



Duel of the Fates

22 Cross-Examination Techniques for Child Abuse Prosecutors

By Robert J. Peters & Christa Miller¹

Cross-examination in child abuse cases differs from its depiction in popular culture. Although television and movies portray cross-examination as confrontational, dramatic, and resulting in sudden, tearful confessions, in reality cross-examination is quite nuanced.

In many situations, it is best to only cross-examine sparingly, in a targeted and strategic manner, or not at all. Even then, writes Peter Megargee Brown, "do only what's necessary, and then get the hell out."² The risk of cross-examination is to allow an adverse witness to reinforce their damaging assertion(s) by repeating what they said on direct examination. Moreover, a lengthy cross-examination, particularly on a witness who has done little damage to the state's case, may create an impression in some jurors' minds that a witness' testimony was more significant than it really was.

Effective cross-examination requires a strong comprehension of human psychology, including the tendency toward logical fallacy. To that end, cross-examination takes careful tactical planning and execution, choosing techniques customized to the witness, the evidence, and the unique goals of engagement. It is therefore useful to work with state witnesses—particularly investigators, forensic interviewers, and experts—to evaluate both witnesses and evidence.

This guide focuses on 22 techniques, split into four categories and ranging from fundamental to advanced tactics. Each relies on scenarios and sample lines of questioning to demonstrate a range of tactics that can be used—on their own or in conjunction with one another—to expose and undermine confusion, obfuscation, deception, and logical fallacies. Each technique includes a Star Wars reference to add levity and invoke pertinent themes.

In a recent Star Wars television series, a villain describes a characteristic of Jedi, who "cannot help what they are. Their compassion leaves a trail." Though this article focuses on the strategy and often aggression of cross-examination techniques, the child abuse prosecutor's most distinctive feature must ultimately be their compassion for and dedication to the children they serve. As another Star Wars character would say, "This is the Way."

¹ The authors are grateful to Zero Abuse Project legal externs Caitlyn Kinsey and Kiley Eichelberger for their research in support of this publication. They are also grateful to Victor Vieth, Chief Program Officer for Education and Research, and Kathleen Nolan, Senior Attorney, for their review and insight. Victor Vieth's prior articles and contributions to the field of child abuse prosecution were invaluable resources for drafting lines of questioning and articulating strategies.

² Peter Megargee Brown, *The Art of Questioning: Thirty Maxims of Cross Examination* (1987).

Table of Contents

Fundamental Tactics	3
"Shorter than Expected": Brief, Plain, Leading Questions.....	3
"You Don't Know the Power" of Parallelism.....	5
"You'll Find I'm Full of Surprises": Dilemma and Roadrunner Techniques.....	7
"As You Are Slowly Digested Over a Thousand Years": The Stretch-Out Technique.....	12
Cross-Examining the Outer Rim.....	13
"Wars Not Make One Great": Constructive Cross-Examination.....	14
Context-Specific Tactics	15
"You Have Failed Me for The Last Time": Things Not Done.....	15
"It Is Pointless to Resist": Using Proof as a Wedge.....	18
"It's a Trap!".....	20
"Never Tell Me the Odds": Highlighting Unlikelihood and Absurdity.....	22
"I Have a Bad Feeling About This [Witness]": Impression Management.....	23
Concession-Based Tactics	25
"Once You Start Down the Dark Path": Concessions to Existing Evidence.....	25
"Twice the Pride, Double the Fall": Concessions to Omitted Evidence.....	27
"Your Eyes Can Deceive You. Don't Trust Them": Concessions to "Missing" Evidence.....	28
"From a Certain Point of View": Concessions to Subjectivity.....	29
Offensive Tactics	31
"I Find Your Lack of [Good] Faith Disturbing": Behavioral Inconsistencies.....	31
"Much to Learn, You Still Have": Limited Knowledge.....	33
"These Are Not the Droids You're Looking For": Perception and Recall.....	34
"The Dark Side Clouds Everything": Impeachment and Prior Bad Acts.....	34
"Deceived by a Lie": Impeaching on Character for Truthfulness.....	37
"Your Arrogance Blinds You": Impeaching with Criminal Convictions.....	38
"Only a Sith Deals in Absolutes": Undermining and Exposing Logical Flaws.....	39
It's Over: You Have the High Ground	40

Fundamental Tactics

“Shorter than Expected”: Brief, Plain, Leading Questions

Applicability: Short, plain questions are generally best practice to avoid overly complex, confusing phrasing. This becomes even more important when the witness is hostile or manipulative. Prosecutors should maintain concise, controlled lines of questioning to avoid deviation or tangents by the witness.

Execution: The questions in effect become the testimony, reducing the witness' ability to answer in any way other than “yes” or “no.” This not only enables control of the narrative; it also offers a chance to gain momentum towards maximum impact. Keep the questions short and plain, using one fact per question.

Example 1A: The defendant is claiming that after he arrived home drunk, he mistook his child for his wife and proceeded to have sex with his “wife.”

1. You've lived in your home for five years?
 - a. Are you familiar with how your house looks?
 - b. Are you familiar with the rooms in your house?
 - c. Over the past five years, you have developed a good sense of the layout of your house?
 - d. Your bedroom is upstairs and at the opposite end of the house from the garage?
 - e. Your child's bedroom is also upstairs from the garage?
 - f. How is your bedroom furnished? Standing at the door, where is the bed, your wife's dresser, etc.? Where are the windows?
 - g. How is your child's bedroom furnished? Standing at the door, where is your child's bed? Desk? Where are the windows?
2. I'm showing you the set of blueprints of your home, which was previously admitted as State's Exhibit _____, and the set of photographs of each bedroom, previously admitted as State's Exhibit _____.
3. According to this blueprint, to get to your bedroom:
 - a. You enter the kitchen from the garage?
 - b. And then turn left to move towards the stairs?
 - c. The stairs lead you to the upstairs hallway?
 - d. The master bedroom is at the opposite end of this hallway?
 - e. It's a straight walk from the top of the stairs to your own bedroom door?
 - f. Your child's bedroom is only halfway between the stairs and your own bedroom?
 - g. You have to turn left to enter your child's room?
4. This photograph of your bedroom shows that as you stand in the doorway between the hallway and the bedroom, your bed is on the opposite wall, between two windows?
 - a. It's a queen-sized bed?

- b. It's been in that position since you moved in?
5. Yet this photograph of your child's bedroom shows the bed against the wall to your right, next to the single window?
 - a. It's a twin sized bed?
 - b. It's been in that position since you moved in?
 - c. The light from the streetlamp is visible from your child's room?
 - d. But not from your own bedroom?
6. These are very different bedroom layouts, are they not?
7. Did you wonder why the walk to your bedroom seemed so much shorter?
8. Were you confused as to why your bed would have moved to a different wall entirely?
9. Why your bed might seem so much smaller than you're used to?
10. Or why light was visible from outside?

Example 1B: Also apply this technique when referring to the sexual acts or behaviors to explore gaps or absurdities in a defendant's narrative.³

1. You've been married for eight years?
2. Your wife is how tall? And weighs about how much?
3. You have sex with your wife on average, once a week?
4. You go out drinking with your friends about once a month?
5. Your typical routine on these gathering nights is to come home and have sex with your wife?
6. What does your wife typically wear to bed?
7. What does your child typically wear to bed?
8. Your child is how tall? And weighs about how much?
 - a. She didn't touch you at all?
 - b. You had to undress yourself?
 - c. Her arms and legs remained limp?
 - d. Did you notice how much smaller she appeared to have become?
 - e. Did you wonder why she was wearing a pajama top and bottom instead of her usual t-shirt and no underwear?

An additional but riskier strategy for this fact pattern is to ask precise questions regarding standard sexual behaviors between the defendant and his wife, contrast those with the sexual acts perpetrated on the child, and highlight the implausibility of the defendant confusing the two. (I.e. "When you first approach your wife for sex, where do your hands usually go? She responds by

³ See also: "Never Tell Me the Odds": Highlighting Unlikelihood and Absurdity.

touching you back? She helps you undress? What nonverbal sounds does she make?") Prior to using this strategy, prosecutors should know their judge and community, and understand the inherent risk of asking a witness to detail their sex life in front of jurors, knowing it may backfire. For example, if the defendant's wife is in the courtroom and is visibly shaken by these details, a jury may be sympathetic, holding the prosecutor responsible and weakening their credibility. Prosecutors should weigh the benefits of achieving clarity and exposing absurdities with these strategic challenges. However, in the appropriate case, application of this strategy can lead to devastating cross-examinations by skilled prosecutors.

"You Don't Know the Power" of Parallelism

This powerful rhetorical technique relies on repetitive language that highlights facts of importance. As such, it is a broad technique that can be used in different situations. Prosecutors may use it to hammer in on key themes or arguments. It can also leverage the concepts of primacy or recency, since most people tend to best remember the first and last pieces of a presentation.⁴

Applicability: The defense is casting doubt on the alleged victim's credibility by claiming that they are too young to recall details, are confused about what really happened, or are making the whole story up.

Execution: Ask a short series of thematically or structurally repetitive questions highlighting the times that the child's forensic interview and statements to others (e.g., parents, teachers, or medical professionals) can be corroborated with other evidence, especially statements the defendant themselves has made. This rhetorical strategy emphasizes the child's truthfulness and credibility.

Example 1:

1. We just viewed the video recorded forensic interview, State's Exhibit _____, of your child Hannah.
 - a. In it, she spoke of having spent that afternoon with you at the trampoline park.
 - That is the truth?
 - b. You watched her go through the obstacle course three times?
 - That is the truth?
 - c. She fell and injured her wrist?
 - That is the truth?
 - d. She asked you if you could both leave early?
 - That is the truth?
 - e. You asked if she wanted to see a doctor, but she said no?

