

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 223 - WITNESSES AND EVIDENCE

§ 3509. Child victims' and child witnesses' rights

(a) Definitions.— For purposes of this section—

- (1) the term “adult attendant” means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;
- (2) the term “child” means a person who is under the age of 18, who is or is alleged to be—
 - (A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or
 - (B) a witness to a crime committed against another person;
- (3) the term “child abuse” means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;
- (4) the term “physical injury” includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;
- (5) the term “mental injury” means harm to a child’s psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;
- (6) the term “exploitation” means child pornography or child prostitution;
- (7) the term “multidisciplinary child abuse team” means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;
- (8) the term “sexual abuse” includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;
- (9) the term “sexually explicit conduct” means actual or simulated—
 - (A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;
 - (B) bestiality;
 - (C) masturbation;
 - (D) lascivious exhibition of the genitals or pubic area of a person or animal; or
 - (E) sadistic or masochistic abuse;
- (10) the term “sex crime” means an act of sexual abuse that is a criminal act;
- (11) the term “negligent treatment” means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and
- (12) the term “child abuse” does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

(b) Alternatives to Live In-Court Testimony.—

(1) Child’s live testimony by 2-way closed circuit television.—

- (A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child’s attorney, or a guardian ad litem appointed under subsection (h) may

apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i)** The child is unable to testify because of fear.
- (ii)** There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii)** The child suffers a mental or other infirmity.
- (iv)** Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are—

- (i)** the child's attorney or guardian ad litem appointed under subsection (h);
- (ii)** persons necessary to operate the closed-circuit television equipment;
- (iii)** a judicial officer, appointed by the court; and
- (iv)** other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.—

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B) **(i)** Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

- (I)** The child will be unable to testify because of fear.
- (II)** There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.
- (III)** The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

(v) **Handling of videotape.**— The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

(c) **Competency Examinations.**—

- (1) **Effect of federal rules of evidence.**— Nothing in this subsection shall be construed to abrogate rule 601 of the Federal Rules of Evidence.
 - (2) **Presumption.**— A child is presumed to be competent.
 - (3) **Requirement of written motion.**— A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.
 - (4) **Requirement of compelling reasons.**— A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.
 - (5) **Persons permitted to be present.**— The only persons who may be permitted to be present at a competency examination are—
 - (A) the judge;
 - (B) the attorney for the Government;
 - (C) the attorney for the defendant;
 - (D) a court reporter; and
 - (E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.
 - (6) **Not before jury.**— A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.
 - (7) **Direct examination of child.**— Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.
 - (8) **Appropriate questions.**— The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.
 - (9) **Psychological and psychiatric examinations.**— Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.
- (d) **Privacy Protection.**—
- (1) **Confidentiality of information.**—
 - (A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall—
 - (i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and
 - (ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.
 - (B) Subparagraph (A) applies to—
 - (i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;
 - (ii) employees of the court;

- (A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;
- (B) telephone consultation services in emergencies and in other situations;
- (C) medical evaluations related to abuse or neglect;
- (D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;
- (E) expert medical, psychological, and related professional testimony;
- (F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and
- (G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) Guardian Ad Litem.—

(1) In general.— The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) Duties of guardian ad litem.— A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) Immunities.— A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) Adult Attendant.— A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) Speedy Trial.— In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

(k) Stay of Civil Action.— If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial Aids.— The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

(m) Prohibition on Reproduction of Child Pornography.—

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2) **(A)** Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

(Added Pub. L. 101–647, title II, § 225(a), Nov. 29, 1990, 104 Stat. 4798; amended Pub. L. 103–322, title XXXIII, §§ 330010(6), (7), 330011 (e), 330018 (b), Sept. 13, 1994, 108 Stat. 2143, 2145, 2149; Pub. L. 104–294, title VI, § 605(h), Oct. 11, 1996, 110 Stat. 3510; Pub. L. 109–248, title V, §§ 504, 507, July 27, 2006, 120 Stat. 629, 631; Pub. L. 111–16, § 3(11), May 7, 2009, 123 Stat. 1608.)

References in Text

The Federal Rules of Evidence, referred to in subsec. (c)(1), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Criminal Procedure, referred to in subsecs. (f) and (m)(2)(A), are set out in the Appendix to this title.

Amendments

2009—Subsec. (b)(1)(A). Pub. L. 111–16 substituted “7 days” for “5 days”.

2006—Subsec. (h)(1). Pub. L. 109–248, § 507, inserted “, and provide reasonable compensation and payment of expenses for,” after “The court may appoint”.

Subsec. (m). Pub. L. 109–248, § 504, added subsec. (m).

1996—Subsec. (e). Pub. L. 104–294, § 605(h)(1), substituted “serve the Government’s” for “serve the government’s”.

Subsec. (h)(3). Pub. L. 104–294, § 605(h)(2), substituted “in paragraph (2)” for “in subpart (2)”.

1994—Pub. L. 103–322, § 330011(e), made technical amendment to directory language of Pub. L. 101–647, § 225(a), which enacted this section.

Pub. L. 103–322, § 330010(7)(B), substituted “Government” for “government” in subsecs. (b)(1)(A), (D), (2)(A), and (c)(5)(B), in subsec. (d)(1)(B)(i) after “hired by the”, and in subsec. (g)(1).

Pub. L. 103–322, § 330010(7)(A), substituted “subsection” for “subdivision” in subsecs. (b)(1)(A), (D)(i), (2)(A), (B)(iii)(III), (c)(1), (d)(4), and (f).

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

Subsec. (a)(11) to (13). Pub. L. 103–322, § 330010(6), redesignated pars. (12) and (13) as (11) and (12), respectively, and struck out former par. (11) which read as follows: “the term ‘exploitation’ means child pornography or child prostitution;”.

Subsec. (k). Pub. L. 103–322, § 330018(b), substituted heading for one which read “Extension of Child Statute of Limitations” and struck out first sentence which read as follows: “No statute of limitation that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.”

Effective Date of 2009 Amendment

Amendment by Pub. L. 111–16 effective Dec. 1, 2009, see section 7 of Pub. L. 111–16, set out as a note under section 109 of Title 11, Bankruptcy.

Effective Date of 1994 Amendment

Section 330011(e) of Pub. L. 103–322 provided that the amendment made by that section is effective as of the date on which section 225(a) of Pub. L. 101–647 took effect.