

# **Trial Strategies in Cases of Child Abuse: Pre trial motions, jury selection, cross-examination, opening statements and closing arguments**

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## **H. Pre-trial motions**

- A. **Special courtroom configurations** such as placing a pillow on the witness chair so the child can see over the witness box, a footstool so that her feet do not dangle uncomfortably, or any other creative approach you can think of to allow the child to feel more comfortable.
- B. **Support person for the child.** A number of states have allowed a support person to be near a child during testimony. *See Stranger v. State*, 545 N.E.2d 1105 (Ind. Ct. App. 1989); *State v. Hoyt*, 806 P.2d 204 (Utah Ct. App. 1991); *Boatwright v. State*, 385 S.E.2d 298 (Ga. Ct. App. 1989); *State v. Pollard*, 719 S.W.2d 38 (Mo. Ct. App. 1986); *Mosby v. State*, 703 S.W.2d 714 (Tex Ct. App. 1985).
- C. **Placing a limit on the length of time the child is on the witness stand** or, at the very least, the length of time she is on the stand without a break.
- D. **Requiring both attorneys to ask questions at an age and developmentally appropriate level.** For instance, it would be improper to ask a young child “how many times did Dad abuse you?” if the child has little conception as to the meaning of numbers. It would be inappropriate to ask questions with legal jargon such as “defendant”. As persuasive authority, cite and provide the court and counsel with the following law review article: John E.B. Myers, Gail S. Goodman, and Karen J. Saywitz, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 27 PACIFIC LAW JOURNAL 1 (1996).
- E. **An age appropriate oath.** Young children often find it difficult to articulate their understanding of the oath and their understanding that it is wrong to tell a lie in court. When queried in a developmentally appropriate manner, however, even pre-school children can meet these common competency standards. *See* Thomas D. Lyon and Karen J. Saywitz, *Young Maltreated Children’s Competence to Take the Oath*, 3 APPLIED DEVELOPMENTAL SCIENCE 16-27 (1999).

### III. JURY SELECTION

#### A. Small jurisdictions

1. Have jurors rated by law enforcement officers and others likely to know most or all of the persons on the jury panel.
2. Run criminal history and driving record checks.
3. Become involved in the community and speak regularly to civic organizations about child abuse and criminal law.

#### B. All jurisdictions

1. **Consider a jury questionnaire for sensitive questions pertaining to abuse.** According to one study, at least 20% of American women and 5-10% of American men were sexually abused during childhood. David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31 (Summer/Fall 1994). If this study is accurate, the chances are good that you will have at least one victim of abuse on your jury. You need to handle this sensitively. A juror questionnaire is more likely to obtain this difficult information. This is particularly so if the jurors are instructed the questionnaire is confidential and will be destroyed following the jury selection. If a questionnaire is not allowed, approach the question delicately. A truthful response is less likely if a question is framed as follows: "Has anyone been the victim of a sexual assault?" This question requires the juror to reveal to the entire panel his status as a victim. Instead, ask if any member of the jury panel, any immediate family member, or close personal friend has ever been a victim of, witness to, or accused of a crime committed against a child. An affirmative response can be followed up with a private discussion.
2. **Educate the jury in voire dire.**
  - a. **People lie for a reason.** Have you ever been lied to? Based on that experience, do you find that people lie for the fun of it or do they usually have a reason?
  - b. **Differentiate between big and small lies** and the fact that children often lie about small things such as spilled milk or who was in the cookie jar.
  - c. **"Problem" children.** Do you believe a child who comes from a troubled family is unworthy of belief? If a victim has suffered emotional, mental or discipline problems, would that automatically prejudice you against the witness?

- d. **The child victim's anticipated nervousness.** Have you ever testified in court? Were you nervous? Do you feel a child might be nervous? Why? Do you believe most adults are uncomfortable speaking about their sexual history? Do you believe a child may also feel uncomfortable? Why? Have you ever had to tell someone about a traumatic event? Did you have to repeat that account? The more times the account was repeated, was it easier, or more difficult to speak of the event without emotion?
- e. **Statutory rape/jury nullification.** How do you feel about laws which make it a crime to have sex with children even if the child does not resist or say no?
- f. **Inconsistent statements.** When talking about something that happened to you, do you always tell it exactly the same way each time? Do you sometimes forget or leave out details when telling of an event?
- g. **Stereotypes.** What does a burglar look like? What does a child abuser look like? Do you have a stereotype as to the kind of person who would molest children? Do you think you can spot a child molester simply by looking at him?
- h. **Child abuse really happens.** Do you believe that child abuse does in fact happen and that many adults molest children? Do you think the issue is overblown?
- i. **The secrecy surrounding abuse.** Generally speaking, do you believe children are sexually molested in public or in private? Would you be surprised if a victim or perpetrator did not speak openly of the abuse? Are there cases in which you would feel comfortable convicting someone on the word of a single eyewitness or will you automatically need something more than a mere eyewitness?
- j. **An open mind.** Have you so firmly planted in your mind the concept of proof beyond a reasonable doubt that you have foreclosed any possibility that I can prove my case? Will you agree to hold me to my burden to prove this case beyond a reasonable doubt and not hold me to a lesser or higher standard?
- k. **If you have a physical abuse case in which the other side is claiming the assault was no more than a parents exercise of "reasonable force",** you need to get the jury to see the case as one not involving a traditional act of spanking. **Consider the following voire dire questions:**

Do you feel it is appropriate to spank kids?

