

**Strategic Considerations When Conducting a Mitigation
Investigation During the Evolving Conditions of the
COVID-19 Pandemic**

July 11, 2020

The COVID-19 pandemic has caused a global health crisis that has affected nearly every profession, including sentencing advocates and mitigation specialists. Defense teams have prioritized the health and well-being of their clients, arguing for bond reduction and compassionate release and working through the shifting bureaucracy to access video and phone calls with their clients. Due to concerns for the health and safety of the communities in which they work, as well as their own exposure to health risks, teams have been forced to halt almost all forms of investigation related to in-person fact-finding and mitigation development.

The effect of the pandemic on mitigation specialists and mitigation investigations is unique because mitigation investigations address topics that are particularly emotional and rely on the ability of the mitigation specialist to establish rapport and relationships of trust with the witnesses. Mitigation specialists strive to conduct mitigation interviews in-person and face-to-face, and in-person interviews are mandatory in capital cases. Mitigation specialists must collect records related to the client and their family, which often requires in-person visits to the records custodian.

But the World Health Organization and Center for Disease Control recommend limiting in-person contact as much as possible during the COVID-19 pandemic. It remains neither responsible from a public health standpoint nor socially tolerable for mitigation specialists to meet in-person with the client or witnesses while strict social distancing is required.

As restrictions are lifted and re-imposed, infection rates change in different regions, and mitigation specialists are asked to conduct in-person outreach to complete their investigations, defense teams will have to carefully consider the risks of conducting in-person, face-to-face mitigation interviews and the record collection processes. They will need to examine not only the risk to the health of the witness and the mitigation specialist, but also the risks to the long-term success of the investigation.

Well-supported declarations have explained the impossibility of conducting a mitigation investigation in a death-penalty cases while in-person interviews cannot be conducted.¹ A taskforce of the National Association for Public Defense has disseminated a guide to measures designed to protect the safety of investigators and mitigation specialists in the field.² We do not wish to duplicate the work of these high-quality documents.

This document is intended to be used as a tool to help offices and private practitioners consider whether to use measures designed to reduce the risk of infection during a mitigation investigation. We hope to explore the damage that safety measures might pose to the quality of a mitigation investigation in both capital and non-capital cases.

Of course, because “death is different,” a mitigation investigation in a capital case must not deviate from the *American Bar Association Guidelines for the Appointment and Performance of Council in Death Penalty Cases*³ and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.⁴ Juvenile cases with a potential sentence of life in prison must follow similarly heightened standards of reliability,⁵ articulated in the Campaign for the Fair Sentencing of Youth’s *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence*.⁶

In a capital or juvenile life sentence case, there are few, if any, ways to advance a mitigation investigation during the pandemic in a way that maintains constitutional standards.

In non-capital cases, there is also a substantial likelihood that compromising best practices to reduce infection risk will ultimately result in long-term and irreparable harm to the case.

1. Best practices in a mitigation investigation are well-established.

Capital and juvenile-life-sentence mitigation investigations must be meticulously conducted according to well-established best practices. The ABA Guidelines,⁷ the Supplementary Guidelines,⁸ and the JLWOP Guidelines⁹ articulate the national standards regarding the mitigation obligations of defense teams in such cases.

¹ See, e.g., Declaration of Elizabeth Vartkessian, Ph.D., Impacts of Covid-19 Pandemic on Mitigation Investigation, (May 27, 2020); Declaration of Emily Olson-Gault, Esq. (April 2, 2020); Declaration of Cassandra Stubbs, Impacts of the COVID-19 Pandemic for Capital Defense Teams (April 1, 2020).

² NAPD Best Practice Recommendations and Considerations for Return to Fieldwork in the Post-COVID-19 Era (June 2020).

³ 31 Hofstra L. Rev. 913 (2003) (ABA Guidelines).

⁴ 36 Hofstra L. Rev. 677 (2008) (Supplementary Guidelines).

⁵ *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. LA*, 577 U.S. ___; 136 S. Ct. 718 (2016).

⁶ <https://www.fairsentencingofyouth.org/media-resources/defense-guidelines/> (2015) (JLWOP Guidelines).

⁷ 31 Hofstra L. Rev. 913 (2003).

⁸ 36 Hofstra L. Rev. 677 (2008).

⁹ <https://www.fairsentencingofyouth.org/media-resources/defense-guidelines/> (2015).

Non-capital mitigation investigations are guided by the same best practices but have more flexibility to modify those practices. Mitigation investigations for capital and non-capital cases have been dramatically affected by COVID-19 and will continue to be affected for the duration of the pandemic.

a. Face-to-face, at-home interviews are the core of a mitigation investigation and take place in circumstances that create a high risk of COVID-19 transmission.

The Supplementary Guidelines describe the scope of a capital mitigation investigation, and the potential scope of a non-capital mitigation investigation, which can include exhaustive research into every aspect of a defendant's life:

The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.¹⁰

To meet this standard, mitigation specialists conduct in-person, one-on-one, face-to-face interviews with the client, the client's family members, friends, teachers, physicians, employers, former attorneys, and others who have information relevant to the client's bio-psychosocial history. Multiple interviews are necessary to establish trust and elicit sensitive information from the client and witnesses.

