

Investigation and Prosecution of Child Abuse

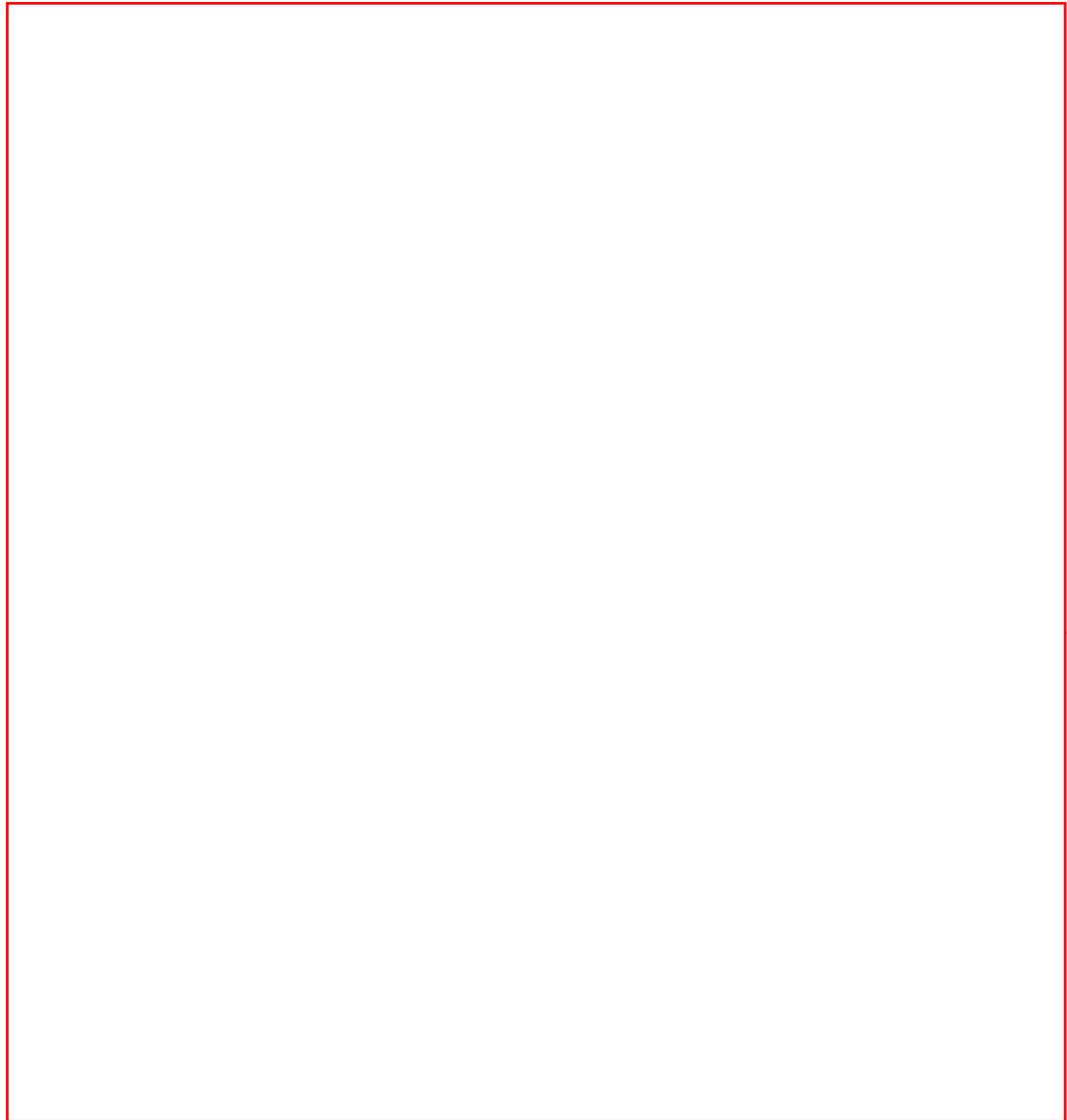
THIRD EDITION



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National Center for Prosecution of Child Abuse

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1. School Teachers

Some jurors want to hear from the child's teacher. If the teacher is to testify, determine whether she will be supportive. A teacher's testimony may be admissible for a variety of reasons. If the teacher is part of the chain of disclosure, simply have her testify about the disclosure and also the details of the disclosure, if this is permissible. Another reason for calling a teacher to the stand is to elicit testimony about emotional and behavioral changes in the victim. If the victim's grades have dropped since the onset of the abuse, the teacher can testify about this change. Some caution is necessary here because some victims of child abuse escape the turmoil of their situations by throwing themselves into schoolwork and becoming straight "A" students. Make sure to explain that dynamic to the jury in your closing argument if that describes the victim.

