

Missouri Association of Prosecuting Attorneys

Special Victims Best Practices Subcommittee

Child Sexual Abuse Trial Recommendations

(Originally Approved October 2017, Updated September 2020)

NOTICE: A best practices recommendation by the Missouri Association of Prosecuting Attorneys (MAPA) 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 or desirable to implement in every county. There may be other methods in local jurisdictions to reach the same or similar objectives.

Best Practices 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 decrease the risk of victim or witness becoming uncooperative.

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: Jury selection is a vital element of a successful child sexual abuse trial. Prosecutors should consult with an experienced child sexual abuse prosecutor, or the MOPS Resource Prosecutor for examples of jury selection questions to use, but prosecutors should be aware that a list of questions is not sufficient preparation. These examples should be used in conjunction with proper training and second seating experience. *See General Child Sexual Abuse Recommendation # 1.* Prosecutors should be sure to tailor the jury selection questions to their own personal style and comfort level. Prosecutors should consider covering the following issues, among others, in jury selection:

- 1) Child abuse happens/Defendant-victim relationship
- 2) Expectations/What evidence should be
- 3) Age of the case/ Imperfect memory doesn't mean it didn't happen/ offender still needs to be held accountable
- 4) Delayed disclosure
- 5) Credibility of a child witness/ Can you believe a child beyond a reasonable doubt?
- 6) Child as sole eye- witness/ Can you consider a conviction on the word of a child alone?
- 7) Expectations of victims & witnesses/ Emotional responses/ Prior testimony as witness
- 8) Prior contact with Children's Division
- 9) Ever (or somebody close to them) been a victim or accused of child sexual abuse

- 10) CSI questions
- 11) Lack of injury/ Normal to be normal
- 12) Terminology (such as the particular child's language, also, legal terms, such as sodomy, where legal meaning may be different than the panel members' definition)
- 13) Case specific problems/ special situations/ potential issues/ possible jury hang-ups e.g. non-offending parent is testifying for abuser, non-offending parent failed to protect child from abuser, etc.
- 14) The #MeToo Movement (how jurors perceive reporting and the issues covered in the media/ social media)
- 15) Social media and its effects on the sexual content to which children are exposed.

RECOMMENDATION #2: Prosecutors should prepare for trial by personally discussing the trial process, including logistical and timing issues, as well as victim's rights pursuant to the Missouri Constitution Article 1, Section 32, and § 595.209, with the victim and their family. Prosecutors should make sure that victim and the victim's family are aware of their rights, particularly their right to be present, to confer with the prosecutor, to a secure waiting area, etc. Prosecutors should also consider the potential impact, positive or negative, of certain family members' presence in the courtroom.

Commentary: The presence of family members in the courtroom may demonstrate support for the victim, but in some circumstances their presence can be distracting or disruptive.

Prosecutors should be cognizant to include older child victims in the discussion of the case. (See Building Rapport Recommendation #2)

RECOMMENDATION #3: Prosecutors should consider informing the trial court and courthouse security in advance of the trial of the anticipated presence of outside advocates,¹ and extended family members, particularly when the prosecutor anticipates that there will be a large number of members of the public/advocates for a particular party or witness will be present, or where the prosecutor knows or suspects the situation between particular individuals to be contentious.

RECOMMENDATION #4: Prosecutors should be conscious of a safe supportive and secure environment for the child during the child's testimony. Prosecutors should be sensitive to the vulnerable nature of the child victim, considering

- 1) The timing of testimony, whether the morning or afternoon is better for the child, when the child naps, without significant wait time, etc.

¹ Advocacy organizations such as BACA (Bikers against Child Abuse) may present specific issues that should be considered and addressed before trial. See **State v. Hartman**, 479 S.W.3d 692 (W.D.2015) for a discussion and guidance about preventing undue impact on jurors.

- 2) Taking breaks as necessary during testimony, making sure that the child knows how to request a break, also being alert for and aware of nonverbal cues.
- 3) The child's isolation on the witness stand during extended bench conferences and should consider making a motion ahead of time to allow the child to sit at a table or have a specific place for the child to go and possibly ask the victim advocate to sit with the child during extended bench conferences.
- 4) Courtroom personnel are alert to the potential for intimidating gestures, body language or eye contact with other people in the courtroom. Prosecutors should make sure that courtroom personnel know to report any such activity to the court.

RECOMMENDATION #5: Opening statement is an important opportunity to introduce the narrative of the case to the jury. Prosecutors should be careful not to overpromise what the evidence will be but, be sure to state the expected evidence strongly and effectively. Using or referring to exhibits in opening statement can assist the prosecutor in making an effective opening statement. Prosecutors should only show/refer to noncontroversial exhibits that the prosecutor is reasonably sure will be admitted at trial. The amount of time necessary to make an effective opening statement can be very case specific. In complicated cases, prosecutors should make sure to carefully outline the evidence in a clear, understandable manner.

