

Investigating and Prosecuting Cases of Child Abuse

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- I. Introduction
- II. **Developing a Multi-disciplinary response to cases of child abuse.** According to the National Center for Prosecution of Child Abuse, “successful prosecution of child abuse requires different practices than those used to respond to other types of crime. One of the major differences is the critical role that information from a variety of individuals and agencies—law enforcement, child protective services (CPS), medical personnel and mental health professionals—plays in building strong child abuse cases. Experts who deal with children, abuse issues, courts and trials on a daily basis agree that the optimal response to child abuse involves a coordinated multidisciplinary approach to share information and establish responsibilities.” INVESTIGATION AND PROSECUTION OF CHILD ABUSE 512 (1993). Coordination of efforts improves cases, is mandated in 2/3rds of the states, and sends a message to the community that combating child abuse is a top priority.
- III. **Develop a protocol for the investigation and prosecution of child abuse cases.** A sample protocol from Cottonwood County, Minnesota is attached as an exhibit. Read the document as a tool and not a panacea. Important provisions for any protocol include:
 - A. **Limit those who investigate cases of abuse.** Cottonwood did this by selecting a handful of officers and social workers and pouring all training into these individuals. The protocol provides that only investigators receiving this specific training will be allowed to handle a case of child abuse.
 - B. **Limit those who prosecute a case of child abuse.** If only a handful of prosecutors are assigned to handle a case of child abuse, these professionals will develop greater expertise by doing it more often.
 - C. **Involve the prosecutor early in the case.** Ideally, a prosecutor should be contacted shortly after the report is received and be allowed to give input into the case. If a child friendly interview room with a two way mirror is constructed, the prosecutor can, and should be present for the interview.
 - D. **Develop one or more child friendly interview rooms.** If video equipment is to be used, care must be given to select high quality taping

and recording equipment which can capture the low voices and whispers of children. Though toys and artwork interesting to children would be appropriate for a waiting area, the interviewing room itself should be free of toys or wall decorations which may be distracting to a child. Chairs comfortable and sized to fit children should be selected. Beanbag chairs often fit this description. A sketch board visible to the camera should be in between the interviewer and the child's chair which can be used by the interviewer to draw pictures and take notes the child can see. Anatomical dolls should not be immediately visible to the child but should be stored in a box or cabinet near the interviewer where they can be readily accessed if necessary. If the taping equipment does not have a clock or other mechanism which discloses to a viewer the time of the interview, you may wish to place a clock above the sketch board which is visible to the camera. When selecting the room, make sure it is easily accessible. If you have a designated room in the police station, for instance, make sure the room is not used for other meetings which cannot be canceled on a moment's notice. Also, can the child be ushered in and out of the building with as little fanfare as possible? If the child has to go past a number of other rooms and officers before she gets to the interview room, the child may be intimidated by the whole process. In small jurisdictions such as Cottonwood, investigators must do the best they can with the facilities available. In selecting a color for the room, you may wish to consult with a local child counselor. Some colors are believed to make children more comfortable than others.

- E. **Train your interviewers in the art/science of interviewing child abuse victims.** There is no substitute for comprehensive, intensive training of child interviewers. Many jurisdictions have expended time and resources on videotape cameras, child friendly interview rooms, and even child advocacy centers without having ever taken the prerequisite step of adequately training forensic interviewers. A child friendly environment may enhance a child's ability to communicate but atmosphere alone cannot make a bad interview good. Experience is also not a substitute for training. As one commentator notes, "(s)ome of the poorest interviews that we have observed were done by workers who had been interviewing children for years." James Wood, Kimberly A. McClure, & Rebeca A. Birch, *Suggestions for Improving Interviews in Child Protection Agencies*, 1 CHILD MALTREATMENT 223, 229 (1996). At a minimum, investigative interviewers must be well-versed in linguistics, child development, memory and suggestibility issues, the dynamics of abuse, and commonly accepted interview guidelines. Wood, et al, *Suggestions for Improving Interviews in Child Protection Agencies*, 1 CHILD MALTREATMENT 223, 229 (1996). To address the need for training, APRI offers basic and advanced education in the investigative interviewing of children.
- F. **Develop an interview protocol.** It is important to develop a protocol for the interview of child abuse victims. Many investigators have an

understanding of child development and linguistics but are unsure how to begin an interview and to transition to different topics. An interview protocol can overcome this obstacle. An interview protocol “provides structure and guidelines for what often can be an unwieldy process...the protocol provides checkpoints that interviewers learn and use to orient themselves throughout the interview process.” Deborah Davies, et al, *A Model for Conducting Forensic Interviews with Child Victims of Abuse*, 1 CHILD MALTREATMENT 189 (1996). An interview protocol “facilitates internal consistency among interviewers and uniformity between interviews.” *Id.* There are many interview protocols in use around the country. There are strengths and weaknesses to each protocol and no one protocol represents a panacea to the problems inherent in the interviewing of children. In selecting a protocol, investigators must choose a model which is supported by the research on interviewing children and which can be defended in court. The protocol should be flexible to allow for variations between interviews depending on the developmental level of the child. One protocol is RATAAC. Each letter stands for a different component of the interview. The “R” stands for rapport. The “A” stands for anatomy identification. The “T” stands for touch inquiry. The second “A” stands for abuse scenario. The “C” stands for closure. For more information about RATAAC, contact CornerHouse Interagency Evaluation Center, 2502 Tenth Avenue South, Minneapolis, MN 55405. (612) 813-8300.

- G. **Train investigators to obtain corroborating evidence, including incriminating statements from the suspect.** Cottonwood County’s protocol requires each officer to receive specific training in obtaining incriminating statements.
- H. **Review your protocol yearly.** Note any attacks in court and make any needed alterations.

IV. Investigating child abuse cases

- A. **Seize or at least document all physical evidence.** If investigators think only in terms of DNA, hair, fibers, semen, and blood, we will not have physical evidence in most abuse cases, certainly not in most sexual abuse cases. If we are to obtain physical, corroborating evidence in most cases, we need to expand our definition of physical evidence. Take the child’s statement apart line by line and find and ask yourself what, if anything, in the child’s statement can be corroborated. If the child claims she missed a lot of school as a result of the abuse, get the school records. If the child says dad drinks a certain brand of beer, search the suspect’s house for that brand. If the child says the color of the room she was abused in was blue, take a picture of the room. If the child says she was abused while on vacation or on a camping trip, ask if the family took any pictures of the trip and seize them.

B. **Obtain incriminating statements in cases of sexual abuse.** Although more difficult than in other cases, child abuse suspects will often confess in the hands of a skilled interrogator. Professionals who deal with child abusers are increasingly aware that this breed of criminal is more difficult to deal with than most. This is particularly true when the offender sexually preys on children. Sex offenders “cannot deal openly and honestly with who they are or what they have done. This is not surprising: With something to hide, they have become practiced at hiding it , often (in part) from themselves as well as from others.” MICHAEL A. O’CONNELL, ERIC LEBERG, & CRAIG R. DONALDSON, *WORKING WITH SEX OFFENDERS* 14 (1990).

The need to hide makes child abusers extraordinary manipulators. According to one observer, “child molesters particularly try to manipulate their wives or the guardians and parents of their victims, their probation officers, and the court...a child molester can sometimes outwit even the greatest efforts of those involved.” ERIC LEBERG, *UNDERSTANDING CHILD MOLESTERS* 91 (1997). The manipulative skill of child abusers enables many to abuse numerous children with little chance of getting caught. In a study of 561 sex offenders, these offenders accounted for the abuse of an astonishing 195,407 victims. Gene G. Abel, et al, *Self Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 *JOURNAL OF INTERPERSONAL VIOLENCE* 3, 17-19 (1987).

