

LAW Pre-Trial Preparation: At the Prosecutor's Desk

—by Sue Marx

The key to winning most cases is good preparation. The following tasks will help you organize your trial file and focus on the issue and potential problems in your case.

1. Review of Statements.

Read any pre-trial statements or testimony given by the victim and witnesses to be called at trial. Chart the testimony, looking for inconsistencies, cross-corroboration, and impeachment material. Some prosecutors make skeletal outlines of prior statements with page notations for easy reference. Others use plastic tabs to signal crucial portions. Whatever system you develop, make sure the content of prior statements is easily accessible during trial.

2. Period of Abuse.

Make a chart for yourself of the victim's ages, school grades, or other identifying factors (prior addresses, prior teachers) during which the abuse occurred. This will help you to present that information clearly to the jury.

3. Applicable Case Law.

Try to predict the legal issues that may arise during the trial and gather all the case law you need. If you have time, prepare written memoranda of law regarding the issues most crucial to your case. Consider presenting the memoranda to the court and the defense attorney prior to trial. The judge will appreciate your preparedness and fairness. If the issues are particularly complicated, consider filing motions *in limine* well in advance of trial. Pre-trial resolution of some issues will avoid delay during the trial. If you are unable to locate case law in your state, the National Center for Prosecution of Child Abuse will be happy to do legal research on any issue in your case.

4. Notice to Defense.

Do a last check to ensure you have given all required notices to the defense: notice of any charges for which you will seek mandatory minimum prison sentences, notice of experts to be presented, notice of intent to proceed under any statutes allowing the use of hearsay evidence, notice of intent to present prior bad acts of defendant in your case-in-chief, notice of any physical evidence to be presented, etc. Obviously, notice requirements will differ greatly from state to state; check your jurisdiction's statutes.

5. Subpoenas.

Make sure that you have subpoenaed all necessary witnesses and all documentary material that you will need at trial. Include here a subpoena *duces tecum* for the files of any prior convictions of the defendant for possible impeachment use.

6. Work Records of the Defendant.

Get the defendant's work records. These can be surprisingly useful. If the defendant testifies and presents an alibi defense by claiming he was always at work and therefore could not have abused the

victim at home, impeachment becomes easy when his work records show numerous instances of vacation and sick time. Also, work records can lead you to "bad character" witnesses from the defendant's workplace—witnesses who can then rebut the defendant's good character witnesses at trial.

7. Discovery.

Make sure discovery is complete. The last thing you want is the granting of a continuance due to the prosecutor's failure to provide all the documentation to the defense.

8. Witness List.

Organize your case-in-chief. This may include jotting down a list (that is subject to change) of your witness line-up. Some prosecutors write brief outlines of what areas they will cover with each witness so that, during the heat of trial, they will not miss covering an important issue with a witness. Your list should include the schedules of the witnesses who are fitting their testimony into a day of other duties, including any medical, social service, or police witnesses. Having schedules and phone numbers in a central place will allow you to juggle their appearances with more ease.

9. Elements of the Offenses.

Read the definitions of the charges in your case. You may want to make a concise list of the elements of each crime and the evidence you will use to prove each element.

10. Cross-Examination Checklists.

Before trial is also a good time to outline areas that you want to cover on cross-examination of defense witnesses and the defendant. It is important that you don't forget to cover certain basic areas, particularly those small details which the victim mentions that can then be corroborated by the defense witnesses.

11. Closing Argument Outline.

As you investigate the case and long before you enter the courtroom, it is a good idea to form your closing argument. Some prosecutors write the argument, some outline, and some merely jot down thoughts. Whatever your style, you should have the points you will be making in your closing argument firmly in mind as you begin the trial. This will help you identify strengths and weaknesses in your case before you begin and formulate appropriate *voir dire* questions and your opening statement.

12. Defendant's Statements.

Make sure that defense counsel has written notice of each statement of the defendant. At first assessment, you may not feel those statements will be important at trial. Often, as the trial develops and particularly if the defendant takes the stand, seemingly inconsequential statements made pre-trial become excellent impeachment material. For example,

continued on next page

Law

-Sue Marx

continued from page 6

the defendant says at trial that the victim fabricated the abuse because she hates him; pre-trial, however, the defendant told the child protective services worker that he and the victim had a wonderful relationship. That pre-trial statement then may be used to impeach the defendant at trial. If the defendant gave a multitude of statements, consider indexing them as you did the victim's statements.

