Bookmarks

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Witness intimidation[1] is a problem that can affect any criminal prosecution at any time during the course of the criminal proceedings. In certain types of cases, however, witness intimidation is especially predictable—among them, cases involving domestic violence, child abuse, elder abuse, gang violence, organized criminal activity (including organized drug crime), and human trafficking. Most often, the source of the intimidation is the defendant or the defendant's allies, including friends, family, or criminal associates. Sometimes even the witness's own family or friends, or the community itself, will actively discourage a victim or witness from cooperating or testifying.

"Intimidation," as the word is used in this *Resource*, should also be understood to include not only acts of force or coercion (fear-based intimidation) but also subtle forms of psychological or emotional manipulation, when those manipulations are intended to induce witnesses to remain silent or to testify falsely.

Prevention of, and effective response to, witness intimidation requires the concerted effort of everyone involved in the criminal justice system, along with community-based advocates and other professionals who work with crime victims or with defendants. AEquitas has published a monograph, *Witness Intimidation: Meeting the Challenge*,[2] which details the strategies that can be employed by everyone involved in the criminal justice system throughout the investigation and prosecution of a case, as well as during post-conviction incarceration and supervision, to prevent intimidation and to respond effectively when it occurs. The monograph emphasizes the benefits of a cooperative and collaborative approach to the problem.

This *Prosecutors' Resource on Witness Intimidation* is intended specifically for prosecutors. The *Resource* outlines strategies for effective prosecution of cases where witness intimidation is, or may be, a factor. It is intended both as a checklist of actions that can increase the likelihood of successful prosecution and as a reference to assist the prosecutor in handling typical problems and legal issues that arise in prosecuting cases involving intimidation.[3] The *Resource* further provides guidance for prosecution practices that will enhance the safety of victims and witnesses. Two other *Prosecutors' Resources* have been developed by AEquitas that also may be helpful in prosecuting cases involving witnesses who are absent from trial due to intimidation: *Crawford and its Progeny*[4] and *Forfeiture by Wrongdoing*.[5] Those *Resources* provide legal analysis and references to case law interpreting the Sixth Amendment's Confrontation Clause and the exceptions to the rule of confrontation when acts of intimidation prevent witnesses from testifying in court.

This *Resource* is organized into three parts. Part I discusses the first steps that should be taken when a prosecutor is assigned a case in which witness intimidation is, or may be, an issue. Part II discusses steps to be taken and strategies that can be employed during the pretrial phase of a criminal prosecution, up through the final pretrial conference. Part III discusses trial strategies that will enhance the likelihood of a successful prosecution that will result in a guilty verdict and an appropriate sentence, including appropriate post-release conditions that will enhance the ongoing safety of victims and witnesses.

1 Throughout this resource the terms "victim" and "witness" will be used together and separately. Victims are witnesses to the crimes committed against them, and the term "witness intimidation" includes victims.
2 Teresa M. Garvey, J.D., Witness Intimidation: Meeting the Challenge (2013), available at http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf.
3 See Appendix B, A quick look at prosecuting cases involving intimidation.
4 AEquitas, The Prosecutors' Resource on Crawford and its Progeny (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf.
5 AEquitas, The Prosecutors' Resource on Forfeiture by Wrongdoing (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

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I. Is There Witness Intimidation in Your Case? First Steps

Experience has shown that criminal defendants inclined to engage in witness intimidation will take advantage of any available opportunity to do so.[6] The longer it takes for a case to go to trial, the more likely it is that some of these attempts to intimidate will ultimately succeed. It is critical, therefore, that these cases move to trial as expeditiously as possible, with witness protection and evidence preservation at the forefront of trial preparation efforts.

As soon as a case is assigned, whether you assume responsibility for the case immediately after arrest or shortly before trial, carefully review the case for potential intimidation issues. In cases involving domestic violence, child abuse, elder abuse, or human trafficking, witness intimidation of some sort is a virtual certainty. Even if there has been no contact between the victim and the defendant since the defendant's arrest, the dynamics involved in these crimes usually dictate that intimidation has been occurring on an ongoing basis, long before the criminal act that precipitated the defendant's arrest. Defendants routinely intimidate their victims in these cases in order to prevent the victims from reporting what has usually been a long-standing pattern of abusive conduct. As a result, the victim may be afraid of cooperating with the prosecution, and afraid to testify, because the defendant has made it clear that speaking out will have dire consequences. Or, as a result of the defendant's emotional manipulation, the victim may be feeling guilty and responsible for the defendant's ensuing legal problems.

In cases involving organized crime—or gang-related violence, particularly those occurring in gang-dominated neighborhoods, witnesses are also predictably fearful and reluctant to testify. Intimidation in those cases is generally fear-based, involving fear of violent retribution on the part of the defendant or the gang, or fear of social disapproval as part of the "no snitching" culture of the community. Emotional manipulation may be a factor in some of those cases, too—particularly where the witness is a partner or friend of the defendant, or is a fellow gang member.

In any case where intimidation is or may be a factor, timely actions can make the difference between a successful prosecution and an unsuccessful one. As a prosecutor, you can increase the probability of a successful outcome by implementing the following strategies immediately upon assuming responsibility for a case.