Investigators report that unless caught in the act or confronted with overwhelming evidence, a child abuse suspect can be expected to deny the allegation. Breaking down the wall of denial is not easy and some law enforcement protocols provide that officers must receive training in the art of obtaining a confession from a child molester before they will be assigned such a task. As one investigator notes, “(s)imply asking an alleged perpetrator if he molested a child does not constitute a proper interview. Any criminal investigator needs effective interviewing skills.” Kenneth V. Lanning, *Criminal Investigation of Sexual Victimization of Children* in *THE APSAC HANDBOOK ON CHILD MALTREATMENT* 261 (1996).

An investigator preparing to interview a suspected child molester may wish to consider the following ten tips:

1. ***Never give up.*** A child molester is unlikely to confess quickly to a crime. Accordingly, an officer should assume a lengthy interrogation is necessary and not stop the interview simply because the suspect is in denial. As long as the suspect is willing to talk and has not invoked his right to counsel or to remain silent, the interrogation should continue. Once the suspect is charged and counsel is appointed, it is a safe bet he will no longer cooperate with the investigation.

Many investigators prefer to interview a suspect alone in order to develop rapport. Even a skilled interviewer, though, can benefit from the input of

others during the interview. If possible, place the suspect in a room where the interview can be watched by other investigators via closed circuit television or other mechanisms. When the primary interviewer takes a break, she can consult with the investigators watching the interview. When it comes to breaking down a child abuser's wall of denial, two heads are better than one.

2. ***Confront each denial.*** An investigator should not allow a suspect's denial of the charge to go unanswered. Although an investigator should not be belligerent or adopt a posture which will end the suspect's cooperation, the implausibility of the suspect's denial should not go unchecked.

If a suspect says the child is mistaken and may be referring to being bathed or to some other innocent touch, the officer should respond by saying something to the effect "no, I was there when your daughter described your conduct and she clearly referred to an act of molestation."

If a suspect maintains that children fantasize or invent tales of abuse, an interviewer can say "I've been an investigator for many years and I've never known a child to invent a claim of abuse."

If a suspect suggests the officer planted the idea in the child's head, the officer can point to the precautions she took to avoid misleading the child. If the officer is properly trained in child development and linguistics, she can tell the suspect "I've received specific training in speaking to a child to avoid any possibility of compelling an unreliable answer."

Many denials can be confronted with evidence. Indeed, some law enforcement protocols suggest the suspect should be interviewed only when all other evidence has been collected. DONNA PENCE & CHARLES WILSON, TEAM INVESTIGATION OF CHILD SEXUAL 110-111 (1994). While this may not always be possible, there should be some evidence with which to confront the accused. Ideally, a perpetrator can be confronted with medical evidence. Unfortunately, most cases of sexual abuse do not involve medical evidence. INVESTIGATION AND PROSECUTION OF CHILD ABUSE (2D ED) (APRI'S NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, ALEXANDRIA, VA) AT 115. There may, however, be other pieces of evidence such as a sexually explicit drawing made by a child or the audio or videotaped interview of the child.

3. ***Emphasize the child's love for the perpetrator.*** If the abuse is within the family unit and the perpetrator contends the child is lying, remind him of the child's affection for the perpetrator. For instance, an officer can say to a suspect: "It's clear to me that your daughter loves you and it is painful for her to speak of these things. Given her love for you and the discomfort of these memories, it is simply implausible to conclude she is lying."

4. ***Emphasize the perpetrator's love for the child.*** Even abusive parents may love their children. If the perpetrator does at some level care for the child, the interviewer can point to the child's pain and ask the caretaker to alleviate it. As an example, the interviewer could take the following approach: *"I've been a police officer for a long time and I know what it's like for children to have to testify about these things. Kid's don't fit well in witness boxes. Their feet don't touch the floor and they can barely see over the wooden frame of the witness box. In front of her father and 12 strangers we then make the child speak of sexual matters we would feel uncomfortable talking about. Then we turn her over to a defense attorney to be ridiculed. Don't do that to your daughter. You love her too much. Let me go home tonight and tell her that Dad owned up to what he did and is going to get help. Don't make me go to her and tell her Dad says she's a liar. She needs to heal as well."*

5. ***Explore the possibility the suspect was abused as a child.*** Although most child abuse victims do not grow up to be child abusers, many child abusers were victimized in their youth. See generally, ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS 48 (1988). It is logical, therefore, to explore the suspect's childhood. If the suspect acknowledges abuse as a child, ask him for details as to who abused him and how. It may be that his pattern of victimization parallels the type of abuse he has inflicted as an adult.

Ask the suspect if, as a child, he ever told anyone about the abuse. Chances are, he spoke of the abuse to a mother or other relative but was not believed. If so, ask the suspect how it feels to be abused and yet not believed. Then ask the suspect how his victims will feel if not believed.

6. ***Offer support for the perpetrator.*** Offer encouragement for the perpetrator as a means of weakening the obstacles preventing him from disclosing his conduct. If he has disclosed being victimized as a child, tell the perpetrator you can understand why he repeated this behavior. Tell the suspect he is not like other suspects who blanket themselves in denial and refuse to get help. Tell the perpetrator you know he didn't want to do this and that it's obvious to you he is himself in pain. Urge him to ease his pain and get the help he needs. I know investigators who have successfully referred to an imaginary mirror, telling the suspect "I wish I had a mirror right now. If you could only see your face, you would know how much you are hurting. Let's put this behind you. Let go of your pain."

7. ***Corroborate the victim's version.*** An interviewer should elicit as much information as possible from the suspect which will corroborate peripheral details of the event. This enables the prosecutor to argue that if the child is accurate as to mundane events, she is likely credible when relating

the traumatic encounter of abuse. The following example illustrates this point.

A child abuse victim once related to a police officer that mom's live-in boyfriend abused her on a particular evening. She recalled she was sleeping in the basement and that her dog was scratching on a basement window to get in. She recalled the perpetrator brought the dog into the basement and then molested her.

Although the suspect was adamant in denying any sexual contact, he confirmed that the dog was scratching to get inside and he brought the dog to the girl. This information enabled the prosecutor to argue the victim was credible. Even the defendant conceded the victim told the truth as to where she was sleeping, the incident with the dog, and that the suspect entered the child's sleeping quarters. The suspect even admitted he believed the child was abused, he simply didn't do it.

8. ***Give the suspect an out.*** If all other approaches fail to obtain incriminating statements, give the suspect an out whereby he can save some face. Child molesters are adept at blaming others for their conduct. A child molester may blame the victim, the victim's mother, or the alcohol or drugs he consumed. LEBERG, *supra* at 81-90. *Also see* Carolyn Copps Hartley, *How Incest Offenders Overcome Internal Inhibitions Through the Use of Cognitions and Cognitive Distortions*, 13 JOURNAL OF INTERPERSONAL VIOLENCE 25 (1998). An interviewer can help this process along by saying something like "alcohol is a terrible thing. It makes us do things we would not do so sober. Is it possible that's what happened here?" According to one interviewer, "(i)f the offender is allowed to rationalize or project some of the blame for his behavior onto someone or something else, he is more likely to confess." PENCE & WILSON, *supra* at 119-120.

9. ***Consider using a polygraph examination.*** Although the examination may be inadmissible, a perpetrator may make incriminating statements when confronted with a failed examination. Some commentators state the polygraph must be done immediately in conjunction with the initial interview. PENCE & WILSON, *supra* at 119-120. While this is the ideal, it may not be an option in small, rural police departments that do not have a polygraph examiner on call. Despite this limitation, a number of rural investigators have successfully used polygraph examinations to obtain incriminating statements from suspects. This is true even when the investigator was forced to delay the polygraph examination for one or more days. Obviously, this is not an option in cases where circumstances necessitate an immediate arrest.

10. ***Consider having the victim make a controlled and recorded telephone call to the perpetrator to discuss the assault.*** Although the victim

must be old enough, adequately briefed, and sufficiently sophisticated to be convincing in the conversation, this method has produced incriminating evidence in a number of cases. See Justin Gillis, *Nobel Laureate is Sent to Jail, Tape Helped to Decide Fate in Sex Abuse Case*, THE WASHINGTON POST, April 30, 1997 at A1. Consult with the child's therapist or other professional to be sure the victim is emotionally able to confront the offender.