Interviews with the client are conducted in-person and face-to-face most often in attorney visitation rooms within correctional facilities. The rooms are usually small, without windows or adequate ventilation. Sometimes there is a window or screen that prevents face-to-face contact. Sometimes the mitigation specialist and the client must talk over a telephone handset. The interview spaces, including tables and chairs, screens or glass, and handsets are not cleaned between users. The facility bathrooms often lack soap and toilet paper. Cleaning supplies are unavailable for visitors, and mitigation specialists are generally prohibited from bringing cleaning supplies into a jail or prison.

Interviews with family members and lay witnesses should be conducted in-person, nearly always in the witness's home. The mitigation specialist often drops in unannounced at the witness's home. While

¹⁰ *Supplementary Guidelines*, 10.11(B).

this practice may vary on a witness-by-witness basis, dropping-in can increase the likelihood of the witness's cooperation.

The most important witnesses are usually family members of the defendant whose demographics mirror the demographics of criminal defendants. They are disproportionately racial and ethnic minorities and poor or working class.

Witnesses often have pre-existing health impairments: asthma, for instance, is common. It is common for mitigation specialists to visit family members who live in mobile home parks, public-housing developments, assisted living or rehabilitation centers, county jails and prisons. Witnesses may live in rural communities with inadequate plumbing, limited resources, and scarce health care, or in urban environments where overcrowding, racial segregation, and poverty are disproportionately experienced. These witnesses are at greater risk of infection and are more vulnerable to health complications and death when infected with the coronavirus.

Given the sensitive information collected during a mitigation investigation, interviews are conducted one-on-one in private spaces and are often several hours or more. Mitigation specialists constantly strive to build rapport. They will use the witness's bathroom or sit in their kitchen, accept food or drink when offered, and sit close to the witness to look at photos and old documents with the witness. When others are present, the mitigation specialist will pet animals, play with children, and chat with other family members. Children may climb on their laps, and witnesses often hug the mitigation specialist when it is time to say goodbye.

Mitigation specialists visit places to which the client was connected, like schools, treatment facilities, and homeless shelters. A friend or family member may act as a tour guide and show the mitigation specialist around the neighborhood, often riding in the mitigation specialist's car.

Mitigation specialists interview professionals, such as former teachers, pediatricians and medical specialists, child-welfare social workers and other service providers, police and corrections officers, and former attorneys. Mitigation specialists often drop-in at a school office before the school day begins, or drop-in at the personal residence of a former case worker.

Interviews with professionals must be conducted in private given the sensitive nature of the information. They often take place in the living room of the witness or in an office, and the witness and mitigation specialist often sit next to each other to review records together.

As state and local governments take steps to reopen, defense teams need to consider how maintaining these practices could lead to the exposure and transmission of COVID-19 and impact their relationships with the client and witnesses. To risk infecting the client and others within detention facilities, including staff, witnesses, or their household members can permanently damage relationships and the

investigation. For many cases, there may be no way to balance safe and ethical measures to reduce health risks while conducting in-person interviews.

b. Record collection is an essential element of a mitigation investigation, even when those records are difficult to get.

The Supplementary Guidelines describe the breadth of the capital mitigation investigation and the potential breadth of the non-capital mitigation investigation in gathering documentation to support the testimony of expert and lay witnesses, including:

school, medical, employment, military, and social service records, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death.¹¹

The mitigation specialist collects signed releases from the client and witnesses during in-person, face-to-face interviews in order to gather records relevant to the client's biopsychosocial history. This is important to do in-person, as witnesses often hesitate to sign releases granting access to their personal, medical, mental-health, and other confidential information. It is unlikely that a witness will do so without a mitigation specialist having established trust with the witness.

Some records are available over the internet, but most require written correspondence with records custodians at schools, federal and state government offices, correctional facilities, and medical facilities. When records are unavailable through these methods or require follow-up, mitigation specialists make in-person requests. At times, this requires that the mitigation specialist assist the records custodian in sorting hard copies of records to locate the records requested, including copies that have been archived in storage closets, basements, or in boxes stacked in corners or under desks. The mitigation specialist may sit for extended periods in a waiting room, sometimes with crowds of people.

2. The COVID-19 pandemic has limited travel and face-to-face interactions.

The United States Secretary of Health and Human Services declared COVID-19 a public health emergency on January 31, 2020.¹² The President of the United States declared a National Emergency

¹¹ *Supplementary Guidelines*, 10.11(F).

¹² Health and Human Services, *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel*

on March 13, 2020.¹³ The vast majority of states ordered most residents to stay indoors, except for essential workers or in specific circumstances. All but five states issued stay-at-home orders and implemented measures to restrict or close non-essential businesses.¹⁴

On March 27, 2020, the CDC issued the Global COVID-19 Pandemic Notice warning against nonessential international travel and 14-day quarantine after returning from international travel.¹⁵ The CDC reported that travel across all forms including airports, bus stations, train stations, and rest stops, increases risk for infection and transmission of COVID-19. State and local travel restrictions vary by state, but many states issued guidance related to quarantines for out-of-state travelers and domestic travel. The orders largely discourage interstate travel and a few states follow the CDC international travel guidelines that require anyone traveling out-of-state to self-quarantine for 14-days or strongly encourage self-quarantine. The Department of State continues to advise U.S. residents to avoid all international travel.¹⁶

On April 1, 2020, The Bureau of Prisons implemented a modified-lockdown order.¹⁷ The 122 federal prisons were ordered to confine federal detainees to their cells for two-weeks to control transmission of the coronavirus. By May 27, 2020, over 5000 federal prisoners and over 600 BOP staff had tested positive for COVID-19. State and local correctional centers have implemented similar measures in an effort to contain and prevent transmission. These numbers likely underestimate the number of cases due to a lack of available testing kits.

