

# **Legal Letters by Andrew Agatston: The Legal List**

## **Forensic Interviewers and Support Persons “In the Room”**

One of the very important roles within a Children’s Advocacy Center is the victim advocate. The nomenclature may be different from CAC to CAC, but the roles are defined: assist and provide support so victims will participate in investigations, prosecutions, needed treatments, needed support services, and more.

There must be a coordinated response to the expansive needs of child sexual or physical abuse victims. At the same time, the child victim must be prepared to participate in the criminal (and sometimes civil) processes. Still more, the child’s physical and mental self must be addressed, and restored.

So many roles, so many hats for the CAC’s victim advocate. And as with all CAC professionals, the question arises: is there a hat that is one hat too many?

So for example, if the victim advocate is the front line coordinator for the child victim’s immediate and continuing needs, does that include serving as a support person either observing the forensic interview or being present during the forensic interview as a support person if the child and/or her non-offending caregiver requests it?

After all, if emotional support is important after a forensic interview, why isn’t it before and during?

I am now putting on my lawyer/trial lawyer/lawyer-for- CAC hat. And despite the huge and myriad roles victim advocates play in the CAC mission, my answer is generally no. (The “generally” part is addressed later in this Legal Letter.)

### **First things first**

The first thing to do is see whether the state legislature or the state’s appellate courts have laid down any rules. Are there any statutes (laws passed by your state legislators) that set forth protocols for forensic and/or investigative interviewing of children? Next, are there any administrative regulations having to do with the same thing? In Georgia, there are neither, but, e.g., in Michigan, where they completed an exhaustive review of protocols and literature related

to investigative interviews of children, they conclude that a support person in the interview is not recommended.

If there is a statute telling us how to conduct the interviews, we follow the statute. If not (as with Georgia), I can now proceed to my trial lawyer concerns. And when I think like this, I want to know where my opponent is going. I don't want to give him or her any easy ammunition or arguments that will hurt my client's case. I am certain this is also the case with prosecutors.

### **What is the subject matter?**

Forensic interviews are objective and fact-finding, and they involve children who at this point are *alleged* victims. Objectivity is critically important in the forensic interview process, and it is imminently reasonable for jurors to hold interviewers to that “objectivity” standard.

Consequently, it is a routine defense tactic to attack the objectivity, or the alleged lack thereof, of forensic interviews with arguments of confirmatory bias, etc. Prosecutors cannot entirely control defense tactics, but they can try to make sure that the strategy will fall on deaf ears.

A victim advocate comprehensively supports, assists, and helps the *victim*. At the objective forensic interview stage, we are required to gather facts. Indeed, it is important that forensic interviewers also explore alternative hypotheses. After the forensic interview, law enforcement continues its investigation.

Thus, the general “victim advocate” definitional concept runs contrary to the forensic interviewer’s objectivity. It is important in the CAC model to have a clear distinction between “advocacy” and “forensics.”

*(NOTE: Evidentiary rules are triggered by a victim advocate’s forensic interview participation, but discussion of this is beyond the scope of this Legal Letter.)*

This does not mean that the victim advocate does not have responsibilities during this stage. The victim advocate still can assist in coordinating a variety of activities.

I note that [NCA standards for membership](#), at Standard #4, addresses victim support and advocacy. I view Standard #4 as the victim advocate fulfilling a *coordinating* role to ensure access to the various stages of investigation (as well as access to needed services).

What do you think a defense attorney will say about a victim advocate either observing or

sitting in as a support person? (Whether he wins this argument with the jury is a matter of jury interpretation. The point is that he has the argument.) He says that it is contrary to the spirit, letter, and definition of forensic interviews. He says that because victim advocates are not "objective" in terms of whether or not they see the child as having been abused or victimized (regardless of how the victim advocate views herself), it is contrary to standard and protocol. A forensic interview that is contrary to standard and protocol, the argument goes, cannot be trusted.

The defense lawyer also has a confirmatory bias button to push against a forensic interviewer on the witness stand who "allows" a victim advocate to observe or be in the room. Specifically, the argument is that when you combine the process of advocating for victims with the forensic aspect of an investigative interview of a child, you are no longer ensuring the process is objective. Children come to advocacy centers as *alleged* victims under a report of suspected child abuse. Abuse has yet to be determined. There is much work to do yet, including the forensic interview and trying to locate corroborating evidence.

### **FIs are dartboard bull's eyes**

We are imminently familiar on this Listserv, through the reading of appellate cases, that forensic interviews are a huge target by the defense, at trial and on appeal. Every line of attack will be launched. So anyone who observes the forensic interview or sits in on the forensic interview can be subpoenaed as a witness. Their perceptions of the forensic interview, including the methodology when they are not trained in the methodology, might be open to question. This is not a good position for a victim advocate to be in, and ultimately it is not a good scenario for the child.

Instead, we should focus on forensic interviewer herself, and her training. It should be such to ensure that most children (assuming no disabilities or other related concerns) do not need a victim advocate at the point of entry.

Jurors should understand that forensic interviewers are trained to handle the developmental needs of children so they conduct an objective, neutral, fact-finding forensic interview that is not just admissible at trial, but persuasive evidence that a jury can rely upon.

These thoughts do not take into account the role of an advocate who has been assigned to a child with a disability and needs special services based upon his disability, which is why I said

on Page 1 it was the “general rule.” However, even in that situation, the advocacy should be for the necessary environment, equipment, or specialist to conduct the interview and not to sit in the interview or to observe the interview, although I would think that this would almost certainly be seen as more reasonable by a jury.

In summary, as it relates to lines of attack, victim advocates come from a subjective stance and forensic interviews are objective and fact finding.

I’ll end with language found in the Michigan Forensic Interview Protocol, referenced for your review. It is online [here](#), and speaks to “support persons”:

*“The presence of social support persons during forensic interviews is discouraged. Although it makes intuitive sense that children might be more relaxed with social support, studies have failed to find consistent benefits from allowing support persons to be present during interviews (Davis & Bottoms, 2002). Support persons might be helpful during early portions of interviews, but they might also inhibit children from talking about sexual details. Individuals who might be accused of influencing children to discuss abuse, such as parents involved in custody disputes or therapists, should not be allowed to sit with children during interviews.*

*“If the interviewer deems a support person necessary (a social worker or teacher, for example), this individual should be seated out of the child’s line of sight to avoid criticism that the child was reacting to nonverbal signals from a trusted adult. In addition, the interviewer should instruct the support person that only the child is allowed to talk unless a question is directed to the support person.”*

This would be a fantastic discussion to have during an MDT meeting, not just to discuss the victim advocate role, but to button down which MDT members will ultimately participate in some way in the forensic interviewing of a child.

Best regards.

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