Do you feel it is necessary to use a belt or other object?

Do you feel parents should hit a child hard enough to necessitate medical attention?

Do you feel a parent should strike a child hard enough to leave bruises, welts, or other injuries?  
When spanking a child on the bottom, did you feel it is necessary to pull down a child's pants and underwear?  
Why is it sufficient to spank with a child's clothes on?  
How old should children be when spanking begins?  
Would it be appropriate to spank a baby? Why not?  
How old should children be when spanking stops? Would it be appropriate to spank a teenager? Why not?  
Would it be appropriate to hit a child in the head? The genitals? The stomach?  
Is it appropriate to hit a child with a fist as opposed to an open hand?  
What infractions necessitate physical discipline?  
Do you agree that toddlers have accidents? A toddler may wet his bed, for example? A toddler may trip and knock over a vase? A toddler may accidentally spill milk? Should a toddler be spanked for an accident over which he has no control?  
Have you read any of the literature on the issue of spanking?  
What have you read? What do you think of what you have read?  
Should spanking be used as a primary means of discipline or only as a last resort?  
Should a parent spank out of anger? Why not?  
If a juror quotes a spare the rod, spoil the child proverb, you may wish to ask the juror if he or she agrees with other Bible verses urging parents to use caution in disciplining their children. Some of these verses are discussed in the attached law review article.

C. Other thoughts

- a. Remember you are always being watched, including in the hallway and walking to and from the court. Show your commitment to justice and professionalism. (President Clinton at the funeral or Commerce Secretary Ron Brown).
- b. Pay attention to non-verbal cues of the jury

## **Cross Examination of Defendants and Non-expert Defense Witnesses**

I. Preparation: every good cross-examination begins with the following:

1. **Thorough understanding of the case** including all the evidence to be presented by both sides as well as all information contained in investigative files, medical records, etc even if it will not be introduced into evidence.

2. **Teach investigators to always record the statement of the defendant and, if possible, defense witnesses.** If possible, have the tape transcribed and ask the defendant to vouch for its accuracy. If the statement is not recorded, the defendant has more wiggle room. For instance, the defendant can claim that although he did speak to the police, he did not make a statement using the precise words contained in the police report. The defendant can also claim he made additional statements which the officer did not put in his report. When the interview is not recorded, it is easy for the defendant to change the focus of cross-examination from guilt or innocence to the memory of the police officer and the accuracy of the officer's report.
3. **When dealing with a defense witness other than the defendant, always contact the witness and assess their demeanor.** If a witness declines to speak with you, send a certified letter expressing your disappointment and letting them know that if they change your mind, you are willing to speak with them. In the letter, remind them that you do not represent the alleged victim, you represent the state. Accordingly, your sole duty is to make sure that justice is done and that you have no interest in prosecuting an innocent person. When the defense witness takes the stand, you can show **bias** by pointing out he refused to speak with you. You did, however, speak with defense counsel? Did you receive a letter I wrote to you? In that letter I advised you to let me know of any exculpatory evidence because I would take it into account in deciding whether or not to pursue this case? And yet you never came forward with this evidence until the trial? Is this because you only thought of this "evidence" in the past couple of days? (The answer to this question is not important, you are signaling to the jury the likely reason the defense witness did not previously come forward).
4. **When preparing for cross examination, ask yourself "what sort of witness is this?"** A soft spoken minister should not be pursued as aggressively as a potty mouthed drug dealer with obscenities tattooed on his shoulder.
5. **Understand the limitations of cross-examination.** The defendant is not going to admit committing the crime and is almost certainly hostile to you and is wary of falling into any traps. Accordingly, don't waste your time arguing with a witness about the ultimate issue. Instead, focus on drafting questions the witness cannot avoid or evade.
6. **Spend time before trial drafting cross-examination topics and questions.** Flexibility is important when cross-examining a witness because we can never predict with certainty what a witness will say or what path the witness will take. Nonetheless, prosecutors can often accurately predict the basic thrust of the defendant's testimony and should be able to outline, if not script out, an effective cross-examination. This is particularly true when investigators provide prosecutors with a tape recorded statement from the accused. In the absence of a recorded statement, look for clues as to what the defendant may say on the witness stand. The defense attorney may provide these clues in her opening statement or in her cross-examination of your witnesses.
7. **Select a handful of points you want to make on cross examination and then script questions which make these points.** For example, one point

could be **opportunity**. Mr. Defendant, you had the opportunity to kill the baby, didn't you? You told officer Jones you were alone with the baby the night she died? A second point could be  **motive**. You told officer Jones the kid was a brat? You said the kid never shut up?

