

Missouri Association of Prosecuting Attorneys
Special Victims Best Practices Subcommittee
General Child Sexual Abuse Case Recommendations
(Originally Approved October 2015, Updated September 2020)

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 Practices Statement: Child sexual abuse cases are some of the most challenging, and yet vitally important, cases that prosecutors face. Prosecutors who handle child sexual abuse cases should develop a specialized knowledge base in order to seek the best possible outcomes for Missouri's child abuse victims.

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 and strategies for presenting propensity evidence under Article 1, Section 18(c). *See State v. Williams*, 548 SW3d 275 (Mo. banc 2018)
- 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, understanding our obligations under Rule 25.03.
- 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 can seek the assistance of experts in the field of child sexual abuse for the purposes of trial preparation and testimony. MOPS can assist prosecutors with finding such experts, or prosecutors can speak directly to their local child advocacy center, a board certified child abuse pediatrician or a member of the SAFE Care provider network.

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) function best when prosecutors take a leadership role. 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.

As vital members of the MDT, prosecutors should work with their MDTs to facilitate communication and foster understanding among member agencies about cursory interviews and the role that each agency should play in the investigation.

Commentary: Each MDT member, including first responders, should have training and experience with conducting quality cursory interviews and the limitations of cursory interviews. MDT members attempting to conduct cursory interviews without proper training can be detrimental to the child and the case. This type of training can be procured through MOPS, Missouri KidsFirst or other resources.

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 or charge enhancements, 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 address, 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.

Missouri Association of Prosecuting Attorneys
Special Victims Best Practices Subcommittee
(\SAFE Exam & Forensic Interview Privacy Protection Recommendation)
(Originally Approved January 2018, Updated September 2020)

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Best Practices Statement: Prosecutors should be mindful of the victims’ need for privacy and protect sensitive discovery so that it is not inappropriately shared with defense attorneys, defendants and other parties.

RECOMMENDATION: Pursuant to Rule 25.07, prosecutors should notify the defense attorney by written correspondence that SAFE exam pictures and forensic interview recordings are available for inspection at a mutually agreeable time, and that suitable facilities are available. Prosecutors should not copy said items for the defense or outside parties unless ordered to do so by a court pursuant to §510.035 & §545.950. *See also State v. Gibson*, 475 S.W.3d 195, 202-03 (Mo. App. S.D. 2015).

With respect to forensic interview recordings prosecutors may consider consenting to copying this material upon entry of a protective order that provides 1) the interview is not to be copied, 2) that it be used only for the purposes of the criminal case, 3) that all copies are returned to the prosecutor, consistent with §545.950.3.

With respect to SAFE Exam pictures or videos, prosecutors should not under any circumstances consent to the copying of this material.

This recommendation is made regardless of the Criminal Code Chapter (e.g. 565, 566, 568, 573, etc.) under which the case is filed.

Type of Discovery	Disclosure Method
Forensic Interview Video	Only produced subsequent to protective order
Forensic Interview Written Materials	Only produced subsequent to protective order
SAFE Written Materials	Only produced subsequent to protective order
SAFE Photos/ Videos	View in prosecuting attorney’s office only

Missouri Association of Prosecuting Attorneys
Special Victims Best Practices Subcommittee
Building Rapport with Child Abuse Victim Recommendations
(Originally Approved April 2016, Updated September 2020)

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Best Practices Statement: Rapport building with child victims of sexual and physical abuse is critical to making the criminal justice process less traumatic for the child and increases reliability in reporting.

RECOMMENDATION #1: Prosecutors should become familiar with the child's culture and developmental level and seek to meet the child where the child is, developmentally, when discussing the case with the child. With children, it is particularly important to use culturally and developmentally appropriate language, which is familiar to the child, whenever possible.

Commentary: It is important for prosecutors to understand a child's developmental level before asking questions about the abuse, as asking questions that are above a child's understanding may make for unreliable or inconsistent disclosures. Prosecutors are encouraged to consult their child advocacy center's forensic interviewer(s) who can be an invaluable resource on how to effectively communicate with children. Discussions should include identification of any nervous habits or behaviors, or mental health concerns.

