

Missouri Association of Prosecuting Attorneys

Special Victims Best Practices Subcommittee (Initial General Recommendations) (General Child Sexual Abuse Case Recommendations)

(Approved October 2015)

Note: A best practices recommendation of the Missouri Association of Prosecuting Attorneys is the product of careful consideration by experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible in every case or in every county. There may be other methods in local jurisdictions to reach the same or similar objectives.

Best Practice Statement: Cases with special victims are prosecuted most effectively when the entire timespan of the matter, from investigation to disposition, is as short as practically and ethically possible. A shortened timeframe in cases with special victims, even more than other criminal cases, is in the best interests of both the victim and the State. Shorter timespans are more likely to avoid uncooperative, recanting witnesses/victims.

Definition of Special Victims: Special victims are victims of domestic violence, sexual assaults, elder abuse, child physical and sexual abuse, Internet crimes against children, human trafficking, stalking, the disabled and victims with special needs.

RECOMMENDATION #1: Prosecutors should work to “know their number” by tracking the length of time it takes for the disposition of their cases, particularly special victims cases from referral. Prosecutors should then seek to reduce the amount of time necessary to move these cases to disposition.

Commentary: Cases involving special victims should be prioritized in the criminal justice system. See, e.g. Section 491.710. Time, delays and continuances only erode the State’s case; reduce the risk of unjustified charges and incarceration while increasing the risk for trauma on the victim. Modern technology allows prosecutors the ability to track the time it takes for a matter to enter and proceed through the criminal justice system. Prosecutors should know this number and seek to shorten this time span.

RECOMMENDATION#2: Prosecutors should notify special victims in prosecutions as soon as possible, but no later than three business days after receiving a referral from an agency for prosecutor review.

Commentary: Victims in special victims’ cases face safety concerns and potential trauma not faced by victims in other cases. Prosecutors should establish systems and processes to notify victims so they are fully informed on the case.

RECOMMENDATION #3: Prosecutors should decide whether they have a conflict of interest in a matter involving special victims as quickly as possible. Delays in prosecutions due to conflicts of interest increase trauma to the victims and weakens the State's ability to pursue justice. Where possible, when a conflict of interest exists a new prosecutor should be requested as soon as possible and no longer than three business days after determining a conflict may exist. Prosecutors should seek the appointment of a special prosecutor with current training and experience prosecuting special victims' cases.

Commentary: Delays in review and analysis by an uninterested prosecutor only increase the length of time for a matter to proceed through the criminal justice system. These delays increase risk of loss of evidence and access to witnesses and risk of trauma to victims. As a consequence, prosecutors should seek to identify conflicts and have appointed a special prosecutor who can proceed quickly.

RECOMMENDATION #4: Prosecutors should make the decision whether to file, not file, or return for further investigation as soon as possible but not later than 24 hours of receiving a domestic violence warrant referral. Victims should be notified in writing, at a minimum and where possible, notified by phone or in person as soon as practically possible.

RECOMMENDATION #5: Where possible, law enforcement should be encouraged to notify a prosecutor about an investigation during the time a suspect is on a 24-hour hold.

RECOMMENDATION #6: Prosecutors should decide whether to file, not file, or return for further investigation a case as soon as possible but within three business days of receiving a complete, comprehensive special victim case referral other than a domestic violence case. Victims should be notified in writing, at a minimum, and where possible notified in person as soon as practically possible.

Commentary: A complete, comprehensive child abuse referral is presumed to include the completed interview of the child and any information that undermines or corroborates the child's statement. Once the complete referral is received, the victim has a right to notice of a decision by the prosecutor. Timely regular communication with the victim is essential to fair and complete prosecution of these cases.

RECOMMENDATION #7: Rapport with witnesses is important to the trial of any criminal case; however, in cases involving special victims, prosecutors should make every effort to establish rapport with victims, witnesses and non-offending caregivers. In order to reduce anxiety for the victim, where possible, the specific prosecutor handling the hearing, trial or other matter should personally establish rapport with special victims.

Commentary: Victim or witness cooperation is an important component for the prosecution of special victim cases. However, because of the relationship between the suspect and the victim, or the nature of the criminal act, special victims have a higher likelihood of recanting or refusing to assist in the prosecution as compared to victims in other kinds of cases. Because of this increased risk, victim rapport and communications become an extremely high priority for prosecutors in moving these cases forward. Rapport allows prosecutors and law enforcement to better obtain full statements, understand and assess credibility and to try to reduce trauma during the pursuit of justice. The continuity of contact with the victim in terms of both persons and frequency of outreach is an important part of building rapport and accessing credibility. Where possible, a vertical prosecution model (one prosecutor handling a matter from start to finish) should be used to build rapport.

RECOMMENDATION #8: To recognize the unique needs of special victims, prosecutors should establish a systematic process for the prosecutor handling the case to personally meet with victims before the day of a hearing, deposition, trial or other event. This will increase the ability of the prosecutor to be adequately prepared and will be a step toward reducing trauma to a victim. While this is contingent on victim and circumstances, advance PERSONAL communication with the prosecutor handling the matter is important in the pursuit of justice.