Defense attorneys may attack the child's character by asking direct or indirect questions about the victim's reputation for truthfulness. If the judge determines that the issue of the victim's character has been raised during your case-in-chief, call a supportive teacher as a good-character witness. If the defense attorney has the defendant

or other defense witnesses testify to the victim's bad character, call a teacher to testify about the victim's good character on rebuttal. Most defense attorneys, however, will attack the child indirectly to negate the opportunity for this type of rebuttal. By calling the victim's teacher, you subtly show the jury that the teacher believes the victim. It also helps the child feel that there are more people on her side. The teacher may also help rebut a claim that the child is unduly suggestive and offer examples from school of the child's resistance to misleading or inaccurate information.

2. Daycare Providers

The daycare provider will often be a witness to whom the abuse was disclosed and can sometimes testify regarding behavioral changes. Daycare people can serve much the same function as teachers: They strengthen your case, they show the child that more people are testifying for her, and they give a subtle stamp of legitimacy to the case. The daycare provider may have information on the child's development, injuries, or lack of injuries at a particular time. A daycare worker may also have had interactions with the defendant. The prosecutor must be on guard that the defense attorney may try to shift the blame for the victim's assault to the daycare provider in cases of physical abuse. If that is the case, it is especially important to produce the daycare provider to refute this suggestion.

3. Child Protective Services Caseworkers

If a child protective services (CPS) caseworker is involved in your case, make sure that you know as much as possible about that file on the case. CPS caseworkers can be crucial witnesses in your case-in-chief, although they may also provide important ammunition for the defense. As part of pre-trial preparation, make sure that the caseworker has carefully reviewed the file and knows that you, the defense attorney, and judge (if applicable) have seen it.

In some jurisdictions, the CPS worker can testify about the child's out-of-court statements, and if the child's statements are not admissible under an exception, at least establish that the child told the worker what happened. You can also use the fact that the victim had to recount the abuse repeatedly to assert that no child would fabricate and maintain a false claim of abuse, given the ordeal she has been put through. Children lie to get themselves out of trouble, not into it. Moreover, the CPS worker can outline the actions he took, such as asking the defendant to leave or removing the child from the home. The prosecutor can then point out in closing that the disclosure caused multiple problems for the child and that the easy response for the child would have been to recant the statements.

The CPS worker will be a major witness if there has been a recantation, since he can describe his knowledge about the pressures placed on the child. In many cases, the CPS worker will have also spoken to the defendant. If the defendant's statements early in the investigation ascribed a ludicrous motive to the victim or one that is different than the motive asserted at trial, you can address the discrepancy in your case-in-chief or on rebuttal. The defendant may have also admitted or corroborated aspects of the victim's testimony in statements to the CPS worker.

Always assess the community attitude toward the child protective agency before calling the worker. The agency is often the scapegoat, as defense attorneys paint a picture of an overzealous child welfare system. If it appears that the defendant was

wrongfully forced from his home, the caseworker's testimony may do more harm than good. On the other hand, a skilled, experienced social worker who handled the case professionally and is a polished witness may do much to reduce, if not eliminate, community biases against the child protective system.

4. *Police Officers*

In many jurisdictions, the police are likely to have talked to the child. Establish that the officer made a report, talked to the victim, and took some action. The officer should explain how, when, and where the statement was taken; the victim's demeanor during the interview; and who else was present during the interview. The police officer should then relate the content of the statement to the jury if it is admissible as a hearsay exception or prior consistent statement. Make sure you have been provided with all notes and reports of the police officer.

Elicit information about the results of searches, photographs of the scene, interviews with the defendant, evidence of flight or use of aliases, and the arrest process. The officer should explain the chain of custody of evidence unless the defense attorney stipulates to the chain of custody regarding physical evidence recovered, including samples taken from the victim at the hospital and submitted by the police officer to the police laboratory. Be as detailed with the police officers in their testimony as is dictated by their helpful observations of the child and resulting investigative action. The officer and CPS worker should detail their training and experience handling child abuse cases, including the number of cases investigated. This is relevant to give the jury background on the witness's qualifications and will allow you to combat the common defense argument that "overzealous" investigators were on a "witch hunt." You can point out that the witnesses have more than enough cases to keep them busy and it makes no sense to conclude they have nothing better to do than try to encourage children to describe abuse when none occurred. The officer may also have sufficient expertise and qualifications to testify as an expert witness. (See, e.g., *People v. Turner*, 608 N.E.2d 906 [Ill. 1993]; *Commonwealth v. Richardson*, 667 N.E.2d 257 [Mass. 1996]; *State v. McMillan*, 590 N.E.2d 23 [Ohio 1990].)

5. *Other Victims*

During the investigation and preparation of the case, you may have become aware of other victims. If the defense opens the door or the judge grants your pre-trial motion to present uncharged victims' testimony, have them ready to testify. Interview, prepare, and present prior victims using the same techniques you used for the child victim in the present case. Emphasize the similarities of the assaults. A checklist or chart of similarities can be extremely helpful.

