



# Conducting and Defending a Pandemic-Era Forensic Interview

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## About the Authors

The Zero Abuse Project envisions a world where every child is free from abuse. We protect children from abuse and sexual assault by engaging people and resources through a trauma-informed approach of education, research advocacy, and advanced technology.

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# Conducting and Defending a Pandemic-Era Forensic Interview

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*“Do what you feel in your heart to be right – for you’ll be criticized anyway.”*

-Eleanor Roosevelt

## I. Introduction

As the COVID-19 pandemic produces quarantines, school closures, and limited interactions between children and mandated reporters,<sup>1</sup> prosecutors and other members of a multi-disciplinary team (MDT)<sup>2</sup> will likely be confronted with two challenges. First, there will likely be an increase in child abuse cases.<sup>3</sup> Second, adjustments to forensic interviews will eventually result in defense attorneys and defense experts challenging the method in which the forensic interview was conducted.<sup>4</sup>

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<sup>1</sup> Victor I. Vieth, Robert J. Peters, Tyler Council, Rita Farrell, Rachel Johnson, Stacie Leblanc, Alison Feigh, Jane Straub & Pete Singer, *Responding to Child Abuse During a Pandemic: 25 Tips for MDTs*, ZERO ABUSE PROJECT (2020), available online at: <https://www.zeroabuseproject.org/responding-to-child-abuse-during-a-pandemic-25-tips-for-mdts/> (last accessed April 23, 2020).

<sup>2</sup> For a history of the development of child protection MDTs, see Antonio Chisea & Donald C. Bross, Multidisciplinary Child Protection Teams, in Chadwick’s *Child Maltreatment: Cultures at Risk and Role of Professionals* 419 (David L. Chadwick, et al., eds., 4th ed. 2014).

<sup>3</sup> Kathryn L. Humphreys, Myo Thwin Myint and Charles H. Zeanah, *Increased Risk for Family Violence During the COVID-19 Pandemic*, PEDIATRICS. 2020; doi: 10.1542/peds.2020-0982

<sup>4</sup> For a discussion of common defense attacks on forensic interviews and approaches for cross-examining defense experts, see Victor I. Vieth, *When the Smoke Clears: Cross-Examining the Defense Expert’s Attack on a Forensic Interview*, 2(4) CENTERPIECE (2010), available at: <https://www.zeroabuseproject.org/wp-content/uploads/2019/02/3eb16f22-centerpiece-vol-2-issue-4.pdf> (last accessed April 23, 2020).

Given these challenges, prosecutors should be proactive in advising the MDT<sup>5</sup> to take steps in conducting pandemic-era forensic interviews in a manner that will help the prosecutor to defend the practice should the interview be challenged in court either in an effort to exclude the interview from evidence as being unreliable or simply as a new avenue to cross-examining the interviewer or the child victim.

The National Children's Alliance (NCA) has produced helpful guidance on conducting forensic interviews during a pandemic and these guidelines are regularly being updated.<sup>6</sup> This article should be read and interpreted in conjunction with the NCA guidelines.

## II. Preparing for in-person forensic interviews

### a. Health screening of employees and children

Prosecutors and forensic interviewers should work with medical professionals on the MDT in developing a screening instrument for the children and parents who may come to the Children's Advocacy Center (CAC), as well as employees and other MDT members who may conduct or view the forensic interview. This may include asking questions about fever, coughs, headaches, digestive issues, and exposure to anyone who may have had the virus. It also includes sensitivity to advanced age, weakened immune systems, or other conditions that may pose a higher risk. Keep in mind that as we learn more about COVID-19, the screening instrument may change.

Any health screening, though, must be balanced against the risks of child abuse. If a child has made an outcry of abuse, particularly if the child has ongoing contact with an offender, a forensic interview is an essential service that must continue, though as safely as possible.

### b. Limit employees and families in the CAC

It is wise to limit those present at the CAC to only employees or other professionals necessary to conduct the forensic interview or other critical functions. This may include rotating staff in order to continue essential work while limiting the contact between people. In advance of the interview, work with families to limit the number of siblings or other family members that may come to the CAC when a child is interviewed. E-mail intake paperwork to the caregiver in advance in order to limit the amount of time the caregiver and child(ren) are in the building. It may be wise to let the caregiver know that an advocate will contact them by phone later in the day to discuss referrals, offer support, and review next steps. Urgent referrals or protective issues will likely need to be addressed or handled in person.

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<sup>5</sup> "Communities in which the prosecutor has taken a leadership role in designing the investigation process tend to be the same communities that have demonstrated the greatest success prosecuting child abusers." APRI, *Investigation and prosecution of Child Abuse* Third edition xxx (2004).

<sup>6</sup> National Children's Alliance, *COVID-19 Resources for CACs, Partners, and Caregivers*, available online at: <https://learn.nationalchildrensalliance.org/covid> (last accessed April 23, 2020).

### c. Expedite getting a child from the waiting area to a forensic interview room

It may be possible to stagger forensic interview schedules to allow one family in the waiting area at a time. This will limit contact with other children and families, and reduce the risk of spreading the virus. Given the limited number of families in the facility, it should be easier to quickly greet the family and transition the child to the forensic interview room while a child advocate speaks with the caregivers (in person or virtually). Staggering the forensic interview schedule in this way may necessitate expanding the hours of the CAC, including opening the facility on weekends.

### d. Modifications to the waiting area

Following any recommendations from health professionals on the MDT, the waiting area should be sanitized before and after each family enters or leaves the facility. The time needed for this process needs to be considered when scheduling interviews. However, if fewer families are coming into the CAC, and the size of the waiting area is reduced accordingly, the time needed to perform this task will be decreased. This can be done, for instance, by blocking off the common play areas where children congregate.