On June 1, 2020, in response to growing political unrest related to police violence, the federal Bureau of Prisons instituted the first total national lockdown in decades, making it even more difficult for defense teams to contact their clients.¹⁸

Coronavirus, HSS, Jan. 31, 2020, <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html#:~:text=Secretary%20Azar%20Declares%20Public%20Health%20Emergency%20for%20United%20States%20for,responding%20to%202019%20novel%20coronavirus>.

¹³ President Donald Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, The White House, March 13, 2020.

¹⁴ Jiachuan Wu, Savannah Smith, Mansee Khurana, Corky Siemaszko, and Biranna DeJesus-Banos, *Stay-At-Home Orders Across the Country: What Each State Is Doing-Or Not Doing-Amid Widespread Coronavirus Lockdowns*. NBC News, April 29, 2020.

¹⁵ Center for Disease Control and Prevention, *Global COVID-19 Pandemic Notice*, CDC, <https://wwwnc.cdc.gov/travel/notices/warning/coronavirus-global> (last visited June 5, 2020). ¹⁶U.S. Department of State, *Coronavirus Disease 2019 (COVID-19)*, U.S. Department of State, <https://www.state.gov/coronavirus/#travel-advisories> (last visited June 5, 2020).

¹⁶ U.S. Department of State, *Coronavirus Disease 2019 (COVID-19)*, U.S. Department of State, <https://www.state.gov/coronavirus/#travel-advisories> (last visited June 5, 2020).

¹⁷ Courtney Buble, *Federal Prison System Goes Into "Modified Lockdown,"* Government Executive, April 1, 2020, <https://www.govexec.com/management/2020/04/federal-prison-system-goes-modified-lockdown/164286/>.

¹⁸ Courtney Buble, *Federal Bureau of Prisons Goes into National Lockdown Over Protests*, Government Executive June 1, 2020, <https://www.govexec.com/management/2020/06/federal-bureau-prisons-goes-national-lockdown-over-protests/165820/>.

Despite these efforts, COVID-19 cases and deaths have been reported in all 50 states. By the end of May, the number of COVID-19 deaths in the U.S. exceeded 100,000.¹⁹ By June 5, 2020, there were 1,862,656 reported cases of coronavirus, and 108,064 deaths.²⁰ By June 17, 2020, there were nearly 270,000 new cases of coronavirus, and 8,798 more deaths.²¹

The current situation is in flux. All states have eased restrictions, and some have eliminated restrictions.²² The number of new cases is declining in some states, but a number of states are experiencing steep increases.²³ Circumstances vary day by day and region by region.

3. The people with whom mitigation specialists work tend to be particularly vulnerable to COVID-19 infection: mitigation investigations can put those people at high risk.

Black people, Latinos, and Native Americans are disproportionately affected through every stage of the criminal legal system and therefore make up a large portion of mitigation specialists' caseloads. These same racial-ethnic groups have been identified as more vulnerable to COVID-19 and are more likely than other groups to develop severe symptoms, complications, and die.²⁴ Other racial and ethnic groups, such as Asian Americans and Pacific Islanders, face higher than average rates of exposure to infection by COVID-19. Because those groups make up a relatively smaller portion of our client population, we do not discuss them individually.

a. Black people account for 13% of the US population, but 24% of COVID-19- associated deaths, where race is known.²⁵

Because Black people suffer disproportionately from institutional racism, they suffer from higher rates of poverty, chronic diseases, and COVID-19. In Milwaukee, Wisconsin Black people were three times as likely to die from COVID-19 as white people.²⁶ Illinois and North Carolina were two of the few areas

¹⁹ Center for Disease Control and Prevention, *Provisional Death Counts for Coronavirus Disease (COVID-19)*, CDC May 30, 2020, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>.

²⁰ Center for Disease Control and Prevention, *Coronavirus Disease 2019: Cases in the US*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

²¹ *Id.*

²² Sarah Mervosh, Jasmine C. Lee, Lazaro Gamio and Nadja Popovich, *How All 50 States Are Reopening*, N.Y. TIMES, HTTPS://WWW.NYTIMES.COM/INTERACTIVE/2020/US/STATES-REOPEN-MAP-CORONAVIRUS.HTML?ACTION=CLICK&PGTYPE=ARTICLE&STATE=DEFAULT&MODULE=STYLN-CORONAVIRUS&VARIANT=SHOW®ION=TOP_BANNER&CONTEXT=STORYLINES_MENU.

²³ *Coronavirus in the U.S.: Lates Map and Cascount*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

²⁴ Tiffany Ford, Sarah Reber, and Richard V. Reeves, *See Race Gaps in COVID-19 Deaths are Even Bigger than They Appear*, Brookings Institute, https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosmarkets&stream=business.

²⁵ The COVID Tracking Project, *The COVID Racial Data Tracker*, The Atlantic, <https://covidtracking.com/race>.

²⁶ Akilah Johnson, *Early Data Shows African Americans Have Contracted and Died of Coronavirus at an Alarming Rate*, ProPublica, April 3, 2020.

publishing statistics on COVID-19 cases by race, and their data also demonstrated the disproportionate rates of infection for Black people early on.²⁷

b. Hispanic and Latino populations face an outsized rate of COVID-19 cases.