⁴ See also: Cross-Examining the Outer Rim.

- That is the truth?
 - f. Instead you took her for ice cream after you left?
 - That is the truth?
 - g. She ordered mint chocolate chip?
 - That is the truth?
 - h. You ordered Rocky Road?
 - That is the truth?
 - i. You sat by the pond watching the ducks?
 - That is the truth?
 - j. She wanted to watch a movie with you that night? She wanted to watch *Frozen*?
 - That is the truth?
 - k. You told her you would be out with friends and wouldn't be home until after her bedtime?
 - That is the truth?
2. Hannah remembered a lot of details about your afternoon together, didn't she?
- a. She told the truth about those details, didn't she?

Example 2:

1. When Katie says she slept in the basement bedroom, she is telling the truth, isn't she?
2. When Katie says she has a dog, she's telling the truth?
3. When Katie says the dog got outside and was scratching on a basement window, she's telling the truth?
4. When Katie says you brought the dog to her bedroom, she's telling the truth?
5. When Katie says the dog jumped up and licked her face, she's telling the truth?
6. When Katie says you also gave her a kiss, she is telling the truth?
7. When Katie says you gave her a hug, she's telling the truth?
8. When Katie says you climbed into bed with her, she's telling the truth?

This technique does not try to change the defendant's stated opinion, but rather asks underlying questions about the several times the child has given accurate statements. Thus, it demonstrates the lack of basis for why the child would lie only about the abuse when they were correct and accurate about many other facts surrounding the abuse.⁵

“You’ll Find I’m Full of Surprises”: Dilemma and Roadrunner Techniques

Applicability: Prosecutors should be alert for situations where defendants and defense witnesses can be boxed into a narrow range of positions that are helpful.

Dilemma

Execution: Present one or more moral dilemmas in which the witness must answer in a way that is agreeable to the prosecution's argument or else they are likely to be seen as immoral.

Example: The defendant's mother is called to testify as a character witness for the defense, and she is adamant that the allegations by her granddaughter were fabricated, despite extensive corroborating evidence of the criminal acts and grooming process.

1. Were you aware that the police found a large amount of pornography on your son's computer?
 - a. Does that concern you?
 - b. If your granddaughter was shown this pornography, does that concern you?
2. Were you aware that your son has nude pictures of your daughter-in-law on his cell phone?
 - a. If your son showed these nude pictures to your granddaughter, would that concern you?
3. Your granddaughter Katie has a dog, doesn't she?
 - a. What is the dog's name?
 - b. Is it fair to say Katie loves her dog?
 - c. If someone kicked, hit, or threatened to hurt Katie's dog, would that concern you?
4. Are you aware that your granddaughter has vaginal injuries so severe that surgery was required?
 - a. Does that concern you?
 - b. Are you aware of the medical records documenting your granddaughter's vaginal injuries?

⁵ See also: “Only a Sith Deals in Absolutes” and Cross-Examining the Outer Rim; Victor Vieth, “Trial Strategies in Cases of Child Abuse: Pre-Trial Motions, Jury Selection, Cross-Examination, Opening Statements, and Closing Arguments,” *National Child Protection Training Center* at 6; Victor Vieth & Suzanna Tiapula, “When Sparks Fly in Defense of Child Victims: Tips for Cross-Examining a Defendant or Defense Witness,” *National Child Protection Training Center* at 1-5.

5. Would it be appropriate to give a vibrator or other sexual toy to a child?
 - a. Are you aware that Katie has disclosed your son gave her sex toys?
 - b. Are you aware that a sex toy was found in Katie's room?

Roadrunner

Execution: Prosecutors should hint that they're moving one direction to encourage the witness to commit, then cut the opposite direction in subsequent questions. This tactic leverages the witness's commitment so that they, like Wile E. Coyote, plummet into the canyon of a groundless position.⁶

Example 1: The prosecutor's goal in this example is to telegraph an emphasis on the defendant's caretaking responsibilities, encouraging them to expand on positive, non-abusive interactions with children.⁷ The prosecutor then cuts in the opposite direction, using the amount of time the "loving parent" spent caretaking to instead demonstrate their opportunity to abuse.

1. You were like parents for the boys?
 - a. You loved them?
 - b. They loved you? Respected and trusted you? Called you Dad?
 - c. They loved your partner? Respected and trusted her? Called her Mom?
 - d. That trust and those names are a great honor, aren't they?
2. And you and your partner earned it, didn't you? You did a lot for the boys?
 - a. Provided a bedroom for them to sleep?
 - b. You take them to all of their doctor appointments?
 - c. You transport them to and from school, so they don't have to take the bus or walk?
 - d. You're the parent who brings them to playdates? Piano lessons? Soccer practice?
 - e. They ride with you in your truck on your weekly grocery shopping trips?
 - f. Built a dedicated playroom for them to spend free time?
 - g. Helped them with homework several days a week? In the dining room and the boys' bedroom?
 - h. For that entire school year?
 - i. You helped one foster son in the boys' bedroom, while your partner helped the other in the playroom?
 - j. This was to avoid distractions?
 - k. You helped them create science experiments in the kitchen?
 - l. As well as in the bathroom?
3. So, you were both alone with the boys a lot?

⁶ For those who are unfamiliar, Roadrunner is a Looney Tunes cartoon bird who is constantly hunted by Wile E. Coyote. One of Roadrunner's many antics involved running off a cliff with Wile E. Coyote in hot pursuit. In this tactic, Roadrunner races off the ledge, inducing Coyote to do the same, then hovers in mid-air while Wile E. Coyote realizes there is no ground under his feet and falls to the ground.

⁷ See also: Concession-Based Techniques.

Example 2a: Similar to the example above, the prosecutor's goal is to telegraph a loving, functional, supportive relationship. This cutback, however, is to establish that the child has no motive to lie.⁸

1. Would you say that you are caring and loving in your relationship with Hannah?
 - a. She feels the same way towards you?
 - b. You communicate with Hannah about her needs?
 - c. She isn't afraid to come to you with new needs?
 - d. She relies on you?
2. You ensure all of her needs are met?
 - a. Her need for a safe, secure home?
 - b. Her need for healthy food?
 - c. Her need for education?
 - d. Her need for social interaction and activities with her peers?
3. And as far as you can tell, Hannah appreciates your dedication to parenting?
 - a. She's grateful for the burglar alarm system you had installed?
 - b. She thanks you for preparing her meals?
 - c. For getting her to school on time? Helping her with homework?
 - d. For taking her to soccer practice and friends' birthday parties?
 - e. She doesn't have to misbehave or be dishonest for you to give her food?
 - f. She doesn't have to lie for you to help her with schoolwork or her grades?
 - g. She doesn't have to lie for you to meet her needs?

To conclude this line of questioning, prosecutors could ask directly for a concession that the child has no motive to lie. However, unless a favorable response is expected, a better strategy is likely to save this final implication for closing. Ultimately, this is a judgment call.

Example 2b: In this case, the defendant works hard to provide for their family but does not believe the accusing child is sufficiently grateful for their efforts. Their defense is that the accusation is part of the child's ongoing animosity towards them. Your goal is still to establish that the child has no motive to lie.

1. You would describe your relationship with Katie as tense and confrontational?
 - a. No matter what you do, she manages to find fault?
 - b. She never thanks you for ensuring her needs are met?
 - c. She didn't thank you for installing a burglar alarm system to secure your home?
 - d. She doesn't thank you for weekly grocery shopping purchases? Preparing family meals?
 - e. She doesn't thank you for bringing her to school? To playdates with her friends?

⁸ See also: "You Don't Know the Power" of Parallelism

2. But Katie does approach you for needs she has?
 - a. She asks you for rides to her playdates?
 - Most of the time you say yes?
 - b. She asks you to pick up groceries, favorite snacks, and drinks?
 - You ensure there's enough food for her?
 - c. She asks you for help with homework?
 - You help her with homework?
 - d. She asks you to walk her dog when she's with her friends or doing an afterschool activity?
 - When you can, you do?
 - e. So she might not say thank you, but it's fair to say that she does rely on you to meet her needs, correct?

Example 3: The prosecutor's goal is to telegraph a focus on the hard work the defendant put into providing for their family. As in Example 1 above, the cutback is to establish their opportunity to offend by undermining their "some other dude did it" defense regarding the illicit material found on their hard drive.

1. In your second job, you are a customer service representative?
 - a. You're able to do this job from home?
 - b. You take calls from customers located all over the world?
 - c. This work requires you to be awake during the nighttime and early morning hours?
 - d. Specifically, your shift runs from 11 p.m. to 7 a.m. on the weekends?
 - e. Was it hard to be away from your family during these hours, while they slept?
 - f. Those are challenging hours, even on weekends. It must be difficult to stay awake at times?
2. Working a day job during the week and a night job during weekends must've left you pretty lonely?
 - a. Your family would leave the house so you could rest?
 - b. You only saw your wife for a brief window of time between the family's arrival home and the start of your shift?
 - c. Most of that window was spent preparing for dinner and bedtime?
 - d. That schedule rarely gave you the opportunity for intimacy with your wife?
 - e. You told her it was just temporary until you could pay off the debt from your father's funeral?
 - f. You were lonely and adult pornography helped you to stay awake?
3. The company you work for provided your laptop and phone?
 - a. The laptop was a semi-rugged Lenovo?
 - b. It had a built-in webcam and microphone?

