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Thirteen Tips for Cross Examining Child Abuse Defendants And Defense Witnesses

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Jurors living in a media age expect sparks to fly when a witness is being cross-examined. If a prosecutor fails to obtain a complete confession from a defendant during cross-examination, or at least inflict significant damage, some jurors will assume the government's case is flawed. Although "Perry Mason" trial moments are rare, it is possible to score points in virtually every cross-examination. to this end, consider the following thirteen tips.

1. Be prepared. An effective cross-examiner has a thorough understanding of the case. Be familiar with the evidence to be presented by both sides as well as all information contained in investigative files, medical records, and social service files even if the documents will not be introduced into evidence.

Thorough preparation, by itself, will produce gems during cross-examination. In one case, a defense expert was attacking the manner in which various parties had interviewed a child sexual abuse victim. As one example of the child's suggestibility, the defense expert contended the child's allegation of abuse had been "escalating" during counseling. Although the prosecutor did not expect the counseling records to be offered into evidence, the prosecutor had read each page of the documents and understood the contents far better than the defense expert. The prosecutor knew that rather than escalating the allegation of abuse, the victim had begun to minimize the abuse as the trial neared. As a result, the following cross-examination was possible:

Prosecutor: You testified on direct examination that during counseling this child's allegation of abuse has been escalating. are you certain of this?

Witness: Yes

Prosecutor: You base this testimony solely on your review of the counseling records?

Witness: Yes

Prosecutor: Do you have those records with you today?

Witness: Yes, I do.

Prosecutor: Using the counseling records, can you cite to the jury even one example that the child's allegation has been escalating?

Witness: There are hundreds of records here, it could take me all day.

Prosecutor: Are you changing your testimony?

Witness: No, I'm not.

Prosecutor: Well, then, I think it's important to see if there is any evidence to support your testimony. Take your time, look through the records, and let us know if you find anything that will support your testimony.

After several minutes of embarrassed searching in front of the jury, the witness admitted she may have been mistaken.

1. Have your investigator contact each defense witness and then contact each defense witness yourself in an effort to assess the witness' demeanor. If a witness declines to speak with you or your investigator, send the witness a certified letter expressing your disappointment. In the letter, remind the witness that you do not represent the alleged victim, you represent the state. Accordingly, your sole duty is to make sure justice is done. Advise the witness that you will not prosecute an innocent person and that the witness should come forward if she has any exculpatory evidence. When the defense witness takes the stand, you can show bias. Your cross-examination could include the following questions: "Madam witness, is it true that you refused to talk to the police about this case? Is it true that you refused to talk to me about the case? You did, however, speak with the defense investigator? You also spoke with defense counsel? Did you receive a letter I wrote to you? Did you read the letter? 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.)

If the prosecutor makes contact with the witness, put the witness on the speaker phone or have the witness come to your office. Have a third party, such as a paralegal or administrative assistant present. In this way, the prosecutor can impeach the defense witness without the need to personally testify.

3. Understand the limitations of cross-examination. Robert Kennedy loved to tell of a witness appearing before a senate investigating committee. When asked if he had a lawyer, the witness responded "No, sir. I decided to tell the truth."[2] Effective prosecutors realize the defendant is unlikely to admit committing the crime and is almost certainly wary of falling into any traps. Accordingly, don't waste time arguing with a witness about the ultimate issue. Instead, focus on drafting questions the witness cannot avoid or evade.

4. Spend time <u>before trial</u> drafting cross-examination questions. Flexibility is important when cross-examining a witness because we can never predict with certainty what a witness will say. 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 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 an opening statement or during cross-examination of your witness.

5. Select a handful of points you want to make on cross-examination and then script questions that 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 baby was a brat? You said the baby never shut up? You told the police you're not sure the baby is your daughter?"

6. Use transition sentences. After you have exhausted one point, make a statement or pose a question that helps the jury understand you are now moving to a new topic. "Mr. Defendant, let's discuss your feelings about his child."

