN. § 16-43-1002(b) (West 2015) (certification of facility dogs for child witnesses); COLO. REV. STAT. § 16-10-404 (West 2019) (defining use of court facility dog); FLA. STAT. § 92.55(2) (2017) (explaining appropriate use of therapy animals or facility dogs); IDAHO CODE § 19-3023(1) (2017); 725 ILL. COMP. STAT. § 5/106B-10 (West 2015); LA. STAT. ANN. § 15:284(a) (2018); OKLA. STAT. ANN. tit. 12 §§ 2611.2(f), 12-2611.12 (2014).
58 See ARIZ. REV. STAT. ANN. §§ 8-422(a), 13-4442(a) (2016) (describing use of facility dogs in court proceedings).
60 See MISS. CODE ANN. § 99-43-101(2)(f) (West 2019) (permitting properly trained facility animal or comfort item to be present).
B. Child Witnesses in Case Law

Court opinions generally mention the age of a child witness at the time of the crime as well as at the time of testimony.⁶⁴ Some crimes occurred over multiple years and the time span is generally indicated. In Coria, the boy was nine at the time he witnessed a violent assault on his mother and was eleven when he testified with a therapy dog.⁶⁵ In Spence, the victim was ten at the time of the sexual assault and eleven during testimony.⁶⁶ In Tohom, the abuse began when the girl was eleven and continued until she was fifteen, which was her age when she testified.⁶⁷ In Chenault, the abuse began when the two girls were five and six, yet they testified when they were eleven and thirteen years old.⁶⁸ The two children in George were six and eight at the time of the crime and seven and ten during the trial.⁶⁹ Reyes indicates the boy was ten at the trial, the same age as the child witness in Smith.⁷⁰ Johnson involved a three-year-old girl whose abuse was witnessed by her six-year-old brother; they were six and ten when testifying and both were accompanied by a support dog during the trial.⁷¹ In Devon D., the girl was nine at the time of the abuse and eleven when she testified.⁷² In Hasenyager, the girl was eleven at the time of the abuse and thirteen at trial.⁷³ In Riley, at the time of the trial, multiple child victims, age thirteen and sixteen, and child witnesses, age ten, fifteen, and seventeen, testified with the help of a support dog.⁷⁴ All five witnesses used a dog when testifying, the largest number of witnesses using a dog in a single trial. In Davis, the six-year-old victim’s forensic interview was presented at court via DVD, but she was present in the courtroom with a dog while the DVD was being played and began

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⁶⁶ See People v. Spence, 151 Cal. Rptr. 3d 374, 378 (Ct. App. 2012) (describing dog sitting at child’s feet when she testified).


⁶⁸ See People v. Chenault, 175 Cal. Rptr. 3d 1, 6 (Ct. App. 2014).


kicking and crying, which resulted in the court stopping the DVD. In *Tomaszycki*, the defendant met the child when she was ten years old, but the decision only specifies that the defendant began abusing the victim when she was under thirteen. The defendant, who represented himself, refused to participate in court proceedings and on appeal argued "there was no need for any witness to use the dog because he was absent from the courtroom . . . ." However, the appellate court noted the following:

[T]he presence of the defendant is only one of many factors that can cause stress to a witness testifying about a sexual assault. Indeed, defendant's absence did not relieve any anxiety associated with being questioned in a public forum about prior incidents of sexual abuse, and reciting the unpleasant details of the attacks.

In *Jacobs*, the victim was between eleven and fifteen during the period of the alleged abuse and seventeen when she testified. To the defense's objection that the witness was no longer under fifteen at the time of her testimony, the appellate court stated that the defense had "failed to offer any authority to support the proposition that there is a certain age cut-off for the use of special procedures on behalf of alleged sexual abuse victims." In *Gardner*, where a witness to sex trafficking was seventeen at time of offense but eighteen at trial, the court only allowed the dog to be with the witness in the lobby area and attorney conference rooms, but not inside the courtroom during testimony. The court, in restricting use of the dog to areas outside the courtroom, noted the lack of evidence of "severe development disabilities" of the witness, apparently because at eighteen, a witness would need some other vulnerability than being underage. In *Nuss*, the victim was fourteen years old at the time of the alleged lewd act and sixteen at the time of trial.

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77 See id. at *4.
78 See id.
80 See id. at *8.
C. Vulnerable Adult Witnesses in Case Law

Not all witnesses accompanied by dogs have been children. In *Dye*, the witness, Douglas Lare, suffered from developmental disabilities, including cerebral palsy, Kallman Syndrome, and mild mental retardation; thus, even though he was fifty-six, he was determined to have the mental age of a child between six and twelve. In *Moore*, a service dog accompanied an adult victim of domestic violence to the stand when she testified against her husband, who had been charged with second degree assault with a domestic violence allegation. The prosecutor had moved to allow the witness to be accompanied by the dog because she “was nervous and scared about testifying….” Defense counsel at trial made no objection. The appellate court argued that because the defendant failed during the trial to raise an objection regarding the dog’s presence as a violation of his right of confrontation, the issue had not been preserved on appeal absent a showing of constitutional error with “practical and identifiable consequences at trial.” Given that the decision is essentially procedural, it is difficult to say whether the State of Washington had accepted that a dog can accompany an adult witness without establishing any disability other than fear of an abusive husband. It is also to be noted that this is one of many cases where the defense failed to object at the time the dog was used in the courtroom and did not raise any issue regarding the dog’s presence until the matter was on appeal.

In the 2018 decision of *Michigan v. Shorter*, a Michigan appellate court reversed a conviction for sexual assault where the witness was an adult, finding the prior Michigan decision of *Johnson* did not control because that case had involved a child witness while *Shorter* involved a “fully abled adult

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83 See State v. Dye, 309 P.3d 1192, 1195 (Wash. 2013). The Washington Supreme Court noted that the defense characterized Lare’s mental age as between 2½ and 8½. *Id.* at 1194 n.1.
85 See id.
86 See id.
87 See id. at *3.
88 See WASH. REV. CODE § 10.52.110(4) (2019). Washington’s courthouse facility dog program statute, enacted after this case, provides for use of such dogs with a witness under 18 or one with a developmental disability, but also provides that courts may allow a witness not meeting such criteria to use a courthouse facility dog, if available. *Id.* § 10.52.110(2).
89 See People v. Geddis, 102 N.Y.S.3d 846, 849 (App. Div. 2019) (holding trial court abused its discretion in allowing adult victim to testify with therapy dog). However, since a new trial was necessitated by other factors, the circumstances of the use of the dog were not described. *Id.* at 848.
The appellate court stated that it had been "unable to find a case in any jurisdiction allowing the use of a support animal or a support person when the witness is a non-disabled adult." The court determined that Michigan's support-person statute allows for the presence of such a person "only if the witness is a child or a developmentally disabled adult," and reversed, requiring a new trial. The court pointed out that the previous Michigan decision of Johnson had involved a child witness, whereas here the witness was neither a child nor disabled. Allowing a dog to make an adult more comfortable "unlocks a door we have great hesitation about opening." The court stated that the legislature could open that door, however.

Some decisions are concerned with whether the presence of the dog suggests that the witness it accompanies must be a victim or must be vulnerable. Referring to a witness using a dog as "vulnerable" in the presence of the jury may contain an element of prejudice. A federal magistrate judge in a habeas petition arising out of a conviction for child rape criticized the trial court for referring to the witnesses using a dog as "vulnerable witnesses."

D. Statutory witness restrictions by age and capacity

Alabama has separate statutes for facility dogs and therapy dogs, both of which specify only that the court may allow either type of dog in

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91 See Shorter, 922 N.W.2d at 633 (emphasis in original).
92 See id. (discussing Mich. Comp. Laws § 600.2163a). The statute was revised, effective January 14, 2019, to provide for use of a "courtroom support dog." Id. Before there were any legislative initiatives regarding facility dogs, courts often began by considering whether it was appropriate to allow a facility dog into the witness box by examining a state's support person or support item statutes. See State v. Dye, 309 P.3d 1192, 1198 (Wash. 2013) (holding comfort dog's presence during victim's testimony did not prejudice defendant).
93 See Shorter, 922 N.W.2d at 635.
94 See id.
95 See People v. Spence, 151 Cal. Rptr. 3d 374, 400 (Ct. App. 2012) (finding dog did not constitute support person under Cal. Penal Code § 868.5). In Nuss, the defense argued that the presence of the dog "would make the victim appear 'more vulnerable' and would give her testimony 'more credence and emotionality.'" State v. Nuss, 446 P.3d 458, 459 (Idaho Ct. App. 2019).
96 See Nuss, 446 P.3d at 459.
a legal proceeding, to reduce the stress of the witness and to enhance the
ability of the court to obtain full and accurate testimony . . . .

Arizona’s facility dog statutes state that the “court shall allow a
victim who is under eighteen years of age to have a facility dog, if available,
accompany the victim while testifying in court,” but for a victim who is
eighteen years of age or more, or for a non-victim witness, the court “may
allow” use of a facility dog.98

The Arkansas statute regarding certified facility dogs refers
specifically to the use of such a dog with a witness who is “a witness
testifying in a criminal hearing or trial whose age at the time of his or her
testimony is eighteen (18) years of age or younger.”100 A facility dog can be
“requested by either party in a criminal trial or hearing and if a certified
facility dog is available within the jurisdiction of the judicial district in which
the criminal case is being adjudicated . . . .”101 Since there must be a dog
available for a request to be granted, neither the state nor the court need
undertake to assure such availability.102

California’s statute allows for “the opportunity to have a therapy or
facility dog accompanying [the witness] while testifying in court, subject to
the approval of the court,”103 when the person in question is a “child witness
in a court proceeding involving any serious felony, or any violent felony,”104
or a “victim who is entitled to support persons pursuant to Section 868.5, in
addition to any support persons selected pursuant to that section.”105 A
prosecuting witness entitled to a support person can be an “elder or
dependent adult.”106 On filing a motion for the use of a therapy or facility
dog, the moving party is to include “[f]acts justifying that the presence of the
therapy or facility dog may reduce anxiety or otherwise be helpful to the
witness while testifying.”107 This falls well short of requiring a finding of
necessity.

98 See ALA. CODE §§ 12-21-147(b) and 12-21-148(b) (2017). Section 12-21-147(b) does not
specify limitations on what witness may be accompanied by the dog, leaving the court to determine
the appropriateness of the dog for achieving “full and accurate testimony.” Id. § 12-21-147(b).
99 See ARIZ. REV. STAT. ANN. §§ 8-422(a), 13-4442(a) (2016).
100 See ARK. CODE ANN. § 16-43-1002(a)(3) (West 2015).
101 See id. § 16-43-1002(b) (emphasis added).
102 See id.
104 See id. § 868.4(a)(1). A child witness “means any witness who is under the age of 18 at
the time he or she testifies.” Id. § 868.4(h)(1).
105 See id. § 868.4(a)(2).
106 See id. § 868.5(a) (highlighting how additional conditions apply to support persons under
this statute).
107 See id. § 868.4(b)(3).
Colorado’s statute provides that a facility dog may be in the courtroom while a witness is testifying in a criminal proceeding if the judge determines, by a preponderance of the evidence, that:

(A) The presence of a court facility dog with the witness during the witness’s testimony would reduce the witness’s anxiety and enhance the ability of the court to receive full and accurate testimony;\(^{108}\)
(B) The arrangements for an available court facility dog during the witness’s testimony would not interfere with efficient criminal proceedings; and
(C) No prejudice would result to any party due to the presence of a court facility dog with the witness.\(^{109}\)

The party wishing to use the facility dog “must file a written motion with the court no less than fourteen days prior to the criminal proceeding.”\(^{110}\)

Florida allows a court to provide special protections for a “victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness.”\(^{111}\) Protections may be granted on that party’s own motion, or on the motion of another party such as a parent, guardian, attorney, or guardian ad litem seeking “to protect the victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the victim or witness is required to testify in open court.”\(^{112}\)

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\(^{108}\) See COLO. REV. STAT. § 16-10-404(1)(a) (West 2019). The dog must be “specially trained to provide support to witnesses testifying” without restricting this use to a category of witnesses, leaving this evaluation to the court’s discretion. Id.

\(^{109}\) See COLO. REV. STAT. § 16-10-404(2)(a).

\(^{110}\) See id. § 16-10-404(2)(b).

\(^{111}\) See FLA. STAT. § 92.55(2) (2017).

\(^{112}\) See id. (explaining process of protecting witnesses from severe emotional distress in judicial proceeding). The statute further provides that:

When deciding whether to permit a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness to testify with the assistance of a therapy animal or facility dog, the court shall consider the age of the child victim or witness, the age of the sexual offense victim or witness at the time the sexual offense occurred, the interests of the child victim or witness or sexual offense victim or witness, the rights of the parties to the litigation, and any other relevant factor that would facilitate the testimony by the victim or witness under the age of 18, person who has an intellectual disability, or sexual offense victim or witness.

Id. § 92.55(5)(a). Thus, as a child witness approaches eighteen, the court may be more receptive to a defense motion to preclude use of a dog. See id.
Hawaii does not specifically provide for facility dogs for children, but states a vulnerable witness “means a witness whose ability to testify in a judicial proceeding will be hampered or ineffective without the assistance of a facility dog, for reasons including but not limited to intellectual or emotional disability, intimidation, or age.” Although age is mentioned, a range is not specified.

The Idaho statute states that a facility dog shall be allowed to remain in the courtroom at the witness stand in certain circumstances. In Nuss, an Idaho appellate court noted that the statute did not require the same “supportive relationship” between a child and a facility dog as it did between the child and the previously enumerated persons.

Illinois statutory law provides that a court may set “[c]onditions for testimony by a victim who is a child or a moderately, severely, or profoundly intellectually disabled person or a person affected by a developmental disability.” A court may set conditions “involving the use of a facility dog in any proceeding involving” certain offenses, specifically “criminal sexual assault, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse.”

Under Louisiana statutory law, a “court shall allow a witness who is either under eighteen years of age or who has a developmental disability . . . to have a facility dog, if available, accompany them while testifying in court.” However, a “court may allow any witness who does not meet the

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114 See id.
117 See 725 Ill. Comp. Stat. § 5/106B-10 (West 2015). Under the statute, an individual is deemed a child if under the age of eighteen. Id.
118 See id.
criteria provided for in Subsection A of this Section to have a facility dog, if available, accompany them while testifying in court. Thus, as in Arizona and Washington, a Louisiana court must allow a child to be accompanied by a dog, but has the discretion to allow the same for an adult.

In order for a witness to be entitled to the presence of a support person or support dog, Michigan’s applicable statute provides that a witness must be an alleged victim under sixteen years old, a person sixteen years old or older with a developmental disability, or a vulnerable adult.

Mississippi’s statute concerning the rights of children testifying in criminal proceedings states that, in “any proceeding in which a child testifies[,] a party’s motion or the court’s own motion may “permit a properly trained facility animal or comfort item or both to be present inside the courtroom or hearing room.”

