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# Forensic mental telehealth assessment (FMTA) in the context of COVID-19

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ABSTRACT

Due to the present COVID-19 pandemic, forensic mental telehealth assessment (FMTA) is an increasingly utilized means of conducting court-sanctioned psychiatric and psychological evaluations. FMTA is not a novel development, and studies have been published during the past two decades that opine on the positive and negative implications of conducting testing and interview procedures online, in forensic and traditionally clinical matters alike. The present article examines prospects for eventual legal challenges to FMTA, describes considerations for conducting FMTA in both institutional and residential settings, and concludes that FMTA is now—due to predicted accommodations on the part of courts, attorneys, institutions, and professional guilds—a permanent part of the forensic evaluation landscape, even once the present COVID-19 pandemic has subsided.

## 1. Introduction

During the past two decades, forensic mental health assessment (FMHA) has been the rubric under which court-sanctioned psychiatric and psychological evaluations are most commonly studied (*see, e.g.,* Heilbrun, Marczyk, & DeMatteo, 2003; Zapf, Kukucka, Kassin, & Dror, 2018). As a direct consequence of the COVID-19 pandemic, the courts have witnessed in recent months a sudden, situationally compelled shift to forensic mental *telehealth* assessment (FMTA). Access to jails, prisons, hospitals, care homes, clinician offices, attorney offices, and private residences has been severely curtailed by a combination of institutional safety policies, governmentally imposed travel restrictions, and other manifestations of what are generally termed "physical distancing constraints" (Wright, Mihura, Pade, & McCord, 2020). Forensic evaluators are increasingly encouraged to conduct testing, interview, and collateral inquiries *via* such interactive social media platforms as Skype or Zoom (Levy, 2020). This article undertakes to address the nature of FMTA, and how it is and will continue to be performed in the context of COVID-19 and beyond.

## 2. FMTA components and antecedents

FMTA is not, of course, a novel development—nor is the scientific criticism its burgeoning components have tended to attract. For example, with regard to *testing*, Buchanan (2002) observed almost 20 years ago that "levels of computer anxiety can affect participants' responses in different ways," and that "certain individual differences may affect the way people respond to online tests" (p. 151). Soon thereafter, James and Busher (2006) identified concerns regarding "the authenticity of participants' voices" in online *interviewing*, and the degree to which that authenticity is "affected by power and control in the interview process" (p. 403).

Such concerns continue to be addressed to the present day, with regard to an array of specialized applications that include neuropsychological assessment (Brearly et al., 2017; Galusha-Glasscock, Horton, Weiner, & Cullum, 2016; Harrell, Wilkins, Connor, & Chodosh, 2014; Wadsworth et al., 2018), dementia evaluations (Cullum, Weiner, Gehrmann, & Hynan, 2006), autism evaluations (Parmanto, Pulantara, Schutte, Saptono, & McCue, 2013; Smith et al., 2017), and school-based cognitive and achievement testing (McGill, Dombrowski, & Canivez, 2018; Wright, 2018), among others.

By contrast, although online *psychotherapy* initially raised concerns as well (*see, e.g.*, Griffiths, 2001), it was helped along in considerable part by the long-standing use of telephone psychotherapy, which was lauded even 50 years ago as a medium that "serves a legitimate place in the armamentarium of the therapist and the clinic" and as one that "should not be accorded second class status" (Rosenblum, 1969, p. 242). This dichotomy is not surprising, given the higher standard to which forensic and clinical testing—as opposed to clinical treatment services—are always going to be held, due to a potential combination of property and liberty interests (Schopp, Wiener, Bornstein, & Willborn, 2009).

## 3. FMTA as a free-standing assessment modality

Overall, rather sparse attention has been paid to FMTA *per se* in the

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professional literature. Brodey, Claypoole, Motto, Arias, and Goss (2000), opining on the "moderately high" satisfaction of examinees with "remote telepsychiatric evaluations," described what at that time seemed like a highly futuristic operation: "a V-Tel work station running on a personal computer" with "real-time interactive audio system" that transmitted at a blistering "384 kilobytes per second" (p. 1305). By contrast, the current standard for "good" Internet speed is typically considered to be at least 65 times faster than that, at approximately 25 megabytes per second or higher (Anders, 2019). An early "telepsychiatry forensic clinic" was described by Miller et al. (2005), with a particular focus upon consultation in cases which examinees were still "seen in their community setting through the rural clinic and, in the case of children, through the school system" (p. 540).

