

# Rules of Evidence or Statutes Governing Out of Court Statements of Children

*Last Updated (May 2014)*



This document is a comprehensive compilation of Rules of Evidence and Statutes governing the admissibility of out-of-court statements of children who are the victims or witnesses of specific types of abuse. It is up to date as of May 2014.

For more than twenty years, courts used a “general approach”<sup>1</sup> when analyzing whether an otherwise admissible hearsay statement violated the Confrontation Clause.<sup>2</sup> The *Ohio v. Roberts* test, allowed the admission of hearsay statements if they bore “indicia of reliability.”<sup>3</sup> The reliability of a statement could be inferred if it fit within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”<sup>4</sup> The Supreme Court’s decision in *Crawford v. Washington* fundamentally changed the way courts consider the admissibility of out-of-court statements in relation to a defendant’s right to confrontation.<sup>5</sup> The *Crawford* Court held that the protections of the Sixth Amendment are procedural rather than substantive and that the Constitution “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>6</sup>

The Court gave us the term “testimonial hearsay,” as a benchmark for what class of statements the Court examines.<sup>7</sup> In subsequent cases, courts have given further insight into what statements are considered “testimonial”.<sup>8</sup> What happens in a case where a child is the victim or witness of abuse and makes an out-of-court statement about that abuse in light of *Crawford*? The following compilation addresses what rules of evidence and statutes exist in the United States concerning the introduction of hearsay statements of children. **Please consult the case law in your jurisdiction regarding *Crawford* along with statutes in this compilation.**

For our 900+ comprehensive Crawford Outline of cases, email the National Center for Prosecution of Child Abuse via the free online prosecution assistance service [http://www.ndaa.org/ta\\_form.php](http://www.ndaa.org/ta_form.php)

Prepared Under OJJDP Grant # **2012-CI-FX-K005**

---

<sup>1</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>2</sup> U.S. CONST. amend. VI.

<sup>3</sup> *Roberts*, 448 U.S. at 66.

<sup>4</sup> *Id.*

<sup>5</sup> *U.S. v. Crawford*, 541 U.S. 36 (2004).

<sup>6</sup> *Id.* at 61.

<sup>7</sup> *Id.* at 51.

<sup>8</sup> See, e.g., *Michigan v. Bryant*, 131 S. Ct 1143 (2011); *Davis v. Washington*, 547 U.S. 813 (2006); *Hammon v. Indiana* 547 U.S. 813 (2006).

# Table of Contents

Click on the state heading to go to the statutes section.

<b><u>ALABAMA</u></b> .....	<b>6</b>
<i>Ala. Code § 15-25-31 (2014). Out-of-court statement -- When admissible</i> .....	6
<i>ALA. CODE § 15-25-32 (2014). Out-of-court statement -- Requirements for admissibility *** Found Unconstitutional by Styron v. State, 34 So.3d 724 (Ala.Crim.App.,2009) ( Applying Crawford v. Washington to § § (2) and § (b))</i> .....	6
<b><u>ALASKA</u></b> .....	<b>7</b>
ALASKA STAT. § 12.40.110 (2014). Hearsay evidence in prosecutions for sexual offenses .....	7
<b><u>ARKANSAS</u></b> .....	<b>7</b>
A. R.E. Rule 804 (2014). Hearsay Exceptions--Declarant Unavailable.....	7
<b><u>CALIFORNIA</u></b> .....	<b>10</b>
<i>Cal.Evid.Code § 1228 (2014). Admissibility of certain out-of-court statements of minors under the age of 12; establishing elements of certain sexually oriented crimes; notice to defendant</i> .....	10
<i>Cal.Evid.Code § 1360 (2014). Statements describing an act or attempted act of child abuse or neglect; criminal prosecutions; requirements</i> .....	11
<b><u>COLORADO</u></b> .....	<b>11</b>
<i>COLO. REV. STAT. § 13-25-129 (2014). Statements of child victim of unlawful sexual offense against a child or of child abuse--hearsay exception</i> .....	11
****Held Unconstitutional By <i>People v. Moreno, 160 P.3d 242, 242 (Colo. Jun 11, 2007) (violates defendant's right of confrontation if defendant is not afforded opportunity to cross-examine victim)</i> .....	11
<b><u>CONNECTICUT</u></b> .....	<b>13</b>
<b><u>DELAWARE</u></b> .....	<b>13</b>
<i>DEL. CODE ANN. TIT. 11, § 3513 (2014). Hearsay exception for child victim's or witness's out-of-court statement of abuse</i> .....	13
<b><u>DISTRICT OF COLUMBIA</u></b> .....	<b>15</b>
<b><u>FLORIDA</u></b> .....	<b>15</b>
<i>FLA. STAT. ANN. § 90.803 (2014)Hearsay exceptions; availability of declarant immaterial (23) Child Victim</i> .....	15
<b><u>GEORGIA</u></b> .....	<b>16</b>
<i>REPEALED GA. CODE ANN. § 24-3-16 (2013), relating to statements made by child under age of 14 years describing acts of sexual contact or physical abuse Repealed by Laws 2011, Act 52, § 2, eff. January 1, 2013</i> .....	16
<b><u>HAWAII</u></b> .....	<b>16</b>
<b><u>IDAHO</u></b> .....	<b>16</b>
<b><u>ILLINOIS</u></b> .....	<b>17</b>
725 ILL. COMP. STAT. § 115-10 (2014). Certain hearsay exceptions .....	17

<b><u>INDIANA</u></b> .....	<b><u>19</u></b>
<i>IND. CODE ANN. § 35-37-4-6 (2014) Application of section; “protected person” defined; applicable offenses; admissibility of statement or videotape; notice to defendant; jury instructions; hearing as evidence</i> .....	
	19
<b><u>IOWA</u></b> .....	<b><u>22</u></b>
<b><u>KANSAS</u></b> .....	<b><u>22</u></b>
<b><u>KENTUCKY</u></b> .....	<b><u>23</u></b>
<b><u>LOUISIANA</u></b> .....	<b><u>23</u></b>
<b><u>MAINE</u></b> .....	<b><u>23</u></b>
<b><u>MARYLAND</u></b> .....	<b><u>23</u></b>
<i>MD. CODE ANN., CRIM. LAW § 11-304 (2014). Out-of-court statements of child victims</i> .....	
	23
<b><u>MASSACHUSETTS</u></b> .....	<b><u>28</u></b>
<i>MASS. ANN. LAWS CH. 233, § 81(2014) . Criminal proceedings; out-of-court statements describing sexual contact; admissibility</i> .....	
	28
<b><u>MICHIGAN</u></b> .....	<b><u>29</u></b>
<b><u>MINNESOTA</u></b> .....	<b><u>29</u></b>
<i>MINN. STAT. § 595.02, Subd. 3. (2014). certain out-of-court statements admissible</i> .....	
	29
<b><u>MISSISSIPPI</u></b> .....	<b><u>30</u></b>
<i>Rules of Evid., M.R.E. 803 (25) (2014); Tender Years Exception</i> .....	
	30
<b><u>MISSOURI</u></b> .....	<b><u>30</u></b>
<i>MO. REV. STAT. § 491.075 (2014). Statement of child under fourteen or vulnerable person admissible, when</i> .....	
	30
<b><u>MONTANA</u></b> .....	<b><u>31</u></b>
<i>MONT. CODE ANN. § 46-16-220 (2014). Child hearsay exception--criminal proceedings</i> .....	
	32
<b><u>NEBRASKA</u></b> .....	<b><u>34</u></b>
<b><u>NEVADA</u></b> .....	<b><u>34</u></b>
<i>NEV. REV. STAT. ANN. § 51.385 (2014). Admissibility; notice of unavailability or inability of child to testify</i> .....	
	34
<b><u>NEW HAMPSHIRE</u></b> .....	<b><u>35</u></b>
<b><u>NEW JERSEY</u></b> .....	<b><u>35</u></b>
<i>Rules of Evid., N.J.R.E. 803(c)(27) (2014). Statements by a Child Relating to a Sexual Offense</i> .....	
	35
<b><u>NEW MEXICO</u></b> .....	<b><u>35</u></b>
<b><u>NEW YORK</u></b> .....	<b><u>36</u></b>
<b><u>NORTH CAROLINA</u></b> .....	<b><u>36</u></b>
<b><u>NORTH DAKOTA</u></b> .....	<b><u>36</u></b>