Few, if any, crimes are as egregious as the offense of child abuse. In fulfilling the obligation to protect the innocent and uphold the law, law enforcement officers and prosecutors must ensure that child abuse suspects are interviewed in a manner that maximizes the potential for uncovering the truth. The child victim is counting on us.

- C. **Obtain incriminating statements in cases of physical abuse.** Many of the approaches in sexual abuse cases are applicable to a case of physical abuse. In addition, the interviewer must elicit from the suspect his version of how the child acquired each injury. If a skilled physician can debunk this history as being inconsistent with the injuries, the statements are nearly as good as a confession. It is also important to clarify who was with the child when various injuries were incurred. Since opportunity is a pre-requisite to inflicting abuse, this information will enable the investigator to pinpoint the perpetrator.

If the perpetrator acknowledges he struck the child but contends the blows were reasonable, and the jurisdiction allows a parent to use reasonable force on a child, an interviewer needs to explore this issue in detail. Relevant inquiries include:

- What is the height, weight, and age of the parent in comparison to the child?
- How many blows were administered?
- Was an instrument used and, if so, what type of instrument? What does the instrument weigh? Does the instrument have any give or is it the child's body which must provide the give? Is the instrument a belt or other object which can wrap around the child's body and cause damage to genitals or vital organs? If the perpetrator used such an instrument, did he do anything to ensure that genitals and vital organs would be protected?
- What did the parent say to the child concerning the assault? If hitting the child was an attempt at discipline, the parent can be expected to have sat down with the child and calmly explained the misconduct and punishment. If this did not happen, it is likely the blows were not an attempt at discipline but an expression of anger.
- What did the parent say to the child *during* the administration of blows? If the child was being called demeaning names, it is again suggestive of a parental expression of anger and not an effort to discipline the child.
- What was the child's conduct that necessitated the parent hitting the child? If the child was hit because he wet his bed or committed an accident such as the

spilling of milk, it appears the child committed no intentional misconduct requiring punishment. Under this scenario, *any* blows may be unreasonable.

- Has the parent ever attempted other means to discipline the child such as time-outs? If so, and the parent acknowledges these techniques have been effective, the administration of blows without first attempting other effective methods of discipline may suggest the child was struck out of anger and not as a means of discipline.

- D. **Medical evidence.** Sexually transmitted diseases or other medical findings obviously corroborate a victim's allegations. Keep in mind that medical examiners "usually cannot 'tell by looking' whether sexual molestation has or has not occurred. The history from the child remains the most important factor in making that determination..." Adams & Wells, *Normal Versus Abnormal Genital Findings in Children: How well Do Examiners Agree?* 17 CHILD ABUSE AND NEGLECT 663, 673 (1993). Even negative medical findings can corroborate the allegation so long as the findings are consistent with the history given by the child. If a child alleges sexual contact, not penetration, or contends the abuse occurred some time ago, a physician can explain the absence of an injury is consistent with the history. This testimony allows the attorney to make the following argument at trial:

If this six year old girl is a liar, she has remarkable foresight. At the time of the original statement to the police, she was able to realize she would no doubt be compelled to undergo a medical examination. Accordingly, she alleged sexual conduct which would not produce medical evidence. Does that make any sense? Do you really believe, members of the jury, the child thought that far in advance and with the degree of sophistication necessary to pull off such a lie?

- E. **Make a detailed report of the emotions and behaviors of the victim.** This information may make the victim's statements admissible as substantive evidence as an excited utterance. An excited utterance is defined as "(a) statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FRE 803(2).
- F. **Seize any 911 tape.** These tapes often contain classic examples of excited utterances. Unfortunately, many police departments destroy or discard the tapes after a short period of time or when a case is closed, forgetting the evidence may be relevant to future cases if the defendant offends again.
- G. **Photograph bruises or other injuries with a high tech camera.** Use a camera that produces instant evidence that can be used in questioning a suspect and at a bail hearing. Photograph bruises not only on the day of the assault but a few days later when the bruising may be more visible.

- H. **Video tape the crime scene.** If possible conduct the video from the perspective of the victim. If, for example, the victim was attacked in several different locations in the house, begin the video tape in the room where the assault began and then proceed chronologically to the other rooms. If the tape is admitted into evidence, the tape allows the jury to see the crime from the vantage point of the victim.
- I. **Diagrams.** Note on a body diagram the location of injuries. Also, diagram the crime scene. If you have multiple injuries to multiple parts of the body, pictures of each injury do not allow the jury to see the “whole picture” or to note distinct patterns of injuries. A full body diagram may be helpful in such a case.
- J. **If the child suffered a recent assault, interview the victim as soon as possible and make note of the interview in relation to the time of the assault.** This procedure may make the victim’s statement admissible into evidence as a present sense impression. A present sense impression is defined as “*a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.*” Federal rules of evidence 803(1).
- K. **Behaviors.** Talk to family, friends, neighbors, teachers, etc about the child’s behaviors. Although bedwetting, nightmares, and sexual behavior are not diagnostic of abuse, they may be consistent with it. *See* FRED KARASOV AND CAROL LANSING, *MANUAL FOR PROSECUTION OF CHILD ABUSE* 165 (Minnesota County Attorneys Association 1995). Also, note the timing of the behaviors. Does the child’s bedwetting occur only after visits with her father? Some behaviors are clearly indicative of abuse. **Know the difference between normal and abnormal sexual behavior among children.** Investigators are frequently confronted with reports of sexual acting out of very young children. For example, a school may report a case of a kindergarten boy grabbing the penis of another boy. In addition to considering what, if any, legal action to take against such a young offender, the investigator must determine if such behavior is indicative that the juvenile offender may also be the victim of abuse. Young children engage in a number of normal sexual practices. Non-abused children “exhibit a wide variety of sexual behaviors at relatively high frequencies, e.g., self-stimulatory behavior and exhibitionism.” JOHN E.B. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* 516 (1998), *citing* William Friedrich, Lucy Berliner, Judy Butler, Judith Cohen, Linda Damon, and Constance Shafram, *Child Sexual Behavior: An Update with the CSBI-3*, 9 *THE APSAC ADVISOR* 1 (1995). There are, however, a number of sexual behaviors that are not normal during childhood. The behaviors *least* often seen in non-abused children were:

- Placing the child’s mouth on a sex part
- Asking to engage in sex acts
- Masturbating with an object
- Inserting objects in the vagina/anus

- Imitating intercourse
- Making sexual sounds
- French kissing
- Undressing other people
- Asking to watch sexually explicit television
- Imitating sexual behavior with dolls. MYERS, *supra* citing Friedrich, Grambsch, Boughton, Kuipers, and Bielke, *Normative Sexual Behavior in Children*, 88 PEDIATRICS 456, 462 (1991).

- L. **Other offenses.** It is unlikely that a child abuser has offended against the known victim only once or that he has not had other victims. Accordingly, in investigating the reported case, ask every witness if they know of any other child who may have been abused and what information they have which leads them to this conclusion. Men who molest girls average 19.8 victims. Men who molest boys average 150.2 victims. In a study of 561 sex offenders, these abusers accounted for the molestation of 195,407 victims. Gene G. Abel, et al, *Self-Reported Sex Crimes of Nonincarcerated Parahiliacs*, 2 JOURNAL OF INTERPERSONAL VIOLENCE 3, 17 (1987).
- M. **Cross-screen for sibling abuse.** An older, abused child may also have been a perpetrator on younger siblings and this possibility should be explored.
- N. **Overcoming a defense of reasonable force.** For an overview of the investigation and prosecution of cases involving this element, see Victor I. Vieth, *When Parental Discipline is a Crime: Overcoming the Defense of Reasonable Force*, 32 THE PROSECUTOR 29 (July/August 1998). The article is attached to this outline.