Lexcen, Hawk, Herrick, and Blank (2006) reported "good to excellent reliabilities" (p. 713) in a comparison of FMTA and standard FMHA administrations of the Brief Psychiatric Rating Scale—Anchored Version and the MacArthur Competence Assessment Tool—Criminal Adjudication, while acknowledging that "[i]nterviews with standardized instruments constitute only one aspect of mental health and forensic assessments and cannot be substituted for complete evaluations" (p. 715). Similarly, Manguno-Mire et al. (2007) identified "high levels of agreement between telemedicine and live interviews," utilizing the Georgia Court Competency Test (p. 481), while noting that "[i]nterviews using standardized tools for competency evaluation, such as the GCCT, constitute only one facet of forensic mental health and should not be considered in isolation in routine practice" (p. 487).

Such psychologist-driven, testing-focused research efforts were soon recognized in studies that generally popularized the benefits of physician-oriented "forensic telepsychiatry" as well (Gunter, 2010), eventually extending in focus beyond the United States to such additional jurisdictions as South Africa (*see, e.g.* Mars, Ramlall, & Kaliski, 2012) and the United Kingdom (*see, e.g.* Sales, McSweeney, Saleem, & Khalifa, 2018), although FMTA remains a primarily American phenomenon. Even prior to the current COVID-19 pandemic, FMTA was being touted as a means of addressing "increasing demands on available resources" (Luxton, Lexcen, & McIntyre, 2019) that, according to Luxton and Lexcen (2018), can result in "long waitlists and significant concerns regarding the civil liberties of persons who are waiting for evaluations" (p. 124), albeit with an acknowledgment that FMTA should be undertaken with an understanding that there will always be examinees who require either "a hybrid assessment method" or a traditional "inpatient evaluation" (p. 129).

## 4. Legal reactions to FMTA

Whatever reservations applied social scientists may continue to express about various forms of telehealth, the courts have yet to engage in an FMTA-related debate to any significant extent. Manguno-Mire et al. (2007) did manage to identify "one report of a case in which the use of video-teleconferencing was an issue on appeal" (p. 488). That Federal matter, *United States v. Baker* (1995), addressed concerns that a state hospital doctor's hearing testimony was difficult for a civil commitment respondent to follow, due for example to "an almost constant shifting between live and video images" (p. 842). One recently reported case referred to telehealth in the context of a *habeas corpus* action seeking the release of a Federal inmate due to allegations that "the relevant detention facilities cannot adequately prevent, manage, or treat a COVID-19 infection" (Refunjol, 2020), but the services in question were clinical, not forensic. The same WESTLAW search that located this case failed to discern, for example, any contemporary legal matters that turned on the computerized nature of "online assessment" or "Internet-based testing" procedures.

Surely, though, the blossoming of FMTA-related appeals, post-conviction motions, and fresh causes of action is merely a matter of time. Currently, attorneys and the mental health witnesses they retain are doing whatever they can to maintain services during a time of unprecedented confusion. That does not mean, however, that counsel on either side of the aisle will refrain in the future from alleging procedural and other substantive inadequacies, with due reference to standardized test manuals, guild-driven assessment guidelines (*see, e.g.*, Wright et al., 2020) and state-sanctioned emergency provisions (*see, e.g.*, American Psychological Association, 2020), as counsel attempts to overturn or seek redress for decisions seen as unfavorable to the parties being represented. It is at the very core of such strategies to identify and condemn what counsel sees as a departure from standard protocols, and at times that is exactly what FMTA does—or is perceived to—represent.

## 5. Undertaking FMTA in the context of COVID-19

The limited professional literature on FMTA offers predictably and understandably scant attention to circumstances in which face-to-face evaluations are obviated by pandemic circumstances. During the H1N1 pandemic of 1918–1919, rotary telephones went into mass production (McFadden, 2019), and AT&T was refining its design for personalized telephone headsets (Feldman, 2005)—two circumstances that lent themselves to a greater degree of privacy for sensitive communications—but in the immediate wake of the First World War, forensic psychiatry itself still lacked "dynamic leadership for the growth of a subspecialty in forensic psychiatry, let alone the psychiatric profession generally" (Prosono, 2017, p. 25). Bereft of specifically pandemic-defined scientific precedent, today's FMTA evaluators are essentially fending for themselves.

### 5.1. Institutional settings

At the time of this writing, institutional settings such as jails, prisons, hospitals, and care homes are disproportionately affected by the COVID-19 pandemic (*see, e.g.*, The Marshall Project, 2020). Often underfunded, understaffed, and minimally equipped, confining facilities are frequently overcrowded into the bargain, and populated with residents who in many cases have pre-existing medical conditions that make them more susceptible to infection than others. Institutional settings fear both the importation as well as the exportation of COVID-19, and have sought as a result to restrict visitation whenever feasible. As the present author was informed by a juvenile detention center superintendent during the first formally recognized weeks of the current pandemic, "you need to realize that we don't even let our *own* psychologists in here these days."

