



Update

**Unsafe Havens II:
Prosecuting Technology-
Facilitated Crimes
Against Children
March 5 – 9, 2012**

Held at AOL in Sterling, Virginia This is an advanced trial advocacy course focusing on the prosecution of technology facilitated child sexual exploitation cases. In addition to presentations on related topics, students will conduct a trial from opening statements to presenting the state's case to cross-examining a defense expert to closing statements.

**Unsafe Havens I:
Investigation and
Prosecution of Technology-
Facilitate Child Sexual Ex-
ploitation
Date: Summer 2012, Location
TBD**

This comprehensive five-day course is designed to
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When Sparks Fly In Defense of Child Victims: Tips for Cross Examining a Defendant or Defense Witness

By Victor I. Vieth¹ and Suzanna Tiapula²

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 may assume the government's case is flawed. Although "Perry Mason" moments and its modern parallels³ are rare, it is possible to score points in virtually every cross-examination. To this end, consider the following nineteen tips.

FIRST, 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, can 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 sessions. Although the prosecutor did not expect the counseling records to be offered into evidence, 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?

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 pages of records here, it could take me all day.

Prosecutor: Are you changing your testimony?

Witness: No, I am not.

Prosecutor: Well, then, I think it is important for the jury to see if there is any basis 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. This successful cross-examination was simply the result of a prosecutor being thoroughly prepared for trial, who understood the facts and records much better than the defense expert.

In some cases involving child maltreatment, preparation involves analysis of the environment or context in which the abusive event occurred and the acts of omission. For example, in cases involving allegations of neglect it is often helpful to map all potential resources that the defendant caregiver could have accessed (family members, neighbors, institutional resources such as services offered at public health clinics or other medical safety net providers accessed by the caregiver).

SECOND, encourage investigators to always record the statement of the defendant/respondent 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.

THIRD, have your investigator contact each defense witness and then contact each defense witness yourself in an effort to assess their demeanor.

If a witness declines to speak with you or your investigator, send a certified letter expressing your disappointment and letting them know that if they change their 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. Urge the witness to come forward if he or she has any exculpatory evidence.

When the defense witness takes the stand, you can show bias. The cross-examination could include the following questions:

Is it true you refused to talk to the police about this case? Is it true you refused to talk to me, the prosecutor, about this case? You did, however, speak with the defense investigator? You also spoke with the defense counsel? Did you receive the 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).

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

FOURTH, 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."⁴ Effective prosecutors realize

the defendant is unlikely to admit committing the crime and is almost certainly wary of falling into 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.

FIFTH, spend time before trial drafting cross-examination topics and questions.

Flexibility is important when cross-examining a witness because you can never predict with certainty what a witness will say or what path the witness will take on the stand. 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. In civil child protection cases, the attorney may be able to depose the accused, serve interrogatories or otherwise have freer access to information. Accordingly, there is even less excuse for failing to adequately prepare for cross-examination.

SIXTH, select a handful of points you want to make on cross examination and then script short, pointed concessions favorable to the state's case, which go a long way in strengthening the credibility of your victim.

Goals for a proactive cross-examination involve "approaching" the ultimate question but leaving the ultimate question for closing argument. For example, one point could be *opportunity*. "Mr. Defendant, you were at home the evening of December 1st? Your wife was not at home with you, correct? Baby Lisa was at home, correct? You told Officer Jones you were alone with baby Lisa from 6 p.m. on December 1st until 7 a.m. the next morning?" These are all questions establishing opportunity. The zinger, "The defendant alone had opportunity to kill baby Lisa," can now be introduced in argument. If the ultimate question is asked in direct, the defendant has an opportunity to qualify and weaken your argument with respect to motive. A second point could be *motive*. "You told Officer Jones the

kid was a brat? You said the kid never shut up?"

In scripting out questions, the goal is to elicit concessions the defendant would have to admit or look silly denying. For example, in a rape case involving a teenage victim where the defense was that the 17-year-old victim had propositioned the defendant for money and the victim had agreed to have sex with the defendant for the princely sum of \$3, a defendant taxi driver was asked the following: "You picked up the victim in your taxi on the Sunday morning, May 5th? She was dressed in white for church? She was alone? She sat in the back of your taxi? You discussed her family with her, correct? You knew she was from another country, correct?" The ultimate question, "Would a victim dressed in an outfit for church proposition taxi drivers for \$3?" can be saved for argument since the elements were established in direct.