<i>Rules of Evid., N.D.R.E. 803(24) (2014). Child's Statement about Sexual Abuse</i> .....	36
<b><u>OHIO</u></b> .....	<b><u>36</u></b>
<i>Rules of Evid., O.H.R.E. 807(2014). Hearsay exceptions; child statements in abuse cases</i> .....	36
<b><u>OKLAHOMA</u></b> .....	<b><u>38</u></b>
OKLA. STAT. ANN. TIT. 12, § 2803.1 (2014). Statements of children not having attained 13 years or incapacitated persons describing acts of physical abuse or sexual contact--Admissibility in criminal and juvenile proceedings .....	38
<b><u>OREGON</u></b> .....	<b><u>39</u></b>
<i>Rules of Evid., O.R.R.E. 803 (18a)(2014). Rule 803. Hearsay exception; availability of declarant     immaterial</i> .....	39
<b><u>PENNSYLVANIA</u></b> .....	<b><u>41</u></b>
42 PA. CONS. STAT. ANN. § 5985.1 (2014). Admissibility of certain statements .....	41
<b><u>RHODE ISLAND</u></b> .....	<b><u>42</u></b>
R.I. GEN. LAWS § 40-11-7.2 (2014). Evidence .....	42
<b><u>SOUTH CAROLINA</u></b> .....	<b><u>43</u></b>
<i>S.C. CODE ANN. §§ 17-23-175 (2014).Admissibility of out-of-court statement of child under twelve;     determination of trustworthiness; notice to adverse party</i> .....	43
<b><u>SOUTH DAKOTA</u></b> .....	<b><u>45</u></b>
<i>S.D. CODIFIED LAWS § 19-16-38 (2014). Statement by child under age thirteen or child with     developmental disability regarding sex crime, physical abuse, or neglect</i> .....	45
<b><u>TENNESSEE</u></b> .....	<b><u>46</u></b>
<i>TENN. CODE ANN. § 24-7-123 (2014). Interview of child by forensic interviewer; sexual contact; video     recording</i> .....	46
<b><u>TEXAS</u></b> .....	<b><u>48</u></b>
<i>Rules of Procedure, Tex. Crim. Pro. ART. 38.071 (2014). Testimony of child who is victim of offense</i> .....	48
**** <i>Section 2 held Unconstitutional by Coronado v. State, 2011 WL 4436474 (Tex.Crim.App.)     (stating Ex parte submission of written interrogatories does not qualify as cross-examination for     Sixth Amendment Confrontation purposes)</i> .....	48
<i>Rules of Procedure, Tex. Crim. Pro. ART. 38.072 (2014). Hearsay Statement of Certain Abuse Victims</i> .....	54
<b><u>UTAH</u></b> .....	<b><u>55</u></b>
<i>Rules of Procedure, U.T. RCRP Rule 15.5 (2013). Out Of Court Statement And Testimony Of Child     Victims Or Child Witnesses Of Sexual Or Physical Abuse--Conditions Of Admissibility</i> .....	55
<b><u>VERMONT</u></b> .....	<b><u>58</u></b>
<i>Rules of Crim. Pro., V.T.C.P. 26 (2014). Evidence</i> .....	58
<i>Rules of Evid., V.T.R.E. 804a (2014). Hearsay Exception; Putative Victim Age 12 Or Under; Person     With A Mental Illness Or Developmental Disability</i> .....	59
<b><u>VIRGINIA</u></b> .....	<b><u>60</u></b>

VA. CODE ANN. § 19.2-268.2 (2014). Recent complaint hearsay exception (Subdivision (23) of Supreme Court Rule 2:803 derived from this section).....	60
<b><u>WASHINGTON</u></b> .....	<b><u>61</u></b>
WASH. REV. CODE ANN. § 9A.44.120 (2014). Admissibility of child's statement--Conditions.....	61
<b><u>WEST VIRGINIA</u></b> .....	<b><u>61</u></b>
<b><u>WISCONSIN</u></b> .....	<b><u>61</u></b>
WIS. STAT. ANN. § 908.08 (2014). Audiovisual recordings of statements of children.....	62
<b><u>WYOMING</u></b> .....	<b><u>65</u></b>
<b><u>FEDERAL LEGISLATION</u></b> .....	<b><u>65</u></b>
<b><u>GUAM</u></b> .....	<b><u>65</u></b>
<b><u>PUERTO RICO</u></b> .....	<b><u>65</u></b>
<b><u>VIRGIN ISLANDS</u></b> .....	<b><u>65</u></b>

## **ALABAMA**

### **Ala. Code § 15-25-31 (2014). Out-of-court statement -- When admissible**

An out-of-court statement made by a child under 12 years of age at the time of the proceeding the statement was given concerning an act that is a material element of any crime involving a child physical offense, sexual offense, and or exploitation, as defined in Section 15-25-39, which statement is not otherwise admissible in evidence, is admissible in evidence in criminal proceedings, if the requirements of Section 15-25-32 are met.

2014 AL S.B. 224 (NS)

### **ALA. CODE § 15-25-32 (2014). Out-of-court statement -- Requirements for admissibility \*\*\* Found Unconstitutional by *Styron v. State*, 34 So.3d 724**

**(Ala.Crim.App.,2009) ( Applying *Crawford v. Washington* to § § (2) and § (b))**

An out-of-court statement may be admitted as provided in Section 15-25-31, if:

(1) The child testifies at the proceeding, or testifies by means of video tape deposition as provided by Section 15-25-2, or testifies by means of closed circuit television as is provided in Section 15-25-3, and at the time of such testimony is subject to cross-examination about the out-of-court statements; or

(2)a. The child is found by the court to be unavailable to testify on any of these grounds:

1. The child's death;
2. The court finds that there are reasonable grounds to believe that the defendant or someone acting on behalf of the defendant has intentionally removed the child from the jurisdiction of the court;
3. The child's total failure of memory;
4. The child's physical or mental disability;
5. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
6. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of closed circuit television; and

b. The child's out-of-court statement is shown to the reasonable satisfaction of the court to possess particularized guarantees of trustworthiness.

CREDIT(S)

(Acts 1989, No. 89-876, p. 1754, § 3.)

## **ALASKA**

### **ALASKA STAT. § 12.40.110 (2014). Hearsay evidence in prosecutions for sexual offenses**

(a) In a prosecution for an offense under AS 11.41.410--11.41.458, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child who is the victim of the offense may be admitted into evidence before the grand jury if

- (1) the circumstances of the statement indicate its reliability;
- (2) the child is under 10 years of age when the hearsay evidence is sought to be admitted;
- (3) additional evidence is introduced to corroborate the statement; and
- (4) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(b) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.

## **ARKANSAS**

### **A. R.E. Rule 804 (2014). Hearsay Exceptions--Declarant Unavailable**

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

...

(6) Child Hearsay in Civil Cases in Which the Confrontation Clause of the Sixth Amendment of the Constitution of the United States Is Not Applicable. A statement made by a child under the

age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against the child, provided:

(A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.
2. The lack of time to fabricate.
3. The consistency and repetition of the statement and whether the child has recanted the statement.
4. The mental state of the child.
5. The competency of the child to testify.
6. The child's use of terminology unexpected of a child of similar age.
7. The lack of a motive by the child to fabricate the statement.
8. The lack of bias by the child.
9. Whether it is an embarrassing event the child would not normally relate.
10. The credibility of the person testifying to the statement.
11. Suggestiveness created by leading questions.
12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.
13. Corroboration of the statement by other evidence.
14. Corroboration of the alleged offense by other evidence.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.



(7) Child Hearsay in Criminal Cases. A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:

(A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.
2. The lack of time to fabricate.
3. The consistency and repetition of the statement and whether the child has recanted the statement.
4. The mental state of the child.
5. The competency of the child to testify.
6. The child's use of terminology unexpected of a child of similar age.
7. The lack of a motive by the child to fabricate the statement.
8. The lack of bias by the child.
9. Whether it is an embarrassing event the child would not normally relate.
10. The credibility of the person testifying to the statement.
11. Suggestiveness created by leading questions.
12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

CREDIT(S)

[Amended by the Supreme Court May 11, 1992.]

## **CALIFORNIA**

### **Cal.Evid.Code § 1228 (2014). Admissibility of certain out-of-court statements of minors under the age of 12; establishing elements of certain sexually oriented crimes; notice to defendant**

Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

(a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.

(b) The statement describes the minor child as a victim of sexual abuse.

(c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.

(d) There are no circumstances, such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.

(e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.

(f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement.

If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

CREDIT(S)

(Added by Stats.1984, c. 1421, § 1. Amended by Stats.1985, c. 1572, § 1, eff. Oct. 2, 1985.)

**Cal.Evid.Code § 1360 (2014). Statements describing an act or attempted act of child abuse or neglect; criminal prosecutions; requirements**

(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

(1) The statement is not otherwise admissible by statute or court rule.

(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

(3) The child either:

(A) Testifies at the proceedings.

(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

(c) For purposes of this section, "child abuse" means an act proscribed by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and "child neglect" means any of the acts described in Section 11165.2 of the Penal Code.

CREDIT(S)

(Added by Stats.1995, c. 87 (A.B.355), § 3.)

## **COLORADO**

**COLO. REV. STAT. § 13-25-129 (2014). Statements of child victim of unlawful sexual offense against a child or of child abuse--hearsay exception**

**\*\*\*\*\*Held Unconstitutional By People v. Moreno, 160 P.3d 242, 242 (Colo. Jun 11, 2007) (violates defendant's right of confrontation if defendant is not afforded opportunity to cross-examine victim)**

(1) An out-of-court statement made by a child, as child is defined under the statutes which are the subject of the action, describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, C.R.S., performed with, by, on, or in the presence of the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of an unlawful sexual offense, as defined in section 18-3-411(1), C.R.S., or is a victim of incest, as defined in section 18-6-301, C.R.S., when the victim was less than fifteen years of age at the time of the commission of the offense, or in which a child is the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104(1)(b), C.R.S., and an out-of-court statement by a child, as child is defined under the statutes which are the subject of the action, describing any act of child abuse, as defined in section 18-6-401, C.R.S., to which the child declarant was subjected or which the child declarant witnessed, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of child abuse or the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104(1)(b), C.R.S., and an out-of-court statement made by a person under thirteen years of age describing all or part of an offense contained in part 1 of article 3 of title 18, C.R.S., or describing an act of domestic violence as defined in section 18-6-800.3(1), C.R.S., not otherwise admissible by statute or court rule which provides an exception to the objection of hearsay is admissible in evidence in any criminal, delinquency, or civil proceeding, if:

(a) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(b) The child either:

(I) Testifies at the proceedings; or

(II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(2) If a statement is admitted pursuant to this section, the court shall instruct the jury in the final written instructions that during the proceeding the jury heard evidence repeating a child's out-of-court statement and that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(3) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

CREDIT(S)

Added by Laws 1983, S.B.11, § 1, eff. May 25, 1983. Amended by Laws 1985, H.B.1327, § 1, eff. June 7, 1985; Laws 1985, S.B.42, § 5, eff. June 7, 1985; Laws 1987, H.B.1256, § 1, eff. April 16, 1987; Laws 1987, S.B.144, § 13, eff. Oct. 1, 1987; Laws 1993, S.B.93-111, § 1, eff. July 1, 1993; Laws 2003, Ch. 134, § 5, eff. April 17, 2003; Laws 2006, Ch. 122, § 1, eff. April 13, 2006.