Minimize the number of toys or other objects children can manipulate in the waiting area while still maintaining a child friendly environment. With a limited number of toys, it will be easier to sanitize these objects before and after a family arrives. Whenever possible, use disposable materials such as water cups and appropriately distance chairs, tables, and other furniture.

### e. Assembling the MDT

MDTs should assess the technological capabilities of the CAC to determine if there is a remote observation function where MDT members could observe a forensic interview being conducted at the CAC without being physically present in the building.

If this is not possible, limit the MDT to core investigative team members and consult with other team members virtually. If the MDT meets in person, appropriately distance furniture and chairs in the monitor room. If physical spaces do not allow for this accommodation, consider earpieces or other forms of remote technology to communicate. Similarly, make accommodations for any post-interview meetings.

As another option, MDT members may be able to observe the interview from separate observation rooms in the facility or other rooms that could serve as an ad hoc observation room during the pandemic. Obviously, each building is different and thus MDTs will have to think creatively to find the best option.

Making accommodations does not mean sacrificing any of the core functions of the MDT such as case review—it simply means performing them as safely as possible. If it is true that child abuse is more likely during a pandemic, then children need these services now more than ever.

### III. Conducting an in-person forensic interview

#### a. Personal protective equipment (PPE) for the child and the interviewer

MDTs should consult with medical professionals and research-based resources in determining the appropriate level and types of PPE. In making these decisions, the MDT should look for forms of PPE that allow for the most effective communication possible. For example, a cloth facial barrier may allow for easier communication than other types of barrier.

When selecting PPE, it is also necessary to consider differing abilities and communication barriers when working with a specific child. For instance, a child who is hard of hearing may rely on visual facial cues and may have greater difficulty participating in a forensic interview where someone is wearing a mask. One option is to utilize a mask with a transparent opening around the mouth to aid a child in reading lips or otherwise grasping what the interviewer is saying.<sup>7</sup> The use of PPE might impair the ability of the interviewer or the MDT to hear the child and thus the interviewer should be prepared to repeat back the child's words if there are communication difficulties.

The age and abilities of the child also need to be considered. A young child may fidget with a mask or even remove it one or more times during the interview. Just as an interviewer might intervene if a child is doing something unsafe in the interview, it may be appropriate to ask the child to put the mask on. If, however, it becomes a power struggle or the mask is unduly interfering with the interview, it may be the child needs to be interviewed without the PPE. Any health screening or other information to assess the risks involved will help the team make this decision. Forensic interviewing is both a science and an art and, in midst of the COVID-19 pandemic, interviewers may justifiably make different decisions given the unique circumstances of a particular child.

It is also important to consider the type of abuse alleged when selecting PPE. If a child is a victim of torture<sup>8</sup> the child may have had his or her mouth covered with tape, cloth, or other materials to prevent speaking or crying out. In these circumstances, placing PPE over a child's face may be a trigger or create a block to effective communication. If a child in this scenario is deemed to be a low health risk, it may also be the correct decision not to require PPE. If PPE is utilized, additional time in explaining the need for a facial barrier and the child's comfort level with the equipment may be essential.

If the MDT/CAC has a sufficient quantity, allow the child to keep the mask as a resource that may help them be safe in other settings. If this is done, be intentional in advising parents and older children about proper cleaning of the masks to limit the possibility of spreading germs.

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<sup>7</sup> Loukia Papadopoulou, *University Student Creates Innovative Face Masks for the Hearing Impaired*, INTERESTING ENGINEERING, April 4, 2020, available online at: <https://interestingengineering.com/university-student-creates-innovative-face-masks-for-the-hearing-impaired> (last accessed April 23, 2020).

<sup>8</sup> Barbara Knox, et al, *Child Torture as a form of Child Abuse*, 7 *Journal of Child & Adolescent Trauma* 37 (2014).

**b. Social distancing between interviewer and child and object handling**

Consider modifications to the in-person forensic interview which allow for more distancing between the interviewer and the child. If an easel is used in the interview, consider how it can be placed to increase distance between the interviewer and the child. If markers are used in the forensic interview, look for options to utilize them in a manner that doesn't require them to be passed between the interviewer and the child. If the child's age permits, a marker could be placed on each chair prior to the interview or there could be a container with markers accessible to the child.

**c. Consider the possibility of a sneeze guard**

Instead of an easel, some CACs have a table at which the interviewer and child sit, separated by a "sneeze guard," which enables the parties to see one another but minimizes the possibility of airborne exchange from coughing or sneezing. The sneeze guard also has an opening to allow diagrams or other paper to be passed through.

Here is a photo of a forensic interview room at the Anna Crawford Children's Center in Woodstock, Georgia, which depicts the sneeze guard option:



#### d. Forensic interview protocol considerations

Most forensic interview protocols are semi-flexible processes<sup>9</sup> that provide tools and structures to address disclosures and life experiences of a child. This semi-flexible process may be ideal for interviewing a child experiencing differences in their lived reality based on the implications of COVID-19. The child may discuss this new reality during various stages or phases of the interview such as discussing family structure or routines during the rapport phase of the interview.

In addition to being prepared for COVID-19 discussions arising at any point in the interview, a forensic interviewer may want to consider some adjustments to the protocol being used in a given case. Using the ChildFirst forensic interviewing protocol as an example, here are some simple adjustments to the four phases of the interview.