RECOMMENDATION #2: To effectively build rapport with a child victim, prosecutors should:

1. Personally meet with the child with some regularity and not just the day the child is giving testimony in a hearing, trial or other matter.
2. Have at least one initial meeting with the child primarily devoted to rapport building and not designed to discuss the charges or the court process. Prosecutors may use this meeting to talk with the child about their likes and dislikes, school, favorite activities, home, family life, pets or other topics of interest to the child.
3. Ensure that someone who is going to have regular contact with the child is also present at all meetings with the child; whether that be a victim advocate, investigator or legal assistant/secretary so the potential does not exist to make the prosecutor a witness. (*See General Child Sexual Abuse Recommendation #4.1*).
4. Seek out any emotional, physical, developmental, psychological or sensory concerns that may impact the case moving forward. Prosecutors should take steps to mitigate and address those concerns.
5. Be careful to include older child victims or witnesses in discussion with their adult family members or nonoffending caregivers about court dates, testimony, potential dispositions and the justice process.

Commentary: Prosecutors must be cognizant of the fact that it is traumatic for child victims of abuse to repeatedly discuss their abuse. Having a good rapport with child victims of abuse will make it less traumatic for the child to discuss the abuse and will provide the prosecutor with increased reliability and opportunity to test the validity and veracity of the child's disclosures.

It may be appropriate to meet with a victim alone if it is impractical to have a third party present and the victim is unwilling to meet with anyone else present, delay will cause the victim substantial hardship or delay may cause the loss of information. It is helpful for the third party not to be a person of influence, but the committee recognizes that circumstances may require otherwise. The prosecutor must be aware that there is no legal requirement that a parent or guardian be present during interviews with a child and that having a parent or guardian present could affect what the child discloses.

In addition to building rapport with child victims, it is equally important to understand the process of disclosure and the fact that incremental disclosure is normative behavior in cases of child sexual abuse. Becoming familiar with the research regarding disclosure can help prosecutors understand how to talk to children about the abuse and how to test the veracity of the disclosures. (See Sorenson, Y. & Snow, B. (1991). How children tell: The process of disclosure in child sexual abuse).

RECOMMENDATION #3: Every time prosecutors interact with a child victim, prosecutors should seek to create an environment in which the child feels comfortable, safe and secure.

Commentary: Courthouses and prosecutors' offices are not typically child friendly. Prosecutors should think creatively and work to find or create child friendly environments for interacting with child victims. Prosecutors should also consider other ideas, including the use of support animals, persons or items during the rapport building stage.

Missouri Association of Prosecuting Attorneys

Special Victims Best Practices Subcommittee

Pretrial Issues in Child Sexual Abuse Cases

(Originally Approved April 2016, Updated September 2020)

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Best Practices Statement: Prosecutors should use every means at their disposal to protect child sexual abuse victims from further trauma and victimization during the pendency of the criminal case.

RECOMMENDATION #1: With the filing of charges, or as soon as possible thereafter, prosecutors should seek stay away orders and/or bond conditions that protect the safety and well-being of victims, witnesses and non-offending caregivers. Stay away orders should be sought even if the defendant remains in the jail to prohibit the defendant from improperly contacting witnesses. *(See attached Sample Motion and Stay Away Order).*

Commentary: Particular bond conditions might include detailed no contact orders, including no contact with any child under 18 years of age, no use or possession of any Internet capable device, no use of social media (including third party usage), compliance with all requests made by the Children's Division/ Juvenile Office, payment of child support, if applicable, and any other specific bond restrictions that the prosecutor identifies after consultation with the victim, witnesses and non-offending caregivers. See also the Rule 33 Recommendations.

RECOMMENDATION #2: Prosecutors should notify and maintain regular contact with victims, witnesses, non-offending caregivers and other professionals working with the family, regarding stay away orders or bond conditions.

Commentary: Prosecutors should advise victims, witnesses and non-offending caregivers of who and how to contact the prosecutor's office in the event of a violation and the process for handling contempt of court and bond revocation motions.

RECOMMENDATION #3: Prosecutors should monitor defendant's compliance with court orders while the case is pending. Prosecutors should diligently enforce stay away orders and bond conditions in order to protect the safety and well-being of victims, witnesses and non-offending caregivers. Upon learning of a stay away or bond violation, prosecutors should immediately seek remedial action with the court. If the defendant is on bond and violates the conditions of his bond, the prosecutor should consider seeking immediate re-arrest of the accused pursuant to Missouri Supreme Court Rule 33.08.

Commentary: Prosecutors should remain attentive to whether defendants are having contact with victims or witnesses. If the defendant is in custody, but still contacting victims or witnesses, prosecutors should take steps to prevent further contact via corrections administration. For example, corrections officials may be able to block certain numbers, limit defendants' phone or mail access, email privileges or other communications.