- **Initial Case Review**

  In reviewing the case, carefully read the police reports, any recorded statements, and all notes by investigators and any previously assigned prosecutors[7] concerning any follow-up contacts with the victim and witnesses. Refusal to cooperate in providing a statement, or sudden reluctance to speak with or meet with police, investigators, prosecutors, or even an advocate, particularly when the victim or witness was initially cooperative, is often an indication that intimidation conduct is occurring.

  Remember that police reports may include indications of intimidation conduct that may not have been recognized as such by the responding officers. Any such indications warrant a follow-up call to the officer, and suggest follow-up

6 Rhonda Martinson, Charlene Whitman, Elizabeth Wofford & Graham Barnes, Improving the Justice System Response to Witness Intimidation, Pilot Project Report: Duluth, Minnesota (2014) Rhonda Martinson, Charlene Whitman, Elizabeth Wofford & Marijka Belgum-Gabbert, Improving the Justice System Response to Witness Intimidation, Pilot Project Report: Knoxville, Tennessee (2014); Rhonda Martinson, Charlene Whitman, Elizabeth Wofford, Marijka Belgum-Gabbert & Sandra Tibbetts Murphy, Improving the Justice System Response to Witness Intimidation, Pilot Project Report: San Diego, California (2014).

7 While vertical prosecution—the same investigator and prosecutor assigned to a case from initial charge through sentencing—is highly desirable for cases involving intimidation, limited resources in many offices may make such staffing impossible. In addition, sometimes reassignments, new hires, or resignations make it necessary to make changes to prosecution staff working on a particular case. Careful documentation in the case file and communication between successive investigators or prosecutors is critical to ensure that information pertinent to the safety of victims and witnesses is clearly communicated. Where possible, a personal introduction of newly assigned staff to the victim or witness by the outgoing investigator or prosecutor can help to build trust and confidence that will enhance both safety and cooperation.

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questions for the witness during the initial meeting with the witness. It is not uncommon for threatening statements to be made during the arrest, transportation of the offender to the police station, or booking. Any such statements made during transport, booking, or processing may have been recorded by a security monitoring system. This potential source of evidence—which may be available only for a limited time, depending on how long recordings are retained—should not be overlooked.

- **ESTABLISH CONTACT WITH ANY ADVOCATE WHO MAY BE WORKING WITH THE VICTIM OR WITNESS**

  The victim or witness may already be working with an advocate—either a community-based advocate or one attached to the prosecutor's office. A community-based advocate may be unable to share confidential witness information with the prosecutor; an advocate employed by the prosecutor's office will not have that particular limitation. Either kind of advocate may be of great assistance in communicating with the witness on a regular basis to provide updates on the status of the case, updates on the incarceration or release status of the defendant (including bail conditions), referrals for services to keep the witness safe throughout the criminal process, and a witness escort for court proceedings or appointments at the prosecutor's office. Name and contact information for any advocate working with the witness should always be noted in the prosecutor's file, and the prosecutor or investigator should check in with the advocate on a regular basis throughout the proceedings to ensure that all parties are informed about the status of the case and any developments affecting witness safety.

- **MEET WITH THE VICTIM OR WITNESS**

  Try to arrange to meet with the victim or any potentially intimidated witnesses as soon as possible upon assuming responsibility for the case. Early and frequent contact can help to build trust so that the witness will be more inclined to be forthcoming about any intimidation that may be occurring, more cooperative in preserving evidence of such attempts, and more willing to continue to participate in the prosecution. If possible, have the victim or witness appear with an advocate, and include the assigned investigator in the meeting, as well.

  Meetings—particularly the first one—should be in person whenever possible. It is much easier to establish a personal connection with a witness when you meet him or her in person, in a private and unhurried setting, than to do so by telephone. It will be easier to "read" the witness's demeanor and to judge the degree of willingness to cooperate or the level of fear when you meet with him or her in person. On the other side of the coin, an in-person meeting allows the witness to gauge *your* sincerity—your commitment to the case, to the witness's safety, and to arriving at a just result. Early personal contact and regular ongoing communication helps to keep victims and witnesses actively engaged in the process, increasing the likelihood that they will remain cooperative throughout the criminal proceedings.

  Ask victims what they would ideally like to see as the outcome of the criminal case. Obviously, the disposition is not wholly dependent upon the victim's wishes—although those wishes should always be taken into consideration—but this is a useful starting point for the discussions to follow. It is important to let victims know whether their expectations are realistic, and if they are not, why not. Even though it is the prosecutor's responsibility to determine whether a plea offer will be made, and what kind of offer, victims can be assured that they will be notified in advance of any plea agreement so they can voice any objections they may have, and can also be assured of their right to make a statement to the court at the time of sentencing.

  It is also important to explain to victims how you expect the case to proceed toward disposition—arraignment, bail hearings, the follow-up investigation, grand jury proceedings (or preliminary probable cause hearings), exchange of discovery, plea negotiations, pretrial hearings, trial, and sentencing. Many victims are startled at the length of time it

can take for a case to reach final disposition.[8] Explaining the reasons for each step and how each step advances the case reassures the victim that the case is not simply languishing during the time between arrest and final disposition.