According to data provided by the city of New York, Hispanic and Latino populations had the second-highest rate of coronavirus deaths, with 259.2 per 100,000, behind Black people, who were averaging 265.²⁸ Bronx County has been a hotspot for COVID-19 cases and deaths.

Hispanic and Latino immigrants, whose communities have faced raids by Immigration and Customs Enforcement and incarceration, would take great risks getting tested, thus are understandably unwilling to get tested. It is unreasonable to expect people who are undocumented or who have loved ones or neighbors who are undocumented to trust the government during the pandemic.²⁹

c. COVID-19 has taken a significant toll on many states with high Native American populations.

Native Americans, like other minoritized groups and those in lower-income communities, have been disproportionately affected by COVID-19. According to Indian Health Services there are more than 3,607 confirmed cases of the coronavirus among Native American nations, with more than 2,000 cases on the Navajo reservation, which stretches across parts of Arizona, New Mexico, and Utah and is home to 250,000 people.³⁰ As of April 30, the Navajo Nation had the third-highest per capita rate of COVID-19 in the country, after New Jersey and New York.

Worsening the situation, Native Americans appear to have a higher risk of serious complications because they are likelier to suffer from diabetes, heart disease, and other conditions.³¹

d. Household crowding, housing instability, and structural inequality are linked to the higher infection rates in urban areas.

Across the U.S., people living in the most impoverished, crowded, and racially and economically polarized counties are experiencing substantially elevated rates of COVID-19 infection and death.³²

²⁷ *Id.*

²⁸ Ed Morales, *Understanding Why Latinos Are So Hard Hit By COVID-19*, CNN, May 18, 2020.

²⁹ Kathleen Page, Maya Venkataramani, Chris Beyer, and Sarah Polk, *Undocumented U.S. Immigrants and COVID-19*, *The New England Journal of Medicine*, May 21, 2020.

³⁰ Indian Health Service, *Coronavirus (COVID-19)*, retrieved June 6, 2020, <https://www.ihs.gov/coronavirus/>.

³¹ Liz Mineo, *Virus Takes Disproportionate Toll on Tribes' Health and Economy, Harvard Experts Say*. *The Harvard Gazette*, May 8, 2020.

³² Haru Coryne, *In Chicago, Urban Density May Not Be to Blame for the Spread of Coronavirus*, ProPublica, April 30, 2020; Jarvis Chen and Nancy Krieger, *Revealing the Unequal Burden of COVID-19 by Income, Race/Ethnicity, and Household Crowding: US County vs. ZIP Code Analysis*, Harvard Center for Population and Development Studies. Vol 19, No 1, April 21, 2020. https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1266/2020/04/HCPDS_Volume-19_No_1_20_covid19_RevealingUnequalBurden_HCPDSWorkingPaper_04212020-1.pdf.

Neighborhoods with higher crowding rates are more likely to include people who can't avoid close contact with an infected person who lives with them. If space in the household is limited, people living in multi-generational households may find it difficult to take precautions to protect themselves and their family members or isolate those who are sick..

Access to public services is often differentially distributed in communities of color and poorer neighborhoods. Chicago, Detroit, and many other cities have suspended water services, for example, closed community clinics. Residents simply have more limited access to resources to protect themselves and seek treatment.

Services for people experiencing housing instability and homelessness are often provided in congregate settings, which could facilitate the spread of COVID-19. By April 22, 2020, the CDC responded to clusters of positive cases in residents and staff members from five homeless shelters in Boston, Massachusetts; San Francisco, California; and Seattle, Washington. A second study was conducted in 12 shelters in Atlanta, Georgia. Overall, 1,192 residents and 313 staff members were tested in 19 homeless shelters, 293 residents and 33 staff members tested positive for COVID-19.³³

e. Rural areas are more vulnerable because those who live there are often poor with limited access to specialists and testing facilities.

The Center on Rural Innovation reported that there were significant variations in rural areas' preparedness to handle COVID-19 and the life-and-death implications of the pandemic. Access to testing was and remains more limited in rural areas.³⁴

States that are relatively more rural, including Iowa, North Dakota, South Dakota, Nebraska, and Arkansas did not order people to stay at home because social distancing was "built-in" to the geographic dispersion of populations. Small towns, however, are close-knit where community events draw people from several different towns. Industries that include meat packing companies and power plants are considered essential where workers are unable to work from home and are in close contact with their coworkers. These factors combined with the concentrated poverty of many rural areas, increases the vulnerability of rural populations.³⁵

f. Jails and prisons are COVID-19 hot spots with alarming rates of infection.

³³ Emily Mosites, et al. *Assessment of SARS-CoV-2 Infection Prevalence in Homeless Shelters—Four U.S. Cities, March 27-April 15, 2020*, U.S. Department of Health and Human Services/Center for Disease Control and Prevention, Morbidity and Mortality Weekly Report May 1, 2020, Vol 69, No.17, 521-522.

³⁴ Andrew Joseph, *Coronavirus Pandemic Threatens to Take Crushing Toll on Rural Areas*, Data Show, STAT, April 16, 2020.

³⁵ Christopher Cheney, *It's Alarming! Coronavirus Pandemic Hitting Rural Communities Hard*, Health Leaders, April 23, 2020.