13. Investigation of Defense Witnesses.

Depending upon your state's discovery statutes, you may have notice from the defense of potential experts, eyewitnesses, or alibi witnesses. Make sure that you investigate these witnesses. In some situations, you may want to have a detective take a statement from the defense witness. Should the witness then change his story at trial, your detective will be available to take the stand and testify concerning the prior inconsistent statement of that witness. Check with the Center to see if they have a file on the expert(s).

14. Preparation of Prosecution Witnesses.

Make sure that you have prepared all of your witnesses for trial. Often in a child abuse trial, prosecutors are caught up in preparing the victim for court and unwittingly forget that their other witnesses may need preparation and reassurance as well. This is particularly true for doctors and social service personnel who often have never testified in a criminal trial. Go through their direct testimony and possible cross-examination questions. Review any documents that may be presented or used by the defense at trial.

15. Inspection of Physical Evidence.

Before trial, look at any physical evidence taken by the police or any other investigators. If your paperwork indicates that the police confiscated the victim's diary, for example, make sure you have read it prior to trial. You need to know both helpful and damaging material contained in potential exhibits before you get to the courtroom. Of course, defense counsel must be given the opportunity to review physical evidence as well.

16. Demonstrative Evidence.

Create charts, graphs, or visual exhibits as needed. Such exhibits can illustrate simply something that is difficult to describe. In a complicated multi-victim multi-defendant case, a chart can be particularly useful in helping a jury follow your closing argument.

17. List of Exhibits.

List all of the exhibits you plan to introduce at trial. Jot down any objections you anticipate to their admission and your responses to those objections.

18. Scientific Testing.

If there are bodily fluids (semen, blood, etc.) found on the victim's clothing, bed sheets or other relevant location, make sure to have the appropriate

laboratory tests ordered, results in your file, results forwarded to defense counsel, and your expert lined up to testify concerning the meaning of the test results.

19. Victim-Witness Support.

Well in advance of trial, contact the person or people who will be the victim's support at trial. You do not want to get to the day of trial and find that you have no one available to be with the victim during her testimony. Should your jurisdiction lack a victim advocate assigned to accompany the victim, evaluate which family members or friends will have a calming and nurturing influence on the victim and not be subject to a sequestration order.

20. Therapy Referral.

Double check to make sure that the victim is in therapy. Depending upon the child, the interruption of supportive counselling can be devastating to her ability to testify, particularly if she is not getting support at home.

21. Record Checks.

Be aware of any prior arrests and convictions of the defendant and each witness. Also find out pre-trial if any of your witnesses is on probation or parole. Subpoena the court files and obtain the prosecuting attorney's files for any of your witnesses' prior arrests and convictions. You will need to prepare the witness should you decide to bring out a prior conviction during your direct examination or should the defense cross-examine about it. Results of record checks should be disclosed to the defense.

22. Investigate Other Victims.

You may become aware, pre-trial, that the defendant has abused other children than your victim. Make sure you locate them, interview them, and file appropriate motions to consolidate their testimony at trial.

23. Defendant's Other Bad Acts.

During your trial preparation, carefully note any harassment or threats made by the defendant to the victim or her family. After ensuring the safety of the family by a motion to revoke bail or through a new arrest on intimidation of witness charges, notify the defense of your intention, when permissible under the case law, to present evidence of the threatening behavior in your case-in-chief.

24. Photograph of Victim.

Ask the victim's family for a picture of the victim showing her appearance at the time of the abuse. The picture will allow the jury to see how much younger the victim was then, if there has been a long delay between the time of the abuse and trial.