##### *Rapport*

If PPE is being used in the interview, the equipment should be introduced in a defensible and developmentally appropriate manner. For children 6 and under, the interviewer may wish to say "before we get started, there is something I want you to know about this room. Today, while I listen to you (I/we/you) are going to wear gloves and masks to keep us safe from germs." As an alternative, the interviewer might first introduce self and setting and then say "today, while I listen to you (I/we/you) are going to wear gloves and masks to keep us safe from germs." If you add an instruction, such as asking the child to tell you if they have trouble understanding you because of the mask, it is important to practice this instruction with children six and younger.

For children seven and older you may wish to introduce self and setting, and then say "while we talk today (I/we/you) are going to wear (masks/gloves) to keep us safe from germs/the coronavirus. If you have trouble understanding me it is okay to let me know. Do you have questions about that"?

During rapport, recognize there is likely an interruption to a child's normal activities during the pandemic. Accordingly, if a child struggles to identify things they like to do for fun, a time segmenting narrative event practice may be more productive. For example, the interviewer might say "tell me everything you did from the time you woke up until the time you came to see me"? The time segmenting can focus on any period of time and, of course, the question should be adjusted for the age and developmental level of the child being interviewed.

##### *Transition to topic of concern*

When asking a child why they are here today, or any other open invitation question, a child may identify COVID-19 or other environmental factors as a primary concern. Accordingly, the forensic

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<sup>9</sup> See Chris Newlin, et al, *Child Forensic Interviewing: Best Practices*, OJJDP Juvenile Justice Bulletin (September 2015), available online at: <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf> (last accessed April 23, 2020).



interviewer should be prepared to address multiple disclosures or concerns in the interview and appropriately use the decision tree<sup>10</sup> to approach the topic of concern.

### *Explore details*

Details about any alleged abuse are critical in collecting corroborating evidence, which, in turn, has a significant impact on whether or not a suspect confesses, a prosecutor files charges, and a defendant pleads guilty.<sup>11</sup> In addition to obtaining details about the presenting problem, such as sexual abuse, the interviewer should screen for other forms of maltreatment. Approximately two-thirds of maltreated children are violated in at least two ways and approximately one-third are violated in five or more ways—a concept known as poly-victimization.<sup>12</sup>

Given the added stressors during the pandemic, there is an increased risk that a child has been physically abused, neglected, or witnessed domestic violence.<sup>13</sup> Given the increased time online, there may also be heightened risk that a child has been victimized online.<sup>14</sup> Accordingly, there is a moral obligation to explore these additional possibilities. MDTs failing to explore for poly-victimization may be criticized by defense experts and defense attorneys for adopting an approach inconsistent with the research and the circumstances presented by a pandemic.

In addition to exploring details that may be relevant to criminal justice professionals, details of a child's struggles during the pandemic may be relevant to civil child protection professionals who may have broader authority to intervene, if only with voluntary services. If, for example, a child is describing yelling or other conduct that may not rise to a level where legal action can be taken, an alternative or differential response designed to prevent future maltreatment may be appropriate.<sup>15</sup>

### *Closure*

If closure involves helping a child make a safety plan if something happens to them in the future, be aware the plan may need to be modified. If, for example, a child says they would reach out to a grandparent if they felt unsafe, they may not be able to reach a grandparent

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<sup>10</sup> The decision tree is a structure to aid the interviewer in determining next steps in the interview based on a child's statements or disclosure. It was developed for use in the RADAR forensic interview training protocol and is also used in the ChildFirst forensic interview training programs.

<sup>11</sup> Theodore P. Cross & Debra Whitcomb, *The practice of Prosecuting Child maltreatment: Results of an Online Survey of Prosecutors*, 69 *Child Abuse & Neglect* 20 (2017) (noting the "need for greater attention to thorough investigations with particular attention to corroboration").

<sup>12</sup> Heather A. Turner, David Finkelhor, and Richard Omrod, *Poly-Victimization in a National Sample of Children and Youth*, 38(3) *American Journal of Preventive Medicine* 323 (2010); David Finkelhor, Richard K. Omrod, Heather A. Turner, *Poly-victimization: A neglected component in Child Victimization*, 31 *JOURNAL OF CHILD ABUSE & NEGLECT* 7 (2007).

<sup>13</sup> Kathryn L. Humphreys, Myo Thwin Myint and Charles H. Zeanah, *Increased Risk for Family Violence During the COVID-19 Pandemic*, *Pediatrics*. 2020; doi: 10.1542/peds.2020-0982

<sup>14</sup> See generally, Robert J. Peters, *Technology-Facilitated Child Abuse*, in Robert Geffner, Victor Vieth, Viola Vaughan-Eden, Alan Rosenbaum, Kevin Hamberger & Jacqueline White (Eds), *Handbook of Interpersonal Violence Across the Lifespan* (2020).

<sup>15</sup> For a critique of differential response systems, American Professional Society on the Abuse of Children, *Issues in Differential Response: Revisited* (December 2019).

during a period of quarantine. Accordingly, it may be necessary to ask the child how these safe adults can be accessed at this time.

## IV. Conducting a tele-forensic interview

Although noting that in-person forensic interviews are optimal, the National Children's Alliance (NCA) has produced some guidelines for conducting tele-forensic interviews. The NCA has broken the concept of tele-forensic interviewing into three categories: more likely, sometimes, and vary rare.

The "more likely" scenario has both the forensic interviewer and child present at the CAC but located in different rooms and interviewed through a video conference. The "sometimes" scenario has the forensic interviewer in a remote setting such as a CAC or home and the child is present at a hospital, police station "soft room," or social service agency. The "very rare" scenario has the child at home and the interviewer in a remote setting such as the CAC or the interviewer's home. In the "very rare" category, NCA encourages MDTs to contemplate situations where another team member might be present to make sure no one else is listening to or influencing the interview, and to ensure the child's safety.<sup>16</sup>

When considering a tele-forensic interviewing option, the overriding principle should be the best interests of the child. Ultimately, that is the best standard for also defending the decision in court.