In one month of data collection during April 2020, more than 9,400 cases emerged in state and federal prisons across the United States according to an analysis by The Marshall Project.³⁶ The number of cases grew three-fold in the final week of the one-month study. More than 140 people had died. By June 4, 2020, The Marshall Project reported at least 40,656 cases of coronavirus among prisoners, and nearly 500 deaths.³⁷

In Chicago's Metropolitan Corrections Center, 20% of detainees and inmates were infected with COVID-19.³⁸ By early July, 1,800 inmates and staff in San Quentin prison were infected and seven had died.³⁹ Nationwide, 70% of federal inmates tested were positive for COVID-19.⁴⁰

County jails also have high infection rates. Cook County Jail is one of the largest county correctional facilities in the country and houses more than 4,000 people. The jail has one of the largest known outbreaks of COVID-19 in the country. In the Cook County Jail, more than 500 incarcerated people and more than 300 correctional officers have tested positive for COVID-19. The situation was so dire that, on April 13, 2020, U.S. District Judge Matthew Kennelly ordered dramatic additional measures be taken by the Cook County Sheriff to prevent further infection.⁴¹

There is no way to separate people in detention centers by six feet at all times. Many of the surfaces used in these settings – stainless steel and plastic – are the very surfaces where the virus is known to live for days at a time. Limited fresh air and inadequate ventilation compounds these issues.

g. People with disabilities generally have more health-care needs than others and are more vulnerable to COVID-19 complications from underlying conditions that make the disease more dangerous.

Developmental and behavioral disorders impair physical, learning, language, and behavioral areas. The CDC identifies as at-risk people with developmental or behavioral disorders. They frequently express comorbidities including serious underlying medical conditions. They may have difficulties accessing information, understanding or practicing preventative measures, and communicating symptoms of illness and may be at risk of serious illness and complications.⁴²

³⁶ The Marshall Project, *Tracking the Spread of Coronavirus in Prisons*, The Marshall Project, April 24, 2020.

³⁷ The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project, June 4, 2020.

³⁸ Jon Seidel, *Covid-19 Outbreak Among Inmates at MCC in Chicago Among the Largest in the System*, Chicago Sun Times, May 10, 2020.

³⁹ Meredith Deliso and Meredith Longo, *California's San Quentin Prison Using Tents, Warehouse to Treat Inmates Infect with COVID-19*, ABC News, July 9, 2020.

⁴⁰ *Over 70% of Tested Inmates in Federal Prisons Have COVID-19*, PBS NewsHour, April 29, 2020.

⁴¹ Debra Cassens Weiss, *Federal Judge Orders COVID-19 Safety Measures for Chicago-Area Inmates; A Second Detainee Dies*. ABA Journal (April 13, 2020). <https://www.abajournal.com/news/article/federal-judge-orders-covid-19-safety-measures-for-chicago-area-inmates-a-second-detainee-dies>.

⁴² UN Special Envoy of the United Nations Secretary General Disability and Accessibility, *Joint Statement: Local Government and Persons with Disabilities in Relation to COVID-19*, May 5, 2020, <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/05/JointStatement-Local-Governments-PWD-Covid19.pdf>; CDC Coronavirus Disease 2019:

Measures that reduce the risk of COVID-19 infection can impair the effectiveness of a mitigation investigation and best practices for mitigation investigation may cause harm in the context of a pandemic.

h. Social distancing, masking, and avoiding enclosed spaces can reduce COVID-19 transmission.

There is currently no vaccine to prevent COVID-19. The CDC specifies that the best way to prevent illness is to avoid exposure. COVID-19 spreads mainly from person-to-person when in close distance through respiratory droplets and may be spread by people who are presymptomatic or asymptomatic. The CDC recommends avoiding close contact with people who are sick, crowds, mass gatherings, and enclosed spaces. People are encouraged to wear a facemask over their mouth and nose, wash their hands thoroughly, and maintain a safe distance from other people to reduce transmission. Cleaning surfaces that are frequently touched can reduce transmission. Meetings outside or in large, well-ventilated spaces are safer than meetings inside or in small, poorly ventilated spaces.

A mitigation specialist can reduce the risk to witnesses by reducing their own risk of infection. Self-isolating at home for several weeks before field work can reduce a mitigation specialist's likelihood of being a carrier of the virus. Being tested for COVID-19 before conducting in-person fieldwork can also reduce that risk.

While mitigation specialists can take personal precautions, the effectiveness of those precautions may be limited. Early research found that a common test for COVID-19 produced false negatives for up to 30 percent of the testing.⁴³ As many as 80 percent of people with COVID-19 are not aware they have the virus.⁴⁴ Even if a mitigation specialist is not a carrier when they leave their office, they may become infected during the long-distance travel that is often a part of an investigation. There is no way for a mitigation specialist to be reasonably certain that they are not carrying the virus before they go into the field.

The more field investigation a mitigation specialist conducts, the more likely they are to be a carrier of the virus. If a mitigation specialist conducts several in-person interviews in a short period of time, they could carry the virus from the first witness to the next or back to their co-workers. If they conduct an interview in a correctional facility, they could become patient zero, spreading the illness to the next correctional facility.

People with Disabilities (last visited June 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>.

⁴³ Elizabeth Pratt, "False Negatives" in COVID-19 Testing: If You Have Symptoms, Assume You Have the Disease, Healthline, Healthline, April 13, 2020, <https://www.healthline.com/health-news/false-negatives-covid19-tests-symptoms-assume-you-have-illness>.

⁴⁴ Roz Plater, *As Many as 80 Percent of People with COVID-19 Aren't Aware They Have the Virus*, Healthline, May 28, 2020, <https://www.healthline.com/health-news/50-percent-of-people-with-covid19-not-aware-have-virus>.