At this initial meeting, it is important to determine (1) whether intimidation conduct has already occurred and (2) whether the victim or witness is at risk for (further) intimidation. If the answer to either of these questions is "yes," then further action is appropriate to obtain proof of any intimidation that has already occurred and to take action to prevent, or minimize the effects of, any future intimidation tactics, as well as to secure the evidence necessary to prove them.

- **WHERE INTIMIDATION HAS ALREADY OCCURRED**

  - **Add criminal charges for intimidation conduct**

    When a victim or witness reports that the defendant, or someone acting on the defendant's behalf, has engaged in conduct intended to intimidate the witness, those incidents should be thoroughly investigated. Depending upon the available evidence, and the conduct at issue, consider charging such acts of intimidation as part of the same charging instrument (indictment or information), superseding the original if necessary. Additional charges might include such crimes as witness tampering, subornation of perjury, witness retaliation, obstruction of justice, threats, stalking, criminal mischief/vandalism, or harassment.

    By charging such acts as part of the same criminal case that is going to trial, you can avoid the necessity of moving to admit evidence of those acts under Fed. R. Evid. 404(b).[9] Motions to sever such charges for trial can be opposed, moreover, on the grounds that such evidence nevertheless *would* be admissible under that evidence rule, as evidence of the defendant's purpose, intent, or consciousness of guilt.[10] Charging the intimidation in the same indictment or information will obviate the need for any limiting instructions that normally would be given in connection with 404(b) evidence, and will also support an argument for consecutive sentences when the defendant is convicted.

  - **Review old case files and police reports**

    Old case files and police reports—particularly those involving the same parties, although some defendants will have previous cases involving other victims (which are also worth reviewing)—may provide a great deal of information relevant to the new case. These prior cases may show a pattern of control and intimidation that might be relevant to a motion on forfeiture by wrongdoing. They may provide clues to the defendant's "style" of intimidation, making it possible to seek appropriate bail with appropriate conditions, to create an effective safety plan for victims and witnesses, and to appropriately monitor the defendant's conduct throughout the adjudication process. They may reveal friends, family, and criminal associates of the defendant who might be involved in intimidation efforts on the defendant's behalf. They may be a source of "other crimes/wrongs" evidence that might be admissible under Rule 404(b) to show motive, intent, or absence of mistake or accident.

    These closed cases can often be identified by reviewing the defendant's criminal history or by reviewing family court history. In addition, the victim should be asked whether there were other incidents in which there was a police response, or a protective order issued, but no criminal charges, including incidents that may have occurred

8 Even a case that has been expedited for trial may take several months from the time of arrest to final disposition.

9 Rule 404(b) governs the admissibility of other crimes or "bad acts" where such acts are relevant to prove some fact at issue, such as the defendant's motive, knowledge intent, absence of mistake or accident, or consciousness of guilt.

10 *See, e.g.,* State v. Banks, 347 S.W.3d 31 (Ark. 2009) (evidence that defendant ordered killing of a witness admissible under Rule 404(b) to show consciousness of guilt); State v. Edwards, 678 S.E.2d 405 (S.C. 2009) (witness intimidation evidence admissible under Rule 404(b) to show consciousness of guilt).

in other jurisdictions. Often the police reports or case files relevant to those matters can be obtained with a phone call or written request to the jurisdiction where the incident occurred.

A review of closed cases may also disclose prior incidents that were not prosecuted due to the non-cooperation of the victim. If these incidents are recent enough to still be within the limitations period, and if it appears there may now be sufficient evidence to proceed, consider re-opening those cases, and either adding them to the present case (particularly if they represent an ongoing pattern of conduct that would survive a motion to sever), or reinstating them as separate cases. Reinstating cases that were closed due to intimidation can be an effective way of deterring that conduct. A defendant facing additional charges, including those for intimidation conduct that can be proved, may be less likely to risk further prosecution for additional acts of intimidation.

- **Investigate and charge third-party intimidators**

  Friends, family, and criminal associates of the offender may engage in criminal intimidation on behalf of the offender. These individuals should be charged with applicable intimidation crimes, as well. Thorough investigation of these acts (including interviews with the actors) may result in sufficient evidence to link the original defendant to these acts, resulting in charges for conspiracy or accomplice liability. Where the original defendant is shown to be responsible for eliciting acts of intimidation by third parties, it may be possible to negotiate plea agreements with those third parties in exchange for their cooperation against the primary defendant. And, of course, in such circumstances the primary defendant should be charged as well, provided there is sufficient proof of personal involvement.

- **Where the victim or witness may be at risk for (further) intimidation**

  - **Conduct a risk assessment**

    There are several ways of evaluating risks to the safety of victims and witnesses. The method of conducting such evaluation may depend upon the type of case. There are several validated risk-assessment instruments for use with domestic violence victims, including the Ontario Domestic Assault Risk Assessment (ODARA),[11] the Spousal Assault Risk Assessment Guide (SARA),[12] MOSAIC,[13] and the Danger Assessment.[14] Most of these instruments are intended to measure lethality risk—the risk that a particular victim will be killed by the abuser. They do not necessarily gauge whether the victim will be subjected to intimidation by the offender. The results of the evaluation, however, may provide important information about the degree of risk faced by a particular victim, and may provide guidance for safety planning. It is important to remember that in domestic violence cases, there is almost always *some* degree of intimidation conduct that can be anticipated.