RECOMMENDATION #4: Prosecutors should be aware of ancillary or collateral issues that arise during the pendency of the investigation and criminal case. Prosecutors should track companion civil case proceedings, court orders, hearings and the discovery process involved therein because these matters may affect the victim and caregivers' safety and wellbeing, as well as the criminal case.

Commentary: Companion civil cases might include orders of protections, juvenile or family court matters, or other civil remedies pursued by any party.

RECOMMENDATION #5: Privacy is of paramount importance to victims and their caregivers. Prosecutors should be aware of the provisions in Rule 25.07 and Rule 25.03(d), (e) and (f) which allow the state to determine the manner in which to provide discovery and to provide redacted discovery to defendants. *See also SAFE Exam & Forensic Interview Privacy Protection Recommendation*

RECOMMENDATION #6: Prosecutors should meet with the child's parent/guardian and allied professionals (e.g., therapists, caseworkers) to advise them of the child's rights, their rights and to ensure they understand the child will likely be required to testify and discuss the child's emotional well-being and how best to prepare the child for court. Prosecutors should be prepared to direct the victim and non-offending caregivers to services related to emotional and physical safety, housing, counselling and other resources.

Commentary: Prosecutors should consult with allied professionals, including members of their local multi-disciplinary team, to learn what services are available in their region. (See General Sexual Abuse Recommendation #5).

RECOMMENDATION #7: Prosecutors should seek to work with the court to ultimately dispose of cases within one year of filing. In order to minimize delays and continuances, prosecutors should consider adopting an internal office policy with respect to the handling of discovery, associate circuit court, plea offers and other matters so that child abuse cases can reach circuit court within 60 days of filing, with a definite trial date set at that time. Prosecutors should consider asking the court to make a scheduling order in order to assure timely completion of discovery, notice of expert testimony, pretrial motions and the resolution of any other matter within a set period of time prior to disposition of the case.

Commentary: The Special Victims Subcommittee has researched and interviewed multiple prosecutors across the state. Some counties are routinely resolving child sexual abuse cases within 9-18 months. Other counties aspire to resolve cases sooner. Prosecutors should work to "know their number". (See Initial General Recommendation #1) Prosecutors should work with their courts to prioritize these cases pursuant to Section 491.710. (See Initial General Recommendation #9).

RECOMMENDATION #8: Prosecutors should send child sexual abuse cases to grand jury whenever possible. If a grand jury is not attainable, prosecutors should seek to allow the admission of hearsay at preliminary hearing to eliminate the need to call the child. *See attached Motion to Admit Hearsay at Preliminary Hearing.*

If the child must be called to testify, the preliminary hearing should be recorded to allow the prosecutor to utilize that testimony at a later date. Prosecutors should file a motion for special procedures to protect the child. Prosecutors should consider the layout of the courtroom, the presence of others, particularly other defendants and any other protective measures that might assist the child in being as comfortable as possible during the child's testimony.

Commentary: The preliminary hearing recording may be later used in lieu of the victim's testimony. See State v. Smith, 240 SW3d 753 (Mo ED 2007).

RECOMMENDATION #8: Prosecutors should seek to minimize the stress on the child victim or witness by moving the court to admit prior statements of the child. These statements include, but are not limited to, the child's initial disclosure, the child's statements to first responders, medical professionals, school personnel, the child's forensic interview and any additional statements the child has made to others since the initial disclosure. *(See General Child Sexual Abuse Recommendation #2).*

Commentary: Section 491.075 requires a written motion and pretrial hearing in order to determine the admissibility of a child victim or witness' statements. It is not necessary for the child victim or witness to testify at the pretrial hearing. If the child victim's statement is recorded and meets the requirements of Section 492.304, then it may be admissible without a pretrial hearing.

RECOMMENDATION #9: Prosecutors should seek to protect the privacy, safety and security of the child through appropriate pretrial motions. Prosecutors should become familiar with and consider filing pretrial motions or notices as follows:

1. Motion for Protective Order under Rule 25.11, §491.060, §545.950 and §510.035. Prosecutors should seek protective orders governing any copies of sensitive documents, photographs or recordings provided to the defense, including but not limited to forensic interview recordings, medical records and victim photographs. Prosecutors should not provide defense copies of photographs or videos containing sexual explicit or obscene material. *See Rule 25.07 and SAFE Exam & Forensic Interview Privacy Protection Recommendation*
2. Motion for Video Tape Deposition in Lieu of Child's Testimony, under Section 491.680 if significant emotional or psychological trauma to the child would result from testifying in open court.
3. Notice of Intent to Offer Propensity Evidence, under Article 1, Section 18(c) of the Missouri Constitution.