### a. Determine appropriate equipment

Recognize that technological necessities are complex with tele-forensic interviews. The Baltimore Child Abuse Center has put together a "shopping list" of technology to utilize during tele-forensic interviews. This is a comprehensive catalog of equipment needs to record all components of the rooms where the child and interviewer will be located, as well as the technology needs of the room(s) where observers will be located.<sup>17</sup>

Here are four important considerations:

- Utilize technology and recording equipment that provide redundant recording and watermarking for tamper resistant storage.
- Ensure the child's developmental capabilities for any technology problems that may occur during the interview and have a plan for how the child communicates problems.
- Technology requirements may vary based on location, but most remote equipment will include laptop and/or recording devices, webcams, routers, voice recorders, HDMI cables, and speakers. Whether you individually create a system or work with a company

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<sup>16</sup> See NCA tele-forensic interviewing guidelines at: <https://learn.nationalchildrensalliance.org/telefi> (last visited April 21, 2020).

<sup>17</sup> See Baltimore Child Abuse Center, *Tele-Forensic Interview Shopping List*, available online at: [https://4a3c9045adefb4cfdebb-852d241ed1c54e70582a59534f297e9f.ssl.cf2.rackcdn.com/ncalliance\\_0aegd7cbda312546d51f5fd2005abc35.pdf](https://4a3c9045adefb4cfdebb-852d241ed1c54e70582a59534f297e9f.ssl.cf2.rackcdn.com/ncalliance_0aegd7cbda312546d51f5fd2005abc35.pdf) (last accessed April 23, 2020).

that provides a remote/mobile unit for recording, the capture of video and audio should always be clear and audible by the multidisciplinary team.

- The technology should include the best security available to avoid hacking of any kind and should include an evidence vault with discernible user identity to follow the chain of custody for recordings.

#### b. Develop back-up plan if equipment fails

Best practice is to video and audio record all forensic interviews.<sup>18</sup> Whether conducting an in-person forensic interview or a tele-forensic interview, a plan should be developed and reduced to writing, providing guidance if equipment and technology fail. If, for instance, the equipment used fails to record an interview, there should be a back-up plan to document what occurred during the interview. Multidisciplinary teams should develop, maintain, and follow written protocols and guidelines even during a pandemic.

#### c. Explain the process of the tele-forensic interview to the child

Forensic interviewers should use age appropriate language and explain the process of a tele-forensic interview that is legally defensible. Here is some sample language:

*Today when I listen, you will be in this room and I will be in the room next door. There is a camera, and a team I work with, and you will see me here (pointing to the device where forensic interviewer will be).*

It is also recommended to show the child the forensic interviewer's room. This may make the process more understandable for the child, and the child will have a greater sense of who is or is not watching.

#### d. Using Interview Aids in the Tele-Forensic Interview

If an MDT determines a tele-forensic interview needs to be conducted, it is important for the MDT to discuss how interview aids will be utilized in accordance with the interview protocol, while still maintaining the integrity of their use.

For instance, in the ChildFirst protocol Anatomical Diagrams are utilized to establish common language or for clarification purposes post-disclosure. If the team elects to conduct a tele-forensic interview with both the interviewer and the child in the CAC, the interviewer's room and child's room should be mirror images. The child's room should be prepared with a paper easel as well as Anatomical Diagrams that the child can access during the course of the interview. Age and developmental capabilities should be considered when determining if a child will be able to follow the forensic interviewer's instructions with regard to the modified use of the Anatomical Diagrams in the interview.

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<sup>18</sup> Michael Lamb, et al, *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 *Law & Human Behavior* 699 (2012).

If the child is being introduced to the room prior to the forensic interview, the location and presence of the tape, markers, Anatomical Diagrams, and paper easel can be noted to assist with the child's access of these tools during the interview.

When considering if a tele-forensic interview should be implemented, careful consideration should center on whether the format will allow for the child to utilize all available structures to talk about maltreatment as needed, including interview aids.

## V. Defending the forensic interview in court

If the MDT conducts a tele-forensic interview, a defense expert may critique the process by stating that there is no published research to support this modification and thus we are unaware of potential shortcomings. The same attack can be made for modifications made for an in-person forensic interview.

Since defense experts often assert that someone outside the interview room, such as a parent, may have influenced the child victim, this critique may now have more traction if there is a tele-forensic interview with a child at home. How do we know, a defense expert may suggest, that a parent was not also in the room coaching a child or perhaps listening in to make sure a child gave the answers a parent desires? This argument is particularly likely in the context of custody disputes.

If at any point the child appears to struggle to hear the interviewer, the expert can speculate that the child may not have correctly understood all of the questions due to potential auditory issues. Even if there is no indication a child struggled to hear any question, a defense expert may contend that in the absence of an interview instruction specifically related to informing the interviewer of any auditory challenges, a child is less likely to make this issue known.

If a child was violated online or depicted in sexually exploitive images, a defense expert may suggest the tele-interviewing process mirrored, perhaps even reinforced the child's description of a technology-facilitated crime. If the child is in his or her bedroom when they are interviewed via a tele-forensic interview, a defense attorney can suggest the government is doing the same thing a suspect did—speaking with a child about sexual matters using technology to facilitate the communication. This may even give rise to defense motions for case dismissal based on claims of outrageous government conduct.

If a child's entire body is not visible on the camera, a defense expert may suggest it was possible the child was doing something with other parts of his body—such as crossing his fingers while he or she lied to the interviewer—which could not be captured since the interview was not done at the CAC with a wide angle depiction of the child's demeanor. This attack may be even more salient if the forensic interviewer testified for the state and noted the child's emotions during the interview. In that scenario, the defense expert can say "yes, she appeared to be displaying sadness with her face but we don't know how her entire body was reacting as she made these statements."