- c. And the phone was an iPhone 10?
 - d. Both of these devices included antivirus and monitoring software?
 - e. You never received any alerts indicating that your computer had detected malware or hacking attempts?
 - f. You weren't aware you were being monitored?
 - g. You thought it was just your work activity that was being monitored, not your sign-ins to non-work-related websites or your sign-ins on non-work nights?
 - h. With your financial situation, you were careful to keep your job and follow company policy?
 - i. It was against company policy to share the laptop username and password?
 - j. You didn't create another account for anyone's personal use?
 - k. You didn't let your children login to your work computer?
 - l. Your wife had her own laptop?
 - m. That's the only laptop she used?
4. So you were the only one in your family awake during the times of day the illicit videos were downloaded?
 5. And you were the only one in your family with access to the computer where these videos were found?

This line of questioning would be more impactful if paired with prior (or possibly rebuttal) testimony from a company IT staff member, who can testify that the company antivirus software flagged no malware or other security threats indicating it might have been hacked. They could also testify that the company's mobile device management software shows a consistent pattern of usage by that sole user, with no usage patterns (times of day or software usage) indicating that anyone else was using the defendant's login to use the device. The prosecutor should highlight these key facts in closing, with critical facts developed in the opening statement.⁹

Example 4: Combining techniques can be effective. Here, blending the dilemma and roadrunner lines of questioning allows the prosecutor to telegraph an opportunity for the defendant to deny the crime and to convey the prosecutor's reasonable belief of why the defendant would not admit to committing the crime. The cutback is the suggestion of shame. In this case, in demonstrating that the defendant is capable of egregious abuse, it is equally relevant to explore their attitudes about domestic violence and child abuse.

1. Mr. Smith, you have denied beating your wife in front of your children.
2. Is it wrong for a man to beat his wife?
 - a. Why is it wrong?
3. Is it wrong for a child to witness an act of violence against another person?
 - a. Why is that wrong?

⁹ Victor Vieth & Suzanna Tiapula, "When Sparks Fly in Defense of Child Victims: Tips for Cross-Examining a Defendant or Defense Witness," *National Child Protection Training Center* at 1-5.

4. Showing State's Exhibit _____, the photograph of your wife and children you took last month. Now, State's Exhibit _____, the photograph of your wife's torn face before she received 35 stitches to repair the wounds.
 - a. What could she possibly have done to deserve being punched so hard that the skin around her eyes turned black and purple?
 - b. Can you think of any legitimate reason to shove a woman's head through a glass cabinet?
 - c. What message does this violence send to that woman's children?
 - d. Do you agree that if anyone intentionally inflicted these injuries, they should be ashamed?
5. Do you love your wife?
 - a. If you ever hurt someone you loved, would you be ashamed?
6. Is it fair to say that the reason you cannot admit your crime to this jury is because you are ashamed of what you did?

By asking questions that pose a moral dilemma, the defendant is forced to provide a reasonable answer so that the testimony will not appear unreasonable or ill-mannered.¹⁰ For example, if the defendant responds to Question 4b with "No," he is letting the jury know that he concedes the obvious. If the defendant grapples with the prosecutor or does not say "No" convincingly, the jury may gain some insight into the offender's character.

"As You Are Slowly Digested Over a Thousand Years": The Stretch-Out Technique

Applicability: The jury needs time to slowly, carefully digest the substance of a prosecutor's argument, which may not be immediately apparent to them. This may occur, for instance, when the prosecutor needs the jury to consider abuse dynamics or the implications of prior bad acts.

Execution: Rather than asking the simple questions up front, this line of questioning stretches the point into a number of questions, bringing admissions that all make the same point with increasing emphasis.

Example: The defendant is a wealthy business executive who beat his wife in front of their children after she accumulated hundreds of thousands of dollars' worth of credit card bills. The prosecutor's theme is power and control.

1. In your workplace, you hold an executive position?
 - a. You also have a leadership role in the church?
 - b. As a leader, you expect people to follow your leadership?

¹⁰ See Victor Vieth, "Trial Strategies in Cases of Child Abuse: Pre-Trial Motions, Jury Selection, Cross-Examination, Opening Statements and Closing Arguments," *National Child Protection Training Center* at 10.

- c. You make financial decisions that must be obeyed?
2. If employees don't obey, you can fire them?
 - a. You can give them a negative performance review?
 - b. Demote them?
3. Is it fair to say you control your family's finances?
 - a. You are paid half a million dollars annually?
 - b. You assume responsibility for paying the bills?
 - c. You do the banking?
 - d. You make the investment decisions?
4. You have, in the past, argued with your wife about the bills she was accumulating?
 - a. Despite these arguments, the problem continued?
 - b. This was an example of fiscal irresponsibility you felt your adopted children should not be witness to?
 - c. You wanted them to understand the consequences of overspending?
 - d. As well as the consequences of disobeying you?
5. When you disagreed with your wife, you couldn't fire her, could you?
 - a. You couldn't give her a negative performance review?
 - b. You couldn't demote her?
 - c. You couldn't control her spending with words?
 - d. You could only control her with your fists?

After spending time on several background questions, this line of questioning concludes with one simple question conveying the theme of power and control. The lead-up points emphasize that power and control are something the husband is used to having and how this assumption influenced his behavior when his wife would not cooperate with his plan for their finances.¹¹

Cross-Examining the Outer Rim

Applicability: The defense has prepared one or more witnesses to testify to a central narrative around the accusation, but you believe the witnesses are unlikely to be prepared to answer questions about peripheral but relevant details.

Execution: Ask questions about these "fringe" details in a way that demonstrates contradictions and unreliable recollection.¹²

Example: Estefania was sexually assaulted in a secluded grove while walking with the defendant. The defense's witnesses say they saw the defendant walking with the alleged victim on the date and

¹¹ See Victor Vieth, "Trial Strategies in Cases of Child Abuse: Pre-Trial Motions, Jury Selection, Cross-Examination, Opening Statements and Closing Arguments," *National Child Protection Training Center* at 9.

¹² See also: "You'll Find I'm Full of Surprises": Dilemma and Roadrunner Techniques.

around the time of the incident and that the pair were never out of sight along the long, straight pathway. Unbeknownst to these witnesses, photos retrieved from the victim's phone refute this, establishing vegetation, topography, and distance that contradict the defense witnesses' claims of visibility.

1. You observed the defendant walking together with Estefania?
 - a. They were walking towards the park pavilion?
 - b. You just testified that they were walking the straight pathway between the trailhead and the pavilion?
 - c. You testified they were never out of your sight?
 - d. You saw them the entire way to that pavilion?
2. I'm showing you the set of photos that has been collectively admitted as State's Exhibit _____.
 - a. Do these photos show the pathway as it appeared that evening?
 - b. This picture shows the trailhead in the background?
 - c. This one shows the parking lot to the west?
 - d. This picture shows the wildflowers growing along the pathway?
 - e. And the crabapple trees planted there as well?
 - f. This picture shows the entrance to a secluded grove off that pathway?
 - g. It's a grove that is well-known among park users in your area as a kind of lovers' lane, isn't it?
 - h. Estefania and the defendant had to leave the pathway to walk down this trail?
 - i. You couldn't see them at that point, correct?

“Wars Not Make One Great”: Constructive Cross-Examination

As discussed in the introduction, cross-examination is often thought of as a destructive process. It can indeed be destructive when it is “adopted to destroy the credibility of a witness produced by the other side, which can be achieved by projecting that the witness has a poor memory or that his knowledge is not credible.”¹³ However, all witnesses do not fit this description, and so cross-examination can sometimes be constructive.

Applicability: The witness has certain information or a fact that helps your case, and you want to highlight it to the factfinder(s). There is no need to destroy the witness' credibility, because the information is favorable to your case.¹⁴

Execution: Ask a series of non-confrontational questions to elicit the appropriate answers from the witness.

¹³ Kunal Vajani & Tariq Khan, *The Art of Cross Examination*, BAR AND BENCH, May 22, 2020, available at <https://www.barandbench.com/columns/the-art-of-cross-examination>.

¹⁴ *Id.* Note that “there may be a scenario wherein [prosecutors] may have to adopt both approaches during cross examination” in a situation “where some evidence given by the witness is harmful, and some part of his evidence is useful. In such a situation, one needs to be extremely careful.” *Id.*

Example: Similar to concession-based strategies where the prosecutor highlights favorable facts, questions include language and framing for a theoretically more positive approach.

1. Jessica was shy?
2. Jessica was a victim of bullying?
 - a. Mr. Smith took Jessica under his wing?
 - b. He tried to protect her from the older kids?
3. You are aware Mr. Smith took Jessica camping?
4. Mr. Smith gave Jessica gifts?
5. He was a “hugger” around children?
6. In your view Mr. Smith was affectionate towards the children, including Jessica?
 - a. He would play games including tickling?

Context-Specific Tactics

“You Have Failed Me for The Last Time”: Things Not Done

Applicability: The witness is an expert hired by the defense to rebut evidence for the prosecution. For example, they may have academic credentials and/or expertise in medicine, psychology, or some other potentially relevant field such as a specialty in a forensic science.