Persuading an institutional setting to enable FMTA can be a daunting prospect at first. Virtually all of them possess the necessary technology—an Internet connection, and an audiovisual-ready computer or smartphone—but may balk at the prospect of placing such expensive equipment in or near the hands of the examinee. On more than one occasion, the present author has found it necessary to pledge to reimburse the facility for any machinery damaged in the course a forensic examination. In some cases, there is an existing court order in place that restricts Internet access—for example when the examinee has been convicted of (or charged with) some form of online harassment or online pornographic offense.

For these reasons, some facilities have initially insisted that a staff person remain in the room with the examinee when FMTA is being conducted. The problems with this are presumably obvious, involving confidentiality, privilege, test security, and the inhibition of responses. Even when such concerns have been finessed—typically with the intervention of counsel, and perhaps the court as well—it is advisable to ask the examinee, at the outset of testing or interview, whether there is another person present in the room or otherwise within earshot. Detention facilities commonly record conversations that occur between inmates and families, and sometimes those recordings are programmed to occur automatically (Francescani, 2019). This underscores the importance of using lines of communication that are either designated for attorney-client use or fashioned independently for the examination in

question.

Once FMTA is approved, it may initially be slated to occur in a room with a distracting echo, or physically arranged in such a fashion that the examinee cannot properly hear, be heard, see, or be seen, underscoring the need to attempt a "dry run" with presently arrayed equipment before the examination formally commences. In criminal matters, a facility's lack of willingness or ability to provide designated, unmonitored, and visually as well as acoustically suitable FMTA conditions can sometimes work to counsel's advantage. Such circumstances may present an opportunity to renew requests for a lowered bond—or even a furlough—with electronic monitoring, if necessary, so that the evaluation can be conducted in a fashion that enables legal proceedings to move forward, to the court's gratification, in a timely manner.

### 5.2. Residential settings

The prospect of FMTA being conducted in *residential* settings presents what is essentially an inversion of concerns raised by conditions that may be present in *institutional* settings. For example, the core problem is more the prospect of solicited or unsolicited assistance than external interference. To what extent is a friend, relative, or legal representative, just outside the visual frame, physically gesturing or showing written notes to the examinee, advising what the "correct" answers might be, suggesting a change of topic, or urging that a current conversational drift be taken in the opposite direction? This problem can be potentiated still further when a third party participates directly in online exchanges and attempts to conduct some sort of backchannel conversation with the examinee by means of a "chat" function or similar feature.

There may also be a do-it-yourself, "cheating" element (Wise, 2018) to residentially based FMTA that would be not normally a factor in a jail, prison, or hospital. Examinees may be tempted to consult the smartphones in their laps or, indeed, to review documents or the results of *ad hoc* Internet searches that they can pull up on the very same screen being used for the forensic interview. In addition to conveying to examinees ahead of time that such activities are unhelpful and unacceptable, evaluators are best advised to position cameras for each participant so that direct eye contact is the baseline setup. Subsequent, suspiciously timed deviations in gaze may prompt a cautionary inquiry. It may also be possible to impose a "shared screen" function or similar feature so that the examiners are seeing almost exactly what it is that examinees are seeing. Naturally, however, examiners will strive to avoid creating an overly distracting visual field of the sort referenced above concerning the case of *United States v. Baker* (1995).

## 6. Conclusion

The current prevalence of Internet-based evaluations may wane somewhat once the COVID-19 pandemic is brought under at least temporary control, but FMTA is with us to stay and can only be expected to increase in frequency and volume during the years to come. Courts cannot help but be impressed by the decrease in travel costs, and by the shorter turnaround time occasioned by more flexible scheduling. Attorneys will become more skilled at defending their own experts' engagement in FMTA, and will at the same time hone their skills in detecting and exploiting—with the assistance of trial consultants—any subtle or not-so-subtle deviations that can be ascribed to experts for the opposing side. Institutional settings, once revised procedures are comfortably in place, will habituate conveniently to the new order of business, while fresh innovations in screen control will help to reduce third-party interference and examinee cheating when FMTA is conducted with persons located in residential settings. Professional guilds, anxious not to see their constituents cheated out of a share of FMTA invitations and proceeds, will promulgate and revise codes and guidelines for the purpose of maintaining the process within ethically acceptable limits.

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## Ethical approval

The attached manuscript is a perspective piece and therefore does not require any ethical approval from a research ethics committee.

## Declaration of Competing Interest

Eric Y. Drogin serves on the faculty of the Harvard Medical School in Boston, Massachusetts USA; the views expressed are his own. He has no conflicts of interest to declare.

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