## **CONNECTICUT**

N/A

## **DELAWARE**

### **DEL. CODE ANN. TIT. 11, § 3513 (2014). Hearsay exception for child victim's or witness's out-of-court statement of abuse**

(a) An out-of-court statement made by a child victim or witness who is under 11 years of age at the time of the proceeding concerning an act that is a material element of the offense relating to sexual abuse, physical injury, serious physical injury, death, abuse or neglect as described in any felony delineated in subpart A, B or D of subchapter II of Chapter 5 of this title, or in any of the felonies delineated in § 782, § 783, § 783A, § 1102, § 1108, § 1109, § 1111 or § 1112A of this title or in any attempt to commit any felony delineated in this paragraph that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of subsections (b)-(f) of this section are met.

(b) An out-of-court statement may be admitted as provided in subsection (a) of this section if:

(1) The child is present and the child's testimony touches upon the event and is subject to cross-examination rendering such prior statement admissible under § 3507 of this title; or

(2)a. The child is found by the court to be unavailable to testify on any of these grounds:

1. The child's death;
2. The child's absence from the jurisdiction;
3. The child's total failure of memory;
4. The child's persistent refusal to testify despite judicial requests to do so;
5. The child's physical or mental disability;
6. The existence of a privilege involving the child;
7. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or

8. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television; and

b. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(c) A finding of unavailability under paragraph (b)(2)a.8. of this section must be supported by expert testimony.

(d) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(e) In determining whether a statement possesses particularized guarantees of trustworthiness under paragraph (b)(2) of this section, the court may consider, but is not limited to, the following factors:

(1) The child's personal knowledge of the event;

(2) The age and maturity of the child;

(3) Certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion;

(5) The timing of the child's statement;

(6) Whether more than 1 person heard the statement;

(7) Whether the child was suffering pain or distress when making the statement;

(8) The nature and duration of any alleged abuse;

(9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(10) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the child's age;

(11) Whether the statement is spontaneous or directly responsive to questions;

(12) Whether the statement is suggestive due to improperly leading questions;

(13) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(f) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

CREDIT(S)

68 Laws 1992, ch. 362, § 1; 70 Laws 1995, ch. 186, § 1, eff. July 10, 1995; 71 Laws 1998, ch. 467, § 9, eff. July 17, 1998; 72 Laws 1999, ch. 212, §§ 1-3, eff. July 20, 1999.

## **DISTRICT OF COLUMBIA**

N/A

## **FLORIDA**

### **FLA. STAT. ANN. § 90.803 (2014) Hearsay exceptions; availability of declarant immaterial (23) Child Victim**

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(23) Hearsay exception; statement of child victim.--

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

#### CREDIT(S)

Laws 1976, c. 76-237, § 1; Laws 1977, c. 77-174, § 1; Laws 1978, c. 78-361, § 20. Amended by Laws 1985, c. 85-53, § 4, eff. July 1, 1985; Laws 1987, c. 87-224, § 11; Laws 1990, c. 90-139, § 2, eff. Oct. 1, 1990; Laws 1990, c. 90-174, § 3, eff. Oct. 1, 1990; Laws 1991, c. 91-255, § 12, eff. July 1, 1991; Laws 1995, c. 95-147, § 498, eff. July 10, 1995; Laws 1995, c. 95-158, § 1, eff. July 1, 1995; Laws 1996, c. 96-330, § 2, eff. July 1, 1996; Laws 1998, c. 98-2, § 1; Laws 2003, c. 2003-259, § 2, eff. July 1, 2003; Laws 2013, c. 2013-98, § 1, eff. Jan. 1, 2014

## **GEORGIA**

**REPEALED GA. CODE ANN. § 24-3-16 (2013), relating to statements made by child under age of 14 years describing acts of sexual contact or physical abuse Repealed by Laws 2011, Act 52, § 2, eff. January 1, 2013**

## **HAWAII**

N/A

## **IDAHO**

N/A



# **ILLINOIS**

## **725 ILL. COMP. STAT. § 115-10 (2014). Certain hearsay exceptions**

(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, or a person who was a moderately, severely, or profoundly intellectually disabled person as defined in this Code and in Section 2-10.1 of the Criminal Code of 1961 or the Criminal Code of 2012 [FN1] at the time the act was committed, including but not limited to prosecutions for violations of Sections 11-1.20 through 11-1.60 or 12-13 through 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012 [FN2] and prosecutions for violations of Sections 10-1 (kidnapping), 10-2 (aggravated kidnapping), 10-3 (unlawful restraint), 10-3.1 (aggravated unlawful restraint), 10-4 (forcible detention), 10-5 (child abduction), 10-6 (harboring a runaway), 10-7 (aiding or abetting child abduction), 11-9 (public indecency), 11-11 (sexual relations within families), 11-21 (harmful material), 12-1 (assault), 12-2 (aggravated assault), 12-3 (battery), 12-3.2 (domestic battery), 12-3.3 (aggravated domestic battery), 12-3.05 or 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.7 (drug induced infliction of great bodily harm), 12-5 (reckless conduct), 12-6 (intimidation), 12-6.1 or 12-6.5 (compelling organization membership of persons), 12-7.1 (hate crime), 12-7.3 (stalking), 12-7.4 (aggravated stalking), 12-10 or 12C-35 (tattooing the body of a minor), 12-11 or 19-6 (home invasion), 12-21.5 or 12C-10 (child abandonment), 12-21.6 or 12C-5 (endangering the life or health of a child) or 12-32 (ritual mutilation) of the Criminal Code of 1961 or the Criminal Code of 2012 [FN3] or any sex offense as defined in subsection (B) of Section 2 of the Sex Offender Registration Act, the following evidence shall be admitted as an exception to the hearsay rule:

(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child or moderately, severely, or profoundly intellectually disabled person either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement; and

(3) In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later, but the statement may be admitted regardless of the age of the victim at the time of the proceeding.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the moderately, severely, or profoundly intellectually disabled person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(e) Statements described in paragraphs (1) and (2) of subsection (a) shall not be excluded on the basis that they were obtained as a result of interviews conducted pursuant to a protocol adopted by a Child Advocacy Advisory Board as set forth in subsections (c), (d), and (e) of Section 3 of the Children's Advocacy Center Act [FN4] or that an interviewer or witness to the interview was or is an employee, agent, or investigator of a State's Attorney's office.

#### CREDIT(S)

Laws 1963, p. 2836, § 115-9, added by P.A. 82-782, § 1, eff. Jan. 1, 1983. Renumbered § 115-10 and amended by P.A. 82-1057, Art. II, § 7, eff. Feb. 11, 1983. Amended by P.A. 83-1067, § 3, eff. July 1, 1984; P.A. 85-837, § 1, eff. Jan. 1, 1988; P.A. 88-166, § 5, eff. Jan. 1, 1994; P.A. 88-479, § 15, eff. Sept. 9, 1993; P.A. 88-670, Art. 2, § 2-65, eff. Dec. 2, 1994; P.A. 89-428, Art. 6, § 605, eff. Dec. 13, 1995; P.A. 90-656, § 5, eff. July 30, 1998; P.A. 90-786, § 10, eff. Jan. 1, 1999; P.A. 91-357, § 243, eff. July 29, 1999; P.A. 92-434, § 10, eff. Jan. 1, 2002; P.A. 95-892, § 5, eff. Jan. 1, 2009; P.A. 96-710, § 40, eff. Jan. 1, 2010; P.A. 96-1551, Art. 1, § 965, eff. July 1, 2011; P.A. 96-1551, Art. 2, § 1040, eff. July 1, 2011; P.A. 97-227, § 140, eff. Jan. 1, 2012; P.A. 97-1108, § 15-30, eff. Jan. 1, 2013; P.A. 97-1109, § 10-955, eff. Jan. 1, 2013; P.A. 97-1150, § 635, eff. Jan. 25, 2013.

## **INDIANA**

### **IND. CODE ANN. § 35-37-4-6 (2014) Application of section; “protected person” defined; applicable offenses; admissibility of statement or videotape; notice to defendant; jury instructions; hearing as evidence**

Sec. 6. (a) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2):

- (1) Sex crimes (IC 35-42-4).
- (2) Battery upon a child (IC 35-42-2-1(a)(2)(B)).
- (3) Kidnapping and confinement (IC 35-42-3).
- (4) Incest (IC 35-46-1-3).
- (5) Neglect of a dependent (IC 35-46-1-4).
- (6) Human and sexual trafficking crimes (IC 35-42-3.5).
- (7) An attempt under IC 35-41-5-1 for an offense listed in subdivisions (1) through (6).

(b) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(3):

- (1) Exploitation of a dependent or endangered adult (IC 35-46-1-12).
- (2) A sex crime (IC 35-42-4).
- (3) Battery (IC 35-42-2-1).
- (4) Kidnapping, confinement, or interference with custody (IC 35-42-3).
- (5) Home improvement fraud (IC 35-43-6).
- (6) Fraud (IC 35-43-5).
- (7) Identity deception (IC 35-43-5-3.5).
- (8) Synthetic identity deception (IC 35-43-5-3.8).

(9) Theft (IC 35-43-4-2).

(10) Conversion (IC 35-43-4-3).

(11) Neglect of a dependent (IC 35-46-1-4).

(12) Human and sexual trafficking crimes (IC 35-42-3.5).