    In gang-violence cases, experienced investigators have noted that the victims and witnesses most likely to be subjected to intimidation tactics are those who have some direct connection to the gang—they are members either of the same gang or of a rival gang.[15] Next in the risk hierarchy are victims and witnesses who reside within or near the gang's territorial boundaries.[16] These victims or witnesses may face intimidation pressure not only from the offender and from the gang, but also from the community at large, which may actively discourage "snitching" to law

11 Nova Scotia Public Prosecution Service, Risk Assessments (ODARA) In Spousal/Partner Violence Cases, http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/ODARA%20RISK%20ASSESSMENTS%20IN%20SPOUSALPARTNER%20CASES%20ALL.pdf.
12 Spousal Assault Risk Assessment Guide (SARA), Multi-Health Systems, http://www.mhs.com/product.aspx?gr=saf&prod=sara&id=overview.
13 *What is Mosaic?* MOSAIC Threat Assessment Systems, https://www.mosaicmethod.com/.
14 Danger Assessment, http://www.dangerassessment.org/.
15 Should read Rhonda Martinson, Charlene Whitman, Elizabeth Wofford, Marijka Belgum-Gabbert & Sandra Tibbetts Murphy, Improving the Justice System Response to Witness Intimidation, Pilot Project Report: San Diego, California 30 (2014).
16 *Id.*

enforcement. Victims and witnesses who are neither involved in gang activity nor have any other connection with the gang or with the neighborhood are at significantly lower risk of intimidation.[17]

In human trafficking cases, as in domestic violence cases, some degree of attempted intimidation can almost always be expected. Some trafficking victims are forced or coerced into trafficking, while others may be emotionally manipulated to lure them in. And intimidation is a common tactic to keep victims enslaved. Traffickers may enlist some "favored" victims to keep the others under control, resulting in intimidation by one victim against the others. In addition, traffickers may engage in threats or assaults against one victim to serve as a means of intimidating the others.

In any criminal case, the best indicator of risk for intimidation is the prior history of intimidation by the defendant, toward this victim or witness or others, as well as the defendant's prior criminal history. Among the factors to consider:

- Has the defendant previously been charged with crimes of violence or intimidation?
- Does the defendant have access to weapons?
- Does the defendant (or the victim) have a drug or alcohol problem, or mental health issues?
- Is there a history of dropped charges or restraining orders, or dismissal of cases due to the failure of the victim or witnesses to appear?
- Does the defendant (or do allies of the defendant) have any power or authority over the victim or witness (*e.g.*, in an institutional setting such as a school, correctional institution, hospital or group home, or in an organizational setting such as the church, the military, or community-based organization)?
- How fearful is the victim or witness? What is that fear based upon?[18]
- How serious are the crimes with which the defendant has been charged, and what is the potential sentencing exposure?[19]

- **Create (or adjust) the safety plan**

  Safety plans should be constantly re-evaluated throughout the proceedings. Changes in circumstances—in the needs or concerns of the victim or witness or in the level of threat—should result in adjustments to the plan. Central to any safety plan are tight restrictions on the defendant's access to personal contact or communication with the witness. Encourage the witness to take an active role in the safety planning process, and to be completely honest about what safety measures are acceptable to him or her. A plan is only as good as the witness's willingness to comply with its provisions. Measures that will help to enhance witness safety and security include:

  - Bail conditions prohibiting contact between the defendant and the witness, prohibiting the defendant from going to certain locations frequented by the witness, or prohibiting contact with criminal associates. Other bail conditions that may reduce the incidence of intimidation or its consequences include restrictions on the possession of weapons, prohibitions on consumption of alcohol or drugs, compliance with recommended substance abuse or mental health treatment programs, and close supervision with regular reporting to a probation officer or other supervisor.
  - Internet/social media safety. Caution witnesses against actions that may undermine their own safety, such

17 *Id.*
18 Victims are often accurate judges of how dangerous the offender is to them, and what is likely to escalate the violence or threatening conduct.
19 Defendants with more at stake may be more desperate to avoid criminal consequences, and thus more likely to resort to intimidation.

as talking about the case to others or posting personal information on social networking sites, Internet forums, or blogs. In particular, counsel them against posting anything about the case or about the defendant, since such actions may not only provoke a response from the defendant or others acting on the defendant's behalf, but may also be a source of impeachment or result in defense requests for communications intended to be private. Defendants or third parties may send "friend" requests that will give them access to personal information that could be used in attempts to intimidate the witness. Advise witnesses to maximize the available privacy settings on any personal social networking profiles, and caution them about posting personal information that could be used by the offender to stalk, harass, or threaten them.