8. **Use transition sentences.** After you have exhausted one point, make a statement or pose a question which helps the jury understand you are now moving to a new topic. Mr. Defendant, now let's discuss your feelings about this child.
9. **Set up the brick wall before knocking it down.** Before moving in for the kill, an effective cross-examiner boxes the witness into a corner. Before the defendant realizes it, the trap is sprung. Examples of this technique are contained throughout the outline. For example, see the *incorporate your theme* and *appropriateness of exposing a child to domestic violence* sections of the outline for concrete examples of setting up a brick wall.

## II. Cross examination of defendant

### A. Cross-examination of the defendant in sexual assault case

1. **Develop a series of questions to show the unreasonableness of questions defense counsel posed to the child.** What does it mean to tell the truth? If you had to, could you give the jury an account of how many times and on what dates you had sex with your wife in the previous year? (This is a risky question which may draw the ire of the judge or the jury. It is, however, a valid point and you may wish to bring it out at trial or, at the very least, in closing argument. In closing argument, for example, you could say: *Defense counsel castigates the child victim for her inability to state precisely how many times her father sexually molested her. He is expecting too much from this child. Indeed, how many sexually active adults could precisely state the number of intimate encounters with their spouse over a period of years?*
2. **Develop a series of questions to get the defendant to corroborate seemingly unimportant features of the child's testimony.** Sally is accurate when she describes the bedroom bedspread, the car you drive, etc? This sets up an argument that according to the defendant the child is right about everything surrounding the abuse except the abuse itself.
3. **Explore the defendant's relationship with the victim.** Do you love the child? Would you describe your relationship as one of warmth and mutual affection? If the defendant agrees, it sets up the argument that the child has no motive to lie. If the defendant says he and his five year old daughter do not have a loving relationship, it allows you to argue there is something wrong. After all, what father and daughter do not have a loving relationship? Obviously, fathers who abuse their daughters do not have a caring relationship with the child.

4. **Find inconsistencies in the various statements the defendant has given and hammer them home to the jury.** If the defendant then wants to highlight the child's inconsistencies as a reason for discounting her testimony, point out to the jury she was no more inconsistent than the defendant.
5. **Find implausible statements of the defendant and then ask him to support them.** If, for example, the defendant claims he was not sexually abusing his daughter but was checking to see if she was a virgin, ask him to explain to the jury what he was looking for. Have you read any literature about conducting this type of exam? Do you have any training in gynecology?
6. **On the other hand, if there is a chance the defendant could modify or explain an implausible answer, you may not wish to give him the opportunity to clarify the matter.** For example, I once had a defendant who got angry with me during cross-examination and said "not only did I not sexually abuse my daughter, I have never been alone with her." It was not tenable for this defendant to assert he had never been alone with his daughter in the 12 years he lived with her and, if I pointed this out, he may have backed away from the statement. In a scenario such as this, it may be better to smile inwardly, realize you now have an argument for closing (how credible is this guy?), and move on.

**B. Cross-examination of defendant in a physical abuse case (many of these questions assume the defense is one of reasonable force but will work even if the defense does not involve this element).**

**A good cross-examination begins with a good investigation.** Police officers need to find out as much as possible about the assault. To prove the blows were unreasonable, a suspect should be asked about his feelings which led to the assault. What other disciplinary practices are used in the home and why were they not used this time? How are the other children treated? How is the dog treated? Is your victim the only person in the home who receives corporal punishment? What infraction was violated? Was this the first time the child violated the rule? How was he disciplined in the past? Have other children in the home violated the rule and, if so, how were they disciplined? Was the child old enough to understand this rule? The more ammunition acquired by the investigators, the better the cross-examination. **Depending on the facts, cross-examination questions may include the following:**

How tall is your son/daughter? How much does he/she weigh? How tall are you? How much do you weigh? Was the purpose of striking the child an act of discipline? Please tell the jury what infraction the

child committed? When was this rule developed? How was it communicated to the child? Was this the first time the child violated this rule? Have other children violated this rule? Does violation of the rule always result in corporal punishment? Do you use any other forms of discipline other than hitting the child? Have you found these other forms of discipline to be effective? (If the answer is no, ask him if you understand his testimony to be that each time his child misbehaves, his only recourse is physically striking the child. If the answer is yes, point out that he did not use another form of discipline in this case. In closing you may be able to use this fact as evidence the conduct was not discipline but an expression of anger). How many times did you strike the child? (If you have multiple injuries and the defendant gives a low number in response to the question, ask him if he is telling the jury that one blow accounts for each injury? You may be able to get him to enlarge his number or, at the very least, you have emphasized the implausibility of his answer). Was each blow to the child of equal force or were some blows harder than others? Did the child cry? How many blows did it take before she cried? (If the child cried after one blow and the defendant concedes each blow was painful, ask him why then he found it necessary to administer successive blows? Think of a situation where a parent strikes a child's hand when the child reaches for a dangerous object. One blow should cause the child to pull away and possibly cry. If the purpose of the punishment was to have the child not touch the object, the goal has been accomplished and any additional blows can be argued to be unreasonable). Was the purpose of the discipline to administer enough pain to change the child's behavior? Certainly you did not want to administer more pain than was necessary, did you? In this case, you did not hit the child with an open hand? You used a fist? A belt? A stick? A flyswatter? A wooden spoon? Do you have a dog? You told Detective Jones you love the dog? In fact, you have never found it necessary to kick or otherwise physically strike your dog? You do, though, find it necessary to strike you daughter? (If there is evidence of animal abuse, you may be able to use this to show a pattern of out of control behavior, but you will likely have to get the court's permission to use it as prior bad act evidence. If you get such evidence admitted, explore with the accused why he kicks his dog. Is it because you can't reason with a dog the way you can a human being? Tell me, sir, is your child a dog or a human being?). Did you remove the pants and underwear of the child to increase the pain she would feel when you spanked her? You didn't? Please, sir, tell the jury why you removed your daughter's pants and underwear before hitting her? How did you feel when your son misbehaved? (If the accused admits being angry at his child you can argue this anger led him to excessive conduct. If anger is denied, you may be able to