6. *The Forensic Interviewer*

It is the best practice to have the child interviewed by a well-trained forensic interviewer. The interviewer can be a social worker, police officer, or employee of the local child advocacy center. Every community must have an interviewer who is well trained. At a minimum, the forensic interviewer should complete a 5-day course that teaches the science and art of interviewing. It is also wise that the interviewer

receive continuing education, have his interviews subject to peer review, and stay abreast of the research on interviewing. The interviewer should utilize a protocol consistent with the research that is defensible in court. Interviewers trained through Cornerhouse, Finding Words, or a similar well-established forensic interview-training program should testify about their credentials, the development of the protocol, the necessity of asking a variety of questions in an interview, and the interview itself. A well-trained interviewer is essential to dispel the myth that most children are so suggestible they can be easily led into making and believing assertions against their best interests. Sample direct examinations of forensic interviewers are contained in Appendixes V.11 through V.13.

7. Other Corroborating Witnesses and Evidence

Most criminal cases have witnesses whose reliability will be called into question. This is particularly true in the typical child abuse case in which a young child, perhaps with mental, emotional, or learning difficulties, is called upon to provide the only direct evidence against a mature, articulate adult abuser. The need for corroborative evidence is more pronounced and, because of the nature of these cases, more difficult to obtain.

There is always a need for corroborative evidence despite the fact that most legislatures have enacted laws eliminating the legal need for corroboration. Before deciding to use this type of evidence, consider how consistent the child has been in her recitations and beware of calling witnesses who will highlight inconsistencies.

a. Corroborating the details of the child's account. Anything a child witness says that can be proven through independent and objective evidence should be pursued and presented as evidence. For example, if the child says she was assaulted on a blue cot located in a classroom closet by a teacher who always wore white clothing, the cot could be seized pursuant to search warrant and photographs should be taken of the closet. The photographs not only show that the cot and closet exist but also help the jury understand what happened from the child's perspective. Locate photographs of the defendant in white. Witness testimony about the cot's location or the dressing habits of the defendant could be sought if photographs cannot be obtained. Photographs of the crime scene, including items the child described and/or the items themselves, should be offered as exhibits at trial. These objects may include sexual literature or implements, weapons, drugs, or alcohol. Children may also accurately remember distinctive furnishings such as pictures, wall colors, locks, windows, shades, or bedspreads.

b. Photographs. If you have photographs of injuries to the child, use them as exhibits. Make sure they accurately portray the location of injury, color, and other descriptive aspects of the injury. Likewise, if you have pictures of the child taken by the offender in a sexual abuse case, use them. You may need to lay a foundation for their admission through the child. If this is the case, do so in a way that minimizes the child's discomfort. If the photos are at all embarrassing, do not display them to the judge and jury while the child is still in the courtroom. If you are using the child's possessions or clothing as exhibits, treat them with respect.

Other corroborative evidence might include photographs of the defendant prior to his arrest and photographs of any unique physical characteristics of the defendant

described by the victim. The former can often be obtained from the defendant's colleagues and will show his appearance before he is "manicured" for trial. A search warrant or court order might be used to obtain the latter. Consider presenting evidence about the vital statistics, such as height and weight, of the defendant and victim to show size and strength differences. This will help explain why the child did not resist or was fearful. It will also allow the jury to better evaluate the reasonableness of physical discipline in a physical abuse case.

In a case involving ongoing abuse over a period of years, introduce a picture of the victim at the time the abuse began to remind the jury how young the victim was when the defendant first used his authority and superior knowledge to ensure compliance and secrecy. (See *Mahoney v. State*, 388 N.E.2d 591 [Ind. 1979] [finding no abuse of discretion for admission of photograph of victim, as victim's appearance changed greatly during the 3 years between the time of offense and trial, and photograph may aid jury in formulating more accurate reconstruction of offense].)

In every child abuse case, there is a crime scene that needs to be photographed. The photos may help the child testify as he describes different aspects of the abuse. The photographs also introduce the child's world to the jury. If the abuse took place in the child's bedroom and that room is cold and desolate, the jury may get a sense the child was not treated well. If, on the other hand, the child's room had all the trimmings and trappings of a child's room, the jury may get a sense of the innocence that was destroyed.