V. Investigating failure to thrive cases

1. **Definition.** Failure to thrive is “an imprecise term that refers to children whose growth deviates significantly from the norms for their age and sex.” DEBORAH A. FRANK AND DENNIS DROTAR, *Failure to Thrive in CHILD ABUSE: MEDICAL DIAGNOSIS AND TREATMENT* (ROBERT REECE, ED. 1994).
2. **Two traditional categories.** FTT “explained by a serious medical condition was called ‘organic failure to thrive.’ All other FTT was termed ‘nonorganic’ and was attributed to psychologic neglect or ‘maternal deprivation.’” *Id.* at 298.
3. **Malnutrition is the key.** The above referenced dual categorization of FTT “is now considered to be overly simplistic and in many ways obsolete. We now recognize that in all cases of ‘nonorganic’ FTT, and in many cases of ‘organic’ FTT, the proximate cause of growth failure is malnutrition, whether primary or secondary.” *Id.*
4. **Diagnosis.** Consider the family history. Is there a history of growth delay in the family? Was the child born prematurely? Premature children take some time to catch up to other children on the growth charts. Prenatal exposure to drugs does not necessarily have a great impact on a child’s growth patterns.

Marijuana use, for example “is not likely a biologic risk factor for later FTT.” *Id. at 303.*

5. **Treatment.** FTT children must be seen more frequently and “families should be instructed to seek care at the first signs of infection so that immediate work-up and treatment are provided.” *Id. at 307.*
6. **Removal from the home.** Doctors recommend removing an FTT child from the parental home when “caretakers are out of control substance abusers, have inflicted injury on the child, have intentionally withheld available food from the child, or are profoundly psychiatrically or cognitively impaired, and when no other competent caretakers are available within the existing family system.” *Id. at 319.*
7. **Investigating FTT.** Determine if the condition is organic. There are medical tests to determine most organic causes. If the child is placed in a safe environment such as a hospital or foster home, does the child eat regularly and grow normally. Is the malnutrition ongoing or recent? Document growth for several months. Did parents seek out medical intervention or advice for the child’s condition? Is there evidence the child was emotionally neglected? Did the parents fail to keep well baby checkups? In searching the house, investigators should look for age appropriate food, bottles, cans of formula and mixing instructions. Is the food fresh? Is there evidence of the most recent purchase? Is there food for adults and older siblings? Is there evidence the victim was otherwise treated differently? How many dirty diapers are there and how long have they been there? Is there evidence money was spent on amenities such as television, video games, etc, but not on the FTT child? Are there any *current* photos of the child? Are there older photos of the FTT child? Are there toys for the victim? What is the overall condition of the home? Is there previous involvement with social services? Previous involvement may show a history of neglect and it may also show the parent is aware of services available to assist with a child in need of food, medical care, etc. (I’m grateful to Brian Holmgren, Senior Attorney at NCPCA for providing me with the above checklist).

Domestic Violence and child abuse: understanding the correlation

I. INTRODUCTION

II. WHAT IS DOMESTIC ABUSE?

One legislature defines domestic abuse as “physical harm, bodily injury, assault or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members, which constitutes a violation of Minnesota Statute sections 609.221 (assault in the first degree), 609.222 (assault in the second degree), 609.223 (assault in the third degree), 609.224 (assault in the fifth degree), 609.2242 (domestic assault), or 609.713 (terroristic threats); or criminal sexual misconduct, within the meaning of section 609.342-609.345, committed against a minor family or household

member by an adult family or household member. A family or household member means spouses, former spouses, parents and children, persons related by blood, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common, regardless of whether they have been married or have lived together at any time.” See Minn. Stat. Section 518B.01, subd. 2(a)(b).

III. HOW COMMON IS DOMESTIC ABUSE?

- A. Three to four million women are beaten each year by their husbands or partners. Mary E. Asmus, et al, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLIN L. REV. 115, 120 (1994) The crime of domestic violence, however, is “difficult to measure because it most often occurs in private and victims may be reluctant to report it because of shame or fear of reprisal by the offender.” RONET BACHMAN, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 6 (U.S. Department of Justice, Bureau of Justice Statistics 1994).
- B. Each year, approximately 1,400 women are killed as a result of domestic violence.
- C. In Minnesota, there are 63,000 *reported* incidents per year. The actual number may exceed 500,000 incidents in Minnesota per year. Mary E. Asmus, Tineke Ritmeester, Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLIN L. REV. 115, 120 (1994).
- D. Domestic violence transcends racial and social classes. As one commentator notes, “the appearance of women from diverse racial, cultural, class and religious backgrounds at the doors of women’s shelters demonstrates to even a casual observer that domestic violence occurs in all socio-economic and racial groups.” Asmus, et al, *supra* at 121. Even so, poor and less educated women are more likely to be the victim of domestic violence. Women with a family income below \$10,000 are five times as likely to be a victim of domestic abuse as women with family incomes exceeding \$30,000. RONET BACHMAN, U.S. DEPT OF JUSTICE, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION REPORT 7 (1994).
- E. Living in suburban or rural areas does “not decrease a woman’s risk of experiencing an act of violence by an intimate. Women living in central cities, suburban areas and rural locations experienced similar rates of violence committed by intimates.” *Id.*

IV. HOW SERIOUS ARE THE ASSAULTS?

- A. Among women who experience a violent victimization, injuries occurred almost twice as frequently when the offender was an intimate (59%) than when a stranger (27%). See U.S. Dep’t. of Justice report, *supra* at 1.
- B. Injured women were more likely to require medical care if the attacker was an intimate (27%) rather than a stranger (14%). *Id.*

- C. Women victimized by an intimate face a weapon 18% of the time. *Id.* at 7. The most common weapon used by intimates against female victims is a knife or other sharp instrument. *Id.*

V. ARE ALL VICTIMS FEMALE?

- A. In comparison to males, females experience annually over 10 times as many incidents of violence by an intimate. *Id.* at 6.
- B. On average each year, “women experienced 572,000 violent victimizations at the hands of an intimate, compared to 49,983 incidents committed against men.” *Id.*

VI. WHAT ABOUT THE KIDS?

- A. Eighty seven percent of the children in homes with domestic violence are aware of the abuse. L. WALKER, *THE BATTERED WOMAN SYNDROME* (New York: Springer 1984).
- B. In 30-70% of the families where there is spouse abuse, child abuse is also present. The severity of the child abuse parallels the severity of the domestic abuse.

VII. IN DV HOMES, WHO ABUSES THE KIDS?

- A. Fifty percent of the men who batter their spouse, also abuse their children.
- B. In one study, 28% of the battered women physically abused their children. *See* L. WALKER, *supra*.

VIII. HOW DOES DOMESTIC VIOLENCE IMPACT CHILDREN?

- A. Kids exposed to domestic violence have higher rates of truancy, serious health problems, suicide attempts, criminal behavior, drug and alcohol problems, dropping out of school, and early adult unemployment. Asmus, et al, *supra* at 121.
- B. Ninety percent of the men in the Minnesota prison system grew up in homes where DV was the norm. Asmus, et al. *supra* at 121.
- C. Sixty-three percent of all men between the ages of 11-20 incarcerated for homicide, killed their mother’s abuser. H. ACKERMAN, *THE WAR AGAINST WOMEN: OVERCOMING FEMALE ABUSE 2* (Hazeldon Foundation 1985).

IX. IS OUR RESPONSE ADEQUATE?

- A. Historically, we have regarded DV as a family issue. Asmus, et al, *supra* at 116-119.
- B. If the report of violence alleges the perpetrator to be a stranger, police respond within 5 minutes in 36% of the cases. If the report alleges the perpetrator to be an intimate the police respond within 5 minutes in 28% of the cases. The

police file a report in 77% of the cases involving a stranger and in only 69% of the cases involving an intimate. Police search for evidence in 29% of the cases involving a stranger as the suspect and seize evidence in 9% of these cases. In contrast, police search for evidence in only 7% of the cases involving an intimate as the suspect and seize evidence in only 2% of the cases. *See* U.S. Dept. of Justice report, *supra* at 8, 10.