Oklahoma provides that a “child witness shall be afforded the opportunity, if available, to have a certified therapeutic dog accompanied by the handler of the certified therapeutic dog in lieu of a support person.” A minor or incapacitated witness has the right to be accompanied by a support person while testifying, but “[i]n lieu of a support person, a witness shall be afforded the opportunity to have a certified therapeutic dog accompanied by the handler . . . .” It is not clear that “in lieu of” creates a hierarchy of support choices with a person being somehow preferable to a dog, but it does suggest that, unlike Mississippi, the witness is not entitled to both of them at the same time. Under Oklahoma statutory law, a child witness “means an individual younger than thirteen (13) years of age who has been or will be called to testify in a criminal proceeding . . . .”

In Virginia, during “any criminal proceeding, including preliminary hearings, the attorney for the Commonwealth or the defendant may apply for an order from the court allowing a certified facility dog to be present with a witness testifying before the court through in-person testimony or testimony

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120 See id. § 15:284(b) (emphasis added).
121 See id.
122 See MICH. COMP. LAWS § 600.2163a(1)(g) (West 2019). According to the Michigan statute, the definition of “vulnerable adult” includes an “individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.” Id. § 750.145m(u).
123 See MISS. CODE ANN. § 99-43-101(1)(a) (West 2019) (defining child as “any individual under the age of eighteen (18) years of age who must testify in any legal or criminal proceeding.”).
124 Id. § 99-43-101(2)(f) (allowing child to hold teddy bear while having dog at his or her side).
125 OKLA. STAT. ANN. tit. 12 § 2611.12(C) (2014) (emphasis added).
126 See id.
127 See id.; see also MISS. CODE ANN. § 99-43-101(2)(f).
128 OKLA. STAT. ANN. tit. 12 § 2611.12(D)(2).
televised by two-way closed-circuit television. . . .”129 The court must find by a preponderance of the evidence that the “presence and use of the certified facility dog will not interfere with or distract from the testimony or proceedings.”130 The court must also find by a preponderance of the evidence that the “use of a certified facility dog will aid the witness in providing his testimony. . . .”131 Aiding a witness to testify clearly falls short of a necessity requirement. The application for use of the dog must be made “at least 14 days before the preliminary hearing, trial date, or other hearing to which the order is to apply.”132

Washington’s facility dog statute provides that courts “with an available courthouse facility dog must allow a witness under eighteen years of age, or who has a developmental disability,” as defined in the state’s developmental disabilities statute, “to use a courthouse facility dog to accompany them while testifying in court.”133 A court may, however, “allow any witness who does not meet the criteria [of being under eighteen or having a developmental disability] to use a courthouse facility dog, if available, to accompany them while testifying in court.”134 The applicable statute in the state of Washington requires a finding of necessity.135

In sum, in several states, such as Alabama, Colorado, and Hawaii, statutory age restrictions are not imposed, leaving discretion to the judge in a trial.136 Most state statutes, however, including Arizona, California, Florida, Idaho, Illinois, Louisiana, Mississippi, and Washington, specify that dogs generally must be allowed with children who are under eighteen at the time of testimony.137

129 VA. CODE ANN. § 18.2-67.9:1(B) (West 2018). The authors are unaware of any case where testimony with a dog was given by a closed-circuit system. Testimony through a two-way closed-circuit system is specified to be available for “an alleged victim who was 14 years of age or younger at the time of the alleged offense and is 16 years of age or younger at the time of the trial and to a witness who is 14 years of age or younger at the time of the trial.” Id. § 18.2-67.9(a).

130 Id. § 18.2-67.9:1(C)(3).

131 Id. § 18.2-67.9:1(C)(2).

132 Id. at § 18.2-67.9:1(D).

133 WASH. REV. CODE § 10.52.110(1) (2019).

134 Id. § 10.52.110(2).

135 Id. § 10.52.110(4)(d) (stating that parties seeking to “use the assistance of a courthouse facility dog” must state in motion the “reasons why the courthouse dog is necessary to facilitate the witness’s testimony.”).”

136 See ALA. CODE § 12.21-147-48 (2017); COLO. REV. STAT. § 16-10-404(2)(A) (West 2019); HAW. REV. STAT. 621-30(a) (2019).

137 See, e.g., ARIZ. REV. STAT. ANN. § 8-422(A), 13-4424(A) (2016); CAL. PENAL. CODE § 868.4(a) (West 2018); FLA. STAT. § 92.55(2) (2017); IDAHO CODE § 18-1506A (2017); 725 ILL. COMP. STAT. ANN. § 5/106B-5 (West 2015); LA. STAT. ANN. § 15:284(a) (2018); MISS. CODE ANN. § 99-43-101(1)(a) (West 2019); WASH. REV. CODE 10.52.110(2).
Arkansas specifies that the witness can be eighteen or younger.\textsuperscript{138} Michigan and Virginia put the threshold at under sixteen, and Oklahoma is an outlier with a child for these purposes being under thirteen.\textsuperscript{139} Arizona, Arkansas, Colorado, Louisiana, Oklahoma, and Washington provide that the use of the dog depends on one being available, so that courts are not obligated to find dogs for counsel wishing to provide one for a witness.\textsuperscript{140}

\section*{III. THRESHOLD ISSUES AND OBJECTIONS}

\subsection*{A. Judicial Consideration of Training and Training Organizations}

In many decisions, there was little or no discussion of the training that the dog in the case had received. However, in \textit{Devon D.}, the Connecticut Supreme Court referred to the dog used as a service dog that had not been certified, but had "reached the testing age of two [years]."\textsuperscript{141} Beginning at eight weeks old, the dog in \textit{Tohom} was trained "to sense stress and anxiety and act in such a way to help reduce" such stress and anxiety "by raising herself up and offering herself to the person to be petted."\textsuperscript{142} In \textit{Dye}, the dog involved was trained by and lived with the prosecutor at Dye's trial.\textsuperscript{143} In \textit{Chenault}, the dog was described as "a trained service dog that will not disrupt the courtroom and has been inside the court in the past."\textsuperscript{144} In \textit{Reyes}, the dog's handler testified that the dog had been trained as a service animal "from birth until he was nearly two years old for obedience and had gone through public access tests."\textsuperscript{145} The handler had gone through a two-week

\textsuperscript{138} \textit{ARK. CODE ANN.} § 16-43-1002(a) (West 2015).

\textsuperscript{139} See \textit{MICH. COMP. LAW} § 600.2163(a)(1)(g); \textit{OKLA. STAT. ANN. tit. 12} § 2611.12(D)(2) (2014); \textit{VA. CODE ANN.} § 18.2-67.91(b) (West 2018).

\textsuperscript{140} See \textit{ARIZ. REV. STAT. ANN.} § 8-442(A) (2016); \textit{ARK. CODE ANN.} § 16-43-1002(a)(3)(b), § 16-10-404(2)(a); \textit{COLO. REV. STAT.} § 16-10-404(2)(a)(II)(B); \textit{LA. STAT. ANN.} § 15:284(a) (2018); \textit{OKLA. STAT. ANN. tit. 12} § 2611.12(C); \textit{WASH. REV. CODE} § 10.52.110(1).


\textsuperscript{144} \textit{People v. Chenault}, 175 Cal. Rptr. 3d 1, 12–13 (Ct. App. 2014). This dog had been used in San Diego County for the "last several years." \textit{Id.}

\textsuperscript{145} \textit{State v. Reyes}, 505 S.W.3d 890, 895 (Tenn. Crim. App. 2016). There are different types of public access tests, so exactly what the test established about the dog's abilities is unclear. Public
program to learn how to be the dog’s handler. She testified that during a trial, Murch was to lie “very quiet and calm,” be “invisible,” and provide “comfort.”\(^{146}\) It is not clear how providing comfort or reducing stress can be trained, since this is something companion animals almost always do. Even though the dog had apparently received significant training, the handler had not received the amount of training expected for a service dog trainer, which generally lasts at least six months.\(^{147}\) In Gardner, the two-year old chocolate Labrador used at trial had been trained by Leader Dogs for the Blind.\(^{148}\)

B. Legislative Perspectives on Training and the Growth of a Monopoly

The absence of training requirements for facility dogs in the case law is in sharp contrast to the developing statutory law regarding the use of facility dogs, where training and organizational affiliation requirements are often specified. Under Alabama’s facility dog statute, a facility dog must receive “[t]wo years of training and must have passed the same public-access test as a service dog.”\(^{149}\) Additional requirements include certification documentation from an assistance dog organization, a current annual certificate of health from an Alabama veterinarian, and “[p]roof of liability insurance in the minimum amount of five hundred thousand dollars

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\(^{146}\) Reyes, 505 S.W.3d at 895.

\(^{147}\) See ADI Minimum Standards and Ethics, ASSISTANCE DOGS INT’L, available at http://www.childrenatrisk.eu/promise/wp-content/uploads/sites/4/2018/10/ADI-Minimum-Standards-Ethics-2018.pdf (last visited Jan. 18, 2020) [https://perma.cc/TDM6-KQG5]. Several weeks might be the amount of time a service dog user (i.e., someone with a disability) might need to be matched with certain kinds of service dogs. Id. Assistance Dogs International requires that “a training period of a minimum of 2 years is required before an Assistance Dog trainer can be regarded as fully qualified.” Id. at 21.


A certified dog handler may also be required to accompany the witness and dog to the witness stand without the jury present. Furthermore, “if requested by either party in a legal proceeding, the court may examine and confirm the credentials of the certified facility dog and certified handler.” A separate Alabama statute provides for the courtroom use of a “registered therapy dog.”

A “therapy dog organization” is defined as a “nationally registered 501(c)(3) nonprofit . . . that has been continuously active for a minimum of three years as a therapy dog organization with at least 100 active therapy dog teams nationwide and with active members in Alabama.”

Id. § 12-21-148(1)(b), (c).

The same provision regarding verification of credentials applies to a registered therapy dog. See id. § 12-21-147(a)(3).

Id. § 12-21-148(f) (explaining that such request is generally “[s]ubject to the Alabama Rules of Criminal Procedure”).

Id. § 12-21-148. Section 12-21-148 reads as follows:

A trained emotional support dog that has been tested and registered by a nonprofit therapy dog organization that sets standards and requirements for the health, welfare, task work, and oversight for therapy dogs and their handlers, including at a minimum, all the following:

1. A current annual certificate of health from an Alabama veterinarian on a form designed by the nonprofit therapy dog organization.
2. Markings identifying the dog as a therapy dog while working.
3. An identification card or badge to be prominently displayed on the handler.
4. A minimum of 18 months of recorded visits in institutions such as hospitals, libraries, and nursing homes providing therapy and emotional support to people of all ages, and must have passed a test administered by a nonprofit therapy dog organization demonstrating the dog and handler are qualified to access public buildings and interact with the public.
5. Proof of liability insurance in the minimum amount of five hundred thousand dollars ($500,000) for each therapy dog working in the court system which may be provided through a nonprofit therapy dog organization.

Id. § 12-21-148(a)(4). An “active member” applies to a therapy dog team that has “recorded visits at facilities including hospitals, nursing homes, libraries, and extended care facilities in the past 18 months.” Id. § 12-21-147(a)(1). The active-member requirement might preclude certain regional therapy dog organizations but would probably allow for dogs registered with Pet Partners (formerly Delta Society), Therapy Dogs International, and Alliance of Therapy Dogs (formerly Therapy Dogs Inc.). Pet Partners’ website states the organization has more than 13,000 registered teams making more than 3 million visits annually.” About Us, PET PARTNERS, https://petpartners.org/about-us (last visited Dec. 12, 2019) [https://perma.cc/E5GY-DM45]. Alliance of Therapy Dogs has been reported to have over 15,000 members nationwide. See Case Study: Alliance of Therapy Dogs, STERLING VOLUNTEERS, https://www.sterlingvolunteers.com/resources/case-study/case-study-alliance-therapy-dogs/ (last visited Jan. 18, 2020) [https://perma.cc/36HL-WF3F]; see also About TDI, THERAPY DOGS INT’L, https://www.tdi-dog.org/About.aspx (last visited Jan. 18, 2020) [https://perma.cc/TDP3-YDNL] (pointing to how Therapy Dogs International’s website states that by 2012, organization had about 24,750 dog-handler teams).
Two Arizona statutes define a facility dog. The statutes require that a facility dog be trained by one organization that is a member of another, and that both of them be concerned with “assistance dogs,” which would seem very likely to exclude most therapy dog organizations. This is because most therapy dogs are not trained by organizations but rather by individuals not organized as legal entities because national therapy dog organizations are generally not directly involved in the “training, placement and utilization” of assistance dogs, but rather with the registration of therapy dogs and handlers as teams that are members of the organization. The party seeking to use the dog “must file a notice with the court that includes the certification of the facility dog, the name of the person or entity who certified the dog and evidence that the facility dog is insured.”

The Arkansas Statute on certified facility dogs provides that such a dog is one that has the following qualifications:

(A) Graduated from a program of an assistance dog organization that is a member of Assistance Dogs International or a similar nonprofit organization that attempts to set the highest standard of training for dogs for the purpose of reducing stress in a child witness by enhancing the ability of the child witness to speak in a judicial proceeding by providing emotional comfort in a high stress environment.

See ARIZ. REV. STAT. ANN. §§ 8-422(d), 13-4442(d) (2016).

[A] graduate of an assistance dog organization that is a member of an organization or entity whose main purpose is to improve the areas of training, placement and utilization of assistance dogs, staff and volunteer education and to establish and promote standards of excellence in all areas of assistance dog acquisition, training and partnership.

Id.

About TDI, supra note 154 (explaining that organization is dedicated “to regulating, testing and registration of therapy dogs” who must be tested and evaluated by a Certified TDI Evaluator); About Alliance of Therapy Dogs, ALLIANCE OF THERAPY DOGS, https://www.therapydogs.com/alliance-therapy-dogs/ (last visited Jan. 18, 2020) [https://perma.cc/42HN-ZJCU] (pointing to website of Alliance of Therapy Dogs states that lists “an international registry of therapy dog teams,” and also that it “doesn’t require formal training.”). Pet Partners’ website describes the registration of volunteer teams and does provide training “for the human end of the leash (the Pet Partners Handler Course).” How Our Program is Different, PET PARTNERS, www.petpartners.org/about-us/our-programs-different/ (last visited Jan. 18, 2020) [https://perma.cc/X3P6-P62J] (pointing to how such training is given primarily to individuals, so presumably the institutional trainer requirement of Ariz. Rev. Stat. Ann. §§ 8-422(d), 13-4442(d) would not be satisfied).

ARIZ. REV. STAT. ANN. §§ 8-442(a), 13-4442(a).