Commentary: Notice of Intent to Offer Propensity Evidence is not required but prosecutors may wish to seek a pretrial ruling as to admissibility of the evidence prior to the beginning of trial.

- 4.. Motion for Special Procedures during Child Witness' Testimony under Section 491.725. Prosecutors should consider requesting that the child's testimony be taken via closed circuit television or with a one way screen, that the child's testimony be taken at optimal times during the day (so that the child is not tired, hungry or restless), that the child be allowed to have a support person, animal or item with them on or near the witness stand, and/or that appropriate, child- friendly language be used during questioning by both the State and the defendant.

Prosecutors should understand that the Confrontation Clause, *Crawford v. Washington*, and its progeny do not require the Defendant to have visual contact with a child if the court makes a finding that such confrontation would cause the child substantial emotional distress. If such a finding is made, a child may be able to testify via closed-circuit television or behind a screen. *Maryland v. Craig*, 497 U.S. 836 (1990), *see also* Article 1, Section 18(a) of the Missouri Constitution.

Commentary: Certain provisions of Section 491.725 require a motion to be made at least 30 days prior to the trial.

5.. Motion to Prohibit Invasive Discovery pursuant to Missouri Supreme Court Rule 56.01. Prosecutors should seek to minimize the intimidation and embarrassment to victims of overly invasive defense discovery and investigation tactics.

Commentary: Prosecutors should be aware that a defendant does not have an absolute right to discovery. For example, a defendant must prove relevance and materiality prior to being allowed access to victim's privileged psychiatric records. Prosecutors are encouraged to consult with the Missouri Office of Prosecution Services for form motions and orders to prevent invasive discovery.

6. Motion to Exclude Evidence Protected by the Rape Shield pursuant to Section 491.015.

7. Motion to Admit Hearsay Evidence Pursuant to the Doctrine of Forfeiture by Wrongdoing. See, e.g., *State v. Ivey*, 427 S.W.3d 854 (Mo. App. 2014).

RECOMMENDATION #10: Prosecutors should prepare the child for deposition testimony and, whenever possible, prosecutors should seek to find a child friendly room for the deposition. Prosecutors should also be aware that Missouri Supreme Court Rule 25.12 states a defendant cannot be present for a deposition, unless specifically ordered by the court.

RECOMMENDATION #11: Prosecutors should prepare the child for courtroom testimony, including showing the child the courtroom, introducing the child to the courtroom staff, if possible, and explaining the courtroom process. Prosecutors should be aware that child victims are presumed competent to testify pursuant to Section 491.060. See *General Child Sexual Abuse Recommendation #4*.

*Commentary: The child needs to be comfortable with the courtroom in which the child will be testifying and needs to understand what happens in the courtroom. Prosecutors can find information about child court preparation at www.childcourtprep.com, www.nationalcac.org/ncac-training/hcs-dvd.html, and can order coloring books and other child-friendly materials about the trial process. Children should always be told the most important rule is to tell the truth in court. Having a rapport with the child will facilitate this process. See *Building Rapport Recommendations #1-3**

RECOMMENDATION #12: When negotiating a plea, prosecutors should consider special sentencing provisions related to certain types of sex crimes. These special sentencing provisions may allow for additional offender accountability.

Commentary: Examples of special sentencing provisions include persistent and predatory sexual offender status. A prosecutor should review and determine whether the defendant qualifies as either a Persistent Sexual Offender or Predatory Sexual Offender under §566.125. This section provides for enhanced punishment where the defendant has committed one of the listed crimes in the past even if the prior criminal act was not adjudicated.

RECOMMENDATION # 13: Without case-specific proof problems and/or other substantial case specific mitigating factors, prosecutors should not offer probation in child sexual abuse cases. Prosecutors should assure that offers are disclosed and reviewed with the victim prior to being communicated to the defendant.

THE CIRCUIT COURT OF _____ COUNTY
STATE OF MISSOURI

STATE OF MISSOURI,)
Plaintiff,)
) Cause No.
)
vs.)
) Division No.
)
_____,)
Defendant.)