point out the implausibility of the statement. When your son broke the antique vase which had been in your family for generations, you were not angry? When your son spilled grape juice all over the paperwork you had spent hours working on, you weren't angry?) On other occasions, you have also spanked your child? On these other occasions, did you also leave bruises? (If yes, this is an indication that excessive force is an ongoing problem. If no, this is evidence that excessive force was used on this occasion. Again, though, be cautious when delving into other bad acts.) On other occasions, you struck the child on his bottom? On this occasion, though, you struck the child on his head/neck/stomach, etc? Do you love your child? Do you feel your child loves you? Do you believe it would be wrong for a parent to abuse his child? Would you be able to live with yourself if you abused your child? Would you find it difficult to publicly admit to a jury of your peers that you had abused your child?

**F. Cross-examination of the Defendant in a case involving domestic violence issues**

1. **Incorporate your theme.** If, for instance, your theme is power and control, develop a set of cross-examination questions which highlight this theme to the jury. Let's say you are prosecuting a wealthy quarterback who beat his wife after she ran up hundreds of thousands of dollars worth of credit card bills. You might try this line of questioning: Is it fair to say you control your family's finances? You are paid nine million dollars annually? You assume responsibility for paying the bills? You do the banking? You make the investment decisions? You have in the past argued with your wife about the bills she was accumulating? Despite these arguments, the problem continued? Is it fair to say that when you could not control your wife's spending with words, you resorted to your fists? If the defendant is an executive with power and control at the company, you may be able to explore with him the role he plays at work. Get him to agree that he makes company decisions which must be obeyed. Get him to acknowledge he is a leader at work and that he expects people to follow his leadership. If employees do not obey the executive's decisions, they can be fired. Contrast this with his inability to control his spouse. When you disagreed with your wife, you couldn't fire her, could you? You couldn't demote her? You could only control her by violence? (There is an increasing number of executives coming into the legal system as wife batterers. For many of these professionals, they expect but do not receive wives who honor their command. *White-collar Wife Beaters, Some Executives Take home need for power and control*, Karen S. Peterson, USA TODAY December 16, 1997.)

2. **Size differential/spouse.** If there is an obvious difference between the victim and the defendant in terms of weight, height and strength, highlight these facts. The following questions illustrate the approach: How tall are you? How tall is your wife? How much do you weigh? How much does your wife weigh?
3. **Size differential/child.** If a child was also abused or witnessed the crime, you can ask the same size differential questions to drive home to the jury how powerless the child was to protect himself or to intervene on behalf of mom.
4. **Strength differential.** There is often evidence in a defendant's lifestyle or occupation which can document his strength. Perhaps the defendant is a farmer. You can probably get him to agree that being a farmer requires him to keep physically fit. Ask him about farm chores that require strength such as lifting bails of hay. If the defendant goes to the gym, lifts weight, etc, ask him to point out all of this to the jury. Contrast this with the victim's occupation and lifestyle. Even if the victim is physically fit, her occupation is less likely to involve the use of brute strength.
5. **The appropriateness of exposing a child to domestic violence.** If one of the charges is child neglect by exposing a child to domestic violence, you can set up the argument with the following questions. Do you consider yourself a good parent? You would never physically harm your child? Do you control what your child is exposed to on television? What controls do you place on your child? Do you allow your child to watch explicit violence on television? And yet, you allow your child to be present when you beat his mother? Do you allow your child to drink alcohol? And yet you allow your child to be present when you are drunk? Do you teach your child to respect his mother? How do you teach this? When you hit your wife in front of your son, were you teaching the child to respect his mother?
6. **Inconsistencies.** It is imperative that the defendant be interviewed on tape and a transcript be made. The longer the defendant is interviewed, the better. If the defendant minimizes or outright lies about the abuse, there will be ammunition for cross-examination. Inevitably, he will make inconsistent statements that can be pointed out on cross-examination.
7. **The love questions.** If the defendant denies causing harm to the victim, and the abuse is egregious, you may try the following approach: Mr. Smith, you have denied breaking your wife's arm and forcing her to receive 35 stitches to repair her face. In determining, though, whether you are capable of such an act, it is equally relevant to explore your attitudes about domestic violence. Is it wrong for a man to beat his wife? Why is it wrong? Look again at the pictures of your wife's torn face. Do you agree the pictures are repulsive? Do you agree that if anyone intentionally inflicted these injuries, he should be ashamed? Do you love your wife? If you ever hurt someone you loved,

would you be ashamed? Is it fair to say that the reason you cannot confess your crime to this jury is because you are ashamed of what you did?