(c) As used in this section, "protected person" means:

(1) a child who is less than fourteen (14) years of age;

(2) an individual with a mental disability who has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:

(A) is manifested before the individual is eighteen (18) years of age;

(B) is likely to continue indefinitely;

(C) constitutes a substantial impairment of the individual's ability to function normally in society; and

(D) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated; or

(3) an individual who is:

(A) at least eighteen (18) years of age; and

(B) incapable by reason of mental illness, mental retardation, dementia, or other physical or mental incapacity of:

(i) managing or directing the management of the individual's property; or

(ii) providing or directing the provision of self-care.

(d) A statement or videotape that:

(1) is made by a person who at the time of trial is a protected person;

(2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and

(3) is not otherwise admissible in evidence;

is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person in person or by using closed circuit television testimony as described in section 8(f) and 8(g) of this chapter;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.

(ii) The protected person cannot participate in the trial for medical reasons.

(iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

(f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:

(1) at the hearing described in subsection (e)(1); or

(2) when the statement or videotape was made.

(g) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney at least ten (10) days before the trial of:

(1) the prosecuting attorney's intention to introduce the statement or videotape in evidence; and

(2) the content of the statement or videotape.

(h) If a statement or videotape is admitted in evidence under this section, the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following:

(1) The mental and physical age of the person making the statement or videotape.

(2) The nature of the statement or videotape.

(3) The circumstances under which the statement or videotape was made.

(4) Other relevant factors.

(i) If a statement or videotape described in subsection (d) is admitted into evidence under this section, a defendant may introduce a:

(1) transcript; or

(2) videotape;

of the hearing held under subsection (e)(1) into evidence at trial.

CREDIT(S)

As added by P.L.180-1984, SEC.1. Amended by P.L.316-1985, SEC.1; P.L.37-1990, SEC.22; P.L.23-1993, SEC.161; P.L.142-1994, SEC.7; P.L.43-2004, SEC.1; P.L.2-2005, SEC.120, eff. April 25, 2005; P.L.173-2006, SEC.48; P.L.99-2007, SEC.207, eff. May 2, 2007; P.L.137-2009, SEC.10; P.L.28-2011, SEC.1.

## **IOWA**

N/A

## **KANSAS**

N/A

## **KENTUCKY**

N/A

## **LOUISIANA**

N/A

## **MAINE**

N/A

## **MARYLAND**

### **MD. CODE ANN., CRIM. LAW § 11-304 (2014). Out-of-court statements of child victims**

Statement defined

(a) In this section, “statement” means:

- (1) an oral or written assertion; or
- (2) nonverbal conduct intended as an assertion, including sounds, gestures, demonstrations, drawings, and similar actions.

Cases in which out of court statements admissible as evidence

(b) Subject to subsections (c), (d), and (e) of this section, the court may admit into evidence in a juvenile court proceeding or in a criminal proceeding an out of court statement to prove the truth of the matter asserted in the statement made by a child victim who:

- (1) is under the age of 13 years; and
- (2) is the alleged victim or the child alleged to need assistance in the case before the court concerning:
  - (i) child abuse under § 3-601 or § 3-602 of the Criminal Law Article;
  - (ii) rape or sexual offense under §§ 3-303 through 3-307 of the Criminal Law Article;
  - (iii) attempted rape or attempted sexual offense in the first degree or in the second degree under §§ 3-309 through 3-312 of the Criminal Law Article; or

(iv) in a juvenile court proceeding, abuse or neglect as defined in § 5-701 of the Family Law Article.

Out of court statements made to physicians, psychologists, nurses, social workers, and school employees

(c) An out of court statement may be admissible under this section only if the statement was made to and is offered by a person acting lawfully in the course of the person's profession when the statement was made who is:

(1) a physician;

(2) a psychologist;

(3) a nurse;

(4) a social worker;

(5) a principal, vice principal, teacher, or school counselor at a public or private preschool, elementary school, or secondary school;

(6) a counselor licensed or certified in accordance with Title 17 of the Health Occupations Article; or

(7) a therapist licensed or certified in accordance with Title 17 of the Health Occupations Article.

Statements admissible to prove the truth of the matter asserted

(d)(1) Under this section, an out of court statement by a child victim may come into evidence in a criminal proceeding or in a juvenile court proceeding other than a child in need of assistance proceeding under Title 3, Subtitle 8 of the Courts Article to prove the truth of the matter asserted in the statement:

(i) if the statement is not admissible under any other hearsay exception; and

(ii) if the child victim testifies.

(2)(i) In a child in need of assistance proceeding in the juvenile court under Title 3, Subtitle 8 of the Courts Article, an out of court statement by a child victim may come into evidence to prove the truth of the matter asserted in the statement:

1. if the statement is not admissible under any other hearsay exception; and



2. regardless of whether the child victim testifies.

(ii) If the child victim does not testify, the child victim's out of court statement will be admissible only if there is corroborative evidence that the alleged offender had the opportunity to commit the alleged abuse or neglect.

(3) To provide the defendant, child respondent, or alleged offender with an opportunity to prepare a response to the statement, the prosecuting attorney shall serve on the defendant, child respondent, or alleged offender and the attorney for the defendant, child respondent, or alleged offender within a reasonable time before the juvenile court proceeding and at least 20 days before the criminal proceeding in which the statement is to be offered into evidence, notice of:

(i) the State's intention to introduce the statement;

(ii) any audio or visual recording of the statement; and

(iii) if an audio or visual recording of the statement is not available, the content of the statement.

(4)(i) The defendant, child respondent, or alleged offender may depose a witness who will testify under this section.

(ii) Unless the State and the defendant, child respondent, or alleged offender agree or the court orders otherwise, the defendant, child respondent, or alleged offender shall file a notice of deposition:

1. in a criminal proceeding, at least 5 days before the date of the deposition; or

2. in a juvenile court proceeding, within a reasonable time before the date of the deposition.

(iii) Except where inconsistent with this paragraph, Maryland Rule 4-261 applies to a deposition taken under this paragraph.

Out of court statements with particularized guarantees of trustworthiness

(e)(1) A child victim's out of court statement is admissible under this section only if the statement has particularized guarantees of trustworthiness.

(2) To determine whether the statement has particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:

(i) the child victim's personal knowledge of the event;

- (ii) the certainty that the statement was made;
- (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;
- (iv) whether the statement was spontaneous or directly responsive to questions;
- (v) the timing of the statement;
- (vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;
- (vii) the appropriateness of the terminology of the statement to the child victim's age;
- (viii) the nature and duration of the abuse or neglect;
- (ix) the inner consistency and coherence of the statement;
- (x) whether the child victim was suffering pain or distress when making the statement;
- (xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;
- (xii) whether the statement was suggested by the use of leading questions; and
- (xiii) the credibility of the person testifying about the statement.

#### Hearings to determine admissibility of statements

(f) In a hearing outside of the presence of the jury or before the juvenile court proceeding, the court shall:

- (1) make a finding on the record as to the specific guarantees of trustworthiness that are in the statement; and
- (2) determine the admissibility of the statement.

#### Court examination of child victim

(g)(1) In making a determination under subsection (f) of this section, the court shall examine the child victim in a proceeding in the judge's chambers, the courtroom, or another suitable location that the public may not attend unless:

(i) the child victim:

1. is deceased; or

2. is absent from the jurisdiction for good cause shown or the State has been unable to procure the child victim's presence by subpoena or other reasonable means; or

(ii) the court determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary.

(2) Except as provided in paragraph (3) of this subsection, any defendant or child respondent, attorney for a defendant or child respondent, and the prosecuting attorney may be present when the court hears testimony on whether to admit into evidence the out of court statement of a child victim under this section.

(3) When the court examines the child victim as paragraph (1) of this subsection requires:

(i) one attorney for each defendant or child respondent, one attorney for the child victim, and one prosecuting attorney may be present at the examination; and

(ii) the court may not allow a defendant or child respondent to be present at the examination.

Construction with other applicable hearsay exception or rule of evidence

(h)(1) This section does not limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence.

(2) This section does not prohibit the court in a juvenile court proceeding from hearing testimony in the judge's chambers.

CREDIT(S)

Added by Acts 2001, c. 10, § 2, eff. Oct. 1, 2001. Amended by Acts 2002, c. 213, § 6, eff. Oct. 1, 2002; Acts 2002, c. 273, § 3, eff. Oct. 1, 2002; Acts 2003, c. 21, § 1, eff. April 8, 2003; Acts 2011, c. 87, § 1, eff. Oct. 1, 2011; Acts 2011, c. 88, § 1, eff. Oct. 1, 2011.

# **MASSACHUSETTS**

## **MASS. ANN. LAWS CH. 233, § 81(2014) . Criminal proceedings; out-of-court statements describing sexual contact; admissibility**

(a) An out-of-court statement of a child under the age of ten describing an act of sexual contact performed on or with the child, the circumstances under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any criminal proceeding; provided, however, that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; the person to whom the statement was made or who heard the child make the statement testifies; the judge finds pursuant to subsection (b) that the child is unavailable as a witness; and the judge finds pursuant to subsection (c) that the statement is reliable.

(b) The proponent of such statement shall demonstrate a diligent and good faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that:

(1) the child is unable to be present or to testify because of death or physical or mental illness or infirmity; or

(2) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement; or

(3) the child testifies to a lack of memory of the subject matter of such statement; or

(4) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means; or

(5) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(6) the child is not competent to testify.

(c) If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds: (1) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and there was sufficient opportunity to cross-examine; or (2) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to clause (2) of subsection (c), a judge may consider whether the relator documented the child witness's statement, and shall consider the following factors:

(i) the clarity of the statement, meaning, the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(ii) the time, content and circumstances of the statement;

(iii) the child's sincerity and ability to appreciate the consequences of such statement.