STATE'S MOTION FOR STAY AWAY ORDER

Comes now, State of Missouri, through Prosecuting Attorney, _____, and hereby moves the Honorable Court to order defendant to stay away from and to have no contact by any means with (victim's initials) pursuant to Missouri Constitution Article 1, Section 32.1(6) and Missouri Revised Statutes Sections 491.600 and 595.209.1(9) and any other applicable state or federal statutes. In support of its motion, the State informs the Court of the following:

- 1) Defendant is herein charged with _____.
- 2) (list circumstance which indicate the need for a stay away order, e.g. Defendant/ his family/ his friends have a history of intimidating victim/ witnesses, by the nature of the charges and training and experience of the prosecutor/ law enforcement/ other professionals involved in the case).

WHEREFORE, State moves the Court to issue a stay away order to _____ with conditions as requested in the attached (proposed) Order.

Respectfully submitted,

Prosecuting Attorney

IN THE CIRCUIT COURT OF _____ COUNTY

STATE OF MISSOURI

STATE OF MISSOURI,)

Plaintiff,)

) Cause No.

vs.)

) Division No.

_____,)

Defendant.)

SAMPLE STAY AWAY ORDER

*To be requested at the time warrants are filed & again addressed
& at subsequent appearances and status hearings.*

NOTICE: YOUR FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO ARREST & INCARCERATION FOR CRIMINAL CONTEMPT OF COURT PURSUANT TO MISSOURI STATUTES §491.610 AND/OR §476.110 AS WELL AS ANY OTHER APPLICABLE STATE & FEDERAL LAWS.

Whereas probable cause has been shown and warrants issued for Defendant for:

Pursuant to the Missouri Statute §491.600 and any other applicable state or federal laws, IT IS HEREBY ORDERED that _____ (Defendant) (Other Person Before the Court) :

- 1. **STAY AWAY FROM:** _____
 - A. the home of _____
 - B. the school of _____
 - C. the workplace of _____

D. DO NOT GO WITHIN 100 YARDS OF THIS PERSON(S). YOU WILL BE IN VIOLATION OF THIS ORDER EVEN IF YOU ARE INVITED.

E. NO 3RD PARTY CONTACT WITH _____ IS ALLOWED.

2. **REFRAIN FROM** communication or any other contact by mail, telephone, e-mail, voicemail, or other means with _____.
3. **SURRENDER ANY & ALL** handguns, pistols, rifles, shotguns or other firearms possessed. Such surrender shall take place immediately but in no event later than _____.
4. **OTHER SPECIAL CONDITIONS:**

IT IS FURTHER ORDERED that this Stay Away Order shall remain in effect until _____.

SO ORDERED:
in court

(Defendant) (Other Person Before the Court) advised
of the issuance of this Order.

Judge

Defendant

IN THE CIRCUIT COURT OF COUNTY, MISSOURI

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	
)	Case No.
v.)	
)	
,)	
)	
Defendant.)	

BENCH BRIEF CONCERNING ADMISSABILITY OF HEARSAY AT PRELIMINARY HEARING

1. It is well-established in Missouri that hearsay testimony is admissible at a preliminary hearing. *See, e.g., State v. Hester*, 331 S.W.2d 535, 537 (Mo. 1960) (contention that hearsay was improperly used by the sole witness at preliminary hearing “overlooks the fundamental purpose of a preliminary hearing;” hearsay can sustain probable cause as the matter is whether probable cause exists, not whether defendant is guilty or innocent).
2. A preliminary hearing is not a trial; it exists solely for the determination of probable cause. *State v. Turner*, 353 S.W.2d 602, 604 (Mo. 1962); *State v. Aaron*, 218 S.W.3d 501, 510 (Mo. App. W.D. 2007).
3. Preliminary hearings are not guaranteed by the Constitution, but rather by statute, and they are “not even part of the constitutional right to due process.” *Aaron*, 218 S.W.3d at 509.

4. Nor are preliminary hearings intended to be a forum for discovery. *Id.* at 510.
5. The Confrontation Clause does not apply to preliminary hearings. The right to confrontation is a trial right. *Barber v. Page*, 390 U.S. 719, 725 (1968). *See also California v. Green*, 399 U.S. 149, 157 (1970) (The core of the Confrontation Clause is the literal right to confront a witness at trial). All federal circuits which have been presented with the question of whether hearsay is admissible at preliminary hearings have ruled that there is no Confrontation Clause right and thus hearsay is admissible. *See Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010) (holding that *Crawford* does not apply to preliminary hearings); *United States v. Andrus*, 775 F.2d 825 (7th Cir. 1985); *See also United States v. Harris*, 458 F.2d 670 (5th Cir. 1972)(holding that direct pre-trial identification of a defendant at a preliminary hearing is not constitutionally mandated).
6. Recently, the admissibility of hearsay at a preliminary hearing was challenged in *State v. Timothy Paumen*, 18WY-CR00172. In that case, the Defendant filed a writ of prohibition prior to the preliminary hearing. That writ was denied in *St ex rel Timonty Paumen rel v. Hon Randy Schuller Res*, SD 35482 (4/24/2018). A second writ was filed after the preliminary hearing challenging the finding of probable cause based exclusively on hearsay testimony at the preliminary hearing. The second writ was also denied in *St ex rel Tim Paumen Rel v. Hon. Randy Schuller Res*, SD 35496