Execution: The goal in this technique is not to attack the witness' credentials themselves, which may be considerable, but instead to attack their expert opinion based on limits in their knowledge of the facts of the case, and other shortcomings in their approach or analysis.¹⁵

Prosecutors should collect a list of relevant tests, ignored corroborative evidence, etc., that should have been performed or considered. Often, these are included within professional standards or best practices guides. Use these lists to establish the “things not done” and get the witness to admit their mistakes or at least lack of compliance with pertinent authorities.¹⁶

While the “stretch-out technique” is the basic format, it should not be applied to things done correctly, unless you are trying to highlight the nuances in a niche specialty. At that point, the roadrunner technique is applicable as you cut back to why these nuances do not apply to this

¹⁵ “...the main point of Murphy's cross-examination was not only to attack Binger's expert testimony. He determined to show that Dr. Binger's conclusion was erroneous, not because Binger himself was not qualified as an expert, but because the facts which Binger had were inadequate for his conclusion. This was a brilliant decision, though perhaps a subtle one to those not familiar with courtroom strategies. If Murphy had attacked Binger's expertise, he would have been forced to deal in the fields of psychology and psychiatry, areas in which Dr. Binger clearly had the edge. But by simply sticking to the facts, Murphy neutralized Binger's expertise and was able to keep control of his cross-examination.” Peter Megargee Brown, *The Art of Questioning: Thirty Maxims for Cross-Examination*.

¹⁶ See also: Concession-Based Tactics.

specific situation. With expert witnesses in particular, leveraging external sources of authority may be critical to control or “wedge” the witness.¹⁷

Example: The defense hired a forensic expert with limited training and experience in an attempt to claim that the State's expert missed exculpatory evidence.

1. Are you familiar with the Scientific Working Group on Digital Evidence?
2. This organization publishes best practices guides for professionals such as yourself to use in performance of their duties?
3. You would agree with me that the Scientific Working Group on Digital Evidence is a respected organization in your field?
4. One of these documents is titled “[Minimum Requirements for Testing Tools Used in Digital and Multimedia Forensics?](#)”
5. I'm showing you that document, which has been previously admitted as State's Exhibit _____.
6. It was published in November 2018?
7. You're familiar with this document?
8. Prior to imaging the defendant's computer, you did not use a write blocker to preserve the evidence?
 - a. You did not test this device to ensure you could not write to the disk being imaged?
 - b. You did not test this device to ensure it would read the disk?
 - c. You also did not test this device when you first put it into service?
 - d. Nor after each update, in accordance with the Scientific Working Group on Digital Evidence (SWGDE) minimum requirements?
9. You did not, then, use a disk imager to acquire a forensic copy of the defendant's hard disk?
 - a. This device was also not tested prior to use?
 - b. Not using a known dataset?
 - c. So you don't know whether the test acquired the dataset properly?
 - d. You did not use a hash to verify this acquisition?
 - e. You were thus unable to account for unexpected results?
10. The forensic examination of the defendant's computer was conducted using which software?
 - a. But again, you did not test this software against a known dataset in accordance with SWGDE minimum requirements?
 - b. Not before putting it into service?
 - c. Not after each update?
 - d. I'm showing you State's Exhibit _____, the previously admitted training curriculum from the vendor. This curriculum makes no mention of how to validate this tool and verify its results?
 - e. Different training would have provided those skills?

¹⁷ See: “It Is Pointless to Resist”: Using Proof as a Wedge.

- f. But you have never attended this kind of training?
 - g. In fact, you have licensed these tools for less than one year?
11. You've never validated these tools?
 12. Based on what you just testified to, there is no way to know your results are an accurate representation of what's on the computer?

By effectively discrediting the expert based on things he had not done according to general industry accepted best practices, this cross-examination significantly lessens his credibility.

Example 2: The forensic expert has significant training and experience in one aspect of digital forensics but none relevant to key evidence, such as a defense claim that malware downloaded the child sexual abuse material.

1. Your extensive experience in digital forensics includes malware analysis?
2. This is the practice of determining how malware behaves by looking at its code?
3. You are able to determine whether a piece of malware was able to download child sexual abuse material, or CSAM, from the internet?
4. You analyzed the malware from the defendant's computer?
5. And your analysis was unable to determine whether the malware could have downloaded the CSAM?
6. Is it fair to say that your experience does not include the forensic analysis of computer hard drives?
 - a. Computer memory?
 - b. Computer operating systems?
 - c. Computer file systems?
 - d. Timeline analysis?
 - e. Pattern of life analysis?¹⁸
7. After your malware analysis was inconclusive, you did not further examine the computer for other ways the CSAM could have been present there?
 - a. For example, web browser history?
 - b. The Windows Downloads folder?
8. And you did not examine the computer for anti-forensic activities designed to conceal the child sexual abuse material?
 - a. File name changes?
 - b. Hidden files?
 - c. Whether steganographic techniques were used?
 - d. The presence of a "wiping" tool?

¹⁸ Christa Miller, *Forensic Pattern of Life Analysis*, FORENSIC FOCUS, Feb. 25, 2020, available at <https://www.forensicfocus.com/articles/forensic-pattern-of-life-analysis> (last accessed June 14, 2022).

- e. The deleted files themselves?

The result of this examination, which can be stated through a concluding question or in closing argument, is that while the defense expert may be skilled with malware analysis, they are extremely limited when it comes to other forms of digital forensics, which has great implications for the weight of their testimony.

“It Is Pointless to Resist”: Using Proof as a Wedge

Applicability: The witness has knowledge favorable to the prosecutor’s case but is reluctant to testify accordingly. The prosecutor has a document or other proof of the information desired of a certain event, circumstance, or statement.

Execution: The prosecutor informs the witness of the proof, and the witness should realize the futility of withholding the information.

Example: The defense hired an expert who has claimed that the State’s forensic interviewer did nothing correctly when they interviewed a child witness. The prosecutor’s rebuttal proof consists of guidelines published by the United States government.¹⁹

1. Are you familiar with the Office of Juvenile Justice and Delinquency Prevention?
2. This agency is a part of the U.S. Department of Justice?
3. This agency publishes numerous documents designed to help justice professionals perform their jobs?
4. One of these documents is titled “[Child Forensic Interviewing: Best Practices](#)”?
5. I’m showing you that document, which has been previously admitted as State’s Exhibit _____.
6. It was published in September 2015?
7. You’re familiar with this document?
8. It describes techniques that are designed to balance legal requirements with developmentally appropriate interview techniques?
9. These techniques are research-informed?
10. The document describes multiple factors that can influence a child’s disclosure of abuse?
11. These factors include age, culture, disability, and trauma?
12. Let me direct you to page 6. Please read the highlighted section aloud for the jury. I “Conduct the forensic interview as soon after the initial disclosure of abuse, or after witnessing violence, as the child’s mental status will permit.... However, children who are overly fatigued,

¹⁹ Other forms of proof might include industry standards and best practices guides, professional ethics statements published by associations of which the expert is a member, training curricula, academic papers, or other publications the expert has authored or contributed to that demonstrate positions inconsistent with their testimony, etc.

hungry, frightened, suffering from shock, or still processing their traumatic experiences may not be effective reporters in a forensic interview.”]

- a. After Kyle was removed from his home, the medical examination revealed he had not been fed for at least two weeks?
 - b. He was hospitalized for three days to treat his malnourishment and shock?
 - c. During this time, medical professionals observed him to be nonverbal?
 - d. He only began to speak again following his emergency placement with his aunt and uncle?
 - e. So the forensic interviewer's one-week delay in interviewing him was not unreasonable?
13. Now turn to page 8. Please read that highlighted sentence. [“All interview models acknowledge that building rapport is important for both the child and the interviewer.”]
- a. You've testified that the State's forensic interviewer planted the suggestion of abuse by providing instructions. But this best-practices document refers to instructions in the context of building rapport, doesn't it?
 - b. I'd like to turn now to State's Exhibit _____, the forensic interview conducted with Kyle. The interviewer told Kyle that she wasn't there and didn't know what had happened?
 - That she didn't know the answers to questions she planned to ask him?
 - That she needed him to talk only about things that really happened?
 - c. And the interviewer then asked Kyle to tell her about what he likes to do for fun?
 - He told her that he likes to go fishing with his uncle?
 - She asked him to tell her about his favorite fishing trip memory from beginning to end, without leaving anything out?
 - And her remaining questions related to fishing were open-ended? She encouraged him to tell her more about how to prepare bait and hook, in his own words?
 - d. So, providing instructions and building rapport can actually mitigate suggestibility, can't it?
14. Please turn now to page 10. Read that first highlighted portion please. [“Contextually appropriate questions that explore other viable hypotheses for a child's behaviors or statements are essential to the overall integrity of the interview.... There is no one set of questions used routinely in every interview, as child characteristics, contextual settings, allegations, and case specifics vary greatly.”]
- a. I'm returning to Kyle's forensic interview, State's Exhibit _____. Kyle told the interviewer his mother said he needed to be punished because his daddy put his pee on Kyle's pee?
 - b. The interviewer asked him simply to tell her about that “pee” incident?
 - c. She asked for contextual details about where it happened and what it involved?
 - d. She again provided space for Kyle to describe “pee” in his own words?
 - e. She followed Kyle's narrative, including case specifics of his experience?
 - f. She didn't assume right away whether Kyle was talking about sexual abuse?

- g. So in the words of this document, she asked appropriate questions that elicited narrative details, case specifics, and contextual settings?
15. Remaining on page 10, please read the second highlighted portion. ["The closure phase helps provide a respectful end to a conversation that may have been emotionally challenging for the child. The interviewer may use various strategies during this phase."]
- a. The interviewer asked Kyle if there was anything else he wanted to tell her or ask her?
 - b. The interviewer thanked Kyle for taking the time and effort?
 - c. But not for any of the content he provided?
16. Going by this best practices document, the State's forensic interviewer did a lot of things correctly, didn't she?

It is technically possible to use this technique without proof; such as, in this case, OJJDP guidelines for forensic interviewers. However, it is best practice to avoid asking questions to which the prosecutor does not know the answer, barring unique circumstances. Prosecutors should never compromise their authenticity or representation of truth by guessing or committing to a potentially baseless position.

"It's a Trap!"

Applicability: The witness is willing to lie or is lying and the prosecutor has the ammunition with which to demolish their testimony.