If the child was interviewed in a CAC, but the child and interviewer were wearing masks or other PPE, a defense expert may contend that this equipment was intimidating to a child, akin to wearing

gear one might use in a bank robbery. A defense expert might suggest that much of communication is being able to see facial expressions and since a mask is now hiding a child's face, we don't know if a child was kidding, being sarcastic, or otherwise conveying an alternative meaning to his or her words through the child's partially concealed face.

Since a defense attorney and defense expert do not have to prove these or other propositions—but simply suggest them as plausible considerations in the hopes of creating a reasonable doubt, there is no limit to the list of potentially creative critiques. Accordingly, prosecutors may wish to consider the defense attorneys and defense experts they encounter most frequently, review their common attacks on the forensic interview, and consider how these attacks may be woven into a new narrative. Most importantly, prosecutors should work with forensic interviewers and other MDT members to conduct pandemic-era interviews in such a way that it is easier to respond to speculative attacks.

#### a. Cite research supportive of the concept of a tele-forensic interview

Although there is one emerging study suggesting a tele-forensic interview may be just as reliable as a forensic interview conducted in person at a CAC,<sup>19</sup> this research is not yet published and could be used against the state in cases in which the MDT chose to conduct the interview in person at the CAC. A defense attorney may cross-examine the forensic interviewer by suggesting if there is research supporting a tele-forensic interview, it was risky to endanger the child's health to transport the victim to the CAC.

Given the paucity of research on tele-forensic interviewing, the prosecutor may be safer having the forensic interviewer or other witness reference the larger, more established body of research on tele-mental health or tele-medical health—research that finds utility in the practice but also recognizes limitations.<sup>20</sup> Establishing that medical and mental health professionals have found tele-health as an option in at least some cases helps jurors understand that although this concept is new to the field of forensic interviewing, it is not necessarily new to the MDT as a whole. To the extent the forensic interviewer and other team members consulted with any tele-

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<sup>19</sup> Montclair State University, *Researchers Aid Child Witnesses with Tele-Forensic Interviewing*, April 1, 2020, available online at: <https://www.montclair.edu/social-work-and-child-advocacy/2020/04/01/researchers-aid-child-witnesses-with-tele-forensic-interviewing/> (last accessed April 23, 2020).

<sup>20</sup> Annie Irvine, et al. Are there interactional differences between telephone and face-to-face psychological therapy? A systematic review of comparative studies, *Journal of affective disorders* vol. 265 (2020): 120-131. doi:10.1016/j.jad.2020.01.057; American Psychological Association: The Joint Task Force for the Development of Telepsychology Guidelines for Psychologists. *Guidelines for the Practice of Telepsychology* (2013), available online at: <http://www.apa.org/pearl.stkate.edu/practice/guidelines/telepsychology.aspx>; Anne B. Judge, et al, American Psychological Association, Division 29 (Society for the Advancement of Psychotherapy), *Report from the Society for the Advancement of Psychotherapy task force on telepsychotherapy* (2011), available online at: <http://societyforpsychotherapy.org/report-taskforce-telepsychotherapy/>; American Psychiatric Association, *Resource Document on telepsychiatry and related technologies in clinical psychiatry* (2014), available online at: <http://www.psychiatry.org/learn/library--archives/resource-documents> 20 In a national survey of 164 psychologists, the respondents noted a number of ethical concerns about telemental health including managing emergencies, security, confidentiality, and whether or not such work would be covered by malpractice insurance. Robert L. Glueckauf, et al, *Survey of Psychologists' Telebehavioral Health Practices: Technology Use, Ethical Issues, and Training Needs*, 49 *Professional Psychology: Research and Practice* 205 (2018).

health experts in developing the tele-forensic interviewing process, this gives greater weight to what was done in the immediate case.

#### b. Present evidence demonstrating a lack of influence on the child

The concern that someone may have influenced a child during a tele-forensic interview is legitimate. Accordingly, prosecutors should work with the forensic interviewer and other MDT members to collect evidence that will rebut this potential defense. This is particularly critical if a tele-forensic interview is conducted at a child's home. There are several options.

First, the interviewer can ask the child who else is in the home, agency, police station, or other location where they are being interviewed. The interviewer may also clarify with the child how they know this. If, for instance, the interview is being conducted at the child's home, the child may say he knows his father is not home because he saw him go to work or knows mom is in the kitchen because he saw her washing dishes shortly before the child joined the interview.

Second, position the camera to see as much as possible of the room where the child is being interviewed. This will make it easier to rebut any claim that someone else was in the room and may have been feeding the child answers or otherwise influencing or coercing his or her answers. It might be wise to have the entryway to whichever room the child is in visible on the camera so as to provide evidence that no one walked in during the interview with the child.

Third, pay attention to what may be in the background of the room where the child is being interviewed. Some things, such as obscene artwork, may create considerable room for a defense attorney to cross-examine a child or the government on matters unrelated to the case. For instance, if a teenage boy was sexually abused by a female teacher, a seductive poster of a popular female movie star or singer might draw uncomfortable cross-examination questions (e.g. "you are attracted to adult women"? "You think about them a lot"?).

Even innocent images, such as a picture of a child posing with a suspect in a family photo could be fodder for cross-examination of the victim (e.g. "you look like you and dad are having a good time in the photo behind you"? "Are you sure you were all that afraid of him?").

Although less likely in a police department or CPS agency, the background should be free of images, clutter, or objects that may serve as tangents on which a defense attorney can cross-examine a victim or interviewer. This is particularly true if the police department or CPS agency does not have a soft room.