(5/04/2018). Defense sought relief from the Missouri Supreme Court in SC97128 (5/7/2018) and the writ was denied for the last time.

7. As preliminary hearings exist purely to determine probable cause, not the guilt or innocence of the accused, and do not implicate the Confrontation Clause, hearsay is admissible. As such, the hearsay statements of child victim, to Forensic Interviewers are admissible at the preliminary hearing to establish probable cause.

RESPECTFULLY SUBMITTED,

/S ASSISTANT PROSECUTING ATTORNEY FOR THE

Certificate of Service

State certifies that a copy of the foregoing document was e-filed and has been transmitted to Counsel of record via the Missouri e-filing system on 3/26/19.

IN THE CIRCUIT COURT OF COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	
vs.)	Case No.
)	
,)	
)	
Defendant.)	

MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY

COMES NOW State of Missouri, by and through Prosecuting Attorney _____ and moves this Honorable Court to enter a Protective Order in the above-captioned matter, pursuant to Missouri Supreme Court Rule 25.11 and in support of this Motion, states as follows:

1. State alleges that the discovery in this case involves production of personal, confidential, or closed information and materials, and may include personal identifying information such as Social Security Numbers and dates of birth, Children's Division records, medical records, or recorded statements of witnesses, including child witnesses.

2. Unwarranted viewing or distribution of said information, materials, records and recorded statements or their improper use could cause serious damage to the witnesses and would be contrary to the public interest in the witnesses' welfare.

3. State requests that said information, materials, records and recorded statements not be used for any purpose other than to prepare for the defense of Defendant in this case.

4. State requests that said information, materials, records, and recordings of witnesses' statements shall not be shown to, distributed to, or played for any person other than Defendant,

counsel for Defendant, or counsel's staff, and expert witnesses essential for trial preparation in this case.

5. State requests said information, materials, records and recorded statements not be publicly exhibited, shown, displayed, used for educational, research, or demonstration purposes, or used in any other fashion, except in judicial proceedings in the above-captioned case.

6. State requests counsel for Defendant be permitted to make one (1) copy of the information, materials, records, recorded statements and transcripts for each expert witness for the purpose of providing that copy to expert witnesses consulting for or retained by Defendant for the purpose of reviewing the information, materials, records, recorded statements and transcripts and rendering a professional expert opinion, report, or analysis, written or verbal, on the basis of the content of the information, materials, records, recorded statements and transcripts.

7. State requests that other than otherwise allowed above, no other copies shall be made of the information, materials, records, recorded statements and transcripts without a court order.

8. State requests if Defendant's attorney chooses to transcribe any recorded Statement, the Defendant's attorney is authorized to have made one (1) original and copies of a transcript of the recording for the purpose of providing an original for use by Defendant's attorney and a copy to each expert witness consulting for or retained by Defendant for the purpose of reviewing the recording and rendering a professional expert opinion, report, or analysis, written or verbal, on the basis of the content of the recording. The original and copies of any transcript shall not be shown to or distributed to anyone other than Defendant, counsel for Defendant, counsel's staff or expert witnesses essential for trial preparation in this case.

9. State requests that other than otherwise allowed above, no other copies of the transcripts shall be made without a court order.

11. State requests that before turning over any authorized copies of the information, materials, records, recordings or transcripts to any expert, the defense shall obtain an Acknowledgment on Disclosure of Discovery from the expert.

12. State requests the Protective Order be continuing in nature and apply to the case whether pending or on appeal.

WHEREFORE, the State prays that its Motion for a Protective Order be granted and for such other and proper relief as the Court deems just and proper in the premises.

Respectfully submitted,

Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was electronically filed with the Court on this 10th day of October 2019, and, therefore, service was made to____, attorney of record, pursuant to Missouri Supreme Court Rule 103.08.

Assistant Prosecuting Attorney

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.