- Providing the witness's landlord, employer, and schools (including those attended by children of the witness) with information about the threat posed by the defendant, as well as a photograph and a copy of any orders of protection.
- Changing or adding locks, security lighting, surveillance cameras, or panic alarms for the witness's home.
- Changing the witness's routines—times and places for shopping or other personal errands.
- Increased police patrols of the witness's neighborhood, with officers paying particular attention to any suspicious vehicles or activity around the witness's home
- Protective custody or transfer of incarcerated witnesses. If your case involves witnesses who are incarcerated, be sure that the institution where they are confined is aware of the case and the role of the witnesses so it can take appropriate measures to protect the witnesses and ensure that they are not transported for court appearances together with the defendant or the defendant's associates. [20]
- Witness relocation—informal. Witness relocation may be the most comprehensive way to prevent intimidation, but it need not be through a formal witness protection program. Temporary relocation to a shelter or to the home of a distant friend or relative may be sufficient to protect the witness until the defendant is in custody, or during high-risk periods such as the time just before trial or a critical hearing. Permanent relocation to a different housing project or to publicly-subsidized ("Section 8") housing will make it more difficult for the defendant or any criminal associates to contact the witness, and may provide sufficient protection under the circumstances. Such measures are less stressful and disruptive to witnesses and their families, and less costly for law enforcement, than more comprehensive supervised relocation of the type offered by traditional witness protection programs. To the extent that disruption to their lives is minimized, witnesses are more likely to abide by necessary safety precautions.[21]
- Witness relocation—witness protection programs. Although some states have centralized witness protection programs, the eligibility for participation in such programs may be limited. In addition, such programs are, by far, the most disruptive to the personal lives of witnesses and their families, since participation typically requires isolation from, and bars communication with, friends, family, and locations with which the witness has been comfortable and familiar. Moreover, such programs tend to be very costly. In appropriate cases, however, witness relocation programs provide very effective protection to the participating witness.

20 Typically such witness safety concerns should be communicated to the Internal Affairs Unit of the institution so that information about the witness's cooperation is kept appropriately confidential to the extent possible. *See* Viktoria Kristiansson, *Prosecuting Cases of Sexual Abuse in Confinement*, 8 Strategies (Dec. 2012), http://www.aequitasresource.org/Prosecuting_Cases_of_Sexual_Abuse_in_Confinement.pdf. *See also* Viktoria Kristiansson, *Identifying, Investigating, and Prosecuting Witness Intimidation in Cases of Sexual Abuse in Confinement*, X Strategies in Brief (2014) (forthcoming).

21 For more details about relocation strategies for witness protection, see Peter Finn & Kerry Murphy Healey, Nat'l Inst. of Justice, Issues and Practices, Preventing Gang- and Drug-Related Intimidation 22-38 (1996), https://www.ncjrs.gov/pdffiles/163067.pdf; Kerry Murphy Healey, Nat'l. Inst. of Justice, Research and Action, Victim and Witness Intimidation: New Developments and Emerging Responses 6-8 (Oct. 1995), https://www.ncjrs.gov/pdffiles/witintim.pdf.

- **Educate the victim or witness about intimidation and evidence preservation**

  Many victims and witnesses may be unaware of what conduct qualifies as intimidation or manipulation. Domestic violence or human trafficking victims, in particular, may be so accustomed to manipulation and intimidation in their day-to-day lives that they fail to recognize it for what it is, and may consequently fail to report it or to preserve evidence of its occurrence. The initial meeting with the witness should include a discussion about what kinds of tactics the witness can expect, how to stay safe from them, and how to document and report any attempts to intimidate or manipulate them.

  Although victims and witnesses vulnerable to intimidation should be instructed to preserve evidence (such as voicemails, emails, text messages, Internet postings, cards, or letters), and to maintain a contemporaneous record (such as a logbook) of dates, times, and details of any intimidation attempts, they should be cautioned not to deliberately elicit such evidence on their own. Explain to the witness that such actions on their part might result in the court's concluding that the witness was acting as an agent of law enforcement and consequently suppressing the evidence. [22]

  In the same vein, it is not unusual for victims or witnesses to try to record conversations with the offender. If you are in a jurisdiction where voice recording requires the knowledge and consent of both parties to the conversation, it is important to caution the witness that any such recordings may subject the witness to civil or criminal liability. The last thing a victim or witness needs is to be subjected to a criminal complaint or civil lawsuit by the offender for the illegal recording of conversations. Even in jurisdictions with a "one party consent" rule (where recording is legal as long as one participant to the conversation consents), such recording after the right to counsel has attached will be scrutinized for potential law-enforcement involvement. If the court finds that the witness acted on behalf of law enforcement, the recording may be suppressed for violating the defendant's right to counsel.[23] Therefore, it is best to advise victims and witnesses not to record conversations with defendants or with others, except under supervision of an investigator in the course of a properly authorized consensual intercept of the call. Such consensual intercepts may be subject to strict requirements for authorization, and failure to comply with such requirements may result in suppression of the recording.[24]

  The witness should be instructed to notify the assigned investigator or prosecutor immediately in the event of any intimidation attempts so that the incident can be thoroughly investigated. Although emergency situations warrant a call to 911, the witness should be reminded to inform any responding police officers of the pending case and to explain that this is a suspected act of witness intimidation. The witness should also advise the responding officer of the name of the assigned investigator or prosecutor. The witness (and the responding police officer) should inform the assigned investigator or prosecutor as soon as practicable, regardless of whether criminal complaints are issued for the act of intimidation. In this way, acts of intimidation will not be overlooked, or independently disposed of in a different court, or by a different prosecutor, which will preclude the act of intimidation from being tried together with the primary case. The goal should be to have *all* criminal matters related to the primary case referred to the same agency, and ultimately to the same prosecutor, for investigation and ultimate disposition.