Fourth, if an interview is conducted at a child's home, the NCA recognizes the value of an officer or other MDT member inside the house to ensure the child's safety and ensure there is no undue influence on the child. If that cannot be done safely (e.g. someone in the house has been diagnosed with COVID-19), there could be a law enforcement officer or another MDT member outside the house to make sure no one is entering or leaving the home or other location where the child is being interviewed. This would also take away potentially absurd arguments, such as a defense suggestion that someone may have been looking through a window where the child was being interviewed.

Fifth, if an interview is conducted at a child's home the MDT could work with a parent to establish guidelines for where the interview will take place and where other occupants of the house will be located. A parent or other adult could even do a virtual tour of the house to assist the MDT in selecting the ideal location where there is the least possibility of interruption, technical difficulties, or anyone overhearing or being able to influence the interview.

Sixth, if there is a home interview, a victim advocate or other member of the team could be with the parents virtually in one part of the residence while a child participates in the interview in another part of the residence. In this way, the MDT can document where other adults in the home were located and can be with these parents as they process the difficult experience of having a child interviewed about maltreatment. Of course, this would be very different if one or both parents were suspects.

**c. Make it clear that modifications to the forensic interview process were done pursuant to the advice of medical professionals**

If a forensic interviewer or other witness can explain to the trier of fact that any modifications to the interview process were made in consultation with the medical providers on the MDT, these modifications may be more readily accepted by the judge or the jury. If, for example, there is evidence a medical provider recommended masks be worn during a forensic interview, a defense expert's attack on this PPE suddenly becomes a recommendation to endanger the health of the child or the interviewer—a position that is likely untenable in the eyes of most jurors. If the court allows open-ended voir dire, a prosecutor may buttress this during jury selection by asking prospective jurors of their experiences in going to doctors and if they themselves rely on the advice given by their medical providers. In closing argument, a prosecutor could argue "like many of you, the forensic interviewers and investigators in this case relied on the advice of the medical health experts on the team."

**d. Present evidence that NCA accreditation standards allow for modifications during the pandemic**

As noted at the outset, the National Children's Alliance (NCA), the accrediting body for CACs, has specifically allowed for modifications to the forensic interviewing process during the pandemic. If an MDT is engaging in conduct consistent with these guidelines, the interview can be defended as being conducted pursuant to these guidelines.

Equally important, the prosecutor should make it clear to the trier of fact that the core principles of the forensic interview remain intact. The interview is still being conducted by someone who meets the NCA standards for conducting this work, a nationally recognized forensic interviewing model is still being employed, the interview is still being recorded, and the MDT is still participating in the process by giving feedback as to next steps based on the information collected. Stated differently, resist attempts by defense counsel or defense experts to exaggerate the extent of modifications based on the unique circumstances of the pandemic. One potential tactic is the use of parallelism during a re-direct examination rehabilitating the forensic interviewer. For example, the prosecutor could walk through each of the numerous



protocol aspects that were followed in rapid succession, while the forensic interviewer replies "yes" to each, to hammer the point home to the jury. Parallelism and the same line of questioning could also be used to discredit the defense expert witness on cross-examination.

#### e. Prepare the jury for interview modifications during voir dire

If your judge has an open-ended voir dire process, ask prospective jurors about their work and how adjustments may have been made during the pandemic. You may also want to ask them if these adjustments were perfect or if any aspect of their company's work declined. In this way, you remind the jurors that based on their own experiences, many changes to our jobs were made and, although not perfect, everyone was doing the best that they could under this health emergency. In doing so, perhaps jurors will be more receptive to any modifications the MDT had to make during the pandemic. Be wary of any juror who expresses a view that the pandemic was a hoax and that there was no need for social distancing or other protective measures. A juror subscribing to extreme views such as these may frown on any precautions taken to protect the child victim and the interviewer and may focus more on the PPE than the words of the child and the evidence collected.

#### f. Concede that modifications were less than ideal

Perhaps the best way to respond to a defense attorney's attack on the modifications to the forensic interview process is to concede the obvious—that any modifications were not as ideal as conducting a traditional forensic interview in a CAC without anyone wearing PPE. Instead, emphasize that these shortcomings were outweighed by the danger of failing to conduct the interview and running the risk that a child would continue to be abused, or to conduct the interview without modifications and run the risk that the health or even life of the interviewer or child would be jeopardized.

#### g. When admitting a forensic interview under residual or "catch-all" hearsay exceptions, rely on traditional factors of reliability

When prosecutors seek to admit forensic interviews as substantive evidence pursuant to residual or "catch-all" exceptions to the hearsay rule, the interview must meet indicia of reliability pursuant to *Idaho v. Wright*<sup>21</sup> and its progeny.<sup>22</sup> These factors include:

- Play and gestures coinciding with description of abuse (e.g. a child points between his legs to indicate where he was touched by an offender).
- Developmentally unusual sexual knowledge (e.g. a five-year old describing explicit sexual acts that would be unusual for a child of that age to know on his or her own).
- Idiosyncratic detail (a child describing the sights, smells, or sounds of sexual abuse or other crimes).

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<sup>21</sup> *Idaho v. Wright*, 497 U.S. 805 (1990).

<sup>22</sup> John E.B. Myers, *Myers on Evidence of Interpersonal Violence* Fifth Edition 794-829 (2011).



- Developmentally appropriate terminology (a child describing sexual abuse with language congruent to the child's age and maturity).
- Statement against interest (such as a child describing a crime by a parent she or he loves).
- Motive to fabricate (since most children are abused by someone they love, few victims have an incentive to lie to the forensic interviewer).
- Emotions during the interview (e.g. a child displaying anger, sadness, or other emotions; some courts consider this a factor in finding the child's statements to be reliable).<sup>23</sup>

Prosecutors need to be vigilant in reminding judges that if these and other factors are present, the child's statements still meet indicia of reliability worthy of admission into evidence, even if the interview was conducted via technology or with both parties wearing PPE.