X. WHY DO WE DO A POOR JOB?

- A. Victims uncooperative, even hostile.
- B. Recantation is common. According to one study, recantation may be as common as 80%.
- C. Victims return to perpetrator in many cases. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence*, 109 HARVARD L. REV. 1849, 1886 (1996).
- D. We fail to understand the dynamics of the cycle of abuse which causes victims to be hostile, to recant, and to return to the perpetrator. We would do well to view DV victims as prisoners of war. When a POW is captured and forced to denounce his country on international television, we do not take offense. We understand the POW is doing what is necessary to survive. When the POW is returned home, we appropriately praise him as a hero. In many cases, DV victims are POWs. Many victims are financially and emotionally tied to their perpetrators to such an extent that they cannot escape by themselves. Viewing victims from this perspective better enables us to seriously address the issue of domestic violence.

XI. WHY SHOULD WE CARE?

Crime is a hydra, and its heart is domestic violence. In the words of Attorney General Janet Reno, “it’s imperative that we really focus on the whole issue of domestic violence and family violence in its larger context. On many occasions, the child who sees his mother being beaten accepts violence as a way of life.”

XII. INVESTIGATING CASES OF DOMESTIC VIOLENCE

- A. Separate the victim from the perpetrator prior to conducting interviews.
- B. At some point in the investigation, tape record a statement from the victim.
- C. Make a detailed report of the emotions and behaviors of the victim. This information may make the victim’s statements admissible as substantive evidence as an excited utterance. An excited utterance is defined as “(a) statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” MRE 803(2).
- D. Seize the 911 tape.

- E. Photograph bruises and other injuries with a high tech camera which produces instant evidence that can be used in questioning a suspect and at a bail hearing.
- F. Photograph bruises not only on the day of the assault but a few days later when the bruising may be more visible.
- G. Note on a body diagram the location of injuries.
- H. Diagram the crime scene.
- I. Seize or at least document all physical evidence.
 - 1. Torn clothing
 - 2. Clothing not torn or blood stained may be relevant for other purposes. For instance, a woman standing outside in the cold wearing only a nightgown is obviously fearful of great harm. If she were not afraid, why would she be outside dressed in an inappropriate and possibly embarrassing manner? Seizure of the clothing may bring home to the jury the distress of the victim on the night of the attack.
 - 3. Damaged property such as broken toys, chairs, or phones. Marks on the wall where an object struck should be photographed.
 - 4. Answering machine tapes, notes and letters from the perpetrator containing threats. These threats may not always be present at the outset but may appear as the case moves through the system. Advise the victim that if she receives any threats, she should not destroy the evidence but should immediately contact the police.
- J. **Have the victim sign a release to obtain all medical records.**
- K. **Not only obtain the medical records, but the billing records.** The expense of the visit to the emergency room may drive home to some jurors or judges the seriousness of the assault.
- L. **Interview the victim as soon as possible following the assault and make note of the time of the interview in relation to the time of the assault.** This procedure may make the victim's statement admissible into evidence as a present sense impression. MRE 803(1).
- M. **Obtain from the victim and other witnesses not only the details of the assault under investigation but all previous assaults,** even if they occurred in other jurisdictions or the statute of limitations has expired. Many of these other acts may be charged out as separate crimes. At the very least, they may be admissible as prior bad acts. In states such as Minnesota, a history of domestic violence is automatically admissible evidence unless the probative value is substantially outweighed by the danger of unfair prejudice. M.S. Stat. 634.20.
- N. **Obtain information at the outset that will help locate a victim as trial nears.**
- O. **Refer the victim to DV resources in the community such as the local crisis center.**
- P. **Cross-screen for child abuse.**

- Q. **Make a report to social services if children are in the home.** If kids are in the home they are Children in Need of Protection or Services (CHIPS) in that they have been exposed to criminal activity in their home. *See eg, M.S. 260.015.* Exposure to domestic violence also impairs the physical and emotional welfare of the children. Getting the welfare agency involved can be instrumental in supporting the victim and her children pending trial. This support can include financial support in the form of AFDC or medical assistance or can include counseling services, alcohol treatment and the like.
- R. **Interview everyone with knowledge.** This includes the victim, the perpetrator, the children, and the neighbors. At a stage when the victim is cooperative, ask about anyone else who may have knowledge of the present act of abuse or any prior acts of abuse. When asking about the kids, prior acts of abuse and the like, you may wish to ask about the pets. Many spousal and child abusers also act violently toward the family pets. *See generally, Child Abuse and Animal Abuse, 4 UPDATE (December 1991, American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, Alexandria, VA).* Being physically cruel to animals is part of the diagnostic criteria for conduct disorder. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 90 (American Psychiatric Association 1994). Abusing the family pets can be used to show a pattern of uncontrolled violence.
- S. **Run a criminal history check on the perpetrator.** In some states, prior assault convictions may enhance the penalty a suspect faces. (M.S. 609.224; 609.2242). The criminal history may reveal assaults against the victim or others that you may wish to discuss with the victim or perpetrator. These other assaults may be admissible evidence as prior bad acts.

When the Child Abuser is a Child: Dealing with the Juvenile Sex Offender

I. What is a juvenile sex offense?

A juvenile sex offense is a sexual act which violates the criminal code and is committed by someone below the age of 18 at the *time of the offense*. As one commentator notes, "(a)lthough a precise definition of this behavior is illusory, it is useful to begin with a description of the kinds of sexual activity that create the greatest societal concern; specifically, deviant sexual interests that are chronic and compulsive, and thus categorized as paraphilias....Children who sexually abuse and molest others may engage in a range of paraphiliac activities from fondling, frottage, dry humping, vaginal or anal penetration, or any other type of aggressive sexualized behavior. Penetration can be penile, oral, or involve the use of a foreign object. Obviously, sexualized behavior that involves the use of violence creates its own unique concerns, since the interaction is carried out against the

victim's will, without consent, or in an aggressive, exploitive, or threatening manner." Earl F. Martin and Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 CRIMINAL LAW REVIEW 279, 282 (1998).

II. Who commits juvenile sex offenses?

- Youthful sex offenders are between the ages of 5-19
- median age is 14-15 years
- Over 90% of the offenders are male. See Henry R. Cellini, Ph.D, *Assessment and Treatment of the Adolescent Sexual Offender*, in SCWARTZ AND CELLINI, THE SEX OFFENDER (1995).

III. Who are the victims of juvenile sex offenders?

- The victim is typically known to the offender. In fact, over 90% of juvenile sex offenses are perpetrated against a youth known to the offender (relative, babysitter, acquaintance).
- Median age of the victim is 7 years
- Females are 3 times more likely than males to be the victim of a juvenile sex offender. Cellini, *supra* at 6-2. There is, however, a belief that male victimization is under-reported to a greater extent than female victimization

IV. How serious are juvenile sex offenses?

- More than 60% of juvenile sex offenses involve an act of penetration
- Over 1/3 of juvenile sex offenses involve physical force. Cellini. *Supra* at 6-2.
- In comparison to adult offenders, juveniles are more likely to have intercourse or other forms of invasive sexual contact with their victims, to cause their victims physical injury, to expose their victims to pornography, and to directly threaten their victims with a weapon as a means of gaining compliance. Adolescent offenders are also more likely to employ force or threats as a means of keeping the victim silent after the abuse is completed. Kaufman, et. al., *Factors Influencing Sexual Offenders' Modus Operandi: An Examination of victim-Offender Relatedness and Age*, 3 CHILD MALTREATMENT 349, 356-57 (1998).