22 *See, e.g.,* Maine v. Moulton, 474 U.S. 159 (1985).
23 *See id.*
24 *E.g.*, State v. K.W., __ A.3d __ (N.J. 2013), 2013 WL 3481698.

If possible, provide witnesses with a brochure reminding them of the proper way to recognize and report intimidation,[25] as well as a log to record details concerning any suspicious incidents, including date, time, a description of the incident, and any witnesses.[26]

- **Discuss with witnesses what to do if contacted by the defense**

  Explain to witnesses that the defense attorney or a defense investigator has the right to contact them for an interview, and that there is nothing improper about such contacts. Explain also that it is up to the witness whether to speak with a defense attorney or investigator, *just as it is up to the witness whether to speak with the prosecutor or with the prosecutor's investigator*.[27] Explain that the witness has a right to know with whom he or she is speaking, and what kind of identification investigators from your office can present upon request.[28] You can also tell the witness that whether they decide to speak with the defense or not, you would appreciate notification about any such contacts or interviews, stressing again that this is voluntary on the part of the witness, and that there is no obligation to do so. Although there is nothing improper about defense attempts to interview witnesses, a few defense attorneys employ investigators who conduct the defense investigation in a way that amounts to witness intimidation, whether so intended or not. It is best to find out as early as possible if this is an issue so that appropriate corrective action can be taken.[29]

  In some cases, where it is crucial to protect the witness's address and contact information, a motion for a protective order to deny or delay discovery of such information, or to restrict its dissemination to defense counsel only, may be appropriate. Such motions are discussed further in Part II, *infra*.

- **Secure a high bail with appropriate bail conditions**

  Where witness intimidation has already occurred, either in this case or in any of the defendant's prior cases, that fact can be argued in support of a high bail. If your jurisdiction allows consideration of public safety as a factor in the amount of bail, danger to the victim or to witnesses should weigh heavily on that factor. If risk assessment data or expert testimony about the defendant's dangerousness is available, be sure that such information is presented to the judge. Even where the only consideration is to secure the defendant's presence at trial, it can be argued that any defendant who intimidates witnesses against him is a poor risk to obey court orders or to appear for trial when ordered to do so, and that a high bail is therefore warranted to secure his presence. Prior arrests or convictions, particularly for crimes of violence (and especially if they are for similar crimes, such as crimes of domestic violence) should also be vigorously argued in support of a high bail.

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25 Some prosecutor's offices post their brochure online at their office website. *See, e.g.*, at the Denver City Attorney's Office website, http://www.denvergov.org/LinkClick.aspx?fileticket=fGtSHZ6OBt0%3d&tabid=380868&mid=509028.

26 The Stalking Resource Center has created a sample log to record stalking incidents, which could easily be adapted to record any incidents of intimidation. *See* http://www.victimsofcrime.org/docs/src/stalking-incident-log_pdf.pdf?sfvrsn=4.

27 It would be unethical for the prosecution to discourage the witness from speaking with the defense. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2012). However, it is not unethical for the prosecution to remind the witness that he or she does not have an obligation to speak with anyone, except to respond to a subpoena, which is a court order to appear and testify. Stressing that *all* interviews are voluntary, including those granted to the prosecution, should eliminate any misunderstanding on this point.

28 Unfortunately, it is not unusual for some defense investigators to identify themselves as investigators, without identifying themselves as investigators for defense counsel.

29 Such corrective action might begin with a letter to defense counsel explaining the problem and requesting that counsel take steps to ensure that the conduct is not repeated. Of course, in the case of actions that are obviously *intended* to intimidate the witness, the response should be escalated accordingly. Depending upon the circumstances, including whether defense counsel was personally involved, possible responses include notifying the court for whatever corrective action is deemed appropriate, moving to sanction or disqualify defense counsel, filing an ethics complaint, or criminal investigation and prosecution.

Appropriate bail conditions are critical. "No contact" conditions should be routine unless the victim affirmatively requests otherwise. Even in those cases, such conditions should sometimes be imposed, regardless of the victim's wishes, when necessary to protect the victim's safety. While the victim's wishes should always be an important consideration, the ultimate responsibility for making a recommendation is the prosecutor's. Bear in mind that sometimes a victim's insistence on contact is the result of the defendant's intimidation.

In cases where the defendant has criminal associates, as in gang violence cases, the defendant should be prohibited from associating with those individuals as a condition of his bail.

In some jurisdictions, electronic monitoring may be available as a condition of release on bail. These systems may vary widely in their effectiveness as a protective measure for victims and witnesses; it is advisable to learn how your particular monitoring system works so that judges do not release dangerous defendants based on a misapprehension of the effectiveness of the system to protect the victim and witnesses.

Other appropriate conditions may include prohibition on possession of weapons, prohibition on consumption of alcohol or drugs, and compliance with any recommended substance abuse or mental health treatment programs. A bail condition requiring the defendant to report on a regular basis to a probation officer may also provide a measure of deterrence against intimidation.