Execution: The prosecutor commits the witness to the untruthful position by persuading them to take the position several times in different ways. The objective is camouflaged by interspersing questions on other subjects. The prosecutor then destroys the witness's credibility either on the stand or with later evidence.²⁰

Example:

1. You and your husband are lifelong Christians?
 - a. You both grew up in the faith?
 - b. You converted to evangelical Christianity after growing up Lutheran?
 - c. Your husband's father was a pastor?
 - d. You've been active in your church community since you were married?
 - e. Volunteered to teach children's Sunday school?
 - f. Chaperoned children's faith activities?
2. You adopted your children, Leah and Jeremiah, as a result of what you felt was a holy calling?

²⁰ See also: "The Dark Side Clouds Everything": Impeachment and Prior Bad Acts and "Deceived by a Lie": Impeaching on Character for Truthfulness.

- a. You are not able to have children of your own?
 - b. You adopted both children locally?
 - c. They had each been in foster care for a year before you adopted them?
 - d. They had each come from abusive families of origin?
 - e. You believed adopting them gave you the chance to "train up a child in the way he should go"?
3. You've suggested that your disciplining of your adopted children is rooted in your Christian faith?
 - a. In disciplining your children, you look to the Bible for guidance?
 - b. In hitting your children, you often quoted from the book of Proverbs?
 - c. Proverbs 23:13-14 in particular reads, "Do not withhold discipline from a child; if you strike him with the rod, he will not die. If you strike him with the rod, you will save his soul from Sheol." Is that correct?
 - d. And Proverbs 29:15 reads, "The rod and reproof give wisdom, but a child left to himself brings shame to his mother"?
 4. That same book has a lot to say about the obligation of a mother to her children, doesn't it?
 - a. In fact, in Proverbs 31:15, it says a wife of noble character "gets up while it is still dark, she provides food for her family and portions for her servant girls."
 - b. Do you agree with this sentiment?
 - c. Likewise Proverbs 31:26 says, "She opens her mouth with wisdom, and the teaching of kindness is on her tongue"?
 5. When you called your son, Jeremiah, worthless, was that the teaching of kindness?
 6. When you forced your daughter, Leah, to eat a raw onion, was that what the Bible means by providing food for your family?
 7. When your children stole food and drank water from the sink, and you beat them to near unconsciousness, was that acceptable because they didn't die?
 8. May I approach? – This photo shows Leah's physical condition when she came into your house?
 - a. This photo shows Leah's condition when she was taken away?
 - b. Based on these photographs, you clearly did not fulfill your God-given obligation to adequately feed your children?²¹

This brief example shows how the "trap" method can be effective by first influencing the mother to commit to her untruthful claim that her "discipline" was rooted in the Bible, and then destroying her testimony using exact verses from the Bible to contradict the behavior that her testimony purported to be supported by the Bible. It should be noted that unlike this scenario, some parents genuinely

²¹ Victor I. Vieth, *Investigating and Prosecuting Child Torture*, ZERO ABUSE PROJECT, December 2020.

interpret Scripture as mandating physically abusive actions, which has implications for appropriate multidisciplinary team response.²²

As a matter of strategy, prosecutors may choose to incentivize the defendant to offer contextual responses if doing so will alienate the jury; for example, digging themselves in deeper explaining why they believe their actions are justified. If this is not a possibility, however, prosecutors should keep questions tightly phrased to elicit only yes or no answers.

“Never Tell Me the Odds”: Highlighting Unlikelihood and Absurdity

Applicability: The defense is absurd or at best improbable.

Execution: This technique highlights the absurdity or improbability of a defense statement or position. The witness is led into taking positions or making statements that the jury will regard as unreasonable or that can be demonstrated to be unreasonable.

Explicit cross-examination methods highlight the absurd. The jury can see that the defense's account of events is ludicrous given other facts. Conversely, implicit cross-examination methods draw out the absurd, showing the defense's claim of reasonable doubt to be flimsy.²³

Example 1 (explicit): The defendant (who has no medical background) claims he was not sexually abusing his daughter but instead was checking to see if she was a virgin.

1. Can you explain exactly what you were looking for when examining your daughter's vagina?
2. Have you read any literature about conducting this type of exam?
3. Do you have any training in gynecology?
4. What medical equipment did you utilize during this "examination"?
5. What type of sanitary protocols are involved in gynecological examinations?
 - a. Did you wear gloves on both hands?
6. How many vaginal examinations of this type have you conducted?
7. How many were conducted in the presence of medical professionals?

This line of questioning is short but effective because it emphasizes how unreasonable the defendant's statement or position is based on his answers. The prosecutor could ask several additional questions to further demonstrate the absurdity of this claim. While the absurdity of this defense is readily apparent to child protection professionals, it may be dangerous to assume that the jury shares this insight. Prosecutors should ensure the absurdity is recognized outside of the cross-examination context, leveraging jury selection questions and expert medical testimony.

²² Victor I. Vieth, From Sticks to Flowers: Guidelines for Child Protection Professionals Working with Parents Using Scripture to Justify Corporal Punishment, 40(3) WILLIAM MITCHELL LAW REVIEW 907-942 (2014).

²³ See also: "I thought it was my wife" defense in "Shorter than Expected": Brief, Plain, Leading Questions.

Example 2 (explicit): The defendant's claim is that he "lost his penis" during father-daughter tickling play, unintentionally resulting in sexual assault of the daughter.²⁴

1. You and your daughter frequently tickle each other in the nude?
2. Can you recall ever losing your penis in other activities?
 - a. Showering?
 - b. Mowing the lawn?
 - c. Washing the dishes?
3. You say you lost your penis. Do you know where it is now?

Although the final question is likely to draw an objection for being argumentative, the prosecutor is simply talking through the witness to the jury, to help them understand the defendant's ridiculous proposition. Simply stated, the question is more important than the answer.

Example (implicit): A defendant is charged with physically assaulting his five- and seven-year-old children. The defendant claims the defense of "reasonable force." The prosecutor's goal is to box the defendant into a definition of reasonable force and then, using the defendant's statements to the police, show the defendant exceeded his own definition of reasonable force.

1. You claim hitting your children is nothing more than reasonable discipline?
 - a. You hit Leah and Jeremiah because they broke an ashtray?
 - b. Would it be reasonable to hit a child who did nothing wrong?
 - c. Would it be reasonable to hit a child who tells the truth?
2. Were you in the room when the ashtray was broken?
 - a. You don't, then, know who is responsible for breaking the ashtray?
 - b. Is it possible that only one child is responsible for breaking the ashtray?
 - c. Is it possible that at least one of the children told you the truth when they said they didn't do it?
3. In that case, would it be reasonable to discipline a child who did nothing wrong?
4. Would it be reasonable to hit a child who truthfully told you they did nothing wrong?²⁵

"I Have a Bad Feeling About This [Witness]": Impression Management

Applicability: There are no damning errors in the witness's testimony, but the total picture gives an impression favorable to the defense. For example, the witness is selectively claiming a lack of memory or changing narratives in ways that paint the defendant in a more positive light.

²⁴ Victor I. Vieth, "Investigation and Prosecution of Child Abuse," in *Chadwick's Child Maltreatment* (STM Learning, 2014).

²⁵ Victor Vieth & Suzanna Tiapula, "When Sparks Fly in Defense of Child Victims: Tips for Cross-Examining a Defendant or Defense Witness," *National Child Protection Training Center* at 15.

Execution: Prosecutors should craft the examination so that every question adds to the impression the jury sees as it unfolds.

Example 1:

1. Do you love your son?
 - a. Is it fair to say you would do anything you could to help him?
 - b. Since he was charged with crimes against his daughter, have you reached out to support him?
 - c. Have you met with him regularly?
 - d. Hugged him?
 - e. Told him you loved him?
 - f. Helped him with expenses?
2. Since Katie disclosed being sexually abused by your son, have you reached out to her?
 - a. Met with her regularly?
 - b. Have you hugged her?
 - c. Told her you loved her?
3. Katie had a birthday on September 20th?
 - a. Did you send her a present?
 - b. Send her a card?
 - c. Give her a call?
4. Is it fair to say, ma'am, that in terms of loyalties, you have chosen your son over your granddaughter?²⁶

This creates the impression that the witness, a grandmother, is biased towards her son, the defendant. No particular point exists to completely discredit her as a witness, as with impeachment-based offensive techniques, but this line of questioning makes the rest of her testimony appear unfavorable to the jury because of her demonstrated bias.

Example 2:

1. You've testified that Estefania's statement is inconsistent because she wasn't clear on where each meeting took place?
2. When Estefania's mother confronted you, you told her Estefania had misunderstood your spiritual leadership over her?
3. But that same day, you told another youth leader that you thought Estefania had been coming on to you?

²⁶ See Victor Vieth & Suzanna Tiapula, "When Sparks Fly in Defense of Child Victims: Tips for Cross-Examining a Defendant or Defense Witness," *National Child Protection Training Center* at 1-5.

4. And then you told your employer, Pastor Dan, that Estefania was simply confused and repeating what happened to her friend?
5. So actually, it's your statements that are inconsistent?

Note: Even if the defendant relies on tactics to manipulate and control the questioning, allowing the jury to see how they respond in rapid-succession questioning could allow the jury to see the manipulative tactics in real time. Prosecutors should also have each witness testify about what they were told, then highlight these inconsistencies to a jury during closing argument.

Concession-Based Tactics

Tactics based on concessions typically involve the prosecutor taking a "good cop" approach early in the cross-examination. They are designed to draw out useful, uncontested information from a (probably temporarily) agreeable witness. Often, questions consist of a series of damaging statements by the prosecutor, to which the witness must admit the truth.