Ultimately, mitigation investigations may need to continue to accommodate the risks and problems created by the COVID-19 pandemic until a vaccine has been developed and is widely available.

i. Drop-in, face-to-face interviews during a pandemic may permanently damage a witness's trust.

Private, in-person, close-contact interviews are the touchstone of a mitigation investigation. But those same in-person interviews risk transmitting the virus to a witness who is likely to be particularly vulnerable. There are obvious ethical questions about deliberately creating such a risk to a witness, but it might also permanently damage the mitigation investigation. Witness trust is essential to their willingness to disclose essential information. A witness is unlikely to trust a defense team that is willing to expose the witness to life-threatening risks.

An unannounced drop-in at a witness's home will only exacerbate those risks and may further erode a witness's trust. However, abandoning the common practice of dropping in may decrease the likelihood that a witness will agree to an interview.

A mitigation specialist may be particularly likely to damage important relationships if they seek to interview a witness with compounded health and environmental risk factors or who may place other vulnerable people at risk. This includes:

- witnesses that are 65 years old and older;
- immuno-compromised or sick witnesses;
- witnesses with underlying medical conditions, especially respiratory conditions;
- witnesses with insecure housing or who currently homeless;
- witnesses in and out of jails and prisons;
- witnesses who are pregnant;
- witnesses who have not been able to adhere to social distancing guidelines, including essential workers, those living in multigenerational homes, and witnesses living in prisons, nursing homes, or residential-treatment programs.

Mitigation specialists, in most cases, do not have enough information to predict the degree of safety for the interview.⁴⁵ Determining the risk of contact might require an initial phone conversation with the witness, a family member, or a liaison. Long-prevailing professional norms stress the importance of in-person, face-to-face interviews. Phone calls are more likely to jeopardize future contact. For example, witnesses are more likely to decline a phone call since they have no way of confirming who the caller is. Witnesses may also be less comfortable sharing information over the phone because of privacy concerns.

45

A witness risk assessment could be a useful tool for determining whether it is safe to conduct a face-to-face interview in a non-capital case, but the risks should be discussed with the legal team before doing so. Many of the questions involved in a risk assessment can feel personal or intrusive.⁴⁶ Asking those questions before establishing rapport with a witness can permanently damage the relationship with that witness. Conducting such substantive inquiries over the phone is prohibited in capital cases.

j. Personal protective equipment can reduce risk of transmission but may interfere with rapport building.

If the legal team determines that the risk of an in-person interview is acceptable, the mitigation specialist can reduce the risk of transmission by bringing personal protective equipment, such as masks and face shields, for themselves and the witness. However, PPE can interfere with rapport building. They can decrease the witness and the mitigation specialist's ability to read the other's facial expressions. They can interfere with the mitigation specialist's ability to build rapport by mirroring the witness's emotion or expressing concern, sympathy, or other appropriate emotional responses. The visual barrier may also decrease the mitigation specialist ability to detect subtle facial expressions that may indicate inattention, distress, or signals of mental illness. If the mitigation specialist wears a mask,

⁴⁶ For instance, the following questions may be asked to assess a witness's risk:

Behavior

Have you been able to follow social distancing guidelines during the last two weeks? Can you tell me why you haven't been able to?

Have you attended any events including birthday parties, funerals, or church? Have you dined-in a restaurant, gone out to a bar, club, or a party?

Are you able to protect yourself when you are in public? How are you doing so? How are you supporting yourself financially right now?

When were you laid off/lost your job? What kind of work were/are you doing? If current formal employment:

Can you describe your workplace environment?

What safety measures has your employer taken to protect you? Are you able to bring your own mask, gloves, and sanitizer to work?

If informal employment like doing side jobs (construction, hair, cooking, childcare): Are you in your home when working?

What safety measures are you taking to protect yourself while working?

Do you have access to masks, gloves, and sanitizer for yourself and others? If they disclose criminalized survival strategies like selling drugs:

How are you protecting yourself when you are working?

Health

Do you or anyone in your household have any pre-existing or current health problems? Have you or anyone in your household been sick within the last two weeks?

Is anyone in the household currently pregnant?

Are you concerned that someone you've been around recently has exposed you to the coronavirus?

Setting

Would you be comfortable meeting in your home? Can you tell me why not?

How many people are currently living with you?

Would you be comfortable meeting outside, on the porch or in the yard?

Would you be comfortable in an alternative location that would help us follow social distancing guidelines?

Do you have access to a mask or face shield? Would you like me to supply you with a mask or face shield for our meeting?

Do you have any health concerns that make it difficult or dangerous to use a mask?

Do you have any impairments to your hearing that would make it difficult to hear me with a face shield?

the witness may take that as a sign that the mitigation specialist is infected or that the mitigation specialist does not trust the witness. Any of these results can damage the relationship with the witness and thereby the efficacy of the mitigation investigation.

Precautions may be difficult to adhere to. During the interview, the mitigation specialist or the witness may feel pressure to remove their masks because they are having difficulty being heard. If the mitigation specialist or a witness fails to maintain social distance, it may cause offense or fear of offense if the mitigation specialist or witness moves away, asks the other to move away, or feels the need to terminate the interview to protect themselves.

In recent weeks, the use of PPE and participating in social distancing have become politically charged activities.⁴⁷ Choosing to wear a mask or taking other steps to reduce the risk of transmission may lead a witness to make undesirable conclusions about a mitigation specialist's politics.

