

Missouri Association of Prosecuting Attorneys
Child Sexual Abuse Propensity Evidence Best Practices Recommendations
Adopted August 29, 2023

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 or desirable to implement in every jurisdiction. There may be other methods in local jurisdictions that reach the same or similar objectives.

Best Practices Statement: Disclosure of child sexual abuse requires a tremendous amount of courage and strength. As much as possible, we must work to seek all avenues of additional potential evidence of child sexual abuse. This includes evidence of the defendant's prior acts of sexual abuse on other victims under the age of 18 at the time the sexual act occurred, which corroborates the child's disclosure.

RECOMMENDATION #1: Prosecutors should be familiar with the language of Article 1, Section 18(c) of the Missouri Constitution and its relevant case law.

RECOMMENDATION #2: Prosecutors should work with their multi-disciplinary teams to gather potentially admissible evidence of prior sexual acts.

Commentary: Prosecutors should be aware that Missouri case law is very permissive with respect to same victim prior acts. The Article 1, Section 18(c) amendment was enacted to address a previous line of case law disallowing other victim prior sexual acts.

RECOMMENDATION #3: Prosecutors should work with prior victims of sexual abuse to help them understand their role in this process.

Commentary: Prosecutor based victim advocates should work with all involved victims, whether the acts against them are charged in the current case or not.

Prosecutors should be aware that the protections of Section 491.015 specifically apply to prior victims as well as victims of currently charged acts.

RECOMMENDATION #4: Prosecutors should work with their multidisciplinary teams to consider charging all relevant charges, even when involving different victims and different time periods, within the same case.

Commentary: Prosecutors should consider a variety of factors, including but not limited to-

- 1) *Similarity of acts*
- 2) *Time frame of occurrence*
- 3) *Relationship to defendant*
- 4) *Time frame of disclosure*

From time to time, it may be necessary to add additional charges when additional evidence of additional acts comes to light or new victims are discovered. If the prior acts are charged, this could alleviate any concerns of the court that the evidence of the prior acts is overly prejudicial against the defendant.

When considering adding charges, prosecutors should also consider-

- 1) *How close to the trial date the new evidence or charges are discovered*
- 2) *The likelihood the new charges will cause a continuance*
- 3) *The effect new charges could have on plea negotiations in the current case and any related cases in this county or other counties.*

RECOMMENDATION #5: If evidence of another potentially chargeable sexual act is discovered to have occurred in another jurisdiction, prosecutors should consult with the prosecutor in the other jurisdiction to ensure prosecution efforts are coordinated among the separate cases.

Commentary: Coordinated efforts among prosecutors and multidisciplinary teams across jurisdictions enhances the possibility of a victim-friendly and just result.

RECOMMENDATION #6: Prosecutors should consider charging defendant as a persistent sexual offender or predatory sexual offender under Section 566.125.

Commentary: These charging decisions can have implications for the Missouri Attorney General's Sexual Violent Predator Unit, among other sentencing and plea consequences.

RECOMMENDATION #7: Prosecutors should consider identifying propensity evidence and witnesses as far in advance of trial as practicable. In addition, prosecutors should consider filing notice of the State's intent to offer propensity evidence and request a hearing ahead of the trial itself.

Commentary: Different circuits seem to have different standard expectations or requirements of prosecutors. Prosecutors should be familiar with what the standard is in their circuit. Prosecutors should be aware that a specific trial court finding, on the record, that the probative value outweighs the prejudicial value of the evidence better preserves the case at the appellate level.

RECOMMENDATION #8: When offering evidence of unadjudicated prior sexual acts, prosecutors should be cautious when considering how much and what type of evidence to offer. See, e.g. *State v. Travis Williams*, 548 S.W.3rd 275, (MO Sup.Ct. 2018); *State v. Daviune Minor*, 648 S.W.3d 721 (MO Sup.Ct. 2022).

Commentary: For the purposes of the hearing on admissibility, prosecutors should consider the requirements of the local court. If possible, prosecutors should avoid calling the prior victims themselves at the hearing, in order to avoid the victim's having to testify more times than necessary. Prosecutors should be aware that hearsay can be admissible at the hearing on admissibility.

For the purposes of trial, prosecutors should make a careful, case specific determination as to how much and what type of evidence to offer. Prosecutors should consider each witness, line of questions and the length of time testifying in light of the probative value v. the prejudicial effect of said witness and questions. Case law has indicated that the appellate courts prefer less outrage and victim impact evidence regarding prior unadjudicated acts.

Prosecutors should carefully prepare each propensity witness so that they understand their role and the limitations of the information they can provide.

Prosecutors should avoid any inference that the jury should make their decision in order to find justice for the prior victim.

RECOMMENDATION #9: If the prior victim of an unadjudicated prior sexual act is either reluctant or not available, the prosecutor should consider other available avenues of admissibility for the evidence.

Commentary: Prosecutors should consider whether or not the doctrine of forfeiture by wrongdoing can apply to the facts of this case, or whether the prior victim's statement would be admissible under Section 491.075.

RECOMMENDATION #10: If the prior sexual act has resulted in a conviction, then prosecutors should consider simply offering the certified prior conviction, along with a written stipulation as to the similarities between the cases. The prosecutor can then either present this information through a witness or offer the conviction and read the stipulation to the jury.

RECOMMENDATION #11: Prosecutors should be careful not to overly emphasize propensity evidence in closing argument.