ARK. CODE ANN. § 16-43-1002(a) (West 2015). It appears, from the language that ADI or a similar organization “attempts to set the highest standard of training for dogs for the purpose of reducing stress,” that the Arkansas legislature assumes that ADI standards contain training of dogs.
(B) Received two (2) years of training; and
(C) Passed the same public access test as a service dog . . . .159

The credentials of the dog must be presented before it is allowed in an Arkansas courtroom, along with proof that the dog is “adequately insured.”160 The party desiring to use the dog must certify that “a relationship has been established between the child witness and the certified facility dog in anticipation of testimony” and that “the presence of the certified facility dog may reduce anxiety experienced by the child witness while testifying in the criminal trial or hearing.”161

Similar to Alabama, the California facility dog statute allows for the use of a “therapy dog or facility dog” in courtrooms and defines each separately.162 The Colorado facility dog statute defines a facility dog as “a dog that is a graduate of an assistance dog organization that is accredited by an internationally recognized organization whose main purpose is to grant accreditation to assistance dog organizations based on standards of excellence in all areas of assistance dog acquisition, training, and placement.”163

that is somehow supposed to reduce stress. Those standards, however, do not mention stress other than that the dog itself must be able to tolerate “a high level of stress.” ADI Minimum Standards and Ethics, supra note 147, at 2, 10–11. Rather, under the general standards for an Assistance Dog, it is stated that such a dog “must be temperamentally screened for emotional soundness and working ability.” Id. 159 ARK. CODE ANN. § 16-43-1002(a)(1)(A)–(C) (emphasis added).
160 Id. at § 16-43-1002(c).
161 Id. The relationship of the dog with the child is to be created in anticipation of testimony might nonsensically exclude a dog whose relationship with the child was established as an aspect of therapy outside of the legal process.

“Facility dog” means a dog that has successfully completed a training program in providing emotional comfort in a high-stress environment for the purpose of enhancing the ability of a witness to speak in a judicial proceeding and reducing his or her stress level, provided by an assistance dog organization accredited by Assistance Dogs International or a similar nonprofit organization that sets standards of training for dogs, and that has passed a public access test for service animals.

“Therapy dog” means a dog that has successfully completed training, certification, or evaluation in providing emotional support therapy in settings including, but not limited to, hospitals, nursing homes, and schools, provided by the American Kennel Club, Therapy Dogs Incorporated, or a similar nonprofit organization, and has been performing the duties of a therapy dog for not less than one year.

Id. 163 COLO. REV. STAT. § 16-10-404(1)(a) (West 2019).
Florida, similarly to Alabama and California, defines “facility dog” and “therapy animal” separately, requiring that each be “trained, evaluated, and certified . . . pursuant to industry standards.” Florida further provides that a therapy animal must be “certified as a therapy animal pursuant to industry standards by an organization that certifies animals as appropriate to provide animal therapy.”

Hawaii, in addition to requiring that a facility dog be “a graduate of an assistance dog organization that is accredited by Assistance Dogs International or a similar internationally recognized organization” that accredits assistance dog organizations, states that the dog must “be specially trained to provide emotional support to witnesses testifying in judicial proceedings without causing a distraction during the proceedings.” Before a facility dog may be used in a judicial proceeding, the moving party is to file a motion certifying the following to the court: “(1) The credentials of the facility dog; (2) That the facility dog is adequately insured; and (3) That a relationship has been established between the witness and the facility dog.”

Idaho’s facility dog statute defines a “facility dog” similarly to Colorado’s Statute as a “dog that is a graduate of an assistance dog organization that is a member of assistance dogs international or a similar internationally recognized organization whose main purpose is to grant accreditation to assistance dog organizations based on standards of excellence in all areas of assistance dog acquisition, training and placement.” Thus, the Idaho statute presumes that an organization similar to Assistance Dogs International may exist. The statute is sufficiently specific as to exclude therapy dogs and probably all therapy dog organizations. It would also exclude service dog organizations operating independently of an umbrella organization such as ADI.

Illinois requires that a facility dog be “a graduate of an assistance dog organization that is a member of Assistance Dogs International.” No

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165 Id. § 92.55(5)(b)(1).
166 Id. § 92.55(5)(b)(2).
167 HAW. REV. STAT. § 621-30 (2019).
168 Id. § 621-30(c).
170 Id.
171 Id.
172 Id.
173 725 ILL. COMP. STAT. § 5/106B-10 (West 2015).
additional or alternative training is mentioned.\textsuperscript{174} Arguably, under such language, a dog trained to be a hearing dog, a mobility impairment dog, or trained for any other kind of assistance work recognized by programs that are members of ADI would appear to satisfy the statutory requirement.\textsuperscript{175}

Under Louisiana statutory law, a facility dog is:

\[\text{[A] dog that is certified and a graduate of an assistance dog organization that is accredited by Assistance Dogs International or a similar internationally recognized organization whose main purpose is to grant accreditation to assistance dog organizations based on standards of excellence in all areas of assistance dog acquisition, training, and placement. A "facility dog" is one that is specially trained to provide emotional support to witnesses testifying in judicial proceedings without causing a distraction during the proceedings.}\textsuperscript{176}

In Louisiana, a “party seeking the use of a facility dog must file a notice with the court that includes the certification of the dog, the name of the person or entity who certified the dog, and evidence that the dog is insured."\textsuperscript{177}

Michigan statutory law requires that a “courtroom support dog” be “[t]rained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and [] is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog . . . .\textsuperscript{178}

One could conceivably have a dog trained to ADI standards without having it trained by an ADI member organization. Exactly how a dog is “repurposed” to provide emotional support within the legal system is unclear. Note that dogs used in courtrooms prior to September 27, 2018, are grandfathered in even if they do not satisfy the ADI standards requirement.\textsuperscript{179} A notice of intent to use a support dog is required if a dog is to be used at trial, which must name the support dog and request that the “courtroom support dog sit with the witness when the witness is called upon to testify

\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} LA. STAT. ANN. § 15:284(e) (2018).
\textsuperscript{177} Id. § 15:284(c).
\textsuperscript{178} MICH. COMP. LAWS § 600.2163a(1)(a) (West 2019).
\textsuperscript{179} Id. § 600.2163a(1)(a).
during trial."¹¹⁸⁰ Significantly, a “court must rule on a motion objecting to
the use of a . . . courtroom support dog before the date when the witness
desires to use the . . . courtroom support dog.”¹¹⁸¹ This puts a significant
burden on defense counsel (the party most likely to have an objection to use
of a courtroom support dog) to become quickly aware of the risks to the
defendant upon responding to the motion.¹¹⁸²

In any proceeding in which a child testifies, Mississippi allows a
“properly trained facility animal or comfort item or both to be present inside
the courtroom or hearing room.”¹¹⁸³

Oklahoma, in its provision concerning certified therapeutic dogs,
defines one as:

[A] dog which has received the requisite training or
certification from the American Kennel Club, Therapy Dogs
Incorporated, or an equivalent organization to perform the
duties associated with therapy dogs in places such as
hospitals, nursing homes, and other facilities where the
emotional benefits of therapy dogs are recognized. Prior to
the use of a certified therapeutic dog the court shall conduct
a hearing to verify:

a. the credentials of the certified therapeutic dog,

¹¹⁸⁰ Id. § 600.2163a(5).
¹¹⁸¹ Id.
(showing that witness could testify with her own service dog despite no notice given of witness’s
intent). “[T]he trial court allowed the witness to explain to the jury that she required a service
animal for her disability, and that it was not for emotional support.” Id. at *4. The appellate court
concluded that in light of the explanation for the service dog, “because the witness’s medical issues
were not related to any issues involved in the case, the presence of the dog would not deprive
the jury of determining her credibility.” Id. There was no reference to or discussion of the State’s
facility dog statute nor any recognition that analogies to the statute might be appropriately
considered. Id.; see also COLO. REV. STAT. § 16-10-404(5) (West 2019) (providing nothing in
state’s facility dog statute “precludes or interferes with the rights of a qualified individual with a
disability who is accompanied by a service animal pursuant to state or federal law.”). Whether this
means that Colorado courts can be expected to accept service dogs accompanying their masters
during testimony is unclear.
‘support animal’ includes service animal. . . therapeutic animals, comfort animals and facility
animals. However, the term ‘support animal’ does not mean an animal considered as a pet, and is
limited to a dog or miniature horse.” The latter sentence applies generally to support animals,
which includes facility animals (not otherwise defined in Miss. Code Ann. § 99-43-101(2)(f)), and
raises the possibility that a facility animal for courtroom work could arguably be a miniature horse.
The authors note, however, that the use of a miniature horse, even a highly trained one such as may
be used in guide work, would present different logistical problems than the use of a dog in a
courtroom.
b. the certified therapeutic dog is appropriately insured, and
c. a relationship has been established between the child witness and the certified therapeutic dog in anticipation of testimony.\textsuperscript{184}

This reference to the American Kennel Club (AKC) is curious because, although the AKC website on therapy dogs indicates that the organization has titles, the website specifies that “AKC does not certify therapy dogs; the certification and training is done by qualified therapy dog organizations. The certification organizations are the experts in this area and their efforts should be acknowledged and appreciated.”\textsuperscript{185} The AKC states that those organizations provide insurance individual for members.\textsuperscript{186} The requirement of an established relationship between a child witness and an accompanying dog suggests that the legislature anticipated that the certified therapeutic dog would begin to accompany the child during interviews or preliminary stages of a prosecution.\textsuperscript{187} It should be noted, however, that if the dog has an “established relationship” with a child but the dog does not meet any other qualifications, even a well-behaved dog would presumably be excluded from a courtroom.

Under Virginia’s statute, a “certified facility dog” is:

[A] dog that (i) has completed training and been certified by a program accredited by Assistance Dogs International or by another assistance dog organization that is a member of an organization whose main purpose is to improve training, placement, and utilization of assistance dogs and (ii) is accompanied by a duly trained handler.\textsuperscript{188}

The court must find by a preponderance of the evidence that the “dog to be used qualifies as a certified facility dog.”\textsuperscript{189} The statute also provides that “[n]othing contained in this section shall prevent the court from

\textsuperscript{184} \textit{OKLA. STAT. ANN. tit. 12 § 2611.12(D)(1)} (2014).
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{See OKLA. STAT. ANN. tit. 12 § 2611.12(D)(1).}
\textsuperscript{188} \textit{VA. CODE ANN. § 18.2-67.9:1(a)} (West 2018).
\textsuperscript{189} \textit{Id. § 18.2-67.9:1(c)(1).}
providing any other accommodations to a witness as provided by law.\textsuperscript{190} Whether such language could allow for a non-ADI dog is doubtful.\textsuperscript{191}

Under Washington's statute, a courthouse facility dog is:

\begin{quote}
[A] dog that: (i) Has graduated from a program of an assistance dog organization that is accredited by a recognized organization whose main purpose is to grant accreditation to assistance dog organizations based on standards of excellence in all areas of assistance dog acquisition, training of the dogs and their handlers, and placement; and (ii) was specially selected to provide services in the legal system to provide quiet companionship to witnesses during stressful legal proceedings thereby enabling them to better engage with the process.\textsuperscript{192}
\end{quote}

Before the dog is introduced into the courtroom, the party seeking to use the dog must file a motion setting forth the dog's credentials, its insurance, that "a relationship has been established between the witness and the courthouse facility dog in anticipation of testimony, and the reasons why the dog is necessary."\textsuperscript{193} Washington uses nearly identical "main purpose" language as is found in the statutes of Arizona, Colorado, Idaho, Louisiana, and Virginia.\textsuperscript{194} Also, Arkansas, Hawaii, and Oklahoma, Washington have an established-relationship requirement.\textsuperscript{195}

In sum, Arkansas, Hawaii, Idaho, Louisiana, and Virginia specifically state that the dog must be trained by ADI or a similar organization.\textsuperscript{196} Illinois does not even allow for a similar organization to train the dog.\textsuperscript{197} Michigan requires that a dog be trained to ADI standards.\textsuperscript{198} Alabama, Arizona, Colorado, and Washington do not specifically refer to

\begin{footnotes}
\item[190] Id. § 18.2-67.9:1(f).
\item[191] Id. § 18.2-67.9:1.
\item[192] WASH. REV. CODE § 10.52.110(9)(b) (2019).
\item[193] Id. at § 10.52.110(4).
\item[194] See ARIZ. REV. STAT. ANN. §§ 8-422(d), 13-4442(d) (2016); COLO. REV. STAT. § 16-10-404(1)(a) (West 2019); IDAHO CODE § 19-3023(3) (2017); LA. STAT. ANN. § 15:284(e) (2018); VA. CODE ANN. § 18.2-67.9:1(a) (West 2018).
\item[195] See ARK. CODE ANN. § 16-43-1002(c)(3) (West 2015); HAW. REV. STAT. § 621-30(c) (2019); OKLA. STAT. ANN. tit. 12 § 2611.12(D)(1) (2014); WASH. REV. CODE § 10.52.110(4).
\item[196] See ARK. CODE ANN. § 16-43-1002(a)(1)(A); HAW. REV. STAT. § 621-30(a); IDAHO CODE § 19-3023(3); LA. STAT. ANN. § 15:284(e); VA. CODE ANN. § 18.2-67.9:1(a). Since Arkansas allows the handler to be trained by ADI, the American Kennel Club, Therapy Dogs Inc., "or equivalent organization," arguably a national therapy dog organization could be considered, as to the dog, an appropriate training organization. ARK. CODE ANN. § 16-43-1002(a)(1)(A).
\item[197] See 725 ILL. COMP. STAT. ANN. 5/106B-10 (West 2015).
\item[198] See MICH. COMP. LAWS § 600.2163a(1)(a) (West 2019).
\end{footnotes}
ADI, but do require that a facility dog be trained by an "assistance dog organization." This generic term is likely intended to be specific to ADI without naming it. Alabama, however, has a separate statute allowing a "registered therapy dog" into a courtroom as well.

In sum, ten states—Arizona, Arkansas, Colorado, Hawaii, Idaho, Illinois, Louisiana, Michigan, Virginia, and Washington—practically see ADI members as the only source for a dog that could accompany a child or vulnerable witness during testimony. In contrast, four states—Alabama, California, Florida and Oklahoma—seem fully receptive to therapy dogs as

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199 See ALA. CODE § 12-21-148(a)(1) (2017); ARIZ. REV. STAT. ANN. §§ 8-422(d), 13-4442(d); COLO. REV. STAT. § 16-10-404; WASH. REV. CODE § 10.52.110(9)(b) (2019).

200 See ALA. CODE § 12-21-147(a) (defining "registered therapy dog" and "therapy dog organization."). Alabama’s facility dog statute curiously provides for the moving party to “file a notice of intent to use the registered therapy dog," presumably a drafting error resulting from both statutes being composed at the same time. Id. § 12-21-148(g).