SEVENTH, 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. A transition sentence can be as simple as saying, "Mr. Defendant, now let's discuss your feelings about this child."

EIGHTH, 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. 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 statements 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 ashtray that has sentimental value to the father. The defendant demands that the children tell him who is responsible. Both boys claim the other child broke the ashtray. The defendant proceeds to "discipline" the children by physically striking the buttocks of each child, resulting in severe bruising. In looking at these facts, a prosecutor may be able to box the defendant into a definition of reasonable force and then, using the statements to the police, show the defendant exceeded his own definition of reasonable

force.

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

Knocking down the brick wall. “Sir, were you in the room when the ashtray was broken? You don’t, then, know who is responsible for breaking the ashtray? Is it possible that only one child is responsible for breaking the ashtray? Is it possible that at least one of the boys told you 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 hit a child who truthfully told you he did nothing wrong?”

NINTH, develop a series of questions to get the defendant to vouch for the victim’s credibility. Compare the victim’s statement against the defendant’s statement and highlight every claim of the victim that the defendant corroborates. These points of agreement can be turned into questions that allow the prosecutor to use the defendant as a witness to the child’s veracity. In one case, for example, a young victim said she was sleeping in a basement bedroom 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, 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 Molly says she slept in the basement bedroom, she is telling the truth, isn’t she? When Molly says she has a dog, she’s telling the truth? When Molly says the dog got outside and was scratching on a basement window, she’s telling the truth? When Molly says you brought the dog to her, she’s telling the truth? When Molly says you gave her a kiss, she is telling the truth? When Molly says you gave her a hug, she’s telling the truth? When Molly says you climbed into bed with her, she’s telling the truth?

This cross-examination sets up an argument that, according to the defendant, the child is right about everything surrounding the abuse except the abuse itself.

TENTH, explore the defendant’s relationship with the victim.

Consider the value of the following cross-examination questions: “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 the prosecutor to argue there is something wrong. After all, what father and daughter do not have a loving relationship? Obviously, a prosecutor can argue, fathers who abuse their daughters do not have a caring relationship with their child.

ELEVENTH, find inconsistencies in the various statements the defendant has given and hammer them home to the jury.

It is imperative that the defendant be interviewed on tape and a transcript be made. The longer the defendant is interviewed, the better. It is also critical to interview neighbors, employers and others the defendant may have spoken to about the abuse. Although the defendant will likely deny the abuse to everyone, he may deny it in different ways. For example, he may tell his wife the child is confused but he tells his employer the child is lying. He tells his best friend the mother planted the idea of sexual abuse in the child’s mind. 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 far less inconsistent than the defendant. If, though, there is a possibility the defendant may be able to offer an explanation for previous inconsistent statements he has made, it may be best to simply get all of these competing statements before the jury and then highlight them in closing argument.

TWELFTH, 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’? Did you use surgical gloves? You chose to do this yourself rather than take your daughter to a doctor? You are not suggesting you could do a better examination than a gynecologist?”

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, a defendant got angry with a 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 this defendant to assert he had never been alone with his daughter in the 12 years he lived with her and, if the prosecutor had pointed this out during cross-examination, 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.

THIRTEENTH, explore size differential. To get the jury to see the abuse through the eyes of a young child, a prosecutor needs to 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 he weigh?” Whether in a case of sexual or physical abuse, these questions drive home to the jury how powerless the child was to protect him- or herself or to intervene on behalf of another victim.

FOURTEENTH, explore strength differential.

There is often evidence in a defendant’s lifestyle or occupation that can document his or her strength. Perhaps the defendant is a farmer. If so, the prosecutor 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 a bale of hay. If the defendant goes to the gym, lifts weight or engages in other activities that display his strength, ask him to detail all of this to the jury (i.e., “how many pounds can you lift at the gym?”). Contrast this with the child’s abilities. Even if the victim is physically fit, his or her size alone will render the boy or girl incapable of

matching the perpetrator’s strength.