RECOMMENDATION #6: Prosecutors should use the forensic interview of a child as an exhibit at trial, absent highly unusual circumstances. *See Child Sexual Abuse Pretrial Recommendation #7.*

Commentary: Prosecutors can consider presenting the recording of the forensic interview in lieu of having the child go through the details of the abuse during the child's live testimony. Some experienced prosecutors find it more effective to have the child testify directly about the details of the abuse and then play the video through the forensic interviewer while other prosecutors have effectively played the video instead of having the child testify in detail about the abuse.

RECOMMENDATION #7: When showing sensitive victim photos and content, prosecutors should take reasonable steps to preserve the victim's privacy, considering what is observable to the gallery and general public. Victims and their families should be notified ahead of time before sensitive material is displayed.

RECOMMENDATION #8: Prosecutors should offer expert testimony about the case-specific issues, including, but not limited to:

- 1) The forensic interview process
- 2) Medical aspects of child sexual abuse and the unlikelihood of physical findings
- 3) The process of disclosure
- 4) Child development
- 5) Trauma responses

- 6) The dynamics of child sexual abuse, including behaviors consistent with child sexual abuse

Commentary: Absent unusual circumstances, the forensic interviewer can be qualified as an expert and should be used as such. Other professionals to consider for use as expert witnesses include counselors, doctors, SAFE examiners, social workers, Children's Services workers, and anyone else who, as a result of their training or experience has specialized knowledge on the issues. No expert should comment on the truthfulness or credibility of the child. Experts can testify about behaviors consistent with child sexual abuse and trauma but not specifically that this child has suffered child sexual abuse.

RECOMMENDATION #9: In order to build the best possible trial strategy, prosecutors should analyze the case to anticipate and overcome likely defense(s) in each case. Prosecutors should be aware of common defenses brought by child sexual abuse defendants, such as:

- 1) Defendant was disciplinarian.
- 2) Victim was promiscuous/ abused before. *See General Child Sexual Abuse Recommendation #1.6, Child Sexual Abuse Pretrial Recommendations #8.4 & #8.5, re: Rape Shield protection pursuant to §491.015.*
- 3) Child was lying/ coached.
- 4) Inconsistency of disclosure(s).
- 5) Child was abused by a different perpetrator instead of defendant.
- 6) The allegations arise from a custody dispute.

Commentary: Prosecutors should work together with their co-workers, multi-disciplinary team members and other experienced child sexual abuse prosecutors, or the Missouri Office of Prosecution Services Resource Prosecutor, to develop case specific strategies and share successful arguments and tactics from similar cases.

RECOMMENDATION #10: To effectively advocate in closing argument, prosecutors should:

- 1) Make sure that they have adequate time to argue their case in closing argument.
- 2) Use a tone or technique with which they are comfortable while conveying the urgency and importance of the case, and credibility of the evidence. The prosecutor is more likely to achieve justice for the victim when he or she can demonstrate confidence in the case and appropriately express outrage and indignation at the crimes.
- 3) Emphasize the parts of the victim's statement that have been corroborated by other evidence, even statements related to topics other than the abuse itself. Corroboration of this type is especially important in child sexual abuse cases because it helps reinforce the credibility of the victim.

- 4) Focus on the gravity and severity of the act alleged (as distinguished from lesser allegations made in a workplace setting, #MeToo or other minimizing arguments the defense may make.)

Commentary: While the appropriate length of closing argument depends to a significant extent on the facts of the case, experienced prosecutors report that the closing argument in a child sexual abuse case should be a minimum of 30 minutes, with up to an hour or an hour and a half, depending on the complexity and breadth of the evidence in the case. If prosecutors anticipate resistance from the court as to the length of closing argument, prosecutors may wish to consider filing a written request for a specific amount of time, citing the relevant factors and complexity of the case. It is also important to have adequate time for rebuttal argument. (The time for rebuttal closing argument cannot exceed the time for the State's initial closing argument.)

RECOMMENDATION #11: Prosecutors should make sure the court is aware of and adheres to special sentencing provisions related to certain types of child sex crimes, particularly §558.026 requiring sentences for Rape in the 1st Degree, Sodomy in the 1st Degree, Statutory Rape in the 1st Degree and Statutory Sodomy in the 1st Degree to be run consecutively to each other and any other crime when the crime was committed after August 28, 2013.

RECOMMENDATION #12: Prosecutors should not recommend probation and should strongly oppose it after a defendant is found guilty at trial in a child sexual abuse case.

Commentary: Given that trials generally occur as a result of the failure by the defendant to accept responsibility for his or her conduct, the defendant should not be rewarded for causing the additional trauma to the victim that a trial may cause. Further, since probation is a rehabilitative practice, acceptance of responsibility is a prerequisite for rehabilitation, so probation is not appropriate in such circumstances.