201 ARIZ. REV. STAT. ANN. §§ 8-422(d), 13-4442(d) ("graduate of an assistance dog organization that is a member of an organization or entity whose main purpose is to improve the areas of training, placement and utilization of assistance dogs."); ARK. CODE ANN. § 16-43-1002(a)(1)(A) ("Graduated from a program of an assistance dog organization that is a member of Assistance Dogs International or a similar nonprofit organization."); COLO. REV. STAT. § 16-10-404(1)(a) ("dog that is a graduate of an assistance dog organization that is accredited by an internationally recognized organization whose main purpose is to grant accreditation to assistance dog organizations."); HAW. REV. STAT. § 621-30 (2019) ("a graduate of an assistance dog organization that is accredited by Assistance Dogs International or a similar internationally recognized organization."); IDAHO CODE § 19-3023(3) (2017) ("a graduate of an assistance dog organization that is a member of assistance dogs international or a similar internationally recognized organization whose main purpose is to grant accreditation to assistance dog organizations."); 725 ILL. COMP. STAT. ANN. § 5/106B-10 (West 2015) ("a graduate of an assistance dog organization that is a member of Assistance Dogs International."); LA. STAT. ANN. § 15:284(c) (2018) ("a graduate of an assistance dog organization that is accredited by Assistance Dogs International or a similar internationally recognized organization whose main purpose is to grant accreditation to assistance dog organizations."); MICH. COMP. LAWS § 600.2163a(1)(a) (West 2019) ("trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work."); VA. CODE ANN. § 18.2-67.9:1(a) (West 2018) ("dog that (i) has completed training and been certified by a program accredited by Assistance Dogs International or by another assistance dog organization that is a member of an organization whose main purpose is to improve training, placement, and utilization of assistance dogs."); WASH. REV. CODE § 10.52.110(9)(b) ("graduated from a program of an assistance dog organization that is accredited by a recognized organization whose main purpose is to grant accreditation to assistance dog organizations.... "). If an organization must be a member of Assistance Dogs International to train a dog that can be used in a courtroom, judges may at some point be asked to accept dogs that have been trained by organizations that are not full members of ADI, but rather candidate members. It may be worth noting that when the Department of Veterans Affairs ("VA") proposed rules specifying that the agency’s funding of service dogs for veterans would be restricted to dogs trained by ADI member organizations, in responding to comments on the draft, the VA specified that only full members of ADI would be qualified to perform such training, not candidate members of the organization. See Service Dogs, 77 Fed. Reg. 54368, 54372 (Oct. 5, 2012).
well, although Mississippi and the territory of Guam, absent detailed statutory systems on facility dogs or case law, may also be in this category.

Hawaii, Louisiana, and Michigan require special training ("repurposing" in Michigan) for working with testifying witnesses. Although service dogs undergo more intensive training than therapy dogs, this may not be true of dogs trained specifically for courtroom work. It is worth considering how the Courthouse Dogs Foundation, the leading advocate for facility dogs receiving service-dog training, describes the training of a facility dog.

Thus, the two-year period involves eighteen months of fostering and perhaps only six months working with an assistance dog trainer. Many therapy dogs receive a similar amount of training. Many service dogs,

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202 See ALA. CODE §§ 12-21-148(a)(1)(b), 12-21-147(a)(3) ("Documentation showing that the certified facility dog has graduated from an assistance dog organization" but also "trained emotional support dog that has been tested and registered by a nonprofit therapy dog organization . . . ."); CAL. PENAL CODE § 868.4 (2018) ("therapy dog or facility dog"); FLA. STAT. § 92.55(5)(a) ("testify with the assistance of a therapy animal or facility dog"); OKLA. STAT. ANN. tit. 12 § 2611.12(D)(1) (2014) ("dog which has received the requisite training or certification from the American Kennel Club, Therapy Dogs Incorporated, or an equivalent organization").

203 MISS. CODE ANN. § 99-43-101(2)(f) (West 2019) ("properly trained facility animal," term included under "support animal" in Miss. Code Ann. § 43-6-153(e), which also covers service and therapeutic animals"); 10 GUAM CODE ANN. § 34401(i)(2)(B)(i) (2018) ("trained and used to facilitate testimony in minors or mentally disabled within a courtroom setting").

204 HAW. REV. STAT. § 621-30; LA. STAT. ANN. § 15:284(e) (2018); MICH. COMP. LAWS § 600.2163a(1)(a) (West 2019).


Most assistance dogs are "puppy raised" during the first 18 months of their life by either a family or a prison inmate participating in an accredited training program. For about six months before a facility dog is placed in your office, they are trained by service dog trainers at an assistance dog school. It is during these six months of training that the dog matures into his final temperament, allowing the professional trainers to tell what the dog will be good at and what he will enjoy doing . . . . At around 24 months of age, a facility dog is mature and trained and ready to go to work in your office.

Id.

206 Id.

207 See Elizabeth Spruin & Katarina Mozova, Dogs in the Criminal Justice System: Consideration of Facility and Therapy Dogs, 5 PET BEHAV. SCI. 1, 6 (2018), available at https://www.uco.es/ucopress/ujs/index/php/pet/article/view/10084/10038 [https://perma.cc/K34H-46KM] (arguing that dogs appearing with witnesses should have service-dog levels of training because "therapy dogs are not socialized and trained to the same standards as facility dogs leading to a higher likelihood that a therapy dog will become distressed and so removed"). They would not exclude therapy dogs altogether, stating that such dogs "could be introduced into some aspects of the legal process but only following a thorough selection process; they should never be allowed to enter a police interview, or a courtroom." Id. at 7. But see C.M. Cavalli et al., Are Animal
including all guide dogs, receive much more. Many of the most important commands for a dog’s use in a courtroom (i.e., heel, sit, lie down, lie down-stay, leave it) are required for certification or registration of both service and therapy dogs, and indeed are commands required for receipt of the American Kennel Club’s Canine Good Citizen award, which can be earned by pets.\textsuperscript{208} Further, therapy dogs are trained and tested on interacting with diverse types of individuals from various populations, including children and people with disabilities, whereas service-dog training often involves teaching the dog to work with individuals having a specific type of disability and are usually only assigned to a single individual, perhaps for their entire lives.\textsuperscript{209} Of those states with an established-relationship requirement—Arkansas, Hawaii, Oklahoma, and Washington, only Oklahoma appears receptive to therapy dogs.\textsuperscript{210}

There is no need for a program to specify only one type of training that a dog must successfully complete in order to be allowed to work with witnesses. While service dogs are generally trained to work with a specific handler and with people with specific disabilities as a result of their specialized training, therapy dogs may be trained to have multiple interactions with many different people. For example, a therapy dog would be better suited than a service dog for a visit to numerous patients in a hospital, during which the dog may move from one patient to another.

A dog working with a witness is something of a hybrid of these two experiences, where the dog is not solely devoted to a single individual, but rather spends considerable time with a sequence of witnesses. This creates a more intense and much longer relationship than that of the typical therapy dog encounter, particularly where there is a requirement for a relationship with the witness to be established prior to testimony. The witness and the dog may see each other during police and prosecutorial interviews, during

\begin{itemize}
  \item Assisted Activities Dogs Different from Pet Dogs? A Comparison of Their Sociocognitive Abilities, 23 J. VETERINARY BEHAV. 76, 80–81 (2018), available at https://www.sciencedirect.com/science/article/pii/S155878717301508 [https://perma.cc/Q47T-NNTM] (finding that dogs trained in animal-assisted activities are distinguishable from pet dogs). They are different from pet dogs in terms of sociability, attentiveness to human faces (gazing longer than pet dogs), and impulsiveness. \textit{Id.}
  \item Ensminger, \textit{supra} note 2, at 106–07 (table showing substantial overlap in commands for ADI-trained service dogs, TDI-registered therapy dogs, and AKC Canine Good Citizens).
  \item ARK. CODE ANN. § 16-43-1002(c)(3) (West 2015); HAW. REV. STAT. § 621-30(c)(3) (2019); OKLA. STAT. ANN. tit. 12 § 2611.12(D)(1)(c) (2014); WASH. REV. CODE § 10.52.110(4)(c) (2019).
\end{itemize}
therapy sessions, and in preparation for the experience of being in the courtroom. Training adapted from both standard service and therapy dog programs is therefore appropriate. While this has been done for service dogs by the Courthouse Dogs Foundation, it has also been accomplished with therapy dogs. For instance, the K-9th Circuit Program in Florida, created in the Ninth Judicial Circuit Court of Florida by a judge, uses both therapy dog teams (from a provider, Companions for Courage, that certifies teams with Therapy Dogs International), as well as a dog trained by a service dog provider, Canine Companions for Independence. There may be situations where special training that is neither common for service dogs or therapy dogs would be optimal. One therapy dog in Florida’s K-9th Circuit Program, who is deaf, has learned to recognize approximately 100 signs in American Sign Language and can thus be responsive to a witness using ASL. This allows for those who have hearing impairments to build a special connection with the dog, who has a similar disability and needs to understand non-verbal commands.

The authors believe the present case-by-case evaluation by judges should be allowed to continue, and the prosecution should have the burden of establishing that a dog has been adequately trained or has demonstrated the ability to behave and function appropriately in a courtroom.

C. Handler Qualification

Neither cases nor statutes focus nearly as much on the qualification of a dog’s handler as on the training and certification of the dog. In State v. Reyes, the service dog’s handler was trained as a forensic interviewer, but had only undergone a two-week program to learn how to be the dog’s handler, “which training she maintained each year . . . .” In State v. Devon


212 See K-9th Circuit Program, NINTH JUD. CIR CT. OF FLA., https://www.ninthcircuit.org/about/programs/k9th-circuit-program (last visited Oct. 19, 2019) [https://perma.cc/ZW5J-APUY] (providing forms for applying for use of dog with witness and order governing the program). The program has been operating since 2014, and both the therapy dogs and their handlers, and the service dog team, are evaluated periodically. Id.


214 Id.

215 See supra Section III.A – III.B.

the social worker for the child witness had begun working with the child before the trial, and described herself as a “dog handler child therapist.”217

Alabama’s facility dog statute provides that a certified handler is to have “been registered by a qualifying therapy dog organization” as well as to have been trained “on the protocols and policies of legal proceedings...and the role of the registered therapy dog and registered handler to assure there is no interference with the collection of evidence and testimony or the administration of justice.”218 The state’s emotional support dog statute further provides that a handler must wear an “identification card or badge to be prominently displayed...”219 The therapy dog handler is, with his or her dog, to be qualified by a “nonprofit therapy dog organization” as entitled “to access public buildings and interact with the public.”220

National therapy dog organizations generally have qualification tests with both a public access element and an element demonstrating the dog will interact positively with the sorts of individuals that therapy dogs are likely to encounter in hospitals, schools, and other institutions.221 Passing such a test, however, is not the only way to become a therapy dog handler in Alabama, as the state has a unique provision allowing any dog with the appropriate temperament to become a courtroom dog.222 This provision allows for the possibility that a dog of appropriate temperament could be used in a courtroom, even without a formal affiliation with either a therapy or assistance dog organization. A “registered handler” is defined as:

A volunteer registered by the court system as a therapy dog handler who has not been convicted of sexual, animal, or domestic abuse or any felony, who has been registered by a

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218 See ALA. CODE §§ 12-21-148(a)(2), (c) (2017). The same provision regarding verification of credentials applies to a registered therapy dog. Id. But see ADI Minimum Standards and Ethics, supra note 147, at 10–11. ADI Facility Dogs Training Standards do not specify training regarding the collection of evidence for handlers. Id.
219 ALA. CODE § 12-21-147(a)(3).
220 Id.
222 ALA. CODE § 12-21-147(a)(3)(b) (“a handler with a dog having the appropriate temperament may be tested by a certified Alabama law enforcement canine officer with a minimum of two years’ experience for the ability to be registered as a therapy dog for use in certain legal proceedings.”). Curiously, the Alabama legislature may have anticipated resistance from one or more therapy dog organizations regarding such a use of a registered therapy dog, since the statute provides that “[r]egistered therapy dogs and handlers shall not be dismissed from any therapy dog organization for following the rules and procedures in this section or those set by the court.” Id. § 12-21-147(n).
qualifying therapy dog organization, and has taken an oath of confidentiality. An officer of the court may be a handler only if there is no expense to the state.\textsuperscript{223}

Arkansas also specifies training for the handler, defining a “certified handler” as

A person who has received training from an organization accredited by Assistance Dogs International, the American Kennel Club, Therapy Dogs Incorporated, or an equivalent organization on offering the person’s animal for assistance purposes and has received additional training on the protocols and policies of courts, the expected roles of the person’s animal assistance team, and the expected interaction so as not to interfere with the collection of evidence or the effective administration of justice . . . .\textsuperscript{224}

Thus, a handler who has received training from ADI, TD Inc., or an equivalent organization (presumably a guide dog organization or other national therapy dog organizations), would have to get “additional training on the protocols and policies of courts, the expected roles of the person’s animal assistance team, and the expected interaction . . . .”\textsuperscript{225} As a result, the dog and the trainer do not necessarily need to have the same objectives in their training. Thus, a dog trained by an ADI-member organization could presumably be paired with a handler whose experience in handling was obtained from a therapy dog organization. This may result in a situation where dogs will be trained by ADI members as a commercial activity, but made available to purchase, perhaps even by inexperienced individuals interested in providing such facility dog services in various regions of the country.\textsuperscript{226}

In moving for the use of a therapy or facility dog in California, the moving party is to include information about the “training of the therapy or

\textsuperscript{223} Id. § 12-21-147(a)(2).
\textsuperscript{224} See ARK. CODE ANN. § 16-43-1002(a)(2) (West 2015).
\textsuperscript{225} See id.
\textsuperscript{226} See J. A. Serpell, et al., Welfare Considerations in Therapy and Assistance Animals, in ANIMAL-ASSISTED THERAPY: THEORETICAL CONSIDERATIONS AND GUIDELINES FOR PRACTICE 481, 496 (Aubrey Fine, 3rd. ed. 2010) (explaining importance of training therapy dogs). Inexperienced or minimally trained handlers can have a deleterious effect on the performance of a therapy or assistance animal arising from such issues as “being ignored or neglected, given inappropriate or ill-timed commands, and punished for failing to respond to these commands, rewarded at inappropriate times, and so on.” Id.
facility dog handler." Since California permits two types of trained dogs, the definition of "handler" has to consider both types. Virginia provides that a "certified facility dog" is to be "accompanied by a duly trained handler."

Washington's statute defines a "certified handler" as "a person who (i) was trained to handle the courthouse facility dog by the assistance dog organization that placed the dog and (ii) is a professional working in the legal system who is knowledgeable about its practices." This requires that the handler and the dog have a connection with the same organization, which probably has to train both, but also that the handler be a "professional working in," though not necessarily for, "the legal system." The Courthouse Dogs Foundation, headquartered in the state of Washington, specifies that each of its dogs "is handled by a professional working in the legal field, who has been individually trained by the accredited assistance dog organization." Handlers, according to the organization's website "include victim advocates, forensic interviewers, detectives, prosecuting attorneys, Guardians Ad Litem, therapists, and other professionals." The last two categories are not necessarily "in the legal field," so perhaps the assumption is that such individuals would have extensive experience with courts (as some therapists do).

D. Insurance Requirements

No decision of which the authors are aware has required that a dog be insured before accompanying a witness. However, such a requirement is becoming increasingly common in statutory law. Both Alabama's facility-

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228 See supra note 162 and accompanying text.
233 Id.
234 Id.
dog statute and its courtroom-therapy-dog statute require that the animal come with “[p]roof of liability insurance in the minimum amount of five hundred thousand dollars ($500,000).” Arizona’s facility-dog statutes require the party seeking to use a dog to file a notice with the court including “evidence that the facility dog is insured.” The Arkansas statute specifies that a motion to use such a dog must include information that “the certified facility dog is adequately insured . . . .” The applicable statutes in Hawaii, Louisiana, Oklahoma, and Washington also require adequate insurance.

While the Florida statute regarding therapy animals and facility dogs does not include an insurance requirement, one judicially created certified therapy dog program in Florida specifies that a therapy animal or facility dog used in a courtroom must:

[c]arry a minimum one million dollars ($1,000,000) in liability insurance with a rider that includes therapy animals/facility dogs on the premises of the courthouse facility and naming the appropriate county (Brevard or Seminole County) as a named insured.

Such a rider would not likely be provided by a national therapy dog organization.