Based on strategies attributed to the philosopher Socrates, this technique begins by emphasizing the things on which two parties agree.²⁷ In fact, the goal is to keep the opponent from saying "No." Thus, the emphasis on agreement continues, encouraging "the psychological process of the listeners moving in the affirmative direction,"²⁸ even to the point where opponents might find "themselves embracing a conclusion they would have bitterly denied a few minutes previously."²⁹

This is particularly valuable with a hostile witness or the defendant themselves, where encouraging them to concede to facts can actually permit them to relax – even get cocky or hubristic before the prosecutor deals the final blow.

"Once You Start Down the Dark Path": Concessions to Existing Evidence

Applicability: The goal is to obtain a string of defense concessions when the witness first takes the stand and before the witness becomes hostile, depending on the defendant's personality and case strategies. This string of concessions can then be compared to the child's version of events.³⁰

Execution: Building off the child's forensic interview and/or other statements, as well as key pieces of incontrovertible evidence, ask the witness properly formulated questions that they must either concede to or compromise their credibility.

²⁷ Dale Carnegie, *How to Win Friends and Influence People* (1981) at 144.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See also: "You Don't Know the Power" of Parallelism.

Example 1: Character witness

1. The night Avery said they were assaulted was their birthday?
2. You and your partner had spent the afternoon with them?
3. You celebrated by taking them to the haunted house attraction?
4. While you were at the concession stand purchasing ice cream, you returned to your agreed meeting place?
5. But your partner and Avery were not there as agreed?
6. And they remained away for half an hour?
7. Your partner sent a text message telling you that Avery wasn't feeling well and needed to find a bathroom?
8. You were unconcerned by this? You didn't go looking for them?
9. When they returned, Avery seemed unusually quiet?
10. You chalked this up to their supposed illness?
11. Especially when Avery later complained of a stomachache, asking you to bring them home?
12. Avery told the forensic interviewer that they couldn't stand your partner touching them following the incident. You noticed them shying away, correct?
13. You never asked whether something was wrong until Avery complained of their stomachache, correct?

Example 2: Defendant

1. You took Jackson into the bathroom alone to treat him?
 - a. No other children were present?
 - b. No other adults?
 - c. Your wife was engaged in helping one of the children clean up a paint spill?
 - d. You didn't tell your wife you intended to treat his rash?
 - e. Your wife didn't even see you leave the room?
2. You testified you touched Jackson's anus to treat a rash?
 - a. You needed to apply the cream yourself?
 - b. Jackson's motor skills weren't sufficient for him to apply the cream?
 - c. Jackson's medical exam showed diaper rash cream more than an inch inside his rectum?
 - d. You thought the rash extended that far?

“Twice the Pride, Double the Fall”: Concessions to Omitted Evidence

Applicability: The witness has left some facts out of their testimony, either because the defense's direct examination did not cover these facts or the witness chose to omit them. Prosecutors should push the witness to concede the existence of these facts, especially if they are favorable. Doing so will encourage the jury to consider the witness's motives in omitting evidence for the defendant's benefit.³¹

Execution: Rely on other statements or evidence for facts that the witness may have omitted from their testimony.

Example: The defense witness, called for character testimony, has spoken glowingly of the religious perpetrator, but omitted facts regarding excessive physical contact, parental complaints of late-night texts, etc.

1. You've spoken very highly of the defendant Caleb's youth ministry?
2. You were part of the team that reviewed his job application and interviewed him?
3. He impressed you with his in-depth knowledge of child psychology?
4. And also with his Spanish language fluency?
5. Your follow-up with his previous jobs included only the dates of his employment?
6. So you never asked these employers about prior complaints they had received?
7. When you talked about Caleb being with the kids a lot, you didn't mention the extent of his physical contact with them?
 - a. Not the random hugs he gave the girls?
 - b. Not the shoulder rubs he gave to the migrant girls who he said worked so hard?
 - c. Not the multiple comments you and other leadership received from parents, who found Caleb's conduct concerning?
8. And you didn't mention the complaints you'd received of his texting the girls late at night?
9. You didn't talk about the Sunday when you discovered one of the girls crying in a corner of the church hall?
 - a. Or that when she spoke to you about why she was crying, you dismissed her account of his groping her?

³¹ See also: “You Have Failed Me for The Last Time”: Things Not Done.

“Your Eyes Can Deceive You. Don't Trust Them”: Concessions to “Missing” Evidence

Applicability: In contrast to evidence that a defense witness chooses to ignore and omit from their testimony because it undermines their position, “missing evidence” does not exist because the witness has fabricated their version of events.

Execution: The focus in this cross-examination is the defense witness's inability to produce evidence or otherwise substantiate their claims. The burden of proof does not shift to the defendant, but the inquiry points out corroborative evidence the witness could have produced, which undermines their testimony.

Example 1: The defendant claims the child made false allegations of abuse following a fight with their parent over the cost of an evening out, but has no supporting evidence of that disagreement.

1. You believe your partner coached Avery to allege you assaulted them as part of revenge for an argument?
2. You argued with your partner the day before about taking Avery to the haunted house attraction?
3. Your partner believed you didn't have the money for the attraction?
4. She jumped to conclusions about why you took Avery to the bathroom that night?
5. She got in Avery's head, convinced them that her version of events was right?
6. Your text messages with Avery do not include this argument?
7. The WhatsApp messages with your partner also don't show this argument?
8. Avery's forensic interview mentioned nothing about that dispute?
9. Your partner's statement to police said nothing about an argument?
10. When you yourself gave a statement to police the night of the arrest, even you didn't say anything about this argument?

Example 2: The defense theory is that the defendant's wife engineered false allegations to bolster a divorce case and no sexual contact occurred; in fact, the defendant just made this assertion during his testimony at trial. However, medical evidence reflects an assault of such severity that surgery was required, and the defendant is aware of and likely to admit the facts and evidence referenced below.

1. You believe your wife coached Katie to say you assaulted her?
 - a. Your wife called 911 and reported that Katie was nearly unconscious from blood loss?
 - b. She rode with Katie in the ambulance?
 - c. She stayed with her during recovery from surgery?
 - d. Your wife has no medical degrees? She has no expertise in sexual assault examinations?

2. Katie arrived at the hospital with physical injuries?
 - a. A black eye?
 - b. Ligature marks to her neck?
 - c. She was vomiting blood?
 - d. Swollen tongue? Slurred speech?
 - e. Lacerations to her thighs and abdomen?
3. Medical providers identified genital injuries to Katie?
 - a. Abrasions to her labia?
 - b. Vaginal and anal tears?

Following a series of concessions to medical evidence, the prosecutor could veer away from concession-based techniques and further demonstrate the absurdity of the defense theory by asking whether the defendant believed that his wife fabricated the incriminating medical evidence as well. Alternatively, the point could be made in closing argument.

“From a Certain Point of View”: Concessions to Subjectivity

Applicability: The witness testifies to a relative matter or any matter subject to interpretation.

Execution: As no basis exists for the witness' interpretation, the witness may be persuaded to concede to the limitations of their interpretation, i.e., the time involved could have been one minute rather than five.

Example 1: The defense is claiming “some other dude did it” when it comes to the child sexual abuse material found on the defendant's computer and tablet. They point to the extensive malware infections on the defendant's computer in particular, and the fact that his wife's brother is temporarily living with the family.

1. You claim that either malware, or the defendant's brother-in-law, may have downloaded the illicit videos?
 - a. You don't believe the defendant was present when the CSAM was downloaded on his computer?
 - b. You believe the downloads would have occurred while the defendant was at doctors' appointments?
 - While he was visiting his parents?
 - While he was at the bar with his friends?
 - While he was camping up in the mountains?
2. Would you expect this material to have been accessed or viewed following the downloads?
 - a. Again, only during the times the defendant was absent from the home?
3. You would expect to see only malware-related activity?
 - a. Not logins to the defendant's email?

- b. Not logins to the defendant's bank account?
- c. Not social media logins by the defendant?
- d. Or posts from the defendant's Facebook or other social media accounts?
- e. To your knowledge, does the defendant's brother-in-law have access to the defendant's bank account?
- f. Does the defendant give all of his passwords to his wife's family members?
- g. Would you expect malware that had been programmed to download child abuse material, to also have been programmed to log into email, social media, and bank accounts?
- h. And to make posts to those accounts on the defendant's behalf?

Prosecutors could return to this topic in the closing argument to emphasize that, taken all together, the evidence would logically indicate that only the defendant could have downloaded and then accessed this material. In closing argument or on cross-examination, depending on how the jury is responding to the witness, prosecutors could pose a sharp final question referencing the conceded facts, and asking if the witness is still maintaining that the causal actor is not the defendant but an extremely talented virus.

Example 2: Though not depicting a child abuse case, the film *My Cousin Vinny* includes a classic example of subjectivity cross-examination:³²

1. Is it possible the two defendants entered the store, picked 22 specific items off of the shelves, had the clerk take money, make change, then leave?
2. Then, two different men drive up in a similar looking car, go in, shoot the clerk, rob him and then leave?
3. How much time was they in the store?
 - a. Five minutes. You testified earlier that the boys went into the store and you had just begun to make breakfast. You were just ready to eat and you heard a gunshot. So obviously it takes you five minutes to make breakfast, so you knew that.
 - b. Do you remember what you had?
 - c. I like grits, too. How do you cook your grits? You like 'em regular, creamy or al dente?
 - d. Regular? Instant grits?
 - e. So, how could it take you five minutes to cook your [regular] grits when it takes the entire grit-eating world 20 minutes?
 - f. Are we to believe that boiling water soaks into a grit faster in your kitchen than on any place on the face of the earth?
 - g. Perhaps the laws of physics cease to exist on your stove?
 - h. Were these magic grits?
 - i. Did you buy them from the same guy who sold Jack his beanstalk beans?
4. Are you sure about that five minutes?