25. Prior Record of the Defendant.

When you find the defendant has prior arrests or convictions, get as much information as you can about them. This includes obtaining files of the prosecutor who handled prior cases and the court files of conviction.

continued on next page

Law

-Sue Marx

continued from page 7

tions. Should the defendant have an out-of-state conviction, particularly for child abuse, call the prosecutor's office to find out about the case. Make sure to get a certified copy of the conviction. Investigation of this kind can uncover other bad acts (which you may then argue to present at trial), bad character witnesses (should the defendant be foolish enough to present good character), and may well induce a plea.

26. Family Court Records/Transcripts.

If your criminal case is intertwined with a custody matter that is being litigated in Family Court, obtain the records and court transcripts. You may need those materials to combat the "mom-made-it-up-to-get-custody" defense. Check for any existing restraining orders issued by the Family Court judge that were violated by the defendant when he gained access to the victim.

27. List of Pre-Trial Motions.

Make a checklist of any pre-trial motions you need to present to the court. The list may include motions to amend the dates contained in the charging documents, Rape Shield motions, etc.

28. Plea Offer.

As you prepare your case, consider whether plea negotiations are appropriate. If so, formulate an offer. Whether you or the defense attorney initiates plea negotiations, it is important to know what type of sentence you seek if plea negotiations begin.

Sue Marx, JD, is Senior Staff Attorney at the National Center for Prosecution of Child Abuse

This article was previously published in *UpDate*, a publication of the American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, 1033 N. Fairfax, Suite 200, Alexandria, VA, 22314. 703-739-0321

APSAC MEMBERS BY STATE

CA	269	PA	57	AR	35	ID	11
MA	170	MN	55	CT	35	NE	11
WA	159	MD	51	AL	26	VT	11
IL	137	MI	50	DC	26	AK	9
NC	112	MO	48	NV	24	MS	9
NY	100	NH	48	HI	23	UT	7
TX	100	NJ	48	KY	19	ND	6
CO	93	VA	48	NM	18	MT	5
WI	75	GA	38	IA	17	WV	4
TN	72	ME	38	RI	16	WY	3
OH	71	IN	37	SC	14	SD	2
OK	65	AZ	36	KS	13	DE	1
FL	59	OR	36	LA	13		

Foreign/Territorial Members

Canada (28)	New Zealand (4)	Bahamas (1)	Malaysia (1)
Australia (12)	Germany (3)	Ireland (1)	North Ireland (1)
unidentified	Japan (3)	Israel (1)	Scotland (1)
overseas military (7)	England (2)	Italy (1)	West Indies (1)
Puerto Rico (5)	Austria (1)	Kuwait (1)	TOTAL: 2505

THANK YOU!

Sharon Ahart, MD, and Howard Levy, MD, who run the Pediatric Ecology Program at Chicago's Grant Hospital, donated \$1,000 to make APSAC's International Networking and Social Hour possible. Held on August 31 at the Hyatt Regency in Chicago during the Ninth International Congress on Child Abuse and Neglect, APSAC's International Social Hour was a great success. Several hundred people from all over the world came and enjoyed a sumptuous array of cheeses, fruit, and crackers, while they compared notes about the trials and satisfactions of work in this field. **Richard Adie,** General Manager of the Hyatt Regency Chicago, ensured the success of the evening by underwriting half the cost of the food. Many thanks to Drs. Ahart and Levy, and to Mr. Adie, for their generous contributions to APSAC.

Thanks also to all of the APSAC volunteers who staffed the continuing education table and APSAC's booth at the Ninth International Congress in Chicago. **Susan Liuzzo and Greg Dezulskis** in particular gave time and cheer well beyond the call of duty. Also indispensable were Spanish-speakers **Sylvia Balderas, Carmen Calderone, Nilda Claudio, Yolanda Fuentes, Maria Nanos, Enrique Perez,** and **Daliah Ramirez,** and other volunteers **Karen Brown, Richard Cozzola, Kathe Dempster, Mike Dolan, Jennifer Hayes, Cindy Hickman, Lisa Keyes, Ann Koranda, Jennifer Lea, Jolene McCann, Dawn McLaughlin, Julie McLean, Willie Moore, Laura Notson, Tom Ryan, Lee Shell, Linda Singleton, Abigail Sivan, Judy Sommers, Lisa Stone, Ernestine Watts, and Jeanne Wren.**