### III. Other points

1. **Listen to the witness' answers.** Sometimes we get so caught up in our list of cross-examination topics that we overlook a response that is a gem. A woman claiming battered women's syndrome prevented her from stopping her husband from torturing her daughter to death may cry on cross-examination and claim "I tried to help her." You now have an opening for a litany of questions such as: Did you call the police? Did you ask the neighbors for help? Did you ever take your daughter to the doctor?
2. **Be aware of the jury.** Don't get so caught up in the battle with the witness that you lose sight of the impact on the jury. If the defendant is a senior citizen and you have a number of elderly persons on the jury, you may want to be sure you show some measure of respect to the witness.
3. **I have an attachment!** Attached to this outline is a great article from John Tierney in which John emphasizes the importance of speaking to the jury through the witness. The article was originally published in a 1991 edition of *The Practical Prosecutor*. John graciously allowed me to include the article with this handout. I commend the article to your reading.

## **WE'RE JUST GOING TO TALK: PRESENTING YOUR CASE IN OPENING STATEMENT AND CLOSING ARGUMENT**

### I. OPENING STATEMENTS

- A. An opening statement is not an argument but it can be equally persuasive. It is your opportunity to outline what you expect the evidence to show.
- B. At the close of *voire dire*, which can be a lengthy process, jurors are anxious to see what the case is really about and many jurors will develop a bias in favor of or opposed to your case based on your opening statement. Indeed, some studies indicate some jurors make up their minds by the close of *voire dire*. Clearly, the importance of *voire dire* and your opening statement cannot be over-emphasized.
- C. Persuading the jury through your opening statement
  1. **Tell a story.** A narrative account is generally viewed as more effective than a recitation of what each witness will testify to. Although a chronological recitation is often the easiest to follow, you may wish to use an attention getting teaser which uses facts taken from the middle or end of the story.

2. **Develop a theme and weave it throughout the opening.** Possible themes include:
  - a. *“This case is one involving a family secret. A secret so horrible, the victim could not and did not tell for a very long time. The child was afraid, ashamed, confused.”* You may wish to paint the theme in broad strokes in the event the evidence does not come in exactly as you planned. The “secret” theme can explain not only why the child delayed reporting or recanted but also why the family rallied around the perpetrator.
  - b. *“The cornerstone of this case is one of vulnerability. A lonely, troubled child, the kind of child most people turn away from, was taken advantage of precisely because she is the type of child others may not believe.”* This theme may be effective when the victim is an older, troubled adolescent. Even negative factors such as drug and alcohol use may become positive facts if it can be argued the perpetrator made these conditions worse by supplying the child with these substances.
  - c. Other themes: a list of possible other themes prepared by Cindi S. Nannetti, Bureau Chief, Sex Crimes Bureau, Maricopa County, Phoenix, Arizona, is attached.
3. Use powerful, descriptive language
  - a. adverbs, not adjectives (visciously, not viscious, savagely, not savage, brutally, not brutal)
  - b. coke and pringles, not snacks and soda
4. Avoid getting bogged down in the elements of the crime and avoid using legal terms.
5. Weave negative facts into your opening and, if possible, describe them in a way to convey sympathy to the victim. For example, a recantation is the understandable product of post-revelation pressures.
6. Show your sincerity through your voice and your body
7. Create a sense of rythm in your opening statement. Softer/louder, faster/slower, and the effective use of pauses will make the presentation more compelling.
8. Use of exhibits (overheads, charts, timelines, photos, etc)
9. Personalize the victim. What are her hobbies, which school does she attend, the name of her teacher, her friends, etc?
10. Prepare the jury for the demeanor of the victim. Will she be nervous, full of or lacking in emotion, etc. Some children show embarrassment by giggling.
11. Don’t overstate your case.

12. End your closing with confidence, promising to return in closing to request a conviction.
13. When in doubt, ask yourself, “what would the DA’s in ‘Law & Order’ say in this situation?”

## II. CLOSING ARGUMENTS

- A. Write out your argument before the trial begins and modify it accordingly as the trial progresses.
- B. Practice, practice, practice. Repeatedly reading and reciting your closing argument does not make it sound canned. On the contrary, it makes it sound more natural, yet polished.
- C. Organization. Your closing argument must have a logical flow and this can only be achieved if you follow an outline. One simple, but effective outline in a child abuse case is as follows:
  1. **An expression of gratitude.** Tell the jury thanks for their time and labors. Say something like: *On behalf of the State, I would like to thank you, the members of the jury, for your obvious attentiveness throughout these proceedings. It goes without saying that the decisions you are about to make will affect forever the lives of more than one person. Therefore, the diligence with which you have pursued your obligations is appreciated not only by me but by every officer of this court. Now, let’s turn to the matter which is before you for decision.*
  2. **A recitation of the elements of the crime in the context of the victim’s testimony.** Point out to the jury that the child’s statements, standing alone, satisfies each and every one of the elements of the crime with which you have charged the defendant. You may introduce the subject in this way:

*As the court instructs you on the elements of the crime with which the defendant is charged, one thing will become very clear. If you believe the victim, the defendant is guilty. The crime of criminal sexual misconduct consists of four elements...*

After each element, recite the victim’s testimony on this element and then remind the jury that if they believe the victim, this element has been proved.