Proof of liability insurance may be a problem if the handler is not a member of an assistance or therapy dog organization that offers such insurance to members. The Courthouse Dogs Foundation specifically

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236 ARIZ. REV. STAT. ANN. §§ 8-422(a), 13-4442(a) (2016).

237 ARK. CODE ANN. § 16-43-1002(c)(2) (West 2015).

238 HAW. REV. STAT. § 621-30(c)(2) (2019); LA. STAT. ANN. § 15:284(c); OKLA. STAT. ANN. tit. 12 § 2611.12(d)(1)(b) (2014); WASH. REV. CODE § 10.52.110(4)(b) (2019).


240 See Letter from Will de Ryk, Agent to Alliance Therapy Dogs Member, (Apr. 1, 2018), available at https://j3uv01gyihf3iqdfuwz0ojp-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/2018-Insurance-Ltr.pdf [https://perma.cc/Q395-RQ5A] (showing how Alliance for Therapy Dogs provides coverage for members in good standing that allows for $5 million per occurrence). One of the authors, (JE), was registered for many years with Therapy Dogs International, which provided per-incident coverage of $1 million when he was active.
recommends that handlers may consider “adding a rider to the general county liability policy to include the dog to using the handler’s homeowner’s policy to cover the dog.” The present authors believe that if a handler-dog team is not insured by a service dog organization, in order to avoid personal liability, the agency or court system using the dog should provide such insurance.

IV. CONDUCT OF TRIALS WITH FACILITY DOGS

A. Witness Becoming Familiar with Dog Before Trial or at Preliminary Hearing

Requests to use dogs with witnesses generally come from prosecutors. Case histories sometimes indicate that a child began to be accompanied by a dog during a police investigation or interviews with support personnel or psychologists, so the presence of the dog with a witness testifying at trial may continue when an arrangement has begun during the investigation or at preliminary stages of a criminal proceeding. In *Coria*, defense counsel was not given advance notice that the 11-year-old child witness would be accompanied by a dog, but was informed that the child had become familiar with the dog in pre-trial proceedings, and agreed to allow the use of the dog. *Tohom*, Rose, a Golden retriever, had been present during interviews and therapy sessions with the child witness, during which the therapist found that the dog allowed the child to be more verbal. The social worker testified that testifying in open court would retraumatize the


242 The situation should be the same as with police dogs, which are insured by the agencies using the dogs.


244 See *State v. Dye*, 309 P.3d 1192, 1195 (Wash. 2013) (explaining that the facility dog, Ellie, accompanied Lare during the defense interview).

245 *State v. Coria*, No. 66995–8–I, 2012 WL 1977439, at *2 (Wash. Ct. App. June 24, 2012) (“There was no effort by defense counsel to establish what effect there would be on the child if the dog were removed.”).

child.\textsuperscript{247} In \textit{Dye}, the witness, Douglas Lare, a 56-year-old with a mental age between six and twelve, had been accompanied by a facility dog, Ellie, a Golden retriever used previously with children during statements or testimony.\textsuperscript{248} Lare had been accompanied by Ellie during his defense interview and requested her presence during his testimony at trial.\textsuperscript{249}

In \textit{Chenault}, the defense objected to the use of a dog, stating that the witnesses, age eleven and thirteen at the time of trial, had already talked to police, social workers, and the prosecutor without the presence of a dog, and had testified at a preliminary hearing without a dog, though one had been requested.\textsuperscript{250} The request had been denied at the preliminary hearing, according to the defense counsel, who suggested that support people be used instead.\textsuperscript{251} The trial judge stated, however, that the fact that the children had told their stories over and over "perhaps is an argument in favor of a support animal rather than against it."\textsuperscript{252}

In \textit{George}, the trial judge ruled that defense counsel could cross-examine the children during their competency hearings regarding their history and involvement with the facility dog, Avery.\textsuperscript{253} During the competency hearing, "[a]t one point when Avery was not behaving, [defense] counsel stated his objection to having the dog present in the courtroom," and on cross-examination he asked one of the witnesses about her previous interactions with the dog at the prosecutor's office.\textsuperscript{254}

In \textit{Devon D.}, the child witness had met the service dog two hours before a hearing began and had initially refused to touch the dog.\textsuperscript{255} Soon, however, the child witness "became more and more comfortable as she began to pet [the dog]," according to the social worker, who also noted that the girl had touched the dog's teeth, sat with her on the floor, and was progressively "more connected and less fearful."\textsuperscript{256}

\begin{itemize}
  \item \textsuperscript{247} \textit{Id.} at 128.
  \item \textsuperscript{248} \textit{State v. Dye}, 309 P.3d 1192, 1194–95 (Wash. 2013).
  \item \textsuperscript{249} \textit{Id.} at 1195.
  \item \textsuperscript{250} \textit{People v. Chenault}, 175 Cal. Rptr. 3d 1, 7 (Ct. App. 2014).
  \item \textsuperscript{251} \textit{Id.}
  \item \textsuperscript{252} \textit{Id.} at 8.
  \item \textsuperscript{254} \textit{Id.} at *8. Prior to trial, the defense had moved to exclude the dog under \textit{Daubert}, saying there was no "accepted, tested, and/or reviewed theory in the scientific community" to support the idea that the dog would have "a calming or therapeutic effect" justifying its presence. \textit{Id.} at *6.
  \item \textsuperscript{255} \textit{State v. Devon D.}, 138 A.3d 849, 861 (Conn. 2016).
  \item \textsuperscript{256} \textit{Id.} at 861–62.
\end{itemize}
In *Riley*, the dog was used with four minors at a preliminary hearing, but was also used at trial.\(^{257}\) In *Buskirk*, the defendant’s counsel alleged that the witness had been coached to provide testimony against him and during cross-examination the witness was asked about the prosecutor’s dog.\(^{258}\) The prosecutor responded that this inquiry by the defense was by way of “indicating or insinuating that the facility dog is the means for us to get her to say what we want her to say.”\(^{259}\) The prosecutor was permitted to rebut such inferences, and no finding was made that any such allegation had been established.\(^{260}\) There was, in any case, no indication the dog was used during testimony.\(^{261}\)

Under the facility-dog statutes of Arkansas, Hawaii, Oklahoma, and Washington, a relationship with the witness must have been established before a dog can be used in a judicial proceeding.\(^{262}\) Such a relationship might begin with a traumatized child being introduced to a therapy dog as an aspect of the child’s therapy or might involve the use of a facility dog associated with the court system during interviews by the police or other officials. The present authors believe that establishing a relationship with the witness before trial is optimal for establishing the necessity of the use of the dog at trial. There is no need that the relationship necessarily results from anticipation of trial, and such a requirement seems to have no purpose other than to exclude therapy dogs that might form relationships with witnesses as an aspect of therapy rather than as part of the legal process.

**B. Placement of Dogs During Trials**

Courts have often made attempts to keep the dog’s visibility to the jury to a minimum or required that the dog could be hidden altogether by positioning the dog and witness before the jury is brought into the courtroom.\(^{263}\) In *Spence*, the jury was informed that the child witness would be entering through the back door rather than the front entrance to the courtroom.\(^{264}\) The prosecutor noted for the record that the witness would be


\(^{259}\) *Id.* at *3.

\(^{260}\) *Id.*

\(^{261}\) *Id.*


\(^{263}\) People v. Spence, 151 Cal. Rptr. 3d 374, 401 (Ct. App. 2012).

\(^{264}\) *Id.*
accompained by a victim advocate named Norie Figueroa from our office and a canine therapy dog.”\textsuperscript{265} The appellate court, citing the appellate decision in \textit{Dye}, found there to be a “lack of any indication the dog’s presence alone communicated to the jury any presupposition of this witness’s ‘very victimhood . . . .’”\textsuperscript{266}

In \textit{Dye}, a case involving an impaired adult witness, the prosecution asked the witness who was beside him as he testified, to which he replied, “Ellie is to help me and to make it easier for me. And I have treats here.”\textsuperscript{267} Thus, the witness was allowed to call attention to the dog’s presence and its function in helping him testify.\textsuperscript{268}

In \textit{Chenault}, in granting the prosecution’s motion to allow a dog to accompany two minor witnesses/victims, the trial judge anticipated calling a recess before the testimony of F. and C. so that the witnesses could enter the courtroom with the dog and its handler “through the back hallway. After the witness took the stand with the support dog, the jury would reenter the courtroom.”\textsuperscript{269} The judge felt this procedure at least minimized “any untoward prejudice[.].”\textsuperscript{270} Jurors were informed that F. would be accompanied by “a service animal, companion dog, whose [name] happens to be Asta.”\textsuperscript{271} The judge wanted the dog’s presence limited to the courtroom, stating that “one thing I don’t want is for [F.] and/or [C.] and said support animal to be wandering the hallway out here on any recesses with pats on the head by everyone [who] loves dogs, including jurors.”\textsuperscript{272} In affirming, the appellate court said that the trial court should take measures to reduce possible prejudice from use of the dog by making its presence—

as unobtrusive and least disruptive to the proceedings as reasonably possible. The court may have the jury recess while the witness takes the stand and the support dog enters and is positioned, and then recess again before the witness and dog leave the courtroom. In certain physical courtroom settings, it may be possible to have the support dog lie on

\textsuperscript{265} Id.
\textsuperscript{266} See id. at 403; see also Spence v. Beard, No. 14-cv-1624, 2015 WL 1956436, at *9 (S.D. Cal. Apr. 29, 2015) (finding on habeas petition presence of support advocate and therapy dog had not "so fundamentally infected the trial process as to violate the petitioner’s due process rights.").
\textsuperscript{267} State v. Dye, 309 P.3d 1192, 1196 (Wash. 2013) (describing witnesses’ response to prosecutor’s questioning following feeding dog treats).
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} People v. Chenault, 175 Cal. Rptr. 3d 1, 10 (Ct. App. 2014). (explaining possible prejudice by presence of facility dog).
the floor near the witness, entirely out of the jurors’ view. If not, the support dog should be positioned, if possible, so its presence is not significantly distracting to the jurors.\textsuperscript{273}

In \textit{George}, the Ohio trial court said, in denying a defense motion to exclude the dog: “[t]o put your mind at rest . . . Avery is not . . . permitted in the courthouse during this trial wearing any identification of the Summit County Prosecutor’s Office.”\textsuperscript{274} In any case, the dog was to wear “a plain harness or vest.”\textsuperscript{275} The handler was permitted to be in the courtroom, but she was not to wear “her Summit Country Prosecutor’s Polo shirt or she wears a jacket or sweater over it or something like that . . . .”\textsuperscript{276} Jurors were to be shielded from any knowledge that the dog and handler were present “on behalf of the prosecutor’s office.”\textsuperscript{277} Thus, the court’s assumption was that an affiliation with the prosecutor would be prejudicial, and that such a connection should be obscured as much as possible.\textsuperscript{278} In another Ohio case, \textit{Jacobs}, the dog “sat at [the victim’s] feet while she was in the witness stand.”\textsuperscript{279}

In \textit{Reyes}, during the arguments over a motion to exclude the dog, the handler testified that she would have the victim be seated first, then take the dog to the victim and place the dog in a “down command position.”\textsuperscript{280} The prosecution advised the trial court that the dog would remain at the child’s feet during direct and cross-examination and would not be taken out of the witness box until the jury was excused from the courtroom.\textsuperscript{281} The trial judge stated for the record that the jury “could not see [the dog] much from what I can see, if he’s going to be at the side of this jury box. I can’t see him from where I am, the dog, that is.”\textsuperscript{282}

In \textit{Smith}, the Texas appellate court had a perspective similar to that of the California appellate court in \textit{Chenault}, having breaks before and after the testimony of the witness using the dog so that the jury would not see it being placed in the witness stand or taken from the stand at the end of the

\begin{footnotes}
\begin{footnote} 273 Id. at 12. \end{footnote}
\begin{footnote} 274 State v. George, No. 27279, 2014 WL 7454798, at \textsuperscript{*}7 (Ohio Ct. App. Dec. 31, 2014). \end{footnote}
\begin{footnote} 275 Id. (eliminating connection jury could infer between prosecution and facility dog). \end{footnote}
\begin{footnote} 276 Id. \end{footnote}
\begin{footnote} 277 Id. \end{footnote}
\begin{footnote} 278 Id. at \textsuperscript{*}6. \end{footnote}
\begin{footnote} 279 State v. Jacobs, No. 27545, 2015 WL 6180908, at \textsuperscript{*}1 (Ohio Ct. App. Oct. 21, 2015) (no statement was made regarding dog’s visibility to jury). \end{footnote}
\begin{footnote} 280 State v. Reyes, 505 S.W.3d 890, 896 (Tenn. Crim. App. 2016). \end{footnote}
\begin{footnote} 281 Id. \end{footnote}
\begin{footnote} 282 Id. (explaining visibility of dog to court room). \end{footnote}
\end{footnotes}
testimony. On appeal, the defendant argued that reducing the visibility of the dog did not mean jury was unaware of its presence, but since this argument was not made at trial, the appellate court said there was nothing for it to review.

In Johnson, the appellate court said “it may be wise for the witness and support animal to get situated on the witness stand outside the presence of the jury . . . . Once situated and the jury returns to the courtroom, the trial court should inform the jury that the witness will be accompanied by a support animal while testifying.” On appeal, the defense argued that the use of the term “therapy dog” by the trial court implied the witness was undergoing therapy as a result of the sexual assault, but appellate court noted:

the trial court also indicated that the dog was from the prosecutor’s office, thus signaling to the jury that the dog was not the witness’ own therapy dog, but rather one provided by the prosecution to assist the witness with providing testimony. Therefore, no error occurred and any objection to the trial court’s use of the term therapy dog would have been meritless.

Thus, unlike the Ohio court in George, the Michigan appellate court in Johnson felt that an association with a prosecutor’s office reduced prejudice compared to the possibility that the jury would see the dog as part of a witness’s therapy.

In Devon D., the prosecution moved to permit a dog “to sit in close proximity to [the victim] during [the victim’s] testimony, provided that such dog and the dog’s handler shall not obscure [the victim] from the view of the defendant or the jury . . . .”