At the same time, overt expressions of racism and police violence against Black, Indigenous, and other people of color have been more apparent and have received more attention. The decision to wear a mask, meet outside or in public, or open the door to a stranger may be increasingly influenced by the race of the witness and the race of the mitigation specialist. If a mitigation specialist appears insensitive to these concerns, it can cause further damage to the relationship with the witness and to the investigation.

The mitigation specialist may also attempt to reduce risk by sanitizing pens and other shared materials. This can break the flow of the interview or signal distrust or fear.

The use of PPE may be necessary to reduce the risk of infection transmission to an acceptable level, but it is likely to hamper the effectiveness of an interview to an unacceptable degree.

k. Interviewing a witness in a location other than their home may increase safety but decrease the witness's comfort and the information a mitigation specialist can gather.

Interviewing a witness in their home offers advantages that no other location provides. A witness may be more comfortable and feel safer at home. Because the mitigation specialist is a guest while the witness is the host, the home setting can help to correct the power imbalance that puts the mitigation specialist in a position of authority over the witness and can inhibit disclosure. An indoor setting in a home also provides more opportunities for the privacy that is necessary for a sensitive discussion.

Using a witness's home bathroom is often necessary in a long interview. Walking between rooms allows the mitigation specialist to see more of the home and evaluate cleanliness, furnishing, and the availability of food and to look for family photos or documents like diplomas or military awards. If the

⁴⁷ See e.g., *Coronavirus: New Survey Shows How Republicans and Democrats are Responding Differently*, THE CONVERSATION, May 12, 2020.

mitigation specialist leaves their belongings with the witness while going to the bathroom, that can signal trust in the witness and build rapport. Likewise, sharing food and beverages may be a cultural norm that builds relationships. Refusing an offer of food or drink may cause offense.

According to a study conducted by the National Science Foundation, kitchens, bathrooms, and home offices tend to be the most bacteria-ridden in households.⁴⁸ By refraining from using the bathroom or sharing food, mitigation specialists can reduce transmission risk but forgo an important tool for rapport building.

A mitigation specialist may sit next to a witness while the witness shows and explains photo albums or records like school records or funeral programs. They may also sit close while the witness reviews and a mitigation specialist explains a release to obtain the witnesses school, medical, or other records. By avoiding such a situation to maintain social distance, the mitigation specialist may increase safety but lose an opportunity to build a relationship and access valuable information.

The defense team may attempt to reduce health risk by considering conducting interviews in locations other than the witness's home, which may be more sanitary or have better ventilation than a witness's home. An interview outdoors, on a porch or in the yard or driveway may reduce the transmission risk, but the lack of privacy or bad weather may reduce the success of the interview.

A professional office may be more sanitary, and a conference table may allow the mitigation specialist to maintain social distance. But a witness may feel uncomfortable or disempowered and therefore less willing to reveal sensitive information.

If the witness is in a nursing home, hospital setting, or residential setting, the mitigation specialist can contact their case manager or a relevant staff person to ask for assistance in setting up a private and safe space for the meeting. Following this guideline could help reduce risk of transmission but could also pose additional risks for the success of the interview. Third parties could ask questions that violate the witness's privacy, decline the visit, or cause harm to the witness, particularly in high-profile cases or cases in small or tight-knit communities.

Interviewing a witness in their home may be impossible because of the safety risks that setting creates. But interviewing a witness in a different location may cause unrepairable damage to the mitigation investigation.

I. Visits in correctional facilities are often impossible, and are certainly dangerous to the defense team, the client, and other people in the correctional facility.

⁴⁸ NSF International, International Household Germ Study, 2011, https://www.nsf.org/newsroom_pdf/2011_NSF_Household_Germ_Study_exec-summary.pdf.

Incarcerated people live, work, eat, and often sleep in congregate environments, heightening the spread of COVID-19. High turnover rates, with new people admitted daily, and correctional staff coming and going, make it difficult to protect incarcerated people from infection. The ability for incarcerated people to exercise disease prevention measures, like frequent handwashing, is determined by their access to supplies. Incarcerated people have reported that they are making masks out of socks and shirts, are denied access to cleaning supplies and medical care, and have been housed without access to water.

While these factors and the impossibilities of quarantine create significant risks for the mitigation specialist and their clients, most facilities are locked down, preventing face-to-face visits entirely.

Calls and video conferences are unreliable, and access varies by facility. Legal teams must ask staff to arrange the calls, which places new stresses on the already sensitive relationship defense teams have with correctional staff. This power dynamic makes it difficult to push for better arrangements. Uncooperative correctional officers can retaliate, refusing to assist the team or targeting the client in abusive ways.

Calls and videos with defense teams are shortened in some cases and may take place within the earshot of correctional staff compromising the client's privacy and what the team can accomplish. Companies that provide telephonic and video communications have recorded privileged communication in the past, creating further doubts about whether confidential communication with clients is currently possible.

Phone calls and video conferences fail utterly to provide the safe, confidential, and intimate setting that is necessary to discuss sensitive issues related to the client's history or difficult legal decisions such as whether to accept a plea offer.

Mitigation specialists bring hard copies of releases for the client to sign. Without face-to-face contact, defense teams have to further rely on correctional staff to assist in obtaining the client's signature. This practice compromises the client's privacy, and the team is unable to assess whether the client understood the documents they were asked to sign.