(d) An out-of-court statement which is admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

CREDIT(S)

Added by St.1990, c. 339.

HISTORICAL AND STATUTORY NOTES

St.1990, c. 339, adding this section and §§ 82 and 83 of this chapter, was approved Dec. 19, 1990.

## **MICHIGAN**

N/A

## **MINNESOTA**

**MINN. STAT. § 595.02, Subd. 3. (2014). certain out-of-court statements admissible**

An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the

reliability of the person to whom the statement is made provide sufficient indicia of reliability;  
and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

## **MISSISSIPPI**

### **Rules of Evid., M.R.E. 803 (25) (2014); Tender Years Exception**

A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

## **MISSOURI**

### **MO. REV. STAT. § 491.075 (2014). Statement of child under fourteen or vulnerable person admissible, when**

1. A statement made by a child under the age of fourteen, or a vulnerable person, relating to an offense under chapter 565, 566, 568 or 573, performed by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

- (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
- (2)(a) The child or vulnerable person testifies at the proceedings; or
- (b) The child or vulnerable person is unavailable as a witness; or
- (c) The child or vulnerable person is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child or vulnerable person unavailable as a witness at the time of the criminal proceeding.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of fourteen, or a vulnerable person, who is alleged to be victim of an offense under chapter 565, 566, 568 or 573 is sufficient corroboration of a statement, admission or confession regardless of whether or not the child or vulnerable person is available to testify regarding the offense.

3. A statement may not be admitted under this section unless the prosecuting attorney makes known to the accused or the accused's counsel his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the accused or the accused's counsel with a fair opportunity to prepare to meet the statement.

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

5. For the purposes of this section, "vulnerable person" shall mean a person who, as a result of an inadequately developed or impaired intelligence or a psychiatric disorder that materially affects ability to function, lacks the mental capacity to consent, or whose developmental level does not exceed that of an ordinary child of fourteen years of age.

CREDIT(S)

(L.1985, H.B. Nos. 366, 248, 372 & 393, § B, eff. July 19, 1985. Amended by L.1992, S.B. No. 638, § A; L.2004, H.B. No. 1453, § A; L.2008, S.B. Nos. 714, 933, 899 & 758, § A, eff. June 30, 2008; L.2012, S.B. No. 628, § A.)

## **MONTANA**

**MONT. CODE ANN. § 46-16-220 (2014). Child hearsay exception--criminal proceedings**

(1) Otherwise inadmissible hearsay may be admissible in evidence in a criminal proceeding, as provided in subsection (2), if:

(a) the declarant of the out-of-court statement is a child who is:

(i) an alleged victim of a sexual offense or other crime of violence, including partner or family member assault, that is the subject of the criminal proceeding; or

(ii) a witness to an alleged sexual offense or other crime of violence, including partner or family member assault, that is the subject of the criminal proceeding;

(b) the court finds that the time, content, and circumstances of the statement provide circumstantial guarantees of trustworthiness;

(c) the child is unavailable as a witness;

(d) the child hearsay testimony is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence available through reasonable efforts; and

(e) the party intending to offer the child hearsay testimony gives sufficient notice to provide the adverse party with a fair opportunity to prepare. The notice must include the content of the statement, the approximate time, date, and location of the statement, the person to whom the statement was made, and the circumstances surrounding the statement that the offering party believes support the statement's reliability.

(2) The court shall issue findings of fact and conclusions of law setting forth the court's reasoning on the admissibility of the child's testimony.

(3) When deciding the admissibility of offered child hearsay testimony under subsections (1) and (2), a court shall consider the following:

(a) the attributes of the child hearsay declarant, including:

(i) the child's age;

(ii) the child's ability to communicate verbally;

(iii) the child's ability to comprehend the statements or questions of others;

(iv) the child's ability to tell the difference between truth and falsehood;



(v) the child's motivation to tell the truth, including whether the child understands the general obligation to speak truthfully and not fabricate stories;

(vi) whether the child possessed sufficient mental capacity at the time of the alleged incident to create an accurate memory of the incident; and

(vii) whether the child possesses sufficient memory to retain an independent recollection of the events at issue;

(b) information regarding the witness who is relating the child's hearsay statement, including:

(i) the witness's relationship to the child;

(ii) whether the relationship between the witness and the child has an impact on the trustworthiness of the child's hearsay statement;

(iii) whether the witness has a motive to fabricate or distort the child's statement; and

(iv) the circumstances under which the witness heard the child's statement, including the timing of the statement in relation to the incident at issue and the availability of another person in whom the child could confide;

(c) information regarding the child's statement, including:

(i) whether the statement contains knowledge not normally attributed to a child of the declarant's age;

(ii) whether the statement was spontaneous;

(iii) the suggestiveness of statements by other persons to the child at the time that the child made the statement;

(iv) if statements were made by the child to more than one person, whether those statements were consistent; and

(v) the nearness in time of the statement to the incident at issue;

(d) the availability of corroborative evidence through physical evidence or circumstantial evidence of motive or opportunity, including:

(i) whether the alleged act can be corroborated; and

(ii) if the child's statement identifies a perpetrator, whether that identity can be corroborated; and

(e) other considerations that in the judge's opinion may bear on the admissibility of the child hearsay testimony.

(4) As used in this section, "child" means a person under 15 years of age.

CREDIT(S)

Enacted by Laws 2003, ch. 456, § 1.

## **NEBRASKA**

N/A

## **NEVADA**

### **NEV. REV. STAT. ANN. § 51.385 (2014). Admissibility; notice of unavailability or inability of child to testify**

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child is admissible in a criminal proceeding regarding that act of sexual conduct or physical abuse if:

(a) The court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) The child testifies at the proceeding or is unavailable or unable to testify.

2. In determining the trustworthiness of a statement, the court shall consider, without limitation, whether:

(a) The statement was spontaneous;

(b) The child was subjected to repetitive questioning;

(c) The child had a motive to fabricate;

(d) The child used terminology unexpected of a child of similar age; and

(e) The child was in a stable mental state.

3. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

CREDIT(S)

Added by Laws 1985, p. 2132. Amended by Laws 2001, c. 136, § 1, eff. Oct. 1, 2001.

## **NEW HAMPSHIRE**

N/A

## **NEW JERSEY**

### **Rules of Evid., N.J.R.E. 803(c)(27) (2014). Statements by a Child Relating to a Sexual Offense.**

A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

## **NEW MEXICO**

N/A

## **NEW YORK**

N/A

## **NORTH CAROLINA**

N/A

## **NORTH DAKOTA**

### **Rules of Evid., N.D.R.E. 803(24) (2014). Child's Statement about Sexual Abuse**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(24) A statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child if:

(A) the trial court finds, after hearing on notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and

(B) the child either:

(i) testifies at the trial; or

(ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

## **OHIO**

### **Rules of Evid., O.H.R.E. 807(2014). Hearsay exceptions; child statements in abuse cases**

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any

act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) the illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

CREDIT(S)

(Adopted eff. 7-1-91)

## **OKLAHOMA**

### **OKLA. STAT. ANN. TIT. 12, § 2803.1 (2014). Statements of children not having attained 13 years or incapacitated persons describing acts of physical abuse or sexual contact--Admissibility in criminal and juvenile proceedings**

A. A statement made by a child who has not attained thirteen (13) years of age, a child thirteen (13) years of age or older who has a disability or a person who is an incapacitated person as such term is defined by the provisions of Section 10-103 of Title 43A of the Oklahoma Statutes, which describes any act of physical abuse against the child or incapacitated person or any act of sexual contact performed with or on the child or incapacitated person by another, is admissible in criminal and juvenile proceedings in the courts in this state if:

1. The court finds, in a hearing conducted outside the presence of the jury, that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. In determining such trustworthiness, the court may consider, among other things, the following factors: the spontaneity and consistent repetition of the statement, the mental state of the declarant, whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists; and
2. The child or incapacitated person either:

a. testifies or is available to testify at the proceedings in open court or through an alternative method pursuant to the provisions of the Uniform Child Witness Testimony by Alternative Methods Act or Section 2611.2 of this title, or

b. is unavailable as defined in Section 2804 of this title as a witness. When the child or incapacitated person is unavailable, such statement may be admitted only if there is corroborative evidence of the act.

B. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at least ten (10) days in advance of the proceedings to provide the adverse party with an opportunity to prepare to answer the statement.

C. As used in this section, “disability” means a physical or mental impairment which substantially limits one or more of the major life activities of the child or the child is regarded as having such an impairment by a competent medical professional.

CREDIT(S)

Laws 1984, c. 8, § 1, emerg. eff. March 12, 1984; Laws 1986, c. 87, § 1, operative July 1, 1986; Laws 1990, c. 224, § 8, eff. Sept. 1, 1990; Laws 1992, c. 301, § 2, eff. Sept. 1, 1992; Laws 1993, c. 197, § 3, eff. Sept. 1, 1993; Laws 1998, c. 24, § 1, emerg. eff. April 1, 1998; Laws 2000, c. 340, § 22, eff. July 1, 2000; Laws 2004, c. 445, § 2, emerg. eff. June 4, 2004; Laws 2013, c. 42, § 1, eff. Nov. 1, 2013.

## **OREGON**

### **Rules of Evid., O.R.R.E. 803 (18a)(2014). Rule 803. Hearsay exception; availability of declarant immaterial**

The following are not excluded by ORS 40.455, even though the declarant is available as a witness:

(18a)(a) A complaint of sexual misconduct, complaint of abuse as defined in ORS 107.705 or 419B.005, complaint of abuse of an elderly person, as those terms are defined in ORS 124.050, or a complaint relating to a violation of ORS 163.205 or 164.015 in which a person 65 years of age or older is the victim, made by the witness after the commission of the alleged misconduct or abuse at issue. Except as provided in paragraph (b) of this subsection, such evidence must be confined to the fact that the complaint was made.