[T]he jurors never saw [the dog, Summer] because the court excused the jury prior to C1’s testimony so that Summer would be on the witness stand, out of view, before the jury returned. This procedure eliminated the possibility that the

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284 Id. (noting to reserve complaints for review trial judge must have ruled on complaint).
286 Id. at 530 n.6.
287 Id.
jurors might be swayed by the presence of "[a] cute little kid with her cute dog," as the defendant feared.\textsuperscript{289}

In \textit{Riley}, the dog was underneath a witness during preliminary hearing and "basically... out of the view of almost everyone."\textsuperscript{290} In \textit{Lambeth}, a police officer who worked with the service dog placed it in the witness box with the witness before the jury entered the courtroom and removed it from the witness box after the jury left the courtroom.\textsuperscript{291} The defendant argued the attempt to keep the jury from learning of the service dog was unsuccessful because the dog made sounds.\textsuperscript{292} The court recessed the proceedings at one point to address the defendant’s complaint concerning the sounds and the defendant requested a mistrial, which was denied.\textsuperscript{293} In \textit{Nuss}, the dog’s handler placed the facility dog under the witness’s seat during a recess, but "to avoid the disruption of another recess," the court allowed "the handler to walk the facility dog out of the courtroom in the jury’s presence," identifying the handler to the jury at that time.\textsuperscript{294}

Certain statutes also consider the dog’s placement and visibility to the jury during the trial. Alabama’s facility dog statute provides that the dog is to be brought to the witness stand by a certified handler “outside of the presence of the jury, and the certified handler shall return to his or her position in the courtroom within view of the witness stand.”\textsuperscript{295} Also, “[d]uring trial proceedings, all precautions should be taken to obscure the presence of the dog from the jury.”\textsuperscript{296} The jury is, nevertheless, to be instructed by the court “on the presence of the certified facility dog and that the presence of a certified facility dog should not create any prejudice to any party.”\textsuperscript{297} Also “[m]arkings identifying the dog as a certified facility dog while working must be visible.”\textsuperscript{298}

The Arkansas facility dog statute provides that the “jury shall be seated subsequent to the child witness’ and certified facility dog’s taking their places in the witness stand.”\textsuperscript{299}

\begin{flushright}
\textsuperscript{289} Id. at 868. \\
\textsuperscript{291} Lambeth v. State, 523 S.W.3d 244, 247 (Tex. Ct. App. 2017). \\
\textsuperscript{292} Id. at 248. \\
\textsuperscript{293} Id. \\
\textsuperscript{294} State v. Nuss, 446 P.3d 458, 460 (Idaho Ct. App. 2019). The defense failed to object to the exit of the handler and the dog in the jury’s presence. \textit{Id.} at 462. \\
\textsuperscript{295} ALA. CODE § 12-21-148(c) (2017). \\
\textsuperscript{296} Id. § 12-21-148(d). \\
\textsuperscript{297} Id. § 12-21-148(c). \\
\textsuperscript{298} Id. § 12-21-148(e). \\
\textsuperscript{299} ARK. CODE ANN. § 16-43-1002(d)(2) (West 2015).
\end{flushright}
Washington’s statute provides that the handler must be present in the courtroom “to advocate” for the dog “as necessary.”300 This does not mean any kind of continual contact; however, the dog “should be trained to accompany the witness to the stand without being attached to the certified handler by a leash and lie on the floor out of view of the jury while the witness testifies.”301 Also, “[t]o the extent possible, the court shall ensure that the jury will be unable to observe the [courthouse] facility dog prior to, during, and subsequent to the witness’s testimony.”302

The present authors believe that a facility dog should be as inconspicuous as possible. An effort should be made to draw as little attention to the dog as possible. Ideally, the dog should be situated in and removed from the witness box outside the presence of the jury.

C. Presence and Visibility of Handler With or Near Dog

In Dye, the dog that accompanied the adult witness, Douglas Lare, “was trained by, and lives with, the prosecutor at Dye’s trial.”303 Therefore, the dog’s handler would presumably have been at a table only feet away from the witness stand. In Chenault, the prosecutor informed the court that the dog’s handler would be seated where the dog could see the handler to assure that it would not stand up or otherwise misbehave.304 In Smith, the therapist was the handler and sat behind the witness box in a chair “so that if the dog acts up or anything, that she's there to handle it . . . .”305 In Riley, the appellate court noted that the handler was seated near the witness stand.306 In Shorter, however, the Michigan appellate court noted that the prior Michigan case of Johnson “made no mention of allowing an animal handler to also accompany the witness during testimony.”307 Furthermore, once the judge became aware of the need for the handler’s presence in addition to the dog, she “expressed concern about whether there was evidence of a ‘necessity’ for that support animal.”308 The question of necessity then

300 WASH. REV. CODE § 10.52.110(6) (2019).
301 Id.
302 Id. § 10.52.110(7)(b).
304 People v. Chenault, 175 Cal. Rptr. 3d 1, 8 (Ct. App. 2014).
308 Id. at 632.
required an analysis of the state’s support-person statute.\textsuperscript{309} In \textit{Lambeth}, a police officer “who worked with the service dog” placed the dog in the witness box and later removed the dog, but where that officer was during the child witness’s testimony was not specified.\textsuperscript{310}

In \textit{Shepler}, both a support person and a dog were present when a child with cognitive impairment and a brain injury testified, and the court noted that “the jury would not know if the dog was for the support person or the child and the dog would not be visible to the jurors from the witness stand based on the configuration of the courtroom.”\textsuperscript{311}

Statutes sometimes describe the qualifications of the handler but seldom provide detail as to where and how visible the handler is to be in the courtroom. Alabama’s registered therapy dog definition provides that “[a]n identification card or badge [is] to be prominently displayed on the handler.”\textsuperscript{312} The Arkansas facility-dog statute provides that the handler is to accompany the dog to the witness stand “in the absence of the jury.”\textsuperscript{313} Virginia provides that a certified facility dog is to be “accompanied by a duly trained handler,” but this seems only to require that both should be in the courtroom during testimony.\textsuperscript{314} Washington’s statute provides that the handler is to be present to “advocate” for the dog but specifies that the dog is to accompany the witness to the stand without being attached to the handler, though presumably this does not preclude the witness from using a leash.\textsuperscript{315}

One of the authors of this Article (SM), a professional trainer and handler working in several states, has found that, in being brought into cases by psychologists involved in child sexual abuse cases, part of her responsibility has become to instill enough confidence to allow the child to become a temporary and casual handler for the support animal.\textsuperscript{316} Her goal is to facilitate a bond between the child and the dog so that the child may gain enough confidence to handle the dog during the testimony. The trainer seeks to becomes a courtroom observer rather than tangential participant during the testimony. In some instances, the child gains enough confidence

\textsuperscript{309} See \textit{Mich. Comp. Laws} § 600.2163a(4) (West 2019).
\textsuperscript{310} \textit{Lambeth} v. State, 523 S.W.3d 244, 246 (Tex. Ct. App. 2017).
\textsuperscript{311} \textit{People v. Shepler}, D073594, 2018 WL 3979282, at *2 (Cal. Ct. App. Aug. 21, 2018). The dog was brought to the witness box outside the presence of the jury. \textit{Id.} at *2.
\textsuperscript{313} \textit{Ark. Code Ann.} § 16-43-1002(d)(1) (West 2015).
\textsuperscript{315} \textit{Wash. Rev. Code} § 10.52.110(6) (2019).
\textsuperscript{316} See \textit{State v. Nuss}, 446 P.3d 458, 461 (Idaho Ct. App. 2019). The authors disagree with the Idaho Court of Appeals, which stated that “to assume that a facility dog (albeit very well-trained) could perform its function without the aid of its handler is unreasonable.” \textit{See Id.}
through this kind of work that the dog will not even need to be present in the courtroom when the child testifies.

D. Misbehavior of Dog

In Spence, the California appellate court noted that "if any issues or improper behavior by the therapy dog occurred, it would be removed from the courtroom. The record does not show any such problems arose." In Dye, the Washington Supreme Court stated:

"It is the responsibility of a party alleging error to create a record of that error. If Dye’s counsel had seen Ellie jump on Lare, make a defensive posture toward Dye, or engage in other prejudicial behavior, she could have noted such behavior for the record, or even asked the court to remove Ellie from the witness stand momentarily. Counsel did not."

In George, during a competency hearing, defense counsel objected "[a]t one point ... Avery was not behaving...." At trial, however, defense counsel did not object to the dog accompanying two witnesses. In the habeas action filed by the defendant in federal court, Lazaroff, the federal magistrate judge noted that the only direct discussion with regard to the dog during the competency hearing involved an exchange where a witness was advised that the dog might not be present during her testimony because he had "not been as obedient this morning as might have been expected." The witness said that this would upset her "a little, but not much." In Hasenyager, the Ohio appellate court noted that a purported instance of dog’s agitation, characterized by the defense as "movements and interruptions," was not objected to at the time and was not reflected in the record. In Davis, a child who had testified via DVD began kicking and crying as the DVD was being played. A dog was with the child at the time, but there was no indication the dog was part of the disturbance.

320 Id. at *8.
322 Id.
The applicable California statute provides that the court is to “take appropriate measures to make the presence of the therapy or facility dog as unobtrusive and nondisruptive as possible, including requiring the dog to be accompanied by a handler in the courtroom at all times.”\textsuperscript{325}

Further, although a therapy or facility dog may initially be permitted, the statute “does not prevent the court from removing or excluding a therapy or facility dog from the courtroom to maintain order or to ensure the fair presentation of evidence, as stated on the record.”\textsuperscript{326} Colorado’s facility dog statute provides that “the judge has the authority to terminate the presence of a court facility dog at any time prior to, or during, the witness’s testimony.”\textsuperscript{327} Hawaii’s facility dog statute provides that a facility dog “shall be specially trained to provide emotional support to witnesses testifying in judicial proceedings without causing a distraction during the proceedings.”\textsuperscript{328} Washington’s statute provides that the dog is to be selected “to provide quiet companionship to witnesses during stressful legal proceedings . . . .”\textsuperscript{329}

The present authors believe that a facility dog should have a calm temperament, be safely handled by the child and available for support. Further, the handler should be aware of the dog’s temperament and able to confirm the dog’s ability to remain quiet even before offering services to the judicial system.\textsuperscript{330} The authors believe that dogs and dog teams should be evaluated regularly. Thus, Florida’s Ninth Judicial Circuit Court program, which provides dogs that can be used throughout a witness’s experience in the judicial process, provides for frequent evaluation of dogs and teams, assuring that both the service and therapy dogs in the program are

\textsuperscript{325} CAL. PENAL CODE § 868.4(d) (2018).
\textsuperscript{326} \textit{Id.} § 868.4(f).
\textsuperscript{327} COLO. REV. STAT. § 16-10-404(3) (West 2019).
\textsuperscript{328} HAW. REV. STAT. § 621-30(a) (2019) (emphasis added).
\textsuperscript{329} WASH. REV. CODE § 10.52.110(9)(b) (2019).
\textsuperscript{330} See ADI Minimum Standards and Ethics, supra note 147, at 10–11 (indicating that for assistance dogs, calmness is a threshold selection issue, not a behavior that is inculcated by training for assistance dogs); see also COURTHOUSE DOGS FOUND. IN COLLABORATION WITH W. REG’L CHILDREN’S ADVOCACY CTR., supra note 205, at 9 (“These dogs also have the temperament to be able to interact with people from many walks of life in high stress environments for an extended period of time.”). Note also the language on the website of the Courthouse Dogs Foundation that a “courthouse facility dog is a professionally trained assistance dog” and further that such dogs “are specially chosen because of their calm demeanor and ability to work in a high-stress environment . . . .” Facility Dogs, COURTHOUSE DOGS FOUND., https://courthousedogs.org/dogs/facility-dogs/ (last visited Oct. 19, 2019) [https://perma.cc/QS5C-MS3R] (highlighting how therapy dogs are often selected for exactly this quality).
functioning correctly for the witness as well as for the judicial system itself.\footnote{See \textit{K-9th Circuit Program}, \url{https://www.ninthcircuit.org/about/programs/k9th-circuit-program} (last visited Oct. 19, 2019) [https://perma.cc/8DLT-YE66].}

\section{Facility Dogs Present in Court but Not During Testimony}

In \textit{Millis}, the \footnote{State v. Millis, 391 P.3d 1225, 1233 (Ariz. Ct. App. 2017).} facility dog, Blake, and its handler sat beside the mother of the murder victim during the trial.\footnote{\textit{See} \textit{ARIZ. REV. STAT. ANN. §§ 13-4401 – 13-4443} (2016) (allowing for presence of parent, relative or other \textquotedblleft appropriate support person"). Arizona’s therapy and facility dog statutes were not in effect at the time of the trial. \textit{See id.}} The defense argued that Arizona’s crime-victim law provided only for a support person, not a support animal.\footnote{\textit{Millis}, 391 P.3d at 1235.}

\footnote{\textit{See id.}} The court was informed that Blake would not accompany S.F. at the witness stand, but would only sit with her in the gallery. This supports the court’s finding that the use of the dog would not unfairly prejudice Millis, because the animal would have been less visible and prominent to the jury in the gallery than it would have at the witness stand . . . .\footnote{\textit{See id.}}

In \textit{Davis}, the six-year-old victim, who did not testify on the stand, but was present in the courtroom with a facility dog, began kicking and crying when a video of the victim’s forensic interview was being played.\footnote{State v. Davis, No. M2017–00293–CCA–R3–CD, 2018 WL 1468819, at *4 (Tenn. Crim. App. Mar. 26, 2018).} The child and dog were under a table at the time, and court deputies gave the child candy and hugged her.\footnote{\textit{See id.}} Defense counsel objected to the behavior of the court personnel, but not to the presence of the dog.\footnote{\textit{See id.}} This situation raises a question of whether a dog should be permitted to be in a courtroom with a witness when that individual is not testifying, perhaps on the argument that the witness could not remain calm without the dog.\footnote{\textit{See id.}} Alternatives, such as allowing the witness to watch evidence from another room where the dog

\begin{footnotesize}
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  \item \footnote{\textit{See K-9th Circuit Program}, \url{https://www.ninthcircuit.org/about/programs/k9th-circuit-program} (last visited Oct. 19, 2019) [https://perma.cc/8DLT-YE66].}
  \item \footnote{State v. Millis, 391 P.3d 1225, 1233 (Ariz. Ct. App. 2017).}
  \item \footnote{\textit{See} \textit{ARIZ. REV. STAT. ANN. §§ 13-4401 – 13-4443} (2016) (allowing for presence of parent, relative or other \textquotedblleft appropriate support person"). Arizona’s therapy and facility dog statutes were not in effect at the time of the trial. \textit{See id.}}
  \item \footnote{\textit{Millis}, 391 P.3d at 1235.}
  \item \footnote{\textit{See id.}}
  \item \footnote{\textit{See id.}}
  \item \footnote{\textit{See id.} (pointing out that individual that required extra care and emotional support was not testifying at that time).}
\end{itemize}
\end{footnotesize}
could be present outside of the jury’s view should, in the opinion of the authors, be considered.\footnote{See People v Tohom, 969 N.Y.S.2d 123, 126, (App. Div. 2013) (finding that “when appropriate, a child witness . . . should be permitted to testify via live, two-way closed circuit television.”). The authors believe the same argument could be made with regard to the alleged victim’s presence during testimony that might be traumatic to merely listen to.}

V. DOGS AND JURIES

A. Arguments on Jury Prejudice

In Tohom, defense counsel argued that the dog would prejudice the jury against the defendant because the dog’s presence would convey to the jury that the witness was under stress as a result of testifying, and that this stress resulted from “telling the truth.”\footnote{Id. at 126 (citing Goings v. U.S., 377 F.2d 753, 762 (8th Cir. 1967) (“telling the truth” requires judge to exercise discretion so that witness will “feel at ease”).} The appellate court noted that the U.S. Supreme Court had dealt with prejudice in Holbrook v. Flynn, where the Court had stated that “if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.”\footnote{Tohom, 969 N.Y.S.2d at 134 (quoting Holbrook v. Flynn, 475 U.S. 560, 570 (1986)).} The appellate court further noted:

[T]he defendant admits that Rose was trained merely to respond to a person’s stress level. It is beyond dispute that a dog does not have the ability to discern truth from falsehood and, thus, cannot communicate such a distinction to a jury. Nor can it be concluded that any actual prejudice resulted from the concededly unobtrusive presence of the dog in the courtroom.\footnote{Id.}