³² Example adapted from the 1992 film *My Cousin Vinny*, directed by Jonathan Lynn, accessed at <https://www.stockq.org/moviescript/M/my-cousin-vinny.php>.

Example 3:

1. You testified that you are certain your husband never took Jackson or any other child out of the room without your noticing?
2. Yet your husband testified that you were engaged in cleaning up a paint spill when Jackson needed to use the bathroom?
3. You needed to get paper towels to blot up the mess on the floor?
4. You needed to ensure the mess wouldn't spread to the rug or under other children's feet?
5. Your husband testified you had a music CD playing while the children painted?
 - a. This was Laurie Berkner's *Superhero* album?
 - b. Your husband recalled leaving the room while the song "My My Marisol" played?
 - c. He recalled this was the song featuring Ziggy Marley. This is a 3-minute song?
 - d. He returned during the song about the tea party?
 - e. There are three tracks in between these two songs on that album?
 - f. They each vary in length between two and three minutes?
 - g. So your husband was gone from the room with Jackson for a period of roughly 10 minutes, and you never noticed?

Offensive Tactics

If concession-based approaches are typically prosecutors playing the "good cop," then impeachment and similar offensive strategies are prosecutors playing the "bad cop." They rely on a witness' own contradictions and errors to highlight their lack of credibility for the jury.

"I Find Your Lack of [Good] Faith Disturbing": Behavioral Inconsistencies

Applicability: A witness has willingly, even enthusiastically, responded to the defense's direct examination. On cross-examination, their demeanor changes; they appear much less willing to answer questions. They shift their body away from the prosecutor, fail to make eye contact, respond in a much quieter tone of voice, or refuse to answer questions. The witness may show hostility, overzealousness in protecting the defendant, prejudice, evasiveness, or other characteristics which affect their credibility.

Execution: Merely reluctant witnesses can be encouraged through establishing rapport and displaying empathy and compassion for the difficult position in which they find themselves. However, recalcitrant or hostile witnesses may require a stronger approach. If prosecutors anticipate witness aggression, it may be wise to establish "ground rules" to the exchange early on, asking for their cooperation and pivoting to this commitment when the witness resists lines of questioning later in the

examination. Alternatively, when hostility is demonstrated, the prosecutor may highlight this for the jury.

Sample Questions:

- You seemed to be able to hear the defense attorney's questions. Are you having trouble hearing mine?
- You understand that you need to answer my questions as well and not just the defense attorney's?
- Is there a reason for your reluctance to answer my questions?
- That probably was an answer to someone's question, just not mine. [Repeat question.]
- I can appreciate that you want to share a lot of information with the jury. Unfortunately, you have to answer my questions. [Repeat question.]
- [In response to an attack by a defense witness on the child victim] Would it surprise you to know that most of the child's statement is corroborated?
 - Would that surprise you based on the conclusion you've already reached? (Note: if the witness answers yes, they appear to lack relevant knowledge. If they answer no, they concede bias.)

Note: Prosecutors should refrain from treating a witness aggressively until the jury gives their nonverbal permission to do so. Practice, experience, and context assist with discerning when this occurs. Prosecutors should also be mindful of what a particular judge may permit or tolerate in terms of an aggressive cross-examination.

*Example:*³³

1. Is it true you refused to talk to the police about this case?
 - a. Is it true you refused to talk to me, the prosecutor, about this case?
 - b. You did, however, speak with the defense investigator?
 - c. You also spoke with the defense counsel?
2. Did you receive the letter I wrote to you?
 - a. 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?
 - b. And yet you never came forward with this evidence until the trial?
 - c. 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.)

³³ Excerpt from Victor Vieth & Suzanna Tiapula, "When Sparks Fly in Defense of Child Victims: Tips for Cross-Examining a Defendant or Defense Witness," *National Child Protection Training Center* at 2.

“Much to Learn, You Still Have”: Limited Knowledge

Applicability: Witnesses may fill in details when they do not really remember and the proper answer would be “I don’t know” or “I don’t remember.” Rather than declaring a firm “always” or “never,” however, the witness is not fully committed to their version of events because they have filled in blanks and remain uncertain.³⁴

Execution: Prosecutors should push the witness on the limits of their perception and remain firm. If a witness concedes to their limitations, prosecutors should be considerate and say, “I understand, it was a long time ago,” etc.

Example 1: The defense witness was in proximity to the defendant during the timeframe of the allegation and is overstating their knowledge of the case.

1. Would you agree with me that facts and accuracy are very important in this case?
2. Your testimony today is that you were in the same room with your husband for the entire two hours during naptime?
3. You never left the room for a snack?
4. You never left to use the restroom?
5. He never left the room either?
6. During those two hours, you never glanced down to read a book?
7. During those two hours, you never checked messages on your phone?
8. During those two hours, you never played a game?
9. During those two hours, your eyes were glued to your husband the entire time?

Example 2: A defense witness without knowledge of the case has testified to the defendant’s good character and is likely to be viewed sympathetically and favorably by the jury. The prosecutor’s strategy is simply to highlight the evidence they are not aware of for the jury.

1. You didn’t see the forensic interview?
 - a. The medical examination?
 - b. The police interview of the defendant?
 - c. Photographs of the alleged crime scene?
 - d. The forensic analysis of the defendant’s cell phone?
2. I’m showing you what has been premarked as State’s Exhibit ___ [depicting severe physical injuries to the child victim]. Would you agree that if anyone intentionally inflicted these injuries, that person would not have good character?

³⁴ See also: “Only a Sith Deals in Absolutes”: Undermining and Exposing Logical Flaws.

“These Are Not the Droids You’re Looking For”: Perception and Recall

Applicability: Unlike witnesses who make unwarranted claims—thus needing to be boxed into admit their overstepping—this witness is genuinely confused or has a flawed memory. These limitations need to be demonstrated to the jury, particularly if the testimony is damaging to the prosecution.

Additionally, a witness's perception and recall may be the result of suggestion or manipulation. This type of influence can be ascertained via careful questioning.

Whether due to confusion or manipulation, the witness's age, physical or mental limitations, family or community pressures, and other factors may also affect the witness's independent recall of events.

Execution: Focus questions on factors such as the length of time that has passed; the witness's location (e.g., distance, angle) in relation to the incident; any applicable environmental factors such as weather, lighting, or obstruction that could have limited their ability to observe the incident; and whether and to what extent the witness has talked about the case with the defendant or defense attorney, particularly if the facts they can recall are beneficial to the defense.

Example:

1. You were sitting in the pavilion when you say you witnessed the defendant talking with Pastor Dan at the time Estefania says the defendant raped her?
2. I'm showing you a set of photos that has been collectively admitted as State's Exhibit _____.
3. These photos represent the pavilion's location relative to different points in the park.
4. You testified the defendant was talking with Pastor Dan near the playground?
5. The pavilion sits about 50 yards from the playground?
6. It was nearly sunset when you saw the defendant with Pastor Dan?
7. The weather was cloudy?
8. This was a church picnic, so the park was crowded?
9. People walking in front of other people?
10. Children yelling and running around?
11. You're certain it was Pastor Dan you saw speaking with someone?
 - a. You could clearly make out Pastor Dan's facial features?
12. At dusk on a cloudy evening, from a seated position 50 yards away?

“The Dark Side Clouds Everything”: Impeachment and Prior Bad Acts

Applicability: Under Rule 404(b) of the Federal Rules of Evidence, evidence of prior bad acts cannot be admitted “to prove a person's character in order to show that on a particular occasion the person

acted in accordance with the character," but rather, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

The process of admissibility for Rule 404(b) prior bad acts evidence varies by jurisdiction and typically requires pre-trial motions and evidentiary hearings. This will put the defendant on notice of the prior bad act evidence and make impeachment scenarios less likely. However, perjury at trial and other scenarios may open the door to impeachment via prior bad acts.

Execution: Regardless of whether impeachment is attempted in the context of prior bad acts or elsewhere, impeachment questions follow a basic "3 C's" structure: commit, credit, and confront.

1. **Commit.** The witness must be locked into the statement. Failing to do so permits the witness to create ambiguity and confusion, escaping exposure for their inconsistency and lack of credibility.
2. **Credit.** Establish the weight and credibility of the inconsistent statement.
3. **Confront.** Directly quote the source of the inconsistency, and be prepared to confront or refresh the witness with the relevant exhibit.³⁵

Prosecutors should consider the timing and dramatic build of the questioning. For example, if significant time will be spent on the "credit" portion of the impeachment, it may be wise to "credit" before having the witness "commit" for dramatic or emphatic purposes.³⁶ Depending on the witness's response to impeachment questions, prosecutors may be permitted to call witness(es) to the stand to "prove up" the impeachment.³⁷

Another way to conceive of the impeachment process is through "the ABC's":

1. "A**ccuse** the witness of making a false statement."
2. "B**uild up** the trustworthiness of the prior inconsistent statement."
3. "C**onfront** the witness with the prior inconsistency."³⁸

Example 1: The defendant is on trial for sexual conduct with a minor. You are impeaching them based on a prior accusation, but not a conviction, for a similar offense.

1. [*With a tone of disbelief*] You testified on direct examination that you left your previous youth ministry on good terms?
2. [*Authoritative tone*] Before you testified, you were sworn in?
 - a. You're aware that your testimony was under oath?
 - b. You swore to tell the truth and nothing but the truth?
 - c. You understand the importance of truthful and accurate testimony in this case?