c. Out-of-court statements. Hearsay and other evidence of out-of-court statements are discussed in detail in Section IV.F of this chapter. Make sure the investigators have interviewed others to whom the child may have spoken about the abuse. The child may have confided in friends or siblings, asking them to keep the secret, prior to the disclosure that set the investigation in motion. Such statements, if admitted as substantive evidence under a hearsay exception, might provide the *corpus delicti* to allow admission of a defendant's confession or qualify as prior consistent statements to rebut an implication of fabrication by the child. Witnesses from related juvenile court proceedings or transcripts of testimony from these hearings might provide corroborative evidence. If the child testified in juvenile court, that prior testimony may be admissible under nonhearsay rules of evidence. (See Fed. R. Evid. 801[d][1].) If the child is unavailable at the criminal trial because she refuses to testify, testifies to a lack of memory, cannot be located, or for other reasons, the testimony may be admissible as prior sworn testimony. (See Fed. R. Evid. 804[b][1].) Evidence of prior out-of-court statements will strengthen the allegation of abuse, and these witnesses may be able to provide observations of behavioral changes in the child that correspond to the time when the abuse began. Whether the corroborative evidence directly and obviously relates to the facts of the crime should not be controlling. It should be admissible if it meets the relevancy standard; that is, it has any tendency to make the existence of a fact or consequence to the case more or less probable. (See Fed. R. Evid. 401.)

d. Corroborating other events. The child's accuracy in recalling other events occurring during the same period is important to demonstrate the child's reliability in recalling details of the crime. If the child recalls other incidents from that day, witnesses and even photographs may be located to demonstrate the validity of the recollection. For example, if the child went with a neighboring family to the zoo following an episode of abuse, those who accompanied her would be good witnesses.

Photographs of the excursion may, however, cause as many problems as they solve. Juries can be troubled by the image of a happy, smiling face so soon after the alleged abuse. The defense may also be able to elicit from the witnesses who accompanied the child to the zoo that they did not notice any unusual behavior on the part of the child victim. The value of this evidence in enhancing the child's credibility must therefore be weighed against its "defense value."

e. The child's relationship with the abuser. As already touched upon, the relationship between the child and abusing adult may be important testimony to elicit from other witnesses. The testimony of witnesses familiar with the positive relationship between the child and abuser should defeat any attempt by the defense to persuade the jury that the child had a motive to lie.

f. The location of the abuse. Often, a child has been abused in a house occupied by many people unaware of what was occurring, despite defense claims that such abuse could not have occurred without the knowledge of someone in the home. This may be possible because of the location of the room or its uniqueness, such as solid construction, sound proofing, lack of windows, or other features. If at all possible, go to the site of abuse yourself prior to trial so you can understand the statement and be better able to elicit trial testimony. At a minimum, obtain photographs to illustrate critical facts pertaining to the location, and diagram the site for the jury. You may wish to request that the judge allow a jury to view the scene. Do this only when there is no easier way to ensure that the jury understands the evidence and when you believe it to be necessary to refute a defense theory on a critical point. Because of the time and logistical difficulty in arranging a jury view, judges will be reluctant to grant this.

If the child had a daily routine that allowed the defendant exclusive access to the child, the prosecutor should call witnesses to corroborate that routine. If some unusual event in the child's life explains the opportunity for abuse, secure witnesses to corroborate why the child was at the location where the abuse occurred, e.g., the victim's mom was in the hospital so the child stayed with an uncle.

Investigators can also place themselves in the room where the abuse occurred and in other rooms where family members may have been and determine how easy it is to hear noises from one room to another. The argument that someone would have seen or heard the abuse can be attacked by a common sense closing argument from the prosecutor. For hundreds of years, parents have been engaging in marital relations without children or other household guests seeing or hearing the conduct. If a defendant can have sex with his wife and prevent his children from seeing or hearing the event, he is arguably smart enough to molest his daughter without others being aware of the conduct.

g. The defendant's actions after disclosure. Any attempt by the defendant to encourage the victim or others to change their testimony, leave the jurisdiction, or otherwise undermine the administration of justice or the trial process, is relevant to show the defendant's consciousness of guilt. Present any witnesses who can establish that the defendant threatened the victim or her family after the disclosure.

h. Spouses and others involved with the defendant. Consider calling the defendant's spouse as a witness. Marital privilege and spousal incompetency are not applicable in most states in cases involving familial and/or child abuse. The

investigation may have turned up helpful evidence to explore with that spouse. Also, the perpetrator's ex-spouses and/or current and former significant others may provide corroborating information. It may even be possible to use the defendant's therapist as a witness if the applicable state statutes exempt information about child abuse from the relevant privileges. Defense witnesses often know the child, the defendant, their general relationship, and the environment in which the abuse took place. Cross-examination of these witnesses can often corroborate facts provided by the child, such as events of the day or room features and layout. Their observations, too, of a warm relationship between the child and the defendant will add legitimacy to your position that the child had no motive to fabricate. If the case involves physical abuse and a defense claim that the child is "accident prone" or "bruises easily," question these witnesses to show that the child was not always covered with bruises or breaking bones. Use the witnesses in any way you can to cast doubt on the defense explanations.