The defense failed to show that presence of the dog was inherently prejudicial.\footnote{Id.}

In Dye, the defense argued that if the witness had a dog, the defendant should be able to hold a baby, but this argument was denied.\footnote{State v. Dye, 309 P.3d 1192, 1195 (Wash. 2013)} The court observed that this suggestion “appears to be a sarcastic comment
that Mr. Lare could testify with Ellie if Mr. Dye could testify holding his baby.\textsuperscript{345}

In Chenault, the defense objected to "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."\textsuperscript{346} The court acknowledged that in certain circumstances "a support dog might cause a jury to consider impermissible factors in deciding a defendant's guilt," but determined that such a scenario would be rare.\textsuperscript{347} In California case of Riley, the defense argued that the defendant should have been allowed to use a dog as well, but this was denied because the defendant was not under the age of eighteen.\textsuperscript{348}

[The defense also argued that it] was denied due process due to the presence of the support dog because the prosecution's burden of proof was lowered and the presumption of innocence was eroded . . . when a juror hears the testimony of a witness who is comforted by a support dog, the juror will assume that the victim has been harmed and traumatized by the defendant's wrongful acts. Therefore, the mere presence of the support dog will relieve the prosecution of presenting evidence to prove the defendant's guilt, because the dog will stand as a "powerful symbol . . . that the children were 'victims' that suffered an underlying trauma and required protection and/or comforting from a dog."\textsuperscript{349}

\textsuperscript{345} Id. at 1195. The defense also argued that Dye was allergic to dogs and his reaction to Ellie might distract the jury. \textit{Id.} The court asked for documentation of the supposed allergy, but none was provided. \textit{Id.}

\textsuperscript{346} See People v. Chenault, 175 Cal. Rptr. 3d 1, 10 (Ct. App. 2014) (emphasis added); see also State v. Lacey, No. 2017-CA-63, 2018 WL 5307079, at *5 (Ohio Ct. App. Oct. 25, 2018) (arguing that facility dog "invested the victim's testimony with greater credibility than it would have had otherwise . . ."). No objection, however, was made as to the dog's use at trial, and there was nothing in the record to establish that the dog was actually with the witness during testimony. \textit{Lacey}, 2018 WL 5307079, at *5-6. Research on juror decision-making involving detection dogs found that "participants assigning a guilty verdict had higher detection dog belief scores than those assigning a not guilty verdict," thus correlating credibility with the use of a dog in a criminal investigation. Lisa Lit, et al., \textit{Perceived Infallibility of Detection Dog Evidence: Implications for Juror Decision Making}, 32 CRIM. JUST. STUD. 1, 9 (2019).

\textsuperscript{347} See \textit{Chenault}, 175 Cal. Rptr. 3d at 10.


\textsuperscript{349} See \textit{id.} at 3.
The appellate court in *Riley* said that such arguments were disposed of by the previous California case of *Chenault.*

While California courts have generally rejected arguments regarding prejudice as to facility dogs, it is perhaps worth noting that one California court precluded a defendant from bringing her service dog into the courtroom as this "might impact [the jury's] ability to listen to testimony and evaluate the evidence free of distractions." In another California case, an appellate court agreed with the defense that the presence of a trailing dog in the courtroom during the handler's testimony was "more prejudicial than probative and violated [the defendant's] due process right to a fair trial," adding that "[the dog's] presence likely generated sympathy for Garvin and bias against defendants." It should not, in the opinion of the authors, be assumed that such arguments about other types of dogs creating prejudice in courtrooms, are irrelevant to the use of facility dogs with witnesses, as the same physical, emotional, and cognitive reactions as discussed below can be at play even with a jury hearing a police witness.

In *Millis*, the defendant argued that he should have been permitted to have a dog with him if the mother of the victim was permitted to have a dog with her in the courtroom (she was not allowed to do so during testimony).

The state did not oppose Millis's request, but when the trial court asked Millis if having a dog with him at trial would actually comfort him, he said he did not think so and he did not need one. The court then denied Millis's request. He does not challenge this ruling on appeal, nor does he raise an equal protection argument.

On first hearing of the use of a dog in *Smith*, defense counsel did not object, but rather exclaimed, "I love dogs." Later he objected that the use of the dog was "overly prejudicial." The Texas appellate court said that

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350 See id.
351 See People v. Wernke, No. B207542, 2009 WL 3111833, at *8 (Cal. Ct. App. Sept. 30, 2009). The defendant used the dog to reduce the effect of severe panic attacks she had when driving at night. Id. at *7. The court approved bringing the dog into the courthouse, but not the courtroom itself. Id. at *8–9. No inquiry was conducted as to whether the dog was actually a service dog under Department of Justice rules. See Department of Justice, Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56164, September 15, 2010.
354 Id. at 1232 n.8.
356 Id.
the “[a]ppellant did not present any evidence or argument at the hearing that
the jury likely would be prejudiced by the presence of the service dog in the
witness box.” The court was satisfied that “the trial court did not err by
finding that the service dog’s presence was not likely to prejudice the jury in
evaluating [the child’s] testimony.” Even if there was an error, it was
harmless, and the defendant court said any error alleged “does not implicate
constitutional rights.”

In many cases, such as Degner, no argument was made at trial
regarding possible prejudice from the presence of the dog. In Degner, for
instance, defense counsel “stipulated that the support dog could accompany
the minor witnesses.” In Johnson, an argument for ineffective assistance
of counsel was rejected on appeal, but failure to object to use of support dog
at trial would have been meritless in any case. The Michigan appellate
court noted that it could have even been part of the defense counsel’s trial
strategy to let the witnesses testify in the presence of the dog.

At trial, the defense’s theory was that the victim was
“coached” to say that defendant committed these sexual
acts. In fact, during closing argument, defense counsel
argued that the victim was able to “spit back, so to speak,
her script,” and that she kept “saying the same thing that we
think was fed to her by these other people, her parents or
whatever.” Thus, it very well could have been trial counsel’s
strategy to allow the support animal to accompany the
victim while testifying so that she would appear calm while
testifying, which would make it appear that she was coached
on what to say at trial. Consequently, defendant has not
overcome the strong presumption that counsel’s
performance was sound trial strategy.

Arguably, however, a defense argument that a victim is speaking
from a script might be better served by a halting witness who, because of

357 Id. at 875.
358 Id.
359 Id. at 876.
2016)
361 See id. (describing that court found “counsel was not ineffective for failing to challenge the
use of the dog.”).
363 Id.
discomfort, must start over and over again and always repeat the same catch phrases in doing so.\footnote{364}{See \textit{id}.}

In the Texas Court of Appeals case of \textit{Lambeth}, the defendant argued that the jury’s knowledge of the dog’s presence would lead the jurors to conclude that the defendant “had inflicted a significant psychological injury on the complaining witness given the witness’s need for the dog.”\footnote{365}{\textit{Lambeth} v. \textit{State}, 523 S.W.3d 244, 248 (Tex. Ct. App. 2017).} The appellate court was unsure from the record whether the jury was in fact aware of the dog, but reasoned that there was a considerable and diverse amount of evidence that supported the notion that the complaining witness had suffered psychological injury, all of which was cumulative.\footnote{366}{\textit{Id.}}

The present authors believe that the accompaniment of a dog may engender sympathy for a witness and that such sympathy may prejudice a jury. Therefore, we suggest that a specific necessity requirement as to each witness is appropriate to limit the situations in which a defendant will face such a potential prejudice.

\textbf{B. Jury Cautions and Instructions}

Courts have taken the possibility of jury prejudice into account, though perhaps not sufficiently.\footnote{367}{\textit{Id.}} In \textit{Lacey}, a facility dog and his handler were introduced to prospective jurors at the beginning of \textit{voir dire}, but the decision does not indicate whether the dog was actually used during the trial and no objection to its use was made at trial.\footnote{368}{\textit{See supra} Section V.A.} In \textit{Tohom}, before the girl’s testimony, the judge explained to the jury that she would be accompanied by a “companion dog,” but that the jury was not to “draw any inference either favorably or negatively from either side because of the dog’s presence.”\footnote{369}{\textit{Id.}} The jury was also cautioned in this regard prior to beginning deliberation.\footnote{370}{\textit{Id.}}

In \textit{Dye}, the trial court instructed the jury not to “make any assumptions or draw any conclusions based on the presence of this service dog.”\footnote{371}{\textit{Id.}} On appeal, the Washington Supreme Court found no actual evidence that \\textit{Ellie}, the dog, “had the effect of distracting the jury, damaging the presumption of Dye’s innocence, or otherwise tainting the

\addtocounter{footnote}{1}
\footnote{364}{See \textit{id}.}
\footnote{365}{\textit{Lambeth} v. \textit{State}, 523 S.W.3d 244, 248 (Tex. Ct. App. 2017).}
\footnote{366}{\textit{Id.}}
\footnote{367}{\textit{See supra} Section V.A.}
\footnote{368}{\textit{See} \textit{State} v. \textit{Lacey}, No. 2017-CA-63, 2018 WL 5307079, at *3 (Ohio Ct. App. Oct. 25, 2018) (stating that after \textit{voir dire}, “the record includes no further mention of the dog”).}
\footnote{370}{\textit{Id.}}
\footnote{371}{\textit{State} v. \textit{Dye}, 309 P.3d 1192, 1196 (Wash. 2013).}
The Court found that “whatever subconscious bias may have befallen the jury was cured by the trial court’s limiting instruction, which cautioned the jury not to ‘make any assumptions or draw any conclusions based on the presence of this service dog.’” The Court held that Dye had failed to establish that his fair trial rights were violated and that any possible “prejudice that resulted from Ellie’s presence was minor and largely mitigated by the limiting instruction the trial court gave.”

In Spence, the jury had been cautioned, according to the appellate court, “to decide the case based on the evidence, not on any extrinsic factors such as sympathy, passion, or prejudice.” In Chenault, the appellate court considered when the jury should be admonished if the dog’s presence becomes known, or is likely to become known.

In George, the trial judge prepared a cautionary instruction, which was quoted in part by the appellate court:

You must not draw any inference either favorably or negatively for either side because of the dog’s presence. You must not permit sympathy for any party to enter into your considerations as you listen to [H.S.’s] testimony, and this is especially so with an outside factor such as the facility dog. The dog is—you know, it’s a companion. It’s a working dog, I guess, or a companion dog in the sense that we have all seen people with disabilities have a dog who assists them. As these children do not have disabilities, but it is a companion animal and its classification, I guess if you would, is that it’s a facility dog; in other words, it facilitates,

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372 Id. at 1200.
373 Id.
374 Id.
376 See People v. Chenault, 175 Cal. Rptr. 3d 1, 12–13 (Ct. App. 2014).

[T]he court may admonish the jury that it should disregard the dog’s presence and decide the case based solely on the evidence presented, should not consider the witness’s testimony to be any more or less credible because of the dog’s presence, and should not be biased either for or against the witness, the prosecution, or the defendant based on the dog’s presence.

Id. The California statute regarding use of therapy and facility dogs in courtrooms specifically indicates that it is intended to codify Chenault, and that nothing in the section “abrogates the holding of [Chenault] regarding the need to present appropriate jury instructions.” See CAL. PENAL CODE § 868.4(g)(2) (2018). Further, if a dog is used “during a criminal jury trial, the court shall, upon request, issue an appropriate jury instruction designed to prevent prejudice for or against any party.” Id. § 868.4(e).
as I said yesterday, vulnerable witnesses; and it is a resource of the county available to any vulnerable witness who would be called to testify.377

In *Reyes*, at the conclusion of the trial, the judge gave a special jury instruction regarding the dog.378

During this trial, a witness was accompanied by [a] courthouse facility dog. The dog is trained, it is not a pet and it does not belong to the witness. The dog is equally available to both the prosecution and the defense. You must not draw any inference regarding the dog's presence. Each witness'[s] testimony should be evaluated upon the instructions that I give you.379

In *Johnson*, the Michigan appellate court found that a jury instruction to decide the case based solely on the evidence, rather than on sympathy or bias, could be presumed to have been followed by the jury.380

In *Devon D.*, the prosecution and defense counsel both stipulated that jury instructions would provide that the—

[W]itness is anxious about testifying in front of a group of people. The dog is not present due to any concern the witness has with the defendant’s presence. The . . . dog met the witness [the day before] in preparation for court trial.381

The jury was advised to disregard the presence of the dog, to draw no inference for or against any witness using a dog, and to "[t]hink of the dog like an interpreter, an aid to get the witness’ testimony across to you more clearly."382

In *Riley*, the trial court, according to the appellate court, also offered to provide a jury instruction regarding the dog at the request of

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379 Id. at 896.


382 Id.
either party, but neither party made such a request and therefore no instruction was given.\textsuperscript{383}

In \textit{Nuss}, the Idaho trial court stated in pretrial instructions to the jury that a facility dog would be used by one or more witnesses, and that the "dog being with the witness is merely a tool that I have decided to use to promote a more calming supportive setting for the witness."\textsuperscript{384}

As to statutory law, Arizona's facility dog statute provides:

To ensure that the presence of a facility dog assisting a victim or a witness does not influence the jury or is not a reflection on the truthfulness of any testimony that is offered by the victim or witness, the court shall instruct the jury on the role of the facility dog and that the facility dog is a trained animal.\textsuperscript{385}

The Arkansas statute provides, in more general language than Arizona, that in "a criminal trial involving a jury in which the certified facility dog is utilized, the court shall present appropriate jury instructions that are designed to prevent prejudice for or against any party."\textsuperscript{386} Colorado's statute states that the court "may instruct the jury, if a jury instruction is requested by a party who objected to the presence of the court facility dog or upon agreement of the parties, on the role of the court facility dog and that the court facility dog is a trained animal."\textsuperscript{387} The wording apparently allows for the possibility that a jury instruction may not be given, unlike the statutes of Arizona and Arkansas, which require jury instructions.\textsuperscript{388}

Hawaii's statute, like that of Colorado, provides that "[t]o the extent necessary, the court may impose restrictions, or instructions to the jury, regarding the presence of the facility dog during the proceedings."\textsuperscript{389} It appears, however, to be up to the judge to determine the level of necessity for instructions.

Louisiana provides that:

\textsuperscript{385} \textit{ARIZ. REV. STAT. ANN.} §§ 8-422(c), 13-4442(c) (2016) (expressing that significance of training in reducing possibility of jury prejudice is unclear).
\textsuperscript{386} \textit{ARK. CODE ANN.} § 16-43-1002(f) (West 2015).
\textsuperscript{387} \textit{COLO. REV. STAT.} § 16-10-404(4) (West 2019) (emphasis added).
\textsuperscript{388} \textit{ARIZ. REV. STAT. ANN.} §§ 8-422(c), 13-4442(c).
\textsuperscript{389} \textit{HAW. REV. STAT.} § 621-30(d) (2019).
[To] ensure that the presence of a facility dog does not influence the jury or is not a reflection on the truthfulness of any testimony that is offered by the victim or witness, the court shall instruct the jury on the role of the facility dog and that the facility dog is a trained animal.\textsuperscript{390}

Again, like Arizona and Arkansas, a jury instruction is required.