- **Ask the court to admonish the defendant at the time of arraignment**

  In any case where there is a risk of witness intimidation, request that the judge admonish the defendant, preferably at the time of the first court appearance, about refraining from personally contacting any victims or witnesses (other than his own witnesses) in the case. Often a defendant's allies—friends and relatives—will also be in the courtroom at the time of arraignment. A warning from the bench may discourage some would-be intimidators from engaging in those tactics. The defendant should be cautioned that any attempt to influence or dissuade witnesses from testifying truthfully will not only subject the intimidator to possible prosecution, but may be used against the defendant in his criminal case. If the court declines to give such an admonishment, the prosecutor can do so when putting any other matters on the record: "Your Honor, the State wants to be certain that the defendant understands that we take witness tampering or intimidation very seriously. Any attempts to persuade any witness in this case to testify falsely or avoid coming to court will be investigated, and the individuals responsible will be prosecuted. In addition, if we discover that the defendant was responsible for any such attempts, we will use that against him in the criminal proceedings in this case."

- **Prepare for the possibility that cooperation may end**

  Despite the best efforts of the criminal justice system, some attempts at intimidation inevitably will succeed. Consequently, some victims and witnesses who are initially cooperative may, as time goes by, become uncooperative. By taking certain pretrial measures as soon as practicable, you will increase the likelihood of successfully prosecuting your case even if the witness later becomes unavailable to testify at trial.

  - **Obtain witness contact information**

    Obtain as much information as possible from the witness that will provide assistance in contacting or locating him or her in the future. If the witness is produced at trial—even as a hostile witness or as a witness for the defense—there will be no violation of the Confrontation Clause if prior statements are admitted under exceptions to the hearsay rule. If the witness cannot be located, any motion or attempt to admit hearsay—either under the

forfeiture doctrine or as a testimonial statement where the defendant has had a prior opportunity to cross-examine—will require the trial court to find that the witness is "unavailable" for trial.[30] The State will therefore have to present evidence that it made all reasonable efforts to produce the witness at trial. [31]

Obtain contact information for the witness's home address, home and cell phone numbers, employer or school (including the schools of the witness's children), email address, and contact information for a couple of trusted friends or relatives who can pass a message to the witness if necessary. This information will provide leads that can be followed to make documented attempts to locate and serve the witness, which will be essential if the witness fails to appear for trial. It is good practice to check to be sure this contact information is accurate before there is a need to locate a missing witness. Any contact information not already known to the defendant should be protected from disclosure to the defense as long as possible, through use of a protective order to delay or deny discovery.[32]

- **Preserve testimony of witnesses vulnerable to intimidation by calling them to testify at preliminary hearings**

When a witness is unavailable at trial due to intimidation or for any other reason, the State can present recorded testimony from any proceeding at which the defense had an opportunity to cross-examine the witness.[33] Because cross-examination is essential for purposes of the Confrontation Clause, grand jury testimony of an unavailable witness will not be admissible at trial (absent a successful motion to admit evidence under the doctrine of forfeiture by wrongdoing). However, testimony of a witness at a bail hearing or at a preliminary probable cause hearing, when given subject to cross-examination by defense counsel, can be admitted at trial without violating the Confrontation Clause, provided that the witness is unavailable for trial.[34]

These preliminary hearings therefore present the opportunity to preserve the witness's testimony while the witness is still cooperative. To assure the admissibility of such testimony at trial, provide all available discovery to defense counsel prior to the hearing, and do not object to any reasonable adjournments to enable defense counsel to prepare an effective cross-examination of the witness. Objections to questions during cross-examination should be kept to a minimum as well, so that the trial court will be assured that the defendant had a full and fair opportunity to cross-examine.

- **Open a "forfeiture file" for any witnesses who might not appear for trial due to intimidation**

For any witnesses who are vulnerable to intimidation, open a "forfeiture file" in one section of your trial folder or notebook. Maintain this file with any police or investigative reports, statements, or other evidence that would support a finding of the kind of "classic abusive relationship" or other pattern of intimidation that would support a finding that the defendant intended to prevent the witness from testifying. Often you will not know until the day of trial whether an intimidated witness will appear in court. By maintaining a "forfeiture file," perhaps with a draft motion to admit hearsay statements of an absent witness under the forfeiture rule,[35] including copies of any cases upon which you would rely for such a motion, you can be prepared to conduct a forfeiture hearing on short notice, if necessary.

30 FED. R. EVID. 804(b)(6); Ohio v. Roberts, 448 U.S. 56, 74-77 (1980).
31 Id.; Barber v. Page, 390 U.S. 719 (1968); Hardy v. Cross, 132 S.Ct. 490 (2011).
32 *See* Part II, *infra*.
33 *See* California v. Green, 399 U.S. 149 (1970).
34 Some jurisdictions also have provisions for depositions to preserve witness testimony when it is anticipated a witness may not be available for trial. *See, e.g.*, FED. R. CRIM. P. 15(a); United States v. Yida, 498 F.3d 945, 959-60 (9th Cir. 2007). The availability of such a deposition, and the procedures for conducting it, will vary from one state to another.
35 AEquitas has produced sample briefs to admit evidence under the doctrine of forfeiture by wrongdoing, which may be obtained on request.

II. Pretrial Period

For purposes of this *Resource*, the pretrial period encompasses the time period between the initial steps described in the foregoing section and the point of jury selection. Activities during the pretrial period include conducting additional follow-up investigation; making the final charging decisions for the indictment, information, or accusation; exchanging discovery; conducting plea negotiations; filing pretrial motions and conducting any pretrial hearings; developing a trial strategy; subpoenaing witnesses; and conducting the final pretrial conference.