The advantage of this approach is that it gets the jury to focus not on the elements but on your victim. The question becomes not whether the elements of the crime have been proved but simply whether we should believe the child. This also reduces the case to one simple question the jury can understand.

3. **List the reasons the jury should believe the victim.** Tell the Jury: *If you accept what I have said as accurate, then the only question you need to answer before you can convict the defendant is: why should we believe the victim? Members of the jury there are at least eleven reasons you should believe the victim.* Then go on to recite the reasons. Possible reasons include:

- a. **The victim testified under oath, she understood this oath and thus had an incentive to tell the truth.** This is in contrast to the defendant who, though he may have understood the oath, had something to gain by being dishonest. Perjury by the defendant may help him to escape a more serious conviction. What reason does the child have to perjure herself?
- b. **Not only does the victim have, as a result of the oath, an incentive to tell the truth, she has absolutely no incentive to lie.** Does anyone in the courtroom think this trial was fun for the victim? This child had to tell a cop and social worker about sexual conduct that most of us as adults would have difficulty speaking of. She had to endure an uncomfortable medical examination. She is the one removed from the home, not the defendant. She then had to come to court, in front of her father and twelve strangers and tell it all again only to endure a cross-examination at the hands of her assailant's attorney. She's having a lot of fun, isn't she?
- c. **The victim's testimony is corroborated by medical evidence.** (This is probably true even if there is no medical evidence. If the child alleged contact, for example, the absence of medical evidence is consistent with the history given by the child).
- d. **The victim's testimony is corroborated by other witnesses.** Relate to the jury each portion of the child's testimony which is corroborated by another witness.
- e. **The victim's behaviors corroborate her testimony.** Although sexual and other behaviors are not diagnostic of abuse, they are consistent with it. If the child's behaviors, such as bedwetting, occur only after visits with the alleged perpetrator, this is even more compelling.
- f. **The victim's testimony is corroborated by the physical evidence.** A good investigation should produce some physical evidence. Obviously, semen, hair and other evidence is powerful but such evidence is so strong that many such cases do not go to trial. You may, though, have other evidence. If the victim describes a particular picture or a particular bedspread in the room where the abuse occurred, these items should be

seized or at least photographed as documenting the reliability of the child's memory.

- g. **The victim's testimony is corroborated by the defendant.** Even if the defendant denies the allegation, there is often something to hang your hat on. For instance, guilty persons often ask few questions as to a child's statements. You can then say to the jury: *You heard the defendant's interview with the police. Did he act like an innocent man? If he was falsely accused would he not be demanding to see the child's statements and asking as many questions of the officer as he was answering? Isn't it obvious that the reason the defendant had no questions is because he knew he had abused this child? There is no other reasonable conclusion.*

Perhaps the defendant admits taking the child on an outing or being alone with the child at a particular time when she was abused. This also corroborates the victim's statement.

- h. **The victim is not sophisticated enough to pull off the lie alleged by the defendant.** *Think of this, folks. The defendant wants you to believe the victim is so sophisticated she can tell a lie believable enough to fool the police, social services, and a physician. The child was able to keep a consistent story intact over a period of several months in the course of several interviews. Under this rationale, you are asked not only to believe this four year old kid is a liar, but she is a darn good liar.*
- i. **If the victim is a liar, why did she not exaggerate the lie?** In many cases, a victim's testimony is less damning than what you would expect from someone making a false accusation. The victim may allege contact, not penetration. The victim may deny she was threatened by the perpetrator. Find nuggets like these in the victim's statements and testimony and point them out to the jury as evidence this child is not on a crusade to crucify the perpetrator. After all, if the child was really out to get the defendant, why would she not claim he threatened her? The answer of course is the victim is telling the truth. She tells the truth irrespective of whether the truth hurts or helps the defendant.
- j. **The interviewers knew what they were doing.** If the investigators who took the initial statement from the child are well trained professionals who know how to speak to a child, you can point this out as further evidence the child's initial and subsequent statements are reliable.
- k. **Expert witnesses.** If you have expert witnesses, other than medical personnel, whose testimony in some way supports the

victim's testimony, point this out as an additional reason to believe the victim and convict the defendant.