Washington's statute provides that, during jury selection, "either party may, with the court's approval, voir dire prospective jury members on whether the presence of a courthouse facility dog to assist a witness would create undue sympathy for the witness or cause prejudice to a party in any other way."\textsuperscript{391} The court, on request of either party, is to "present appropriate jury instructions that are designed to prevent any prejudice that might result from the presence of the courthouse facility dog before the witness testifies and at the conclusion of the trial."\textsuperscript{392} Here, the use of jury instructions is something either party can request.

\textbf{C. Cross-species Communication and Implicit Bias}

Research indicates that many humans are positively affected by dogs; this research shows that looking at dogs, and receiving gazes from them, increases human oxytocin levels.\textsuperscript{393} Research on oxytocin levels of humans and dogs interacting supports the existence of "an interspecies oxytocin-mediated positive loop."\textsuperscript{394} The acquisition of human-like communication modes by dogs during domestication may have been useful "as a communication tool in the context of needs of affiliative help from others."\textsuperscript{395} A muscle responsible for dramatically raising a dog's inner eyebrow is much more highly developed in dogs than in wolves, leading researchers to argue that the development of this muscle effectively "hijacked the human caregiving response."\textsuperscript{396} It has been found that shelter dogs with features enhancing puppy-like facial expressions are more likely

\begin{footnotesize}
\textsuperscript{390} \textit{LA. STAT. ANN. § 15:284(d)} (2018).
\textsuperscript{391} \textit{WASH. REV. CODE § 10.52.110(7)(a)} (2019).
\textsuperscript{392} \textit{Id. § 10.52.110(7)(a)}.
\textsuperscript{393} See Miho Nagasawa et. al., \textit{Dog's Gaze at Its Owner Increases Owner's Urinary Oxytocin During Social Interaction}, 55 NAT'L CTR. FOR BIOTECHNOLOGY INFO. 434, 438 (2009).
\textsuperscript{394} See Miho Nagasawa et al., \textit{Oxytocin-Gaze Positive Loop and the Coevolution of Human-Dog Bonds}, 348 SCI. 333, 334 (2015); see also Evan L. MacLean & Brian Hare, \textit{Dogs Hijack the Human Bonding Pathway}, 348 SCI. 280, 280–81 (2015).
\textsuperscript{395} See Nagasawa, \textit{supra} note 394, at 333.
\end{footnotesize}
to be adopted by people visiting the shelters than dogs without such pronounced expressions. Such expressions, along with the oxytocin loop, may explain why children and vulnerable witnesses are able to express themselves more easily and fully while dealing with difficult memories on the witness stand.

The mere association of dogs with children or vulnerable witnesses may result in a transfer of observers’, including jurors’, natural reactions and sympathies from the dogs and onto the associated witnesses. In a study on the effects of service dogs for children with disabilities published over twenty-five years ago, Mader, Hart, and Bergin considered whether “disabled children in wheelchairs with service dogs receive more frequent social acknowledgment than when no dog is present.” They found that children with service dogs receive “friendly glances, smiles, and conversations” more frequently when their service dog is present. Further, they found social effects “were more pronounced in shopping malls, typical of unfamiliar settings where the child would be likely to experience being ignored or overlooked.” Such research raises the possibility that the presence of a service dog could alter a jury’s “social acknowledgment” of a child witness.

Thus, the presence of a dog with a witness is likely to elicit physical, emotional, and cognitive reactions in jurors, perhaps resulting in biases (including implicit biases, also termed unconscious or cognitive biases) that may then cause bias cascade and influence the jury’s perception of the testimony and subsequent deliberations. Instructing jurors to disregard the presence of a dog does not eliminate the jurors’ emotions and the accompanying biases. Such biases cannot be eliminated by mere cautions and instructions as, for example, an article that examined the effect that hearing inadmissible evidence had on jurors found that, even with instructions to disregard such evidence, jurors “resist giving up evidence that they believe is probative.” Objections by defense counsel may actually

398 See Nagasawa, supra note 394, at 333.
399 See id.
401 Id. at 1530.
402 Id. at 1529.
403 Itiel E. Dror, Biases in Forensic Experts, 360 SCI. 243, 243 (2018). “Implicit bias” is unintentional bias, the individual exhibiting such a bias is generally ignorant to it. Id. These biases often cascade and snowball among people. Id.
highlight the significance of an issue in the minds of jurors, meaning that it could have more significance in their deliberations than it would have had no objection been made.\textsuperscript{405}

The authors of this Article suggest that the best way to support children and vulnerable witnesses with dogs while simultaneously limiting implicit biases against the defendant as much as possible, is to try to keep the dog out of the jurors’ view so the dog is not visible. Furthermore, efforts should be made to reduce, to the extent possible, eye contact between jurors and the witness’s dog.

\textbf{D. Research on Impact on Juries of Dogs Accompanying Witnesses}

A 2014 doctoral thesis submitted to Texas A&M University looked specifically at how judges viewed the presence of a dog during testimony.\textsuperscript{406} The doctoral candidate interviewed five judges, all of whom personally had children and dogs.\textsuperscript{407} Only one of the judges had experience with a therapy dog in a courtroom, but that occurred when the judge was a district attorney, and the case was that of a colleague.\textsuperscript{408} Another judge was aware of a victim whose father had been prosecuted for abuse, and who had interacted with a dog during his recovery.\textsuperscript{409} Most judges considered the following questions that must be resolved before allowing a therapy dog into a courtroom: 1) whether the child needed the dog to express himself or herself; 2) whether the dog’s presence may reduce the likelihood that testifying would cause the witness to feel victimized again by reliving traumatic moments; 3) whether a therapy dog could be considered a support person under a Texas statute allowing for such persons when children testify; and (4) how therapy dogs might compare to other accommodations, such as testifying by closed circuit television.\textsuperscript{410} The judges also talked about the issues that would need to be resolved for a program involving therapy dogs to be practical, with questions about whether the handler could be readily available when a dog was needed,

\textsuperscript{405} Lisa Eichhorn, \textit{Social Science Findings and the Jury’s Ability to Disregard Evidence under the Federal Rules of Evidence}, 52 L. AND CONTEMP. PROBS. 341, 344 (1989) ("[T]he ‘fuss’ that was made in objecting to the evidence and in ruling on its admissibility seemed to indicate to jurors that the insurance had a particular importance."). Of course, a failure to object is likely to mean that an assignment of error would not be preserved for appeal.


\textsuperscript{407} See id. at 12, 47–48.

\textsuperscript{408} See id. at 48.

\textsuperscript{409} See id. at 51.

\textsuperscript{410} See id. at 55–60.
whether a handler could be in a local agency, where the dog could be kept in the courthouse when not needed in a courtroom, and whether agencies could share the use of such a dog.\textsuperscript{411} One judge in this study noted that the presence of a dog could increase sympathy for a victim if the dog was visible, but felt that the same problem would not exist before a Grand Jury.\textsuperscript{412} Another judge argued that it would be easier to deal with bias in a bench trial, apparently assuming that prejudice is less likely to affect a judge than a jury.\textsuperscript{413}

One study looked at the impact facility dogs might have on juries.\textsuperscript{414} As to what courthouse dogs are, researcher, Kayla Burd, took her description from data provided on the website of the Courthouse Dogs Foundation, and stated that courthouse dogs are “trained by members of the Assistance Dogs International,” whose “handlers are professionals within the criminal justice system . . . “.\textsuperscript{415} She noted that supporters of the use of such dogs “believe that these dogs are not prejudicial to jurors,” but she correctly states that “no empirical research has been conducted to examine if [facility dogs] are prejudicial or if they will unduly sway jurors to the side of the witness.”\textsuperscript{416}

Kayla Burd sought to design experiments that would test a number of hypotheses regarding the use of facility dogs by comparing their effect on jurors against a witness holding a teddy bear and against a witness who was not accompanied at all during testimony.\textsuperscript{417} The experiments involved a mock child sexual abuse case where a “defendant” was accused of molesting his six-year-old granddaughter by genital fondling over clothing, actions alleged to have occurred four times over the course of six months.\textsuperscript{418} The sister of the “victim” saw the abuse and described it to their mother, who in turn reported it to authorities.\textsuperscript{419} The defendant denied the charges, saying the children were confused by his behavior while playing with them and made up fantastic stories.\textsuperscript{420}

Participants—mock jurors—were divided into four groups, who read a series of documents online: “1) Judge’s preliminary instructions[;] 2) Prosecutor’s opening statement[;] 3) Defense opening statement[;] 4)
Prosecutor’s questioning of the victim for some mock jurors; prosecutor’s interrogation of the victim’s sister for other mock jurors. No cross-examination by the defense was presented; 5) Prosecution closing remarks; 6) Defense closing remarks; 7) and Judge’s closing remarks.421

As indicated in the fourth step, mock jurors were distinguished by those who read testimony of the victim and those who read testimony of the sister witness.422 Mock jurors were further subdivided by whether they had read the interrogation of the “victim,” seeing three pictures of (1) a young girl with a supposed courthouse dog, (2) the young girl with a teddy bear, or (3) the young girl with no accommodation.423 If the mock jurors read the interrogation of the sister, they saw the same young girl in one of the same three “conditions” (with dog, with teddy bear, or without accommodation). There were thus six “conditions.”424

After reading the transcript of the victim’s testimony and looking at the pictures, the mock jurors filled out a questionnaire that verified they had paid attention to the transcript and pictures.425 They were then asked whether they thought the victim was abused, how confident they were of this belief, the degree of accuracy they thought was contained in the child’s testimony, and whether the defendant was guilty or not guilty.426 The number of jurors finding the defendant guilty, based on which witness’s testimony they read and which pictures they saw, was divided as follows:427

<table>
<thead>
<tr>
<th>Witness</th>
<th>Innovation Type</th>
<th>Total Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>None</td>
<td>Courthouse Dog</td>
</tr>
<tr>
<td>Victim</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>22/50 (44%)</td>
</tr>
<tr>
<td>Sister Witness</td>
<td>16/50 (32%)</td>
<td>21/53 (39.6%)</td>
</tr>
<tr>
<td>Combined</td>
<td>35/102 (34.3%)</td>
<td>43/103 (41.7%)</td>
</tr>
</tbody>
</table>

421 See id. at 26.
422 See id. at 26–27.
423 See id.
424 See Burd, supra note 414, at 26–27.
425 See id. at 27–30.
426 See id.
427 See id. at 34. Note: this table corrects a mistake that was made in the posted version of the thesis, and which has been acknowledged in an email from the author of the thesis to the authors of this paper. The numerator in the fourth column under victim is 22, not 29 as indicated in the thesis.
Thus, when there is no innovation (no dog, no teddy bear) and the witness was the victim, 36.5% of the mock jurors in this category found the defendant guilty, whereas when there was a courthouse dog, 44% did, and when there was a teddy bear, 43.1% did. When the witness was the sister, on the other hand, 32% of mock jurors found the defendant guilty, but if they saw a courthouse dog, 39.6% did, and if they saw a teddy bear, 43.1% did. If one combines the results for both types of witnesses (which was not done in the thesis or in the tabulation), it appears that when there was no accommodation, 34.3% of mock jurors voted for conviction, if there was a courthouse dog, 41.7% voted for conviction, and if there was a teddy bear, 43.2% voted for conviction. The thesis also found that these conviction rates were not to be significantly different under a chi-square test.

It is important to note that the mock jurors observed a photograph. In an actual courtroom setting, a dog’s behaviors, facial expressions, breathing and moving could have a greater impact than results with a static photo might suggest. Further, note that when the witness was the victim, the percentage of mock jurors voting for conviction was higher if she was seen with a courthouse dog than if she was seen with a teddy bear. This raises the possibility that, from a defense perspective, it is more dangerous for the victim to testify with a dog present than it is for a non-victim witness. More research on the impact of dogs on juries, with larger samples and perhaps mock courtrooms, is clearly necessary.

VI. CONCLUSION

Courts have dealt with this issue on a case-by-case basis, examining the circumstances individually and considering independently each dog, each witness, and the necessities of both. Courts have sought assurance, often through the witness’s involvement with the dog during counseling or pre-trial proceedings, that the dog will not disrupt the courtroom proceedings and that its presence will be as inconspicuous as possible. Sometimes, however, dogs have been more visible to juries than necessary, and dogs have occasionally been allowed to interact with juries during breaks. Given

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428 See id.
429 See Burd, supra note 414, at 34.
430 See id.
431 See id.
432 See id. at 26–27.
433 See id.
434 See Burd, supra note 414, at 26–27.
the previously mentioned findings of an “oxytocin loop” resulting from such interactions and the possible implicit biases from the presence of a dog with a witness, maximum precautions are called for.  

Facility dogs should generally not be present in courtrooms with witnesses when they are not testifying if eye contact or direct interaction may be possible between the dog and the jurors. Handlers should also be inconspicuous and, where possible, should only move a dog when the jury is not present. Ideally, a witness should have prior experience with the dog before a courtroom appearance and should not be overly focused on interacting with the dog when testifying.

Few courts have required that the dog be necessary for the witness to testify at all, but some have said that a dog is implicitly necessary if the witness would be more severely traumatized, or unable to answer questions fully, if she or he had to testify without the dog. Other courts have allowed dogs in courtrooms just to make witnesses more comfortable, which the present authors believe is too lax a standard. Specific necessity should be demonstrated for children approaching maturity and for high functioning but vulnerable witnesses.

Many courts have too readily dismissed the possibility of prejudice arising from the presence of a dog, ignoring or unaware that juries have implicit biases and may find a witness more sympathetic, and perhaps more credible, merely from the presence of a dog. Psychological research on the impact on juries of dogs accompanying witnesses is beginning, but results are so far inconclusive. The popularity of facility dogs in the courtroom is growing and therefore so too should the number and frequency of rigorous experiments with mock juries in law schools, psychology departments, and other areas of academia.

State legislatures have created requirements on the institutional affiliations of dogs and trainers who may accompany children or vulnerable witnesses. An increasing number of state laws now require that dogs be trained by member training organizations of Assistance Dogs International, an organization that sets standards for training service dogs.  Some state laws allow the use of therapy dogs registered with national therapy dog organizations and Alabama allows for a dog with “appropriate temperament” to be tested by a state law enforcement canine officer, a recognition that some dogs are inherently right for this kind of duty. Most of the dogs described in the case law were not service dogs, and many were not trained for service or therapy work at all, but nevertheless remained and calmed the witness. The

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435 See supra Section V.C.
436 See supra Section III.B.
legislative tendency to create an overarching and broad rule is unnecessary in this circumstance. Judges should be given the latitude to determine, on motion for the use of a dog, whether the dog that is being offered will behave appropriately, and usefully as to the witness, in the courtroom.

Judicial experience with dogs accompanying witnesses should be allowed to develop in trial courts, with appellate review, which has been happening. Legislative approval of this practice is appropriate where other support statutes might effectively narrow support to persons and items (such as teddy bears) to the exclusion of dogs. Many dogs have the appropriate disposition for such work, and many types of training can give them the necessary experience to assure that they will remain beside a witness without violating court decorum or becoming overly visible to a jury. Legislatures would be well-advised to refrain creating a one-size-fits-all rule where none has been shown to be necessary or effective. To end with an ancient but not unwise aphorism, sometimes it is best to let lying dogs remain as they are.