## h. Corroborating evidence

### i. Opportunities and best practices during a pandemic

Corroborating evidence is the most important factor in determining whether a case of child sexual abuse results in charges and convictions.<sup>24</sup> Given the potential challenges to pandemic-era forensic interviews, it is even more critical for MDTs to find corroborating evidence. Recording a forensic interview and dissecting the interview paragraph by paragraph, line-by-line, and identifying statements that can be corroborated is an effective model for collecting corroborating evidence.<sup>25</sup>

If a child describes stressors in the home that contributed to the abuse, such as a father who resumed drinking or a mother who lost a job, these additional factors need to be corroborated during interviews with the parents or others with knowledge of the families. Corroborating seemingly small pieces such as these increases the chance for confessions and successful case outcomes.<sup>26</sup>

It should be noted that the pandemic itself potentially provides an opportunity for corroboration, in the form of establishing the approximate timeframe of offenses. If a child makes an outcry post-isolation, then school closures during the pandemic provide a useful reference point that is likely ingrained in the minds of most children. Tragically, in many cases this timeframe will mark the beginning or intensifying of abuse.

Immediacy is a critical factor in the collection of corroborative evidence. Any delay to the child abuse investigation is problematic and possibly fatal to establishing key facts that

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<sup>23</sup> Id at 807-819.

<sup>24</sup> Wendy Walsh, Theodore P. Cross, Tonya Lippert, & Lisa Jones, *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56 *CRIME & DELINQUENCY* 436 (2010).

<sup>25</sup> Victor I. Vieth, *When the Child Has Spoken: Corroborating the Forensic Interview*, 2(5) *CENTERPIECE* 1 (2010).

<sup>26</sup> Wendy Walsh, Theodore P. Cross, Tonya Lippert, & Lisa Jones, *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56 *CRIME & DELINQUENCY* 436 (2010); Theodore P. Cross & Debra Whitcomb, *The practice of Prosecuting Child maltreatment: Results of an Online Survey of Prosecutors*, 69 *CHILD ABUSE & NEGLECT* 20 (2017) (noting the "need for greater attention to thorough investigations with particular attention to corroboration").

determine a case outcome.<sup>27</sup> This is because there is a limited window of opportunity to collect critical evidence, and investigative delay increases the chance defendants and their allies will destroy evidence, fabricate plausible counter-narratives, and manipulate or coerce children into silence or recantation.<sup>28</sup>

What was true pre-pandemic is often if not likely true post-pandemic; for example, best practices include the use of specialized investigators and prosecutors. While it has been suggested in some jurisdictions that investigators be moved to patrol positions during the pandemic, it is critical that whoever responds to reports of child abuse is trained and experienced in the unique dynamics of these crimes and the specialized response they require.

Similarly, it is critical that the MDT continue to meet, even if only remotely, and ensure that case review and supervision of at-risk youth continues in this time of heightened child vulnerability. Child victims must continue to be referred for and participate in mental health treatment. In addition to the critical support this may provide in a time of intensified anxiety and concern, this may also result in potentially admissible disclosures of abuse.

Work schedules have been altered in many prosecuting attorneys' offices, but whenever possible, vertical prosecution, where "victims are able to work with the same prosecutor and investigator from the time potential charges are first reviewed through the sentencing of the offender,"<sup>29</sup> should be maintained. The benefits of vertical prosecution are well established and, pandemic or not, it is "considered best practice."<sup>30</sup>

## *ii. Digital evidence*

Prosecutors, investigators, and other MDT members should reflect on the extensive role that technology can and should play in the corroboration of offenses. Digital evidence falls into four categories: contraband itself, such as child sexual abuse material; evidence of a crime; instrumentality of a crime; and target of a crime.<sup>31</sup> Every criminal case, including child abuse cases, contains corroborative digital evidence. Even if the only source of digital evidence were a single phone, the amount of potential evidence is significant: call logs of received, sent, and missed messages; photographs, which could include EXIF data;<sup>32</sup> numerous video and audio files; records of online accounts; email accounts and downloaded emails; social

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<sup>27</sup> Mike Johnson, *The Investigative Windows of Opportunity: The Vital Link to Corroboration in Child Sexual Abuse Cases*, 1(g) CENTERPIECE (2009)

<sup>28</sup> See Lindsay Malloy, et al, *Familial Influences on Recantation in Substantiated Child Sexual Abuse Cases*, 21 *Child Maltreatment* 256 (2016).

<sup>29</sup> Wisconsin Coalition Against Sexual Assault, "Wisconsin Adult Sexual Assault Response Team Protocol," (2011), <https://www.nsvrc.org/sites/default/files/publications/2018-09/Best%20Practices%20for%20Prosecution.pdf>, last accessed April 23, 2020.

<sup>30</sup> *Id.*

<sup>31</sup> U.S. Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (2009), available at <https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf>.

<sup>32</sup> Exchangeable image file format. Most modern cameras include GPS coordinates of where digital photographs were taken, embedded within the metadata of the photograph itself.

media accounts and messaging; banking applications; text and video messaging applications; cell site location information;<sup>33</sup> billing information; Internet and data usage, including browser histories; phone user identifiers and subscriber information; various connected devices;<sup>34</sup> and the list continues.