Some legal teams have succeeded in acquiring better arrangements by partnering with institutional defender offices to demand changes in correctional policies to allow for regularly scheduled telephone or video communication with the client or to allow defense team members to bring hand sanitizer or disinfectant into the facility.

m. Remote Interviews are unacceptable in capital cases and have serious disadvantages in non-capital cases.

In non-capital cases, the team may have the ability to make some compromises to accommodate pandemic conditions. In capital cases, the defense team must abide by the American Bar Association Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases,⁴⁹ and the Supplementary Guidelines even if the pandemic makes compliance more difficult. Telephonic and video communication may be appropriate for casual check-ins to maintain existing relationships, but substantive remote interviews are therefore impermissible in capital cases.⁵⁰

In a non-capital case, if there is a substantial need to conduct an interview and there is too great a risk for the witness or the mitigation specialist to do so in-person, the defense team might consider a video interview using an application like Whatsapp, Skype, or Zoom.⁵¹ The security and encryption of video-conferencing applications are in flux, so defense teams should investigate existing protections and security gaps before deciding to use a particular platform.⁵² Teams must consider that this requires a level of access to resources that some witnesses will not have.

In every instance in which the team considers conducting a remote interview, it must consider the need and the cost to the quality of the information potentially provided. For example, elderly and sick witnesses might not survive long enough to delay the interview until after the pandemic, but in-person, face-to-face contact could complicate their health conditions severely.

Interviewing professionals remotely may have lower cost than remote interviews with family members. The content of an interview with a professional may be less emotionally charged than an interview with a family member. In addition, some professionals in multiple fields are accustomed to working remotely, while this may not be true of all witnesses.

Legal teams can consult family members with whom they have built relationships with to assess risk or vulnerabilities of other witnesses. This method will likely take more time, since interviewing would rely on the development of relationships rather than dropping-in. Visits to correctional facilities, nursing homes, and vulnerable witnesses may have to wait until there's a vaccine. Depending on the case, there may be no way to balance safe and ethical measures to reduce health risks while providing effective assistance.

⁴⁹ 31 Hoftra L.R. 913 (2003).

⁵⁰ ABA Guideline 10.5 – Relationship with the Client.

⁵¹ Consider asking the witness these questions to assess the witness's access needs.

Do you have access to a computer at home?

Do you have internet access at home? How reliable is your internet connection?

Have you used apps like Skype, Zoom, Google Duo, Whatsapp, or Facetime?

Do you have any concerns with using an app, including impairments with vision or hearing?

Is there someone who can help you install an application on your computer or phone so we can see each other while we talk?

⁵² See, e.g. Nico Grant and Candy Chang, *Zoom Says Subpoena is Needed to Work With Law Enforcement*, BLOOMBERG, June 5, 2020.

The following factors are among those that limit the ability to gather information or encourage a witness to disclose sensitive information during a remote interview as compared to an in-person interview:

- Inability to confirm the identity of the witnesses and others who may be observing or listening to the interview;
- Inability to truly identify yourself at a time when robocalls and telemarketing scams are at an all-time high, which has caused a trust deficit in telephonic interactions;
- Inability to secure the confidentiality of calls;
- Difficulty in learning information about the witness from their environment (conditions of the home, neighborhood characteristics, etc.);
- Difficulty in obtaining copies of records witnesses may have (childhood pictures, school records and year books, letters, etc.);
- Difficulty in collecting releases signed by the witness in a timely fashion;
- Limitation on the ability to properly observe physical characteristic and body language including whether the witness has muscle spasms, ticks, shakes, struggles to maintain sustained eye contact and so on;
- Limitation to observe hygiene including odors, general cleanliness of the environment and so on.
- Limitations on observations of the immediate environment included the presence of substances (legal or otherwise), medications, holes in the walls or floors, and soon.

n. Record collection is also impaired by the pandemic.

Schools, correctional facilities, health-care providers, and nearly every organization or business imaginable has been impacted by the COVID-19 pandemic. Many are closed, short staffed, or do not have the capacity to respond to records requests. While defense teams have tried to maintain record collection processes, they expect delays and complications to persist as state and local governments lift social-distancing restrictions and staff return to work.

When a mitigation specialist encounters difficulties obtaining records, they will follow up on their request with an in-person visit to the office. But record collection often relies on the same relationship-building techniques that are the foundation of mitigation interviews. An unannounced visit to the records custodian is less likely to be successful during pandemic conditions and might permanently damage the relationship with the record custodian, ultimately interfering with the team's ability to collect the needed records at all.

4. Every deviation from best mitigation practices and every strategy to reduce infection risk comes with a cost to the quality of the representation.

A defense team's ability to conduct a mitigation investigation is likely to be impaired for some time. The team's flexibility to adjust their mitigation investigation practices depends on the nature of the case and is much more tightly constrained in capital cases than in non-capital cases.

In every instance that the team considers deviating from best practices, they must consider the need for and the cost of that deviation.

Mitigation specialists should understand the state regulations, COVID-19 responses, and their individual risk before agreeing to work on a new case. Ultimately, it is the mitigation specialist's role to identify best practices and the costs of compromising best practices. The final design of the investigation plan in light of that information may fall, at least partially, to others.

In the case of capital and juvenile-life-sentence cases, it's likely impossible to conduct a substantive mitigation investigation in a way that comports with constitutional requirements. In every case, the ability to conduct responsible and high-quality mitigation investigation will be substantially, perhaps entirely, impaired.

For questions, comments, or other concerns, please contact Betsy Wilson, Sentencing Advocacy Group of Evanston, betsy@sagemitigation.com.