RECOMMENDATION #9: Prosecutors should work to limit continuances and proactively work to obtain priority trial dates for special victim cases.

Commentary: This is consistent with the statutory priority that child witness cases receive under Section 491.710 but also holds true for other types of special victim cases. Under Section 491.710, prosecutors are required to “take appropriate action to insure a speedy trial in order to minimize the length of time the child must endure the stress of his or her involvement in the proceeding.”

(Initial General Recommendations)

RECOMMENDATION #1: Prosecutors should have sufficient knowledge of the special issues related to child sexual abuse cases to make informed charging decisions. To obtain this knowledge, prosecutors should:

- 1) Attend at least one comprehensive training on prosecuting child sexual abuse cases.
- 2) Second chair at least one child sexual abuse case with a prosecutor experienced in this type of case before having primary responsibility for a child sexual abuse case.
- 3) Become familiar with Sections 491.075 and 492.304, which makes admissible out of court statements of witnesses under the age of 14 in certain situations.
- 4) Understand the law regarding juror unanimity in child sexual abuse cases. *See State v. Celis-Garcia*, 344 S.W.3d 152 (Mo. banc 2011), and its progeny, which limit the *Celis-Garcia* holding.
- 5) Become familiar with the admissibility of propensity evidence under Article 1, Section 18(c).
- 6) Understand the protections of the Rape Shield law, Section 491.015.
- 7) Understand the privacy rights and legal protections against invasive discovery available for the victim, including the non-offending caregiver family members, as defined in Section 595.200.4 and 595.200.6.
- 8) Understand the role played by each member of the Multi-Disciplinary Team (MDT), and how to best contribute to, and lead, aspects of the MDT.

Commentary: Child sexual abuse cases are highly complex and present issues that are unique to this field such that special training is necessary to effectively prosecute these cases. The National District Attorneys Association, the Missouri Office of Prosecution Services (MOPS) and other organizations frequently provide specialized training related to child sexual abuse. Scholarships and other financial assistance are often available to attend these trainings. After completing a comprehensive initial training, prosecutors should continue to hone their craft by seeking out Continuing Legal Education opportunities related to the prosecution of child sexual abuse cases. MOPS provides training by webinar at no cost to Missouri’s prosecutors.

To achieve second chair trial experience, prosecutors in small offices should consider partnering with a more experienced prosecutor in a nearby county. MOPS can assist less experienced prosecutors in connecting with a more experienced prosecutor/mentor.

This area of practice is constantly evolving. Even highly experienced prosecutors will benefit from close collaboration with other prosecutors specializing in this area.

RECOMMENDATION #2: Child sexual abuse crimes, by their nature, often are committed without witnesses other than the victim. While these cases can be successfully prosecuted based on the testimony of the child victim alone, prosecutors should do everything possible to ensure that the victim does not stand alone. In cases based largely on the child victim's testimony, prosecutors should:

- 1) Understand the special issues related to child sexual abuse cases, such as:
 - a) Physical evidence is rare in child sexual abuse case and that it is "normal to be normal."
 - b) Disclosure is a process. Incomplete, inconsistent or delayed disclosure is consistent with child sexual abuse. Traumatized victims often do not disclose in a chronological, linear fashion.
- 2) Ensure that the suspect either gives a recorded statement or invokes his *Miranda* rights.
- 3) Work with law enforcement to ensure that as much of the victim's testimony is corroborated as possible, even "innocent" details.
- 4) Obtain information related to changes in behavior that coincide with the sexual abuse. This may require interviewing and meeting with teachers, therapists, non-offending family members, caregivers, and others.
- 5) Obtain information related to grooming behavior by the suspect.
- 6) Prosecutors should carefully balance the desire for a full and complete investigation with safety and well-being concerns of the victim when deciding when to issue a criminal complaint in a child sexual abuse case.
- 7) Seek out relevant evidence of prior criminal acts, charged or uncharged, beyond the offender's known criminal history. Prosecutors should seek information from the family history, child protection records, other police reports, information from other jurisdictions and any other possible source.

Commentary: Prosecutors should be sensitive to the confidentiality inherent to the therapist-patient relationship when deciding whether to seek information from a therapist. Prosecutors should understand that confidentiality of the therapeutic relationship may be integral to the victim's healing process.

RECOMMENDATION #3: When time and circumstances allow, prosecutors should personally meet with the victim prior to making a charging decision. In this meeting, prosecutors should:

- 1) Take time to build rapport and trust with the victim. For more information on building rapport with child sexual abuse victims, see Building Rapport Recommendations (*forthcoming*).
- 2) Assess the expectations of the victim and the victim's family.
- 3) Convey a reasonable timeline for the resolution of the case by explaining the typical steps in the court process and emphasizing the expected duration of a case of this type in the jurisdiction.