In the modern world, digital evidence often exists in items that untrained prosecutors and investigators may not consider. Wireless routers often contain "evidence to place [offenders] at a scene, at a particular time."<sup>35</sup> Vehicle systems often store detailed information of vehicle activity, location data, connected devices, and even call logs or messaging content.<sup>36</sup> Wearable tech such as the Fitbit or Apple Watch may possess critical corroborative information.<sup>37</sup> Amazon's Alexa may even weigh in.<sup>38</sup> The detailed location information collected by Google Dashboard may prove devastating to false alibis. The "Internet of Things" renders nearly any item a potential repository of digital evidence, including showers, refrigerators, thermostats, sex toys, toothbrushes, jet engines, and more.<sup>39</sup>

Social media is an extensive source of incriminating statements, and upon locating such statements, law enforcement must immediately send letters of preservation to the relevant service provider, followed by appropriate legal process.<sup>40</sup> MDT members should be aware that offenders are strategic in their use of social media communications, utilizing "age-appropriate language and [emojis] to dialogue effectively with minors."<sup>41</sup>

Prosecutors and investigators must communicate with digital forensic examiners to locate pertinent evidence, such as search terms or deleted file names on suspect devices that are

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<sup>33</sup> "Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called 'cell sites.' Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI)." *Carpenter v. United States*, 138 S. Ct. 2206, 2208 (2018). In *Carpenter*, the Supreme Court established a warrant requirement for CSLI in the significant quantity present in that case.

<sup>34</sup> Eoghan Casey and Benjamin Turnbull, *Digital Evidence on Mobile Devices* at 7, in *Digital Evidence and Computer Crime* (Eoghan Casey 3 ed. 2011).

<sup>35</sup> Blackman, D., & Szewczyk, P. (2015). The challenges of seizing and searching the contents of Wi-Fi devices for the modern investigator, DOI: <https://doi.org/10.4225/75/57b3f385fb887>.

<sup>36</sup> See generally "Discover," Berla (2020), available at <https://berla.co/discover/>.

<sup>37</sup> Nicole Chauriye, *Wearable Devices as Admissible Evidence: Technology is Killing Our Opportunity to Lie*, 24 *Cath. U. J. L. & Tech* (2016), available at: <https://scholarship.law.edu/jlt/vol24/iss2/9>

<sup>38</sup> Whittaker, Zack, "Judge orders Amazon to turn over Echo recordings in double murder case," November 14, 2018, available at <https://techcrunch.com/2018/11/14/amazon-echo-recordings-judge-murder-case/>

<sup>39</sup> Cassie Morein, "Connectivity 101: The Internet of Things," The University of Texas at Austin Center for Identity, available at <https://identity.utexas.edu/id-perspectives/connectivity-101-the-internet-of-things>.

<sup>40</sup> One helpful resource for determining where and how to send legal process is the ISP list maintained by SEARCH, [search.org](http://search.org). Given the trajectory of Fourth Amendment jurisprudence and recent privacy-based challenges to traditional doctrines, it is recommended that a search warrant be obtained in most situations, often even where the Stored Communications Act seemingly permits acquisition of subpoenas or orders issued under 18 U.S. Code § 2703, since these are issued upon a showing of "reasonable grounds for believing that records are relevant and material to an ongoing investigation," a lower standard than probable cause. See 18 U.S. Code § 2701, *et seq.*; *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>41</sup> Robert J. Peters, Technology-Facilitated Child Abuse. In Robert Geffner, Victor Vieth, Viola Vaughan-Eden, Alan Rosenbaum, Kevin Hamberger, & Jacqueline White (Eds), *Handbook of Interpersonal Violence Across The Lifespan* (2020).

indicative of child sexual abuse material or in-person offenses, or otherwise corroborate a sexual preference for the victim or specific, relevant sexual acts.

Prosecutors should be mindful of optimal trial presentation of digital evidence. For example, instead of presenting cell site location information in sprawling, monotonous Excel spreadsheets, prosecutors should utilize applications that overlay this information on maps to demonstrate relevant device locations to the jury.<sup>42</sup>

### *iii. Traditional methods of corroboration*

While harnessing the corroborative value of digital evidence, prosecutors and investigators should not neglect traditional avenues of corroboration. For example, child abuse crime scenes must be thoroughly photographed and leveraged for every detail that corroborates the child victim's statements.<sup>43</sup> Investigators and prosecutors must "think like a child" to identify and locate corroborative evidence; for example, children have referred to condom receptacles as "worms" and vibrators as "microphones." Suspects and all third-party witnesses must be interviewed promptly and locked into their accounts to avoid fabrication and manipulation. Prior victims and "bad acts" must be identified and thoroughly explored for their corroborative value.<sup>44</sup>

## VI. Conclusion

Although the COVID-19 pandemic has interrupted the lives of everyone, it is a particularly difficult time for children. It may be confusing and frustrating to be unable to go to school or sports practice. Missed recitals and lost proms or graduations cannot be fully replaced. For many children, the pandemic is a time of fear as they realize their confinement is with someone who can now hurt them more freely, and who has less likelihood of being detected.

In these troubling times, grocers, truckers, food processors, and health care professionals are rightly seen as essential employees who must continue working in order to keep us alive. To this list we can add child abuse prosecutors, investigators, forensic interviewers, and other MDT members who are likely the only hope of abused children in the midst of this pandemic.

For the sake of these children, we must rise to the occasion.

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<sup>42</sup> See generally COMMENT: The Admissibility of Cell Site Location Information in Washington Courts, 36 Seattle U. L. Rev. 1473, 1473 (2013).

<sup>43</sup> Victor I. Vieth, *Picture This: Photographing a Child Sexual Abuse Crime Scene* 1(5) CenterPiece (2009).

<sup>44</sup> Fed. R. Evid. 404(b); see generally Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327 (2012).