³⁵ F. Dennis Saylor IV & Daniel I. Small, *Cross-Examination and the Three C's of Impeachment*, MASSACHUSETTS LAWYERS WEEKLY, November 2, 2017, available at https://www.hklaw.com/files/Uploads/Documents/Articles/DanSmall/cross_examination_three_Cs.pdf (last accessed March 25, 2022).

³⁶ *Id.*

³⁷ D. Shane Read, *Winning at Trial*, NATIONAL INSTITUTE FOR TRIAL ADVOCACY, 2008, at 227.

³⁸ Excerpt adapted from D. Shane Read, *Winning at Trial*, NATIONAL INSTITUTE FOR TRIAL ADVOCACY, 2008, at 223.

3. *[Approach]* I'm showing you what has been pre-marked as State's Exhibit _____. You know what this is?
 - a. This was an agreement with your previous employer?
 - b. This is your signature?
 - c. It reflects that you were accused in that parish of acting inappropriately with minor girls?
 - d. Sending flirtatious text messages?
 - e. You admitted to "persistent temptation and lustful thoughts" for these minor girls?
4. I'm showing you what has been premarked as State's Exhibit _____.
 - a. These are the text message conversations between you and Oksana?
 - b. She was 13 when you were her youth group leader?
 - c. Her parents wouldn't allow her to go on an overnight camping trip with your group?
 - d. Your message in response said you were going to miss her?
 - e. That you had looked forward to her keeping you warm?
 - f. That you had purchased condoms for the trip?
 - g. So that no one would ever have known?
5. The agreement was that neither the parish nor Oksana's parents would contact the police if you resigned your position and left the area?
6. And you've told the jury today that this is, in your words, leaving on good terms?

Example 2: The defendant is on trial for sexual conduct with a minor. The prosecutor is impeaching them based on a prior conviction³⁹ for possession of child sexual abuse material to show intent, preparation, and other 404(b) categories for the offense.

1. You've testified that Avery misunderstood your intent?
2. You were responding to affection you felt they showed you?
3. Three years ago, you were convicted for possession of child sexual abuse material?
4. You served one year?
5. The child abuse material you were convicted of possessing depicted boys dressed and made up to look like girls?
6. Part of the evidence introduced against you included web browser search terms including "androgynous preteen sluts" and "nonbinary preteen sex"?
7. Your sentence did not include undergoing sex offender treatment?
 - a. So you never sought help for your attraction to underage nonbinary individuals?
8. Part of a condition of your parole was submitting to searches of your computer and phone?
 - a. So you still had the attraction but were unable to access viewing material?

³⁹ See: Federal Rules of Evidence 609; "Your Arrogance Blinds You": Impeaching with Criminal Convictions.

9. You met Avery's mother at the warehouse where you both worked after your release?
 - a. She spoke to you about Avery's identity struggles?
 - b. You gave her advice for Avery?
 - c. Soon after this, you started dating Avery's mother?
 - d. Giving you virtually unlimited access to a nonbinary preteen?

"Deceived by a Lie": Impeaching on Character for Truthfulness

Applicability: A witness may be subject to impeachment based on their character for truthfulness. Under Rule 608 of the Federal Rules of Evidence, this includes not only opinion concerning the witness's reputation for truthfulness but specific instances of conduct as well, if probative of the witness's character for truthfulness or untruthfulness.

Execution: Consider and apply the "3 C's" and/or "ABC's" of impeachment.⁴⁰

Example: The prosecutor is impeaching an expert witness based on prior unprofessional conduct, and their cross-examination is based on the ethical guidelines pertaining to the expert's profession.

1. On direct examination, you spent significant time attacking the forensic interviewing methods of the interviewer?
2. You represented that you have a "significant expertise and experience in the realm of forensic interviewing?"
3. Given the specificity of your critiques of the forensic interviewer, you would agree with me that precision and accuracy are important?
 - a. In the courtroom as well as the forensic interview room?
4. Are you familiar with the ethical guidelines of the American Psychological Association?⁴¹
 - a. You recognize the rules require you to be competent in the areas you are practicing in or are otherwise offering your expertise? (APA rule 2.01)
 - b. These rules also require you to "undertake ongoing efforts to develop and maintain your competence"? (Rule 2.03)
 - c. Do you agree with these rules? You agree that they are important?
5. In this case, you are offering your "significant expertise and experience" relating to forensic interviewing?
 - a. You have never attended even one of the major forensic interviewing courses?
 - b. You have never attended training provided by any of the major forensic interviewing course providers?
 - c. You've never sat in an observation room while a forensic interview was being conducted?

⁴⁰ See: "The Dark Side Clouds Everything": Impeachment and Prior Bad Acts.

⁴¹ American Psychological Association, "Ethical Principles of Psychologists and Code of Conduct," available at <https://www.apa.org/ethics/code> (last accessed June 14, 2022).

- d. You have never conducted a forensic interview?
 - Since you haven't attended the prerequisite training, you wouldn't be permitted to?
- e. So you don't even have the minimum qualifications to conduct a forensic interview, but you've represented to this court that you're an expert in the field?

“Your Arrogance Blinds You”: Impeaching with Criminal Convictions

Applicability: Most States allow impeachment of a defendant with conviction for felonies or crimes of dishonesty. However, it is important to consider how best to use the conviction and whether it is more probative than prejudicial. Some considerations include:

- How long ago the crime was committed
- Whether the prior crime was so similar to this offense that its prejudicial value outweighs its probative worth
- How directly the defendant's prior conviction relates to their truthfulness
- Whether the defendant has declared themselves to be a particularly honest or trustworthy person

Execution: State law concerning impeachment with prior convictions varies greatly. Thus, when dealing with prior criminal convictions as considered by Rule 609 of the Federal Rules of Evidence, the prosecutor should be familiar with their relevant evidentiary case law prior to attempting this type of impeachment.

Prosecutors should verify that the conviction in question has not been overturned or vacated. In some circumstances, prosecutors must file a pre-trial motion declaring the State's intent to use the conviction. If the impeachment strategy also encompasses prior bad acts evidence, complying with Rule 404(b) requirements in pre-trial hearings is also essential.

Example:

1. Your daycare business is a kind of fresh start?
2. You had previously served as bookkeeper for the county humane society?
3. But you were charged with embezzling funds from that organization?
4. You admitted to lying to your supervisor about those funds?
5. You maintained those lies under oath when the case went to trial?
6. Despite those lies, you were convicted?
7. You served six months?
8. Today, you claim to be telling the truth when you say that your husband was never alone with the alleged victim?
9. You claimed to tell the truth in your embezzlement trial too, didn't you?

10. That oath didn't mean much to you then, did it?

“Only a Sith Deals in Absolutes”: Undermining and Exposing Logical Flaws

Applicability: This technique applies to firm opinions or conclusions (i.e., “He was never alone with that child,” as well as those that are logically fallacious, with the understanding that the two often overlap, as previous examples demonstrate.

Execution: Instead of attempting to get the witness to change their opinion or conclusion, prosecutors should focus on underlying facts showing the lack of basis for the conclusion or that the conclusion is wrong. The opposite conclusion can be presented on summation, using the undermining facts as support.

1. You testified that you clearly saw Estefania walk with the defendant back to the pavilion at sunset?
 - a. I'm showing you the set of photos that has been collectively admitted as State's Exhibit _____, the photos from Estefania's phone that night.
 - b. These photos are timestamped between 7 p.m., just before sunset, and 7:30 p.m., just after.
 - c. Do these photos show the pathway as it appeared that evening?
 - d. The final photo in the set, of the entrance to the grove, is timestamped at 7:33 to be specific. That's after sunset?
 - e. To take that photo, Estefania wouldn't have been in the pavilion, would she?
 - f. So she couldn't have been there fifteen minutes before?
2. You claimed to see Estefania, but she wasn't there, correct? You claimed to see the defendant too, didn't you?

Example: A defense character witness insists, “There's no way he abused that child,” citing their high opinion of the suspect: they've lived or worked together a long time, for instance, and the witness has never seen the defendant engage in abusive conduct or even be alone with a child long enough to abuse. Prosecutors have several paths to undermining their argument, i.e. with all the times the witness has not been near the defendant, why the witness' assertions are problematic, etc.

1. You stated that your husband was never alone with Jackson?
2. You are the only other adult supervising children in your daycare?
3. What time of morning does your daycare open?
4. What time in the evening does your daycare close?
5. You run your daycare from your home?

6. You are with the children all 11 hours of the workday?
 - a. You never take a bathroom break?
 - b. You never run a quick errand?
 - c. The children in your care never get sick or fight with one another, requiring separation?
 - d. You never become occupied cleaning up a mess or comforting a crying child?
 - e. Your husband never becomes occupied in the same way?
 - f. When the children take a nap, you both remain in the room with them?
 - g. You maintain constant, direct eye contact with your husband whenever you're in the same room?
 - h. You are able to see his hands at all times?
 - i. When he is within reach of a child, you can see exactly where his hands are, every moment of every single workday?

It's Over: You Have the High Ground

The prosecutor has signaled and cut back, exposed the improbabilities of a defense, constructively gained concessions, and impeached definitively. Their use of the force of persuasion has meted out justice and restored balance... until the next trial.

Prosecutors should use their time between trials to continue to learn, refining their understanding of what worked, what did not, and what can be improved. Persuasion is as much art as it is tactics and strategy. Remember the words of David Paul Brown:

"Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail, or the fearful; rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that you may shine, but that virtue may triumph, and your cause may prosper."⁴²

⁴² David Paul Brown, "Golden Rules for the Examination of Witnesses."