Prosecutors should track the duration of child sexual abuse cases and compile statistics so that estimated timelines can be as accurate as possible.

- 4) Assess the credibility of victim.
- 5) Assess the ability of the victim to withstand the rigors of the case.
- 6) Evaluate the victim's support system.
- 7) Explain services available to the victim.
- 8) Explain the role of the prosecutor, and the prosecutor's staff, including the victim advocate. The discussion should include the prosecutor's responsibility of disclosure to the defense.

A victim advocate, if available, should participate in this meeting. However, the victim advocate should not substitute for the prosecutor.

Commentary: Absent extraordinary circumstances, the allegations of abuse would not normally be discussed until further into the rapport-building process. Available services might include counseling, medical treatment, victim's compensation and other resources available locally, regionally, or state-wide.

RECOMMENDATION #4: Prosecutors should be aware of ethical considerations related to meeting with the victim or any other witness. Specifically:

- 1) Meeting with a victim or witness alone has the potential to make the prosecutor a witness in the case. To the extent practical, when meeting with a victim or witness an appropriate third party should be included in the meeting.
- 2) When a prosecutor meets with a victim or witness, he should be sufficiently familiar with the facts of the case to recognize material inconsistencies. Prosecutors should be familiar with *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and their progeny.
- 3) Prosecutors must disclose witnesses' "written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements." MO. SUP. CT. R. 25.03. Notes taken by the prosecutor or members of the prosecutor's office may be summaries of witness statements and thus discoverable.

Commentary: It may be appropriate to meet with a victim or witness alone if it is impractical to have a third party present and (1) the victim or witness is unwilling to meet with anyone else present, (2) delay will cause the victim or witness substantial hardship, or (3) delay may cause the loss of the information. When practical under the circumstances, it is helpful for the third party to not be a person of influence (e.g., mother, father, grandparent, outcry witness, etc.). However, the committee recognizes that circumstances may require otherwise.

Prosecutors have an affirmative responsibility to disclose exculpatory information and information that is relevant to the impeachment of the State's witnesses. When it is unclear if information is exculpatory or relevant to impeachment, prosecutors should err on the side of disclosure.

RECOMMENDATION #5: Multi-Disciplinary Teams (MDTs) are a valuable tool in the successful investigation and prosecution of child sexual abuse. Prosecutors should maintain open and cooperative relationships with the other members of their MDT. Prosecutors and members of allied professions should jointly develop a written protocol for the investigation of child sexual abuse cases.

RECOMMENDATION #6: The timing and substance of the charging decision should protect the victim's identity to the extent it is consistent with seeking justice in the case.

Commentary: For example, certain charges, such as Incest, may give clues to the victim's identity, gender or relationship to the defendant. Prosecutors should work with law enforcement to ensure that the Probable Cause Statement does not give gratuitous clues to the victim's identity, gender or relationship to the defendant. Unnecessary detail may lead to negative victim publicity, bullying and additional trauma.

RECOMMENDATION #7: A prosecutor should, in making charging decisions consistent with a prosecutor's ethical obligations, consider:

1) Case themes.

Example: Where the child sexual abuse was facilitated by drugs, a prosecutor might consider an additional charge of Unlawful Distribution of a Controlled Substance to a Minor, under section 195.212. This additional charge will reinforce the age disparity between the defendant and the victim and the fact that the abuse was drug-facilitated.

2) Enhanced punishment by additional charges.

Example: In a statutory rape case involving a 14 year old victim and a defendant older than 21, charging Enticement of a Child in addition to Statutory Rape in the Second Degree increases the range of punishment from up to 7 years' incarceration to 5 to 30 years' incarceration. An Enticement conviction also requires that the Defendant serve 5 years before being eligible for parole.

3) Enhanced punishment by additional allegations.

Examples: An offender's sentence can be enhanced if the offender is predatory sexual offender pursuant to Section 558.018, or a prior and persistent offender pursuant to Section 558.016, or if the circumstances of the charged crime could lead to an aggravated sentence, such as under Section 566.030.2 (until December 31, 2016) or under 566.010.1 (after January 1, 2017).

4) Admission of additional evidence.

Example: Where the defendant has sexually abused multiple victims, prosecutors should consider charging crimes against multiple victims in a single case. Depending on the circumstances of the crimes, counts may be tried together even where "evidence relating to one count would not be admissible in the trial of a second count if the two were tried separately." State v. Conley, 873 S.W.2d 233, 238 (Mo. 1994); State v. French, 308 S.W.3d 266, 272 (Mo. App. E.D. 2010).

5) Defendant's eligibility for Sexually Violent Predator Commitment under Section 632.480.

6) Defendant's ineligibility for child custody under Section 210.117.

RECOMMENDATION #8: Prosecutors are responsible to personally notify a victim of child sexual abuse, or the child's non-offending caregiver, that a decision has been made not to charge the case. The notification should occur promptly and if possible before the defendant is notified.