- **Alert the trial judge about potential intimidation problems**

  It is generally good practice to alert the trial judge, as early in the proceedings as possible, of any intimidation issues that may affect the proceedings. Depending upon the nature of the case, and the gravity and type of intimidation threatened, there may be a need to implement special security precautions in the courtroom—even during the pretrial period—as well as a need to issue orders to ensure the safety of witnesses and any other participants in the trial.

  Because of the sensitive nature of the disclosures that may be required in support of a request for special security measures, it may be necessary to discuss the matter with the court and defense counsel in chambers. In such instances, be sure that the court makes a record of the proceedings to facilitate appellate review of the decision. In rare, emergent circumstances, *ex parte* communication with the court may be necessary. In such instances, consult your court rules and rules of professional responsibility for guidance to avoid reversible error and/or an ethics violation.

  It may also be wise, in high-risk cases, to alert the chief of courthouse security so that additional staffing and monitoring of the courtroom and the surrounding areas can be implemented. In addition, if your courtroom has a regularly assigned bailiff, court clerk, or other courtroom staff, be sure they are aware of the issue so they can make observations and report any suspicious conduct to you and/or to the judge.

- **Expedite disposition of the case**

  The longer it takes for a case to reach its conclusion, the more time and opportunity the defendant has to engage in intimidation attempts. Even a cooperative witness who receives maximum safety support from the prosecution team may eventually be worn down to the point of refusing to cooperate if the defendant finds a way to circumvent the protections in place or if the case languishes long enough that the witness becomes overly stressed by the process.

  It is important for the prosecution to prioritize these cases in conducting the investigation and preparing for trial. Oppose defense requests for continuances, seek to minimize their length, and ask the court to prioritize for trial these cases over those involving more routine crimes.

- **Move for a protective order to deny/delay discovery of sensitive witness information**

  Discovery rules in most jurisdictions require the State to provide to the defense all police and investigative reports, photographs, documents, statements of witnesses, criminal histories of witnesses expected to be called at trial, and contact information (addresses and phone numbers) for the State's witnesses. Where the defendant is already aware of such information, there is usually no added risk to providing it in discovery.[36] However, when a defendant is unaware of the wit-

36 One notable exception is for evidence of intimate photographs or video of a victim. Although the defendant may be aware of the photographs or already have seen the contents, there are legitimate concerns about providing copies to the defendant, who may use them for personal gratification or may disseminate them to others, including other inmates. A protective order may provide that they can be released only to

ness's information or present location and there is a serious risk of intimidation, most jurisdictions permit the prosecutor to move for a protective order to redact sensitive personal information from the discovery package, or for an order sealing documents such as search warrant affidavits or grand jury transcripts.[37] Your motion for such an order must set forth articulable reasons for the order, which should be no more restrictive than necessary to accomplish its purposes. Where there is a need to protect the present location of the witness, you may need to make some provision to allow defense counsel to request an interview (which the witness is, of course, not obligated to grant).[38] In some cases, the witness's personal information may be necessary for defense counsel to prepare a proper defense; in such cases, an order may be granted giving defense counsel access to the information, on the condition that he or she not disclose it to the defendant.[39]

Another potential strategy is to file a motion to delay discovery of the witness's name and personal information for a specified period of time. A plea offer could be extended to the defendant that will expire upon provision of the temporarily withheld information. In some cases, this will enable you to resolve the case without ever disclosing the witness's name or information.[40] If this strategy is used, you should be sure that the record of the plea recites the terms of the plea agreement, the fact that certain information was withheld in consideration of the offer, and that the defendant agreed to plead guilty with full knowledge that the information would not be disclosed. You should place on the record, through personal questioning, the defendant's understanding of these terms of the agreement in order to forestall post-conviction claims that the plea was less than knowing and voluntary.

It is important to indicate prominently on the outside of every case file whether the file contains confidential victim/witness information, and to be sure that all staff, including clerical staff, are trained never to provide discovery in such cases without the express approval of the assigned prosecutor, who can make any necessary redactions from the file. Otherwise, in offices with "open file" discovery policies, confidential information might inadvertently be provided when a new defense attorney takes over responsibility for the case, or when an appeal or a petition for post-conviction relief is filed.

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defense counsel, who would be barred from providing copies to his or her client, or from copying or disseminating them without court order. *See, e.g.*, State v. Boyd, 158 P.3d 54 (Wash. 2007) (*en banc*).

37 *See, e.g.*, FED. R. CRIM P. 16(d)(1); United States v. Aiken, 76 F.Supp.2d 1339 (S.D. Fla. 1999).

38 The prosecutor must be careful not to discourage the witness from speaking to the defense; such conduct would be in violation of the Rules of Professional Conduct. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4 (2012). However, it is not unethical for the prosecutor to advise the witness that he or she is not obligated to consent to be interviewed.

39 A recent California Supreme Court case provides an example of implementation of this strategy. In State v. Valdez, 281 P.3d 924, 941-60 (Cal. 2012), the trial court tightly managed the disclosure of information concerning the identity and location of several witnesses who were at high risk of intimidation in