(b) A statement made by a person concerning an act of abuse as defined in ORS 107.705 or 419B.005, a statement made by a person concerning an act of abuse of an elderly person, as those terms are defined in ORS 124.050, or a statement made by a person concerning a violation of ORS 163.205 or 164.015 in which a person 65 years of age or older is the victim, is

not excluded by ORS 40.455 if the declarant either testifies at the proceeding and is subject to cross-examination, or is unavailable as a witness but was chronologically or mentally under 12 years of age when the statement was made or was 65 years of age or older when the statement was made. However, if a declarant is unavailable, the statement may be admitted in evidence only if the proponent establishes that the time, content and circumstances of the statement provide indicia of reliability, and in a criminal trial that there is corroborative evidence of the act of abuse and of the alleged perpetrator's opportunity to participate in the conduct and that the statement possesses indicia of reliability as is constitutionally required to be admitted. No statement may be admitted under this paragraph unless the proponent of the statement makes known to the adverse party the proponent's intention to offer the statement and the particulars of the statement no later than 15 days before trial, except for good cause shown. For purposes of this paragraph, in addition to those situations described in ORS 40.465 (1), the declarant shall be considered "unavailable" if the declarant has a substantial lack of memory of the subject matter of the statement, is presently incompetent to testify, is unable to communicate about the abuse or sexual conduct because of fear or other similar reason or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the declarant in chambers and on the record or outside the presence of the jury and on the record. The examination shall be conducted immediately prior to the commencement of the trial in the presence of the attorney and the legal guardian or other suitable person as designated by the court. If the declarant is found to be unavailable, the court shall then determine the admissibility of the evidence. The determinations shall be appealable under ORS 138.060 (1)(c) or (2)(a). The purpose of the examination shall be to aid the court in making its findings regarding the availability of the declarant as a witness and the reliability of the statement of the declarant. In determining whether a statement possesses indicia of reliability under this paragraph, the court may consider, but is not limited to, the following factors:

- (A) The personal knowledge of the declarant of the event;
- (B) The age and maturity of the declarant or extent of disability if the declarant is a person with a developmental disability;
- (C) Certainty that the statement was made, including the credibility of the person testifying about the statement and any motive the person may have to falsify or distort the statement;
- (D) Any apparent motive the declarant may have to falsify or distort the event, including bias, corruption or coercion;
- (E) The timing of the statement of the declarant;
- (F) Whether more than one person heard the statement;
- (G) Whether the declarant was suffering pain or distress when making the statement;



(H) Whether the declarant's young age or disability makes it unlikely that the declarant fabricated a statement that represents a graphic, detailed account beyond the knowledge and experience of the declarant;

(I) Whether the statement has internal consistency or coherence and uses terminology appropriate to the declarant's age or to the extent of the declarant's disability if the declarant is a person with a developmental disability;

(J) Whether the statement is spontaneous or directly responsive to questions; and

(K) Whether the statement was elicited by leading questions.

## **PENNSYLVANIA**

### **42 PA. CONS. STAT. ANN. § 5985.1 (2014). Admissibility of certain statements**

(a) General rule.--An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness.

(a.1) Emotional distress.--In order to make a finding under subsection (a)(2) (ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

(a.2) Counsel and confrontation.--If the court hears testimony in connection with making a finding under subsection (a)(2)(ii), all of the following apply:

(1) Except as provided in paragraph (2), the defendant, the attorney for the defendant and the attorney for the Commonwealth or, in the case of a civil proceeding, the attorney for the plaintiff has the right to be present.

(2) If the court observes or questions the child, the court shall not permit the defendant to be present.

(b) Notice required.--A statement otherwise admissible under subsection (a) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

CREDIT(S)

1989, Dec. 22, P.L. 730, No. 100, § 1, effective in 60 days. Amended 1996, Dec. 18, P.L. 1077, No. 161, § 5, effective in 60 days; 2000, Oct. 18, P.L. 615, No. 84, § 1, imd. effective; 2004, July 15, P.L. 736, No. 87, § 4, imd. effective.

## **RHODE ISLAND**

### **R.I. GEN. LAWS § 40-11-7.2 (2014). Evidence**

(a) A videotape recording made by the department of children, youth, and families, a law enforcement officer, or a hospital, of an interview of or statement made by a child who is the subject of an investigation conducted pursuant to § 40-11-7 is admissible in any court proceeding pursuant to this chapter, notwithstanding any objection to hearsay statements contained therein, provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or other person responsible for the child's welfare. The circumstances of the making of the videotape recording, including the maker's lack of personal knowledge, may be proved to affect its weight.

(b) Prior to the videotaped recording being introduced into evidence the court shall first determine that:

(1) The statement is sworn to under oath by the child and the significance of the oath is explained to the child;

(2) The recording is both visual and aural and is recorded on film or videotaped or by other electronic means;

(3) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) Every voice on the recording is identified;

(5) The statement was not made in response to questioning calculated to lead the child to make a particular statement;

(6) The person conducting the interview of the child is available to testify at any court proceeding pursuant to this chapter; and

(7) The child shall be available to testify at any court proceeding pursuant to this chapter.

CREDIT(S)

P.L. 1985, ch. 371, § 2.

## **SOUTH CAROLINA**

### **S.C. CODE ANN. §§ 17-23-175 (2014). Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party**

(A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:

(1) the statement was given in response to questioning conducted during an investigative interview of the child;

(2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);

(3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and

(4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:

- (1) whether the statement was elicited by leading questions;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement represents a detailed account of the alleged offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the court.

(C) For purposes of this section, a child is:

- (1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and
- (2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.

(D) For purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.

(E)(1) The contents of a statement offered pursuant to this section are subject to discovery pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

(2) If the child is twelve years of age or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve.

(F) Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:

- (1) the necessary visual and audio recording equipment was unavailable;
- (2) the circumstances surrounding the making of the statement;
- (3) the relationship of the professional and the child; and
- (4) if the statement possesses particularized guarantees of trustworthiness.

After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

CREDIT(S)

HISTORY: 2006 Act No. 342, § 8, eff July 1, 2006 and 2006 Act No. 346, § 2, eff July 1, 2006.

## **SOUTH DAKOTA**

### **S.D. CODIFIED LAWS § 19-16-38 (2014). Statement by child under age thirteen or child with developmental disability regarding sex crime, physical abuse, or neglect**

A statement made by a child under the age of thirteen, or by a child thirteen years of age or older who is developmentally disabled as defined in § 27B-1-18, describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child observed by the child making the statement, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant or in any proceeding under chapters 26-7A, 26-8A, 26-8B, and 26-8C in the courts of this state if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness.

However, if the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

No statement may be admitted under this section unless the proponent of the statement makes known the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

CREDIT(S)

Source: SL 1984, ch 155; SL 1985, ch 166; SL 1987, ch 157; SL 1992, ch 154, § 2; SL 2009, ch 107, § 1.

## **TENNESSEE**

### **TENN. CODE ANN. § 24-7-123 (2014). Interview of child by forensic interviewer; sexual contact; video recording**

(a) Notwithstanding any provision of this part to the contrary, a video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual contact performed with or on the child by another is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at the trial of the person for any offense arising from the sexual contact if the requirements of this section are met.

(b) A video recording may be admitted as provided in subsection (a) if:

(1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;

(2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pre-trial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:

(A) The mental and physical age and maturity of the child;

(B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;

(C) The timing of the child's statement;

(D) The nature and duration of the alleged abuse;

(E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(F) Whether the statement is spontaneous or directly responsive to questions;

(G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;

(H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;

(I) The relationship of the child to the offender;

(J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and

(K) Any other factor deemed appropriate by the court;

(3) The interview was conducted by a forensic interviewer who met the following qualifications at the time the video recording was made, as determined by the court:

(A) Was employed by a child advocacy center that meets the requirements of § 9-4-213(a) or (b);

(B) Had graduated from an accredited college or university with a bachelor's degree in a field related to social service, education, criminal justice, nursing, psychology or other similar profession;

(C) Had experience equivalent to three (3) years of fulltime professional work in one (1) or a combination of the following areas:

(i) Child protective services;

(ii) Criminal justice;

(iii) Clinical evaluation;

(iv) Counseling; or

(v) Forensic interviewing or other comparable work with children;

(D) Had completed a minimum of forty (40) hours of forensic training in interviewing traumatized children and fifteen (15) hours of continuing education annually;

(E) Had completed a minimum of eight (8) hours of interviewing under the supervision of a qualified forensic interviewer of children;

(F) Had knowledge of child development through coursework, professional training or experience;

(G) Had no criminal history as determined through a criminal records background check; and

(H) Had actively participated in peer review;

(4) The recording is both visual and oral and is recorded on film or videotape or by other similar audio-visual means;

- (5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and
- (6) Every voice heard on the video recording is properly identified as determined by the court.
- (c) The video recording admitted pursuant to this section shall be discoverable pursuant to the Tennessee rules of criminal procedure.
- (d) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.
- (e) The court shall enter a protective order to restrict the video recording used pursuant to this section from further disclosure or dissemination. The video recording shall not become a public record in any legal proceeding. The court shall order the video recording be sealed and preserved following the conclusion of the criminal proceeding.

Acts 2009, ch. 413, § 1.