V. Compared to sexual offenses committed by adults, how common are juvenile sex offenses?

- Brother-sister sexual contact may be 5 times as common as father-daughter incest. A survey of 796 New England College students revealed that 15% of females and 10% of males had a sexual experience with a sibling. VERNON R. WIEHE, SIBLING ABUSE 50 (1990).
- In one study, 56% of the child sexual abuse cases referred to a Washington, D.C. hospital involved juvenile perpetrators. See Nicholas Groth and Carlos M. Loreda, *Juvenile Sex Offenders: Guidelines for Assessment*, 25

INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 31 (1981).

- A number of studies estimate that 20-30% of rapes and 30-50% of child molestations are committed by adolescents. Cellini, *supra* at 6-2 (citations are omitted).
- Given the “tender age of the offender and in many cases his social familiarity with the victim, such offenses are under-reported...” Groth & Lored, *supra* at 31.

VI. Do juvenile sex offenders become adult sex offenders?

- As juvenile sex offenders become adults, the number of sexual offenses they commit increases 50 fold. Cellini, *supra* at 6-2 *citing* Abel, Mittelman and Becker (1985). Sex Offenders: results of assessment and recommendations for treatment. In Ben-Aaron, Hucker, and Webster (Eds.) Clinical Criminology: *Current Concepts*. Toronto: M & M Graphics.
- 47-58% of adult sex offenders committed their first offense during adolescence. Cellini, *supra* at 6-2 (citations omitted). In another study, 71% of adult offenders subjected to polygraph tests during therapy admitted their sexual offenses began while they were juveniles. See Jan Hindman, *Research Disputes Assumptions about Child Molesters*, 7 NDAA Bulletin 1 (July/August 1988).
- The likelihood that most *adult* offenders began their sexual deviancy as juveniles does not mean that most *child* offenders will necessarily become adult offenders. As stated in a position paper of the Association for the Treatment of Sexual Abusers, “poor social competency skills and deficits in self-esteem can best explain sexual deviance in juveniles, rather than the paraphilic interests and psychopathic characteristics that are more common in adult offenders” and that “there is little evidence to support the assumption that the majority of juvenile sexual offenders are destined to become adult sexual offenders, or that these youths engage in acts of sexual perpetration for the same reasons as their adult counterparts.” Mark Chafin & Barbara Bonner, “Don’t Shoot, We’re Your Children”: *have We Gone Too far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?* 3 CHILD MALTREATMENT 314 (1998).

VII. Investigating the juvenile sex offender

- A. Develop a multi-disciplinary response to juvenile sex offenses just as is done for adult-child sex offense cases.** Most jurisdictions have adopted the team approach to handling cases of child abuse. Indeed, 33 states require by law that child abuse cases be investigated as part of a “team” effort. Jerome R. Kolbo and Edith Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A national Survey*, 2 CHILD MALTREATMENT 61 (1997). When a case involves a juvenile sex

offender, however, it appears that many local authorities do not have a coordinated response. Robert M. Sanders and Usha Ladwa-Thomas, *Interagency perspectives on Child Sexual Abuse Perpetrated by Juveniles*, 2 CHILD MALTREATMENT 264 (1997). Part of the difficulty may be that police officers and social workers view juvenile sex offenders differently. According to one study, “(c)hild protection specialists...felt that juvenile abusers should be seen as victims, and the police and juvenile justice workers...felt that they should be seen as offenders.” Sanders and Ladwa-Thomas, *supra* at 269.

B. Treat juvenile sex offenses as serious crimes. Often-times, juvenile sex offense cases are viewed as lacking serious or significant allegations. As one commentator notes, “all too often such behavior is dismissed as merely sexual curiosity or experimentation, situational in nature, and due to the normal aggressiveness of a sexually maturing adolescent with the result that, what should be a priority in our efforts to combat the serious social problem of sexual victimization, is neglected.” Groth & Carlos, *supra* at 31. As a result, “no intervention is made at a crucial stage in the early development of the sexual offender, at a point when he first begins to exhibit the symptoms of his pathology and at a time when his assaults have not become an ingrained behavior pattern and when he still may be accessible and responsive to treatment and rehabilitation.” *Id.* Although it is easy for us to say in the abstract that we take juvenile sex offenders seriously, the fact is that many of these cases involve an element of “childish” behavior or horseplay. If we focus on the horseplay, we may overlook the serious, underlying problem. A victim in her 40’s recounted the following example of her sexual exploitation by an older brother:

I was about six years old. My brother persuaded me to lie down on the bathroom floor. There were some neighbor boys in the house. He promised not to let them in. He got me on the floor with my pants down and then opened the door. He laughed about it.
WIEHE, *supra* at 55.

C. Some believe we are taking cases too seriously. According to Bonner and Chafin, “Fifteen years ago, our battle was getting the system to take cases seriously. We may have been too successful.” Chafin and Bonner, *Don’t Shoot, We’re Your Children*, 3 CHILD MALTREATMENT 314 (1998). As anecdotal evidence, the authors cite the following examples:

- children as young as 10 subjected to sex offender registration laws
- 10 year old children “coercively interrogated”
- 7 year old child not returned to parents after two incidents of genital fondling of 5 year old sibling
- intensive treatment of teens who are required to admit being a pedophile and that they can never be cured. Bonner and Chafin, *supra*.

- **NOTE:** There are myriad problems in relying on anecdotal evidence to support any proposition. Nonetheless, practitioners should be slow to judgment in cases of juvenile sexual conduct. Immaturity, curiosity, and other factors may account for some misconduct and we should not assume that each juvenile offender is doomed to a life of deviance and incarceration. Juvenile sexual misconduct is very individualistic behavior and the system should respond on a case by case basis. In this vein, we should be careful in applying labels to juvenile offenders. As researcher Judith Becker notes:

Labeling young children as *child rapists* or *pedophiles* has the potential to stigmatize youth and to isolate them further from peers, adults, and potential sources of social and psychological support. Consideration should be given to being much more descriptive when we are discussing minors and using terminology such as ‘children with sexual behavior problems’ ...In the case of postpubertal juveniles, the same caution is issued. Judith V. Becker, *What We Know About the Characteristics and Treatment of Adolescents Who Have Committed Sexual Offenses*, 4 CHILD MALTREATMENT 317 (1998).

- D. **Know the difference between normal and abnormal sexual behavior among children.** Investigators are frequently confronted with reports of sexual acting out of very young children. For example, a school may report a case of a kindergarten boy grabbing the penis of another boy. In addition to considering what, if any, legal action to take against such a young offender, the investigator must determine if such behavior is indicative that the juvenile offender may also be the victim of abuse. Young children engage in a number of normal sexual practices. Non-abused children “exhibit a wide variety of sexual behaviors at relatively high frequencies, e.g., self-stimulatory behavior and exhibitionism.” JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 516 (1998), *citing* William Friedrich, Lucy Berliner, Judy Butler, Judith Cohen, Linda Damon, and Constance Shafram, *Child Sexual Behavior: An Update with the CSBI-3*, 9 THE APSAC ADVISOR 1 (1995). There are, however, a number of sexual behaviors that are not normal during childhood. The behaviors *least* often seen in non-abused children were:

- Placing the child’s mouth on a sex part
- Asking to engage in sex acts
- Masturbating with an object
- Inserting objects in the vagina/anus
- Imitating intercourse

- Making sexual sounds
- French kissing
- Undressing other people
- Asking to watch sexually explicit television
- Imitating sexual behavior with dolls. MYERS, *supra* citing Friedrich, Grambsch, Boughton, Kuipers, and Bielke, *Normative Sexual Behavior in Children*, 88 PEDIATRICS 456, 462 (1991).

E. **If the behavior is not normal, deal not only with the juvenile offense, but cross-screen for abuse.** If “non-abusive” explanations such as watching pornography are ruled out, the sexual behavior is “a good marker of sexual abuse.” MYERS, *supra* at 519

F. **When investigating a sexual abuse case involving an *adult* caretaker’s abuse of a child, cross screen for the possibility of abuse between siblings.** If we view a child abuse victim *only* as a victim, we may overlook abuse which has taken place between siblings.