FIFTEENTH, the appropriateness of exposing a child to domestic violence.

Assume a defendant strikes his wife in front of his little boy. The defendant admits to the police he was drunk and that he hit his wife, but claims it was in self-defense. If one of the charges is child neglect by exposing a child to domestic violence, a prosecutor 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 hit 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? How tall are you? How much do you weigh? How tall is your wife? How much does your wife weigh? You could have taken a blow from your wife and still survived? Instead, you chose to slam your fist into the face of your wife even though you knew your little boy was watching? Were you a good father that night?

SIXTEENTH, explore the defendant’s feelings toward the victim.

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 shaking the baby violently or in any way contributing to the broken ribs and multiple bruises on the boy’s body. In determining, though, whether you are capable of such an act, it is relevant to explore your attitudes about child abuse. Is it wrong for a man to beat his son? Why is it wrong? Look again at the pictures of your son’s injuries. Do you agree the pictures show significant injuries? Do you agree that if anyone intentionally inflicted these injuries, he should be ashamed? Do you love your son? If you ever hurt someone you loved, would you be ashamed? Is it fair to say that

familiarize prosecutors with the various stages of an investigation, pre-trial and case preparation of a child sexual exploitation case that has been facilitated through technology. This course includes a hands-on computer lab.

SafetyNet: Multidisciplinary Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation

Date: Early Fall 2012,

Location: TBD

This intensive five-day course is intended for prosecutors, investigators and computer forensic examiners, investigation and prosecuting technology-facilitated child sexual exploitation cases. This course includes mock trial exercises and a hands-on computer lab.

Please contact NCPCA Senior Attorney Justin Fitzsimmons at jfitzsimmons@ndaa.org or (703) 519-1695 for additional information about these courses.

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the reason you cannot confess your actions to this jury is because you are ashamed of what you did?

SEVENTEENTH, listen to the witness's 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?" Pursuing this line of cross-examination presumes the prosecutor has concluded, *after thorough investigation and thoughtful analysis of dynamics of abuse within the home*, that the mother participated or was an accomplice in the torture of the child.

EIGHTEENTH, be aware of the jury.

A prosecutor should not get so caught up in the battle with the witness that he or she loses sight of the impact on the jury. If, for example, the defendant is a senior citizen and there are a number of elderly persons on the jury, the prosecutor may want to be sure the cross-examination is respectful while still forceful. This can be done by asking the witness if he needs a cup of water or a break.

NINETEENTH, keep in mind some important differences when confronting the accused in a civil child protection case.

In civil child protection cases, you don't have to wait for the accused to be called to the witness stand but, in fact, can call him or her as part of your case in chief.

Think of this strategy in termination of parental rights cases in which the respondent claims the government's efforts at reunification are unreasonable. The child protection attorney could call the respondent to the stand, go through each service plan, and ask him or her if anything about the plan is unreasonable. This strategy may get the respondent off of a carefully prepared script with defense counsel and may be more effective than waiting to cross-examine the respondent.

Conclusion

If a prosecutor has filed charges against a man or woman who has, in fact, abused a child, the cross-examination is of a person who is likely lying under oath. If this is the case, there is a good chance the witness has made inconsistent, exaggerated or unsupportable statements about the events in question. Accordingly, prosecutors who closely scrutinize previous statements of the defendant as well as the witness's answers while testifying will almost certainly be able to undermine the credibility of the accused and increase the chance of bringing justice to a victim.

¹ Director, National Child Protection Training Center. This article is based on an earlier article entitled *Thirteen Tips for Cross-Examining Child Abuse Defendants and Defense Witnesses* published by the National Center for Prosecution of Child Abuse (NCPC) in Volume 13(6) of Update.

² Director, National Center for Prosecution of Child Abuse a program of the National District Attorneys Association.

³ Many younger jurors anticipate some version of the court scene in *A Few Good Men* with Tom Cruise's thundering demand, "I want the truth!" followed by Jack Nicholson's blistering response, "You can't handle the truth!" with a complete admission of Nicholson's guilt.

⁴ MAKE GENTLE THE LIFE OF THIS WORLD, THE VISION OF ROBERT F. KENNEDY 111 (MAXWELL TAYLOR KENNEDY ED) (1988)