## **TEXAS**

### **Rules of Procedure, Tex. Crim. Pro. ART. 38.071 (2014). Testimony of child who is victim of offense**

**\*\*\*\* Section 2 held Unconstitutional by Coronado v. State, 2011 WL 4436474 (Tex.Crim.App.) (stating Ex parte submission of written interrogatories does not qualify as cross-examination for Sixth Amendment Confrontation purposes)**

Sec. 1. This article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:

- (1) Section 19.02 (Murder);
- (2) Section 19.03 (Capital Murder);
- (3) Section 19.04 (Manslaughter);
- (4) Section 20.04 (Aggravated Kidnapping);
- (5) Section 21.11 (Indecency with a Child);
- (6) Section 22.011 (Sexual Assault);
- (7) Section 22.02 (Aggravated Assault);
- (8) Section 22.021 (Aggravated Sexual Assault);



- (9) Section 22.04(e) (Injury to a Child, Elderly Individual, or Disabled Individual);
- (10) Section 22.04(f) (Injury to a Child, Elderly Individual, or Disabled Individual), if the conduct is committed intentionally or knowingly;
- (11) Section 25.02 (Prohibited Sexual Conduct);
- (12) Section 29.03 (Aggravated Robbery);
- (13) Section 43.25 (Sexual Performance by a Child);
- (14) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
- (15) Section 43.05(a)(2) (Compelling Prostitution); or
- (16) Section 20A.02(a)(7) or (8) (Trafficking of Persons).

Sec. 2. (a) The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

(b) If a recording is made under Subsection (a) of this section and after an indictment is returned or a complaint has been filed, by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries, if possible, and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording.

(c) A recording made under Subsection (a) of this section is not admissible into evidence unless a recording made under Subsection (b) is admitted at the same time if a recording under Subsection (b) was requested prior to the time of the hearing or proceeding.

Sec. 3. (a) On its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact. To the extent practicable, only the judge, the court reporter, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons necessary to operate the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but the court shall attempt to ensure that the child cannot hear or see the defendant. The court shall permit the attorney for the defendant adequate opportunity to confer with the defendant during cross-examination of the child. On application of the attorney for the defendant, the court may recess the proceeding

before or during cross-examination of the child for a reasonable time to allow the attorney for the defendant to confer with defendant.

(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 4. (a) After an indictment has been returned or a complaint filed, on its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact. To the extent practicable, only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact but shall attempt to ensure that the child cannot hear or see the defendant.

(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and is not altered;

(3) each voice on the recording is identified;

(4) the defendant, the attorneys for each party, and the expert witnesses for each party are afforded an opportunity to view the recording before it is shown in the courtroom;

(5) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;

(6) the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time the recording was made; and

(7) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings is established at the hearing or proceeding.

(c) After a complaint has been filed or an indictment returned charging the defendant, on the motion of the attorney representing the state, the court may order that the deposition of the child be taken outside of the courtroom in the same manner as a deposition may be taken in a civil matter. A deposition taken under this subsection is admissible into evidence.

Sec. 5. (a) On the motion of the attorney representing the state or the attorney representing the defendant and on a finding by the court that the following requirements

have been substantially satisfied, the recording of an oral statement of the child made before a complaint has been filed or an indictment returned is admissible into evidence if:

- (1) no attorney or peace officer was present when the statement was made;
  - (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
  - (3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and has not been altered;
  - (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
  - (5) every voice on the recording is identified;
  - (6) the person conducting the interview of the child in the recording is expert in the handling, treatment, and investigation of child abuse cases, present at the hearing or proceeding, called by the state, and subject to cross-examination;
  - (7) immediately after a complaint was filed or an indictment returned, the attorney representing the state notified the court, the defendant, and the attorney representing the defendant of the existence of the recording;
  - (8) the defendant, the attorney for the defendant, and the expert witnesses for the defendant were afforded an opportunity to view the recording before it is offered into evidence and, if a proceeding was requested as provided by Subsection (b) of this section, in a proceeding conducted before a district court judge but outside the presence of the jury were afforded an opportunity to cross-examine the child as provided by Subsection (b) of this section from any time immediately following the filing of the complaint or the returning of an indictment charging the defendant until the date the hearing or proceeding begins;
  - (9) the recording of the cross-examination, if there is one, is admissible under Subsection (b) of this section;
  - (10) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;
  - (11) the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time that the recording was made; and
  - (12) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings has been established at the hearing or proceeding.
- (b) On the motion of the attorney representing the defendant, a district court may order that the cross-examination of the child be taken and be recorded before the judge of that court at any time until a recording made in accordance with Subsection (a) of this section has been introduced into evidence at the hearing or proceeding. On a finding by the court that the following requirements were satisfied, the recording of the cross-examination of

the child is admissible into evidence and shall be viewed by the finder of fact only after the finder of fact has viewed the recording authorized by Subsection (a) of this section if:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the attorney representing the defendant, and the recording is accurate and has not been altered;

(3) every voice on the recording is identified;

(4) the defendant, the attorney representing the defendant, the attorney representing the state, and the expert witnesses for the defendant and the state were afforded an opportunity to view the recording before the hearing or proceeding began;

(5) the child was placed under oath before the cross-examination began or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully; and

(6) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings was established at the hearing or proceeding.

(c) During cross-examination under Subsection (b) of this section, to the extent practicable, only a district court judge, the attorney representing the defendant, the attorney representing the state, persons necessary to operate the equipment, and any other person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but shall attempt to ensure that the child cannot hear or see the defendant.

(d) Under Subsection (b) of this section the district court may set any other conditions and limitations on the taking of the cross-examination of a child that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 6. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article or if the court finds the testimony of the child taken under Section 2 or 5 of this article is admissible into evidence, the child may not be required to testify in court at the proceeding for which the testimony was taken, unless the court finds there is good cause.

Sec. 7. In making any determination of good cause under this article, the court shall consider the rights of the defendant, the interests of the child, the relationship of the defendant to the child, the character and duration of the alleged offense, any court finding related to the availability of the child to testify, the age, maturity, and emotional

stability of the child, the time elapsed since the alleged offense, and any other relevant factors.

Sec. 8. (a) In making a determination of unavailability under this article, the court shall consider relevant factors including the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:

(1) of emotional or physical causes, including the confrontation with the defendant; or

(2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding.

(b) A determination of unavailability under this article can be made after an earlier determination of availability. A determination of availability under this article can be made after an earlier determination of unavailability.

Sec. 9. If the court finds the testimony taken under Section 2 or 5 of this article is admissible into evidence or if the court orders the testimony to be taken under Section 3 or 4 of this article and if the identity of the perpetrator is a contested issue, the child additionally must make an in-person identification of the defendant either at or before the hearing or proceeding.

Sec. 10. In ordering a child to testify under this article, the court shall take all reasonable steps necessary and available to minimize undue psychological trauma to the child and to minimize the emotional and physical stress to the child caused by relevant factors, including the confrontation with the defendant and the ordinary participation of the witness in the courtroom.

Sec. 11. In a proceeding under Section 2, 3, or 4 or Subsection (b) of Section 5 of this article, if the defendant is not represented by counsel and the court finds that the defendant is not able to obtain counsel for the purposes of the proceeding, the court shall appoint counsel to represent the defendant at the proceeding.

Sec. 12. In this article, "cross-examination" has the same meaning as in other legal proceedings in the state.

Sec. 13. The attorney representing the state shall determine whether to use the procedure provided in Section 2 of this article or the procedure provided in Section 5 of this article.

CREDIT(S)

Added by Acts 1983, 68th Leg., p. 3828, ch. 599, § 1, eff. Aug. 29, 1983. Amended by Acts 1987, 70th Leg., ch. 998, § 1, eff. Aug. 31, 1987; Acts 1987, 70th Leg., 2nd C.S., ch. 55, § 1, eff. Oct. 20, 1987; Acts 1991, 72nd Leg., ch. 266, § 1, eff. Sept. 1, 1991; Acts 1995, 74th Leg., ch. 76, § 14.24, eff. Sept. 1, 1995; Acts 2001, 77th Leg., ch. 338, §§ 1 to 8, eff. Sept. 1, 2001; Acts 2007, 80th Leg., ch. 593, § 3.16, eff. Sept. 1, 2007; Acts 2011, 82nd Leg., ch. 1 (S.B. 24), § 2.06, eff. Sept. 1, 2011.

**Rules of Procedure, Tex. Crim. Pro. ART. 38.072 (2014). Hearsay Statement of Certain Abuse Victims**

Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child younger than 14 years of age or a person with a disability:

- (1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);
- (2) Section 25.02 (Prohibited Sexual Conduct);
- (3) Section 43.25 (Sexual Performance by a Child);
- (4) Section 43.05(a)(2) (Compelling Prostitution);
- (5) Section 20A.02(a)(7) or (8) (Trafficking of Persons); or
- (6) Section 15.01 (Criminal Attempt), if the offense attempted is described by Subdivision (1), (2), (3), (4), or (5) of this section.

Sec. 2. (a) This article applies only to statements that:

- (1) describe:
  - (A) the alleged offense; or
  - (B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is:
    - (i) described by Section 1;
    - (ii) allegedly committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and
    - (iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;
- (2) were made by the child or person with a disability against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and

(3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense or extraneous crime, wrong, or act.

(b) A statement that meets the requirements of Subsection (a) is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child or person with a disability testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Sec. 3. In this article, "person with a disability" means a person 13 years of age or older who because of age or physical or mental disease, disability, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.

CREDIT(S)

Added by Acts 1985, 69th Leg., ch. 590, § 1, eff. Sept. 1, 1985. Amended by Acts 1995, 74th Leg., ch. 76, § 14.25, eff. Sept. 1, 1995; Acts 2009, 81st Leg., ch. 284, § 1, eff. June 11, 2009; Acts 2009, 81st Leg., ch. 710, §§ 1, 2, eff. Sept. 1, 2009; Acts 2011, 82nd Leg., ch. 1 (S.B. 24), § 2.07, eff. Sept. 1, 2011.