G. **When investigating the juvenile sex offender, be cognizant of pertinent case and statutory law governing the investigation.** For example, juveniles who will be charged in juvenile delinquency court, have a **fifth amendment** right against self-incrimination. *In re Gault*, 387 U.S. 1 (1967). In determining whether an accused has waived his rights, courts believe “the waivers of constitutional rights by children merit closer scrutiny...” ROBERT M. HOROWITZ AND HOWARD A. DAVIDSON, *LEGAL RIGHTS OF CHILDREN* 478 (1984). In considering the totality of the circumstances, courts consider the juvenile’s age, prior experience with the law, physical and mental condition at the time of the interrogation, the absence or presence of counsel, the absence or presence of parents or other supportive adults during the questioning, the duration of the interrogation, and the conditions imposed upon the accused during interrogation. HOROWITZ & DAVIDSON at 478-479. If, however, you are opting to take the child into court as part of a petition alleging the child is in need of protection or services, you may have greater leeway in speaking to a child. Indeed, in such a civil case, the child could be subpoenaed as a witness. Children also have a **fourth amendment** right against unreasonable search and seizure. However, parents are generally allowed to consent to a search of a child’s room or property. HOROWITZ & DAVIDSON at 481. When in doubt, get a search warrant. Even if a parent can and does give consent, the parent may not be a cooperative witness when the constitutionality of the search is later challenged.

H. **A special note about interrogation.** When investigating a case of child abuse inflicted by an adult on a young child, there is a real possibility that any older sibling in the home was also abused and may himself have become a perpetrator. If you interview the older sibling and he denies any knowledge of

abuse in the home, you may want to consider the following approach: “*Listen, kid, I’ve been in this business a long time and I know that sexual abuse always gets discovered eventually. Your sister has told us she was abused and I believe her. Given what I know about the dynamics of these cases, there’s a good chance you were abused and there’s a good chance you perped on your sister too. If that didn’t happen, great, you have nothing to worry about. If it did happen, I’ll find out about it eventually and then you’ll be charged. If, though, you talk to me about it today, I won’t charge you.*” Obviously, only offer such as a deal as a last resort and only after speaking with the prosecutor who has the authority to offer the deal. It is, though, an option some officers have found effective. Make sure the child knows he may still have to participate in treatment and other programming as a result of any civil protection action which may be filed on behalf of the children in the home.

VIII. Prosecuting juvenile sex offenders

- A. **Jurisdiction questions.** Juvenile delinquency court does not have jurisdiction over all children. Most states have upper and lower age limits on the jurisdiction of juvenile courts. The minimum age is typically between the ages of 6-12. Some states have no statutory minimum age but require the child to “display sufficient intellectual and emotional maturity to justify a criminal conviction.” Martin & Pruett, *supra* 316. The maximum age in most states is 18. *Id.* at 317. However, in most states *all* children are subject to the state’s civil child protection statutes. To the extent unusual sexual practices endanger the community or warrant treatment which is not being provided, these civil statutes can be invoked as a means of obtaining jurisdiction over a child.
- B. **Charging considerations.** A prosecutor may have four or more options in a case involving a juvenile sex offender.
 1. **The prosecutor could divert the case** on the condition the offender complete treatment and fulfill other requirements the prosecutor sets forth. This may be an option in a case where proving guilt is unlikely. However, unless a diversion agreement is filed and approved by the court, judges may be unwilling to enforce its provisions. Also, a diversion agreement done outside the court system is less likely to generate a paper trail which future investigators may find helpful if the child re-offends. In a number of states, juvenile sex offenders must submit a sample of blood to the state’s bureau of criminal apprehension. This will likely not happen if you divert the case. Again, a diversion agreement should only be done as a last resort in the weakest of cases. If you do select this option, make sure the offender admits the offense and provides a factual basis for the admission. Ideally, the child should speak about the offense on the record in the

courtroom. If this is not an option, have an investigator take a tape recorded statement from the juvenile as part of the diversion agreement. Another option is to hire a court reporter to record the statement. Transcribe the statement and then have the child sign a notarized admission that the transcription is accurate. Many tape recordings have a limited life span and thus may not be available years later if the admission is needed to show a prior bad act. Accordingly, it is important to make a transcript and have the juvenile acknowledge it as accurate.

2. **The prosecutor could file a child in need of protection or services petition.** This option has several advantages. In many jurisdictions, the burden of proof is lower than in a juvenile delinquency proceeding. Since a child protection proceeding is civil in nature, the prosecutor may be able to compel the child and the child's parents to testify. Although a witness can still invoke their fifth amendment right in a civil case, a number of cases provide that a trier of fact can make an adverse inference from the assertion. There are also other advantages to a civil action. For example, if the responding party fails to show for trial, the trial can still take place provided the state can show the other party received notice. Also, in most cases, the state will only have to prove a child was abused, not who the perpetrator was. When abuse is proved, many juvenile courts are able to shift the burden of proof and require each parent seeking custody or contact with the child to prove he or she is not the perpetrator. *See Myers, supra* at 387; *see also West Virginia Dep't of health & Human Resources v. Doris S.*, 475 S.E.2d 865, 878 (1996).
3. **The prosecutor can file juvenile delinquency charges.** These proceedings are typically closed to the public and thus may be less traumatic to a victim. In small towns, a public accusation of child abuse often results in the victim being teased and ostracized in the community. *See generally*, Victor I. Vieth, *In My Neighbor's House: Confronting Child Abuse in Rural America*, 22 *HAMLIN LAW REVIEW* 143 (1998). In a juvenile delinquency proceeding, an accused does not have a constitutional right to a jury trial. To those who believe a bench trial is "a slow guilty plea", this fact may make it easier to obtain a finding of guilt.
4. **The prosecutor can reference the juvenile to adult court.** Many jurisdictions are adopting reference statutes which make it easier to try juvenile sex offenders as adults. In some cases, this is done by petitioning the court for a transfer. The age of the child, the number of victims, whether the offense involved violence, and the child's previous involvement with the legal system and treatment programs are factors courts commonly consider in referencing a child to adult court. *See Kent v. United States*, 383 U.S. 541 (1966). In some cases, including homicide and certain sex offenses, a reference to adult court is automatic. In other cases, the prosecutor has the discretion to file

certain cases either in adult or juvenile court. In cases involving older juvenile sex offenders, a rule of thumb is to reference them to adult court when possible. We simply don't know if treatment is a viable alternative at the present time and the public may be best served by referring the child to adult court. Indeed, it may be advisable to call an expert at the reference hearing to explain the imperfection of treatment as well as the high recidivism rate for offenders. There will, of course, be instances where retaining juvenile court jurisdiction is wiser. In some cases, the sex offense may not be of a type which will result in long term incarceration and, since non-prison treatment programs for adult offenders are often difficult to find, it may be wiser to keep the child in juvenile court. In some cases, the incarceration period in adult court may be of a short duration. If this is the case, it may be better to keep the child in juvenile court where a probation officer can be involved with the offender for a longer period of time.