Summarize these reasons for the jury one more time and do so in a way that highlights the absurdity of any claim the child is lying. You might try something like this: *When you consider the child testified under oath, when you consider the child has no reason to lie, when you consider the child is not sophisticated enough to pull off such a convincing lie, when you consider that some or all of the child's statement is corroborated by medical personnel and other witnesses who also have no reason to fabricate, and when you consider that even the defendant corroborated portions of the victim's testimony, it is clear the defendant is guilty beyond a reasonable doubt.*

#### 4. Address the Defendant's arguments

- a. **Inconsistent statements.** If the defendant claims your victim has made inconsistent statements, you have at least two arguments. **First, you can argue the statements are not inconsistent.** For instance, if the child in one interview claims to have been raped over a 10 minute period and in another interview alleges a 15 minute period, you can effectively contend these statements are not inconsistent. Try something like this: *The victim never said she had a stop watch which she dutifully punched at the beginning and end of the rape so that she could satisfy the inquiries of those who seek to discredit her. When asked on multiple occasions to estimate the duration of the rape, she gave her best estimate. In this context, the statements of 10 and 15 minutes, though different, are not inconsistent. During each interview, the victim tells us the rape occurred over a relatively brief period of time, a matter of minutes.*

**Second, you may argue a child's statements to be inconsistent but explainable.** If the inconsistencies are unimportant such as giving different colors of the room where the rape occurred, ask the jury to think of an important event in their lives such as a wedding. Ask them to think of how many times they have told stories of the wedding over the years. Ask them if they have been consistent as to each detail each time they have told the story. Remind them that sometimes we are tired and may not tell all the details of an event. Sometimes we are responding to different questions

and that accounts for emphasizing different aspects of a story. Sometimes we have not correctly heard or understood a question and thus give a different answer. As time passes, our memory for details fades. The day after our wedding, we may recall the gift Aunt Bertha gave. Several years later, we may not even recall that Aunt Bertha was at the wedding. How can we expect more of a child than we expect of ourselves as adults?

- b. **Attack the interviewer.** In many child abuse cases, particularly child sexual abuse cases, the defendant does not attack the child but rather the person or persons who interviewed the child. In response, concede there is no perfect interview and if the defendant can point to a handful of questions that could have been phrased differently, so what? The question is whether the interview or interviews as a whole were so improper the child was coerced into making a false statement. If you have a video taped statement which is admitted into evidence, challenge the jury to find any statement of the interviewer in which the child was threatened or even encouraged to say something false. Point out statements of the interviewer encouraging the child simply to tell the truth. Recite to the jury numerous open ended, clearly proper questions the interviewer asked. Point out times in the interview where the child disagreed with an assertion of the interviewer. Perhaps the child denied penetration. A denial such as this can be used to show the child was not manipulated by the interviewer. You may also point out that the interviewer asked improper questions which benefited the defendant. For example, the interviewer may have asked a young child how many times the abuse happened. Unable to comprehend the value associated with a number, the child may have said the abuse took place a million times. Point out to the jury that this was clearly an inappropriate question given the child's age and that it is ironic the defendant has no qualms about this question.
- c. **Its Mom's fault.** In cases of child abuse in which the accusation is Mom put the child up to making the accusation of abuse in order to score points in a custody fight, a prosecutor has several counter punches. Many of the arguments already advanced may be available to negate the claim that a custody battle is behind the allegation. For instance, if the child and mom are out to get the defendant, why is the allegation not more egregious than it is? How is it that the police could find some corroborating evidence? How convenient that even the defendant joined in the conspiracy

and made incriminating statements. Do not, though, stop here. Take the issue of the divorce and use it as further evidence corroborating the victim's allegation. Perhaps the divorce came about because of the abuse of the child. If the allegation arose after the abuse, argue that once the defendant was out of the home and mom was no longer supportive of the perpetrator, the child felt free at last to disclose the abuse. If the child first revealed the abuse to a teacher or friend, this also indicates Mom was not behind the allegation. If it was Mom, after all, would we not expect to see her marching the child into the police station to make a statement?

- d. **When appropriate, mock the defendant's argument for its outrageousness.** A defendant may claim that although he is the child's father and has lived with her all his life, he has never been alone with the child. In response, you may argue: *In the history of fatherhood, has there ever been a man who went to such great lengths to avoid his daughter? In this household, apparently, Mom never went anywhere without the children. Are we to believe that if Mom, Dad, and child were watching TV in the living room, and Mom went to the bathroom, Dad would follow Mom or run outside to avoid being alone with his daughter? Does this child have the plague? Members of the jury, once you uncover this story to be the lie that it is, ask yourself why did the defendant lie?*

I once had a case where the defendant's counsel proudly produced letters the victim wrote the defendant expressing her love. This, supposedly, was inconsistent with her claim that Dad abused her. In such a case, the following response would be appropriate: *Let me get this right. According to the defendant, the victim loves him and thus you can't trust her. Does that make any sense? The fact of the matter is that it is precisely because of her love that you can trust this victim. A child who harbors only affection for her father yet is willing to tell you the evil her father committed is inherently trustworthy. If you love someone, you do not falsely accuse that person in an effort to send him to prison. What apparently upsets the defendant is that his daughter does not love him enough to perjure herself.*

## 5. Other thoughts

- a. Look at the jury
- b. Point at the defendant
- c. Ask for a verdict of guilty