7. Set up a brick wall before knocking it down. Before moving in for the kill, an effective cross-examiner boxes the witness into a corner. Before the witness realizes it, the trap is sprung. Assume, for example, the defendant is charged with assaulting his five and seven year old sons. The defendant claims the defense of reasonable force. According to the defendant's statement to the police, he was in the living room drinking beer and watching football on television when he hears a crash in another room. The defendant races to the other room and sees his two boys standing over a broken ash tray that has sentimental value to the father. The defendant asks the children who is responsible. Both boys claim the other is responsible. The defendant proceeds to "discipline" the children by spanking each until their buttocks are severely bruised. In looking at these facts, you may be able to box the defendant into a definition of reasonable force and then, using his statements to the police, show he exceeded his own definition of reasonable discipline.

The brick wall. "Mr. Defendant, you claim your spanking of the boys is nothing more than reasonable discipline? You spanked the boys because they broke an ash tray? Would it be reasonable to hit a child who did nothing wrong? Would it be reasonable to hit a child who tells you the truth?"

Knocking the wall down. "Sir, were you in the room when the ash tray was broken? You don't, then, know who is responsible for breaking the ash tray? It's possible that only one child is responsible for breaking the ash tray? It's possible that one of the boys told the truth when he said he didn't do it? In that case, would it be reasonable to discipline a child who did nothing wrong? Would it be reasonable to discipline a child for telling the truth?"

8. Use the defendant to vouch for the victim's credibility. Compare the victim's statement against the defendant's and highlight every claim the defendant corroborates. These points of agreement can be turned into questions that allow the prosecutor to use the defendant as a witness of the victim's veracity. In one case, for example, a young victim said she was sleeping in a bedroom basement the night her mother's boyfriend slept over. The girl said she had a dog

that got outside and was scratching on a basement window. The girl said mom's boyfriend went outside and retrieved the dog and brought the animal to the child. Seeing the girl was awake, the man gave the girl a hug, a kiss, and then climbed into bed and began fondling her vagina. When interrogated by the police, the suspect denied sexually abusing the girl but admitted all other aspects of the victim's statement. These admissions could be used to script the following cross examination: "When Suzy says she slept in the basement bedroom, she's telling the truth? When Suzy says she has a dog, she's telling the truth? When Suzy says the dog got outside and was scratching on a basement window, she's telling the truth? When Suzy says you brought the dog to her, she's telling the truth? When Suzy says you gave her a hug, she's telling the truth? When Suzy says you gave her a kiss, she's telling the truth? When Suzy says you got into bed with her, she's telling the truth?"

9. Explore the defendant's relationship with the victim. "Do you love your daughter? 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 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? The answer, you can argue, is a father who abuses his daughter.

10. 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? What is a hymen? Was anyone present when you conducted this examination?" What instruments, if any, did you use for this 'examination?' Did you use surgical gloves? You chose to do this yourself rather than take her to a doctor? You're not suggesting, are you, that you could do a better examination than a gynecologist?"

11. On the other hand, if there is a chance the defendant can modify or explain an implausible answer, you may not wish to give him the opportunity. In one case, for example, the defendant got angry with the prosecutor 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 the

defendant to assert he had never been alone with his daughter in the 12 years they lived together. If the prosecutor pointed this out, the defendant 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.

12. Explore size differential. To get the jury to see the abuse through the eyes of a young victim, a prosecutor need ask the defendant only four questions. "How tall are you? How much do you weigh? How tall is your four-year-old son? How much does your son weigh?"

13. Listen to the witness' answer. Though many cross-examination questions can be "scripted" out, do not get so caught up in the list of questions or topics that you overlook an opening the defendant may give you. Assume, for example, a prosecutor is cross-examining a mother for the death of her daughter. The mother claims that Battered Women's Syndrome prevented her from intervening when her husband tortured the child to death. During cross-examination, the mother begins to sob and volunteers "I tried to help her." The prosecutor now has 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?"

Conclusion. Hubert Humphrey claimed that "child abuse has been ignored because children have no political muscle, no effective way of articulating their needs to those of us who write the law."[3] In courtrooms across this land, prosecutors have the opportunity to ensure that jurors, the enforcers of the law, hear the cries of victimized children. Mastering the art of cross-examination will go a long way toward realizing this dream.

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[1] Director, APRI's National Center for Prosecution for Child Abuse.
[2] MAKE GENTLE THE LIFE OF THIS WORLD, THE VISION OF ROBERT F. KENNEDY 111 (MAXWELL TAYLOR KENNEDY, ED.) (1998).
[3] SHELDON D. ENGLEMAYER & ROBERT J. WAGMAN, HUBERT HUMPHREY 313 (1978).

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