

BACK TO BASICS: PRE-TRIAL MOTION PRACTICE

THE CHILD ABUSE PROSECUTION PROJECT'S BACK TO BASICS SERIES

The Association of Prosecuting Attorneys' Child Abuse Prosecution Project is pleased to offer its Back-to-Basics Series, a "to-do" list for both new and experienced child abuse prosecutors and their multi-disciplinary teams.

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Pre-trial Motion Practice is Critical in Child Abuse Cases

Value of Pre-trial Litigation

Child abuse cases will be some of the most important and meaningful cases of your career. These cases can be won (or lost) prior to trial with an effective motion practice. If law enforcement has conducted a thorough investigation and the case is going to trial, **it is ALWAYS worth the time and effort to build a strong case from the beginning.**

Pre-trial motions are an essential piece of these cases to:

- Educate the court on the case specific issues prior to trial
- Reduce the available defenses
- Expose the defense strategy
- Enhance the strength of the state's case for both plea negotiations and trial
- Reduce the number of continuance requests to minimize trauma to the child victim

Form of Motions

Effective prosecutors build their child abuse cases from the beginning with written motions well in advance of trial. In each written motion, the prosecutor should take the time to present the case facts, legal authority, and analysis on any issue in a child abuse case to ensure the court has an opportunity to review, research, and analyze the issue prior to any substantive evidentiary hearing or trial. Do not assume judges are familiar with the specific issues in these cases. Further, a written motion may prompt a written response by defense counsel which provides the prosecutor advance notice of what arguments to expect and further opportunity to prepare and respond.

Initial Considerations

When initially assigned a child abuse case, the prosecutor should thoroughly review the file and consider if there are any loose ends from the investigation that need to be tied up through pre-trial litigation.

This type of litigation can include:

- Additional search warrants
- Motioning for samples from the defendant (i.e. blood or fingerprints)
- Requesting preservation orders (for example, phones and social media)
- Motioning for protective orders for sensitive material that needs to be disclosed

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Motions to Include Beneficial Evidence

The prosecutor should motion the court for pre-trial rulings permitting the presentation or admission of beneficial evidence to the state. It is your opportunity to educate the court. Do not rely on the judge to accept your argument on why the evidence is admissible in the heat of the trial.

These motions can include:

- Hearsay statements made by a child or witness based on either a specific legal exception created within your jurisdiction or a standard exception such as:
 - Present sense impression
 - Excited utterance(s)
 - For the purpose of medical treatment/diagnosis
 - State of mind
- Having the child declared unavailable for trial if the circumstances merit such a request (i.e. death or extensive trauma). This motion should also include a request to admit any of the child's "non-testimonial" statements under a *Crawford v. Washington* analysis. This request can also include the child's "testimonial" statements if an exception such as forfeiture by wrongdoing is applicable in your case
- A pre-trial ruling on propensity evidence citing to your jurisdiction's specific legal authority or the MIMIC exceptions (to prove Motive, Intent, absence of Mistake, Identity, or Common scheme or plan)
- A pre-trial ruling to admit expert testimony to explain absence of physical or scientific evidence such as absence of injury or DNA
- A pre-trial ruling to admit expert testimony on delayed disclosure, partial disclosure, recantation, or similar non-intuitive victim behavior

Motions to Exclude Harmful Evidence

During the pendency of the case, the prosecutor should assess if there are other substantive legal issues that can be litigated prior to trial. If an evidentiary issue can be raised prior to trial, it should be raised prior to trial! Motions to exclude certain evidence or argument may include:

- Defendant's self-serving hearsay testimony
- Improper character evidence of any witness
- Prior bad acts of the victim (including Rape Shield) or witness
- Any other issues identified in the case that will either confuse the jury or prejudice the case

If the defense identifies any expert witnesses, ensure you research the witness' credentials and his or her proposed testimony and file *Daubert* motions when appropriate. Find and review prior testimony, if available, to see if defense expert always gives the same opinion or always uses the same reasoning in cases. Depose defense experts whenever possible. This allows you to lock in their testimony and gives you additional information to counter their opinion or narrow the scope of their opinion (e.g. "you based your opinion solely on this set of documents provided to you by the defense attorney and did not examine the child or speak with the caregiver").