5. **Alford pleas.** An Alford plea should not be an option in sexual offense cases. This is because no treatment can succeed unless the offender admits the offense. Indeed, since the purpose of juvenile court is reform, it is questionable whether a juvenile court judge *can* take an Alford plea. After all, how can the juvenile court "treat" a juvenile for his delinquency if the juvenile denies doing anything wrong?
6. **Treatment is not punishment.** Although the focus of juvenile court is on rehabilitation, some commentators view treatment as punishment. It may be advisable to differentiate treatment from punishment by recommending community service or some other form of punishment to make this distinction clear to the child. Punishment also serves as a reminder to the offender that his behavior is against the law and the court has the power to punish.
7. **Unusual cases.** What if a child committed a serious offense which was not detected until the offender became an adult? If the juvenile court has lost jurisdiction, some states will allow the offender to be charged as an adult. The Minnesota Supreme Court, for example, has said "(w)e believe it would be ridiculous to say that if a person of 16 or 17 years of age commits a murder and escapes *detection* or apprehension ...until after he has reached 18 years of age...he could no longer be proceeded against in the Juvenile Court or tried by the District Court." *Matter of Welfare of SV*, 296 N.W.2d 404 (Minn. 1980).
8. **Multiple filings.** In addition to filing a delinquency petition, consider filing a civil protection case on behalf of the offender, the victim, or both. Unlike many delinquency actions, the civil case will allow you to have access to the entire family unit and be sure the victim's needs are being attended to. Be careful, however. If you are a small town prosecutor handling both the civil and criminal case, there are myriad ethical considerations. You cannot, for example, use the criminal case as leverage to gain compliance in the civil case.

9. **Create and allow access to juvenile court records for future use.** In charging and pleading these cases, view the matter long term. Many juveniles will re-offend as adults and may eventually be considered for commitment under your state's sexually violent predator statute. If your state does not allow for the long term preservation of juvenile records and does not allow them to be accessed for SVP purposes, consider working with the legislature to amend your jurisdiction's juvenile statutes. As part of a plea bargain, consider having the child waive confidentiality of the juvenile records at least to the extent they can be accessed by law enforcement, prosecutors, therapists, and for SVP purposes. Have the child articulate on the record his understanding of this waiver and get the court to approve it on the record. For a review of SVP statutes, see Brian K. Holmgren, *Sexually Violent Predator Statutes—Implications for Prosecutors and Their Communities*, 32 THE PROSECUTOR 20 (May/June 1998).
10. **Dealing with a child who is both an offender and a victim.** If a child is adjudicated delinquent for offending against a younger sibling and that same child is also a witness who will testify as a victim in adult court against a caretaker, many courts will allow the delinquency adjudications to be used for impeachment. In this event, mention the child's offending in opening statement and on direct examination with the victim. Argue the offending behaviors are consistent with the child being victimized by an adult. Therefore, the prior offenses enhance, they do not detract from the child's credibility. You can also argue the child is honest and is willing to tell the truth not only about his caretaker's abuse but also about his own offenses. You may wish to call an expert witness to testify that certain sexual behaviors are consistent with being a victim of abuse. Obviously, the expert cannot say that because the child became an offender he is automatically a victim, but the expert can be used to educate the jury that being a victim and an offender is not uncommon. Do not call an expert witness in a child abuse case, however, without thoroughly evaluating your state case law on this topic. Many jurisdictions severely limit what an expert can say.

C. **Prosecutorial discretion.** Some states adopt an "all inclusive" statutory scheme of sex offenders. Under this scheme, it is a crime to have sexual contact with a children below a certain age, such as 13 or 16. The age of the offender is irrelevant. Under this framework, consensual sexual contact between two 14 year old children could result in both being charged with felonies in juvenile court. When challenged as violations of due process and equal protection, most courts have upheld these statutory schemes. See Martin and Pruett, *supra* at 323. Other states adopt a "less inclusive approach" which requires the offender to be a minimum number of years older than the victim. For a discussion of these approaches, see Martin & Pruett, *supra* at 318-322.

When exercising discretion, particularly in an “all inclusive” state, what factors should a prosecutor consider? Relevant factors may include:

1. Age difference between parties
2. Mental capacities of the parties
3. Juvenile’s history of other acts

D. **Disposition/treatment considerations.** Before a child can be “treated” for his or her sex offenses, the juvenile must first be assessed. What type of sex offender assessment is appropriate for juveniles? For a small portion of juvenile sex offenders, limited cognitive abilities may play a role in their acting out. For this reason, some professionals advocate that **intelligence testing** be part of the assessment. There are several “tests” to evaluate **sexual behavior and interests** in juveniles. These tests are of questionable validity and should be used with caution. Most researchers agree that broad **personality tests** such as the MMPI are helpful in assessing offenders. Some assessors use polygraph and plethysmograph testing on juveniles as a means of verifying truthfulness and assessing sexual interests. For a thorough discussion of assessment issues, see Barbara Bonner, et al, *Assessment of Adolescent Sexual Offenders*, 3 CHILD MALTREATMENT 374 (November 1998). There are at least three theories of treatment. These theories are outlined below.

1. *Biological.* This therapy theory uses medications to control the juvenile offender’s impulses. Some of the drugs control the level of male hormones and may not be effective with young victims. According to one commentator, “(b)ecause the bodies of adolescents are in a constant state of hormonal flux, antiandrogens are used on a restricted basis, generally only with adolescents sixteen years or older who manifest serious sexually deviant behavior.” Martin & Pruett, *supra* at 306-307.
2. *Cognitive-behavioral/social learning.* This theory assumes that “sexually coercive behavior has been learned, observed, or experienced, and changing behavior will require new ways of thinking and new responses to distressing feelings and conditions.” *Id.* at 307. The theory is typically applied in individual and group therapy supplemented with family counseling. *Id.*
3. *Relapse prevention.* This is the most common treatment model presently being used for juvenile sex offenders. This model is premised on the belief that “precursors can be identified and addressed...in the last stages of treatment, an individual’s analysis of trigger cues and risk factors is shared with the prevention team so that they are fully apprised of a youth’s unique vulnerabilities.” *Id.* This information is then shared with counselors, family members and others who have contact with the child to make sure he or she is not regressing.

4. **What treatment option is best?** Treating juvenile sex offenders is still a fledgling effort and thus no one can say with complete confidence that one approach is more effective than another. Although the prevailing view is that lengthy, offense specific peer group therapies are needed to effectively treat adolescent sex offenders, “there is not one shred of evidence to support this stand.” M.R. WEINROT, *SEXUAL AGRESSION: A CRITICAL REVIEW* (1996). Still there is some evidence that a “multi-systemic” approach is more effective than individual therapy. Under this approach, therapy focuses not only on cognitive processes but also family relations, peer relations, and school performance. Martin & Pruett, *supra* at 312. In one study, 12.5% of juveniles treated in a multi-systemic manner re-offended as compared to 75% of those receiving only individual treatment. However, the sample size only numbered 16. *Id.* at 313 and n. 198. When considering a particular treatment plan, ask if the program is inpatient or outpatient, if the program involves individual as well as group therapy, if the program has a polygraph component to monitor the offender’s truthfulness, whether the program is experienced with juvenile as opposed to adult sex offenders, and what treatment “theory” the program follows.
5. **Additional considerations.** When fashioning a disposition, make sure:
 - a. **The probation officer can freely share information.** As part of the disposition order, the probation officer must be able to access therapy records and must be able to share the information with school teachers, police officers, churches, and anyone else who may have contact with the child.
 - b. **Restrict the offender’s contact with children.** Not only should an offender be denied unsupervised contact with the victim, but his access to other children should also be restricted. Activities such as baby sitting, teaching Sunday School, etc, should be prohibited.
 - c. **Reunification.** At some point the juvenile offender may seek to return home. This is problematic if the victim is a younger sibling also living in the home. If the court is entertaining such a request, demand answers to the following questions: has the offender “successfully” completed treatment? Is successful treatment even possible given what little we know about this topic? Has the victim also received therapy and, if so, what does the therapist believe would be in the victim’s best interests? Has the family unit received counseling and, if so, what progress has been made? Is there a game plan to ensure the offender will not have unsupervised contact with the victim? If so, how reasonable is the plan and can we be sure the parents will enforce the plan and report any violations to the

court? Given the importance of all these issues, it is important that in cases of sibling abuse, we file not only delinquency charges against the offender but also civil child protection petitions to ensure the victim's needs are being addressed.

Prosecuting Cases of Child Abuse: Pre trial motions, jury selection, cross-examination, opening statements and closing arguments

I. 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 your 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 (8th 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)