## **UTAH**

### **Rules of Procedure, U.T. RCRP Rule 15.5 (2013). Out Of Court Statement And Testimony Of Child Victims Or Child Witnesses Of Sexual Or Physical Abuse-- Conditions Of Admissibility**

(a) In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or other witness younger than 14 years of age which was recorded prior to

the filing of an information or indictment is, upon motion and for good cause shown, admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

(a)(1) the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant's rights of confrontation are not violated;

(a)(2) no attorney for either party is in the child's presence when the statement is recorded;

(a)(3) the recording is visual and aural and is recorded on film, videotape or other electronic means;

(a)(4) the recording is accurate and has not been altered;

(a)(5) each voice in the recording is identified;

(a)(6) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;

(a)(7) the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury; and

(a)(8) the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

(b) In a criminal case concerning a charge of child abuse or of a sexual offense against a child, the court, upon motion of a party and for good cause shown, may order that the testimony of any victim or other witness younger than 14 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room. All of the following conditions shall be observed:

(b)(1) Only the judge, attorneys for each party and the testifying child (if any), persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be in the room during the child's testimony. A defendant who consents to be hidden from the child's view may also be present unless the court determines that the child will suffer serious emotional or mental strain if required to testify in the defendant's presence, or that the child's testimony will be inherently unreliable if required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:

(b)(1)(A) the defendant may not be present during the child's testimony;



(b)(1)(B) the court shall ensure that the child cannot hear or see the defendant;

(b)(1)(C) the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child's testimony;

(b)(1)(D) the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child's testimony; and

(b)(1)(E) the conditions of a normal court proceeding shall be approximated as nearly as possible.

(b)(2) Only the judge and an attorney for each party may question the child.

(b)(3) As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(b)(4) If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without violating other requirements of Subsection (b)(1).

(c) In any criminal case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of a party and for good cause shown, that the testimony of any victim or other witness younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (b) are observed, in addition to the following provisions:

(c)(1) the recording is visual and aural and recorded on film, videotape or by other electronic means;

(c)(2) the recording is accurate and is not altered;

(c)(3) each voice on the recording is identified; and

(c)(4) each party is given an opportunity to view the recording before it is shown in the courtroom.

(d) If the court orders that the testimony of a child be taken under Subsection (b) or (c), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

CREDIT(S)

[Amended effective November 1, 2008.]

# **VERMONT**

## **Rules of Crim. Pro., V.T.C.P. 26 (2014). Evidence**

(a) Form. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court.

(b) Examination of Witnesses. Except with leave of court, a witness shall not be examined by more than one attorney on a side, nor shall more than one attorney on a side be heard on questions of evidence. Attorneys shall stand when examining witnesses or addressing the court.

(c) Other Criminal Offenses. When the state in a criminal action intends to offer evidence of other criminal offenses under Rule 404(b) of the Vermont Rules of Evidence, or when any party in a criminal action intends to offer evidence of an offense for impeachment under Rule 609 of the Vermont Rules of Evidence, at least thirty days before the trial, or such greater time as the court may order, that party shall furnish to the other parties in the proceeding a written statement of the acts or offenses it intends to offer except that the court may allow the notice to be given at a later date, including during the trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. No notice is required for evidence of offenses used in rebuttal. When evidence of other criminal offenses is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(d) Hearsay Statements of a Victim Who is a Child Ten Years of Age or Under or a Mentally Retarded or Mentally Ill Person. When the state in a criminal action intends to offer hearsay statements of a victim who is a child ten years of age or under or a mentally retarded or mentally ill person, made admissible by Rule 804a of the Vermont Rules of Evidence, the state shall furnish to the defendant a written statement of the evidence it intends to offer, including the name of each witness who will testify to the statement of the victim, at least 30 days before trial. The court may allow the notice to be given at a later date, including during the trial, if it determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence results has newly arisen in the case.

(e) Record of Audio and Video Recordings Submitted as Evidence. Whenever an audio or video recording of any statement or other evidence is presented as evidence to the trier of fact in the course of a trial, the party offering the evidence shall clearly identify on the record the starting

and stopping points of the portions actually presented to the trier by reference to frame or other indicators on the recording medium or to specific words in the recording.

**Rules of Evid., V.T.R.E. 804a (2014). Hearsay Exception; Putative Victim Age 12 Or Under; Person With A Mental Illness Or Developmental Disability**

(a) Statements by a person who is a child 12 years of age or under or who is a person with a mental illness as defined in 18 V.S.A. § 7101(14) or developmental disability as defined in 18 V.S.A. § 8722(2) at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a civil, criminal, or administrative proceeding in which the child or person with a mental illness or developmental disability is a putative victim of sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. § 3253, aggravated sexual assault of a child under 13 V.S.A. § 3253a, lewd or lascivious conduct under 13 V.S.A. § 2601, lewd or lascivious conduct with a child under 13 V.S.A. § 2602, incest under 13 V.S.A. § 205, abuse, neglect, or exploitation under 33 V.S.A. § 6913, sexual abuse of a vulnerable adult under 13 V.S.A. § 1379, any offense in which bodily injury or serious bodily injury is an element as defined in 13 V.S.A. § 1021, or wrongful sexual activity and the statements concern the alleged crime or the wrongful sexual activity; or the statements are offered in a juvenile proceeding under chapter 52 of Title 33 involving a delinquent act alleged to have been committed against a child 13 years of age or under or a person with a mental illness or developmental disability if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under chapter 53 of Title 33, and the statement relates to the sexual abuse of the child;

(2) the statements were not taken in preparation for a legal proceeding and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial officer under Rule 5 of the Vermont Rules of Criminal Procedure;

(3) the child or person with a mental illness or developmental disability is available to testify in court or under Rule 807; and

(4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

(b) Upon motion of either party in a criminal or delinquency proceeding, the court shall require the child or person with a mental illness or developmental disability to testify for the state.

Sec. 2. Rule 807 of the Vermont Rules of Evidence is amended to read:

**Rule 807. TESTIMONY WHERE VICTIM IS A MINOR, A MENTALLY ILL PERSON OR A MENTALLY RETARDED PERSON PERSON WITH A MENTAL ILLNESS OR DEVELOPMENTAL DISABILITY**

(a) Application. This rule applies only to the testimony of a child age 12 or under or mentally ill or mentally retarded person as defined in 14 V.S.A. § 3061(4) or (5) in a proceeding a person with a mental illness or developmental disability:

(1) in a prosecution for sexual assault under 13 V.S.A. § 3252 or aggravated sexual assault under 13 V.S.A. § 3253 alleged to have been committed against that child or mentally ill or mentally retarded person a person with a mental illness or developmental disability;

(2) in a prosecution for lewd and lascivious conduct with a child under 13 V.S.A. § 2602 or incest under 13 V.S.A. § 205 alleged to have been committed against that child;

(3) in a prosecution for abuse, neglect or exploitation under 33 V.S.A. § 6913 or lewd and lascivious conduct under 13 V.S.A. § 2601 alleged to have been committed against that mentally ill or mentally retarded person person with a mental illness or developmental disability;

(4) under chapter 55 of Title 33 involving a delinquent act alleged to have been committed against that child or mentally ill or mentally retarded person a person with a mental illness or developmental disability, if that delinquent act would be an offense listed in this subsection if committed by an adult;

(5) in a civil action in which one of the parties or witnesses has been an alleged victim of causes of action alleging sexual assault, lewd and lascivious conduct or, sexual activity as defined in 33 V.S.A. § 6902, or an offense involving bodily injury or serious bodily injury as defined in 13 V.S.A. § 1021;

(6) in a prosecution where an offense involving bodily injury or serious bodily injury as defined in 13 V.S.A. § 1021 was alleged to have been committed against that child or person with a mental illness or developmental disability.

\* \* \*

## **VIRGINIA**

### **VA. CODE ANN. § 19.2-268.2 (2014). Recent complaint hearsay exception (Subdivision (23) of Supreme Court Rule 2:803 derived from this section)**

Notwithstanding any other provision of law, in any prosecution for criminal sexual assault under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, a violation of §§ 18.2-361, 18.2-366, 18.2-370 or § 18.2-370.1, the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness.

CREDIT(S)  
Acts 1993, c. 592.

## **WASHINGTON**

### **WASH. REV. CODE ANN. § 9A.44.120 (2014). Admissibility of child's statement-- Conditions**

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

CREDIT(S)

[1995 c 76 § 1; 1991 c 169 § 1; 1985 c 404 § 1; 1982 c 129 § 2.]

## **WEST VIRGINIA**

N/A

## **WISCONSIN**

N/A

## **Wis. Stat. Ann. § 908.08 (2014). Audiovisual recordings of statements of children**

(1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 302.113(9)(am), 302.114(9)(am), 304.06(3), or 973.10(2), the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.

(2)(a) Not less than 10 days before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).

(b) Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44(12).

(3) The court or hearing examiner shall admit the recording upon finding all of the following:

(a) That the trial or hearing in which the recording is offered will commence:

1. Before the child's 12th birthday; or

2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the recording is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the

usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding

what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5)(a) If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

(am) The testimony of a child under par. (a) may be taken in accordance with s. 972.11 (2m), if applicable.

(b) If a recorded statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross-examination at the preliminary examination.

(6) Recorded oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293(3), 304.06(3d), 971.23(1)(e) and 973.10(2g).

(7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

<<For credits, see Historical Note field.>>  
COMMENTS--1985 ACT 261, § 3



**WYOMING**

N/A

**FEDERAL LEGISLATION  
/U.S. TERRITORIES**

**FEDERAL LEGISLATION**

N/A

**GUAM**

N/A

**PUERTO RICO**

N/A

**VIRGIN ISLANDS**

N/A