- d. Use analogies to drive home complex legal concepts. To explain the concept of circumstantial evidence, you might try this: *Members of the jury, the court has given you a definition of circumstantial evidence but let me give you a hypothetical that drives the point home. Let's say that before you go to bed for the night one November evening in Minnesota, you notice there is no snow on the ground. Let's say that when you wake up the next morning, there is snow on the ground. Combining the fact of an absence of snow before you retired with the presence of snow when you woke up, you conclude it snowed during the night. Now, that is not the only conclusion you could have reached. Maybe someone brought a truck filled with snow and dumped it on your lawn. This, however, is not consistent with our every day understanding of the world. We rely on circumstantial evidence each day of our lives when doing so makes sense. Members of the jury, it makes sense in this case.*
- e. Use powerful quotes at least once in your closing argument.
  - 1) *"Someday, maybe, there will exist a well reasoned, well informed, and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child's spirit."* Erik Erickson.
  - 2) *"Child abuse leaves a footprint on the heart."* Anna Salter
  - 3) *"If wishes were changes, we'd all live in roses, and there wouldn't be children who cry in their sleep."* Nanci Griffith

## **Recantation Issues**

RECONTATION: If the child recants before or after trial, do not automatically dismiss the case. You can salvage the case if:

### A. The child's original statement must be admissible

- 1. Medical diagnosis exception. A statement is not hearsay if "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." FRE 803(4).

**NOTE: Train your physicians to explain the purpose of the examination to the child so that this exception is applicable. If the child is unaware she is speaking to a medical professional, the medical diagnosis exception is**

**inapplicable. *Ring v. Erickson*, 983 F.2d 818, 820 (8<sup>th</sup> Cir. 1993).**

2. Catch all exception to the hearsay rule. A statement may be admissible if not otherwise covered by the hearsay rules but which contains "equivalent circumstantial guarantees of trustworthiness." FRE 803(24). In determining the reliability of a child's statement, the U.S. Supreme Court has listed the following factors:

- a. spontaneity
- b. consistent repetition
- c. mental state of the declarant
- d. use of terminology unexpected of a child of similar age
- e. lack of motive to fabricate
- f. NOTE: the evidence used to convict must possess indicia of reliability by virtue of inherent trustworthiness, not by reference to other evidence at trial. *Idaho v. Wright*, 497 U.S. 805 (1990).

Other reliability factors may include:

- a. statements are not the product of extensive interrogation
  - b. the statements are not the result of leading questions
  - c. victim is reluctant to speak to men about the incident
  - d. victim does not agree with everything the questioner asked
  - e. the individual testifying about the child's statement has no motive to fabricate. *State v. Bellotti*, 383 N.W.2d 308 (Minn. Ct. App. 1986).
  - f. the individual receiving the statement has no preconceived notion of what the child would or should say. *State v. Edwards*, 485 N.W.2d 911, 915-16 (Minn. 1992).
3. Other Exceptions: excited utterance, present sense impressions. FRE 803(1),(2). Unfortunately, these exceptions presuppose a prompt report following the assault. Also consider rule 801 (allowing prior statements of a witness to be admitted into evidence if they are statements of identification made after

perceiving the person, consist of previously sworn testimony which is inconsistent with the present testimony, or which are consistent statements used to rebut a claim of fabrication). Rule 806 (when a hearsay statement is admitted, "the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.)

- B. Corroborative evidence (This evidence is not relevant under *Idaho v. Wright* to evaluate the reliability of a child's statement but it is obviously relevant to determining the defendant's guilt).
1. Search warrants for pornography or other items used in the assault or grooming of the child. Even if the evidence appears innocuous on the surface, it may be of assistance in proving the reliability of the child's memory. For instance, if the child describes being abused on a particular blanket or in a setting with unique characteristics, seizure of the blanket or other items will document the child's veracity.
  2. Incriminating Statements. This includes not only statements the accused made to the police, but to other persons. Also, consider the use of controlled phone calls, etc.
  3. Other victims/bad acts. It is unlikely that the defendant in your case abused only one child. Men who molest girls average 19.8 victims. Men who target boys average 150.2 victims. A study of 561 sex offenders revealed these men victimized an astonishing 195,407 children. Abel, et. al, *Multiple Paraphilic Diagnosis Among Sex Offenders*, 16 BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 153-168 (1988). The more of these victims an investigator discovers, the stronger the case becomes.
- C. An expert is likely necessary to explain the recantation to the jury. Many states have allowed expert testimony concerning recantation. See e.g. *Wheat v. State*, 527 A.2d 269 (Del. 1987); *Potter v. State*, 410 N.W.2d 364 (Minn. Ct. App. 1987); *Sexton v. State*, 529 So.2d 1041 (Ala. Crim. App. 1988); *State v. Spigarolo*, 556 A.2d 112 (Conn. 1989); *State v. Davenport*, 806 P.2d 655 (Okla. Crim. App. 1991); But see *Davidson v. Commonwealth*, 445 S.E.2d 683 (Va. Ct. App. 1994)(holding that prosecution failed to establish that recantation is a principle generally accepted as reliable by the scientific community). In Vermont, see *State v. Gokey*, 574 A.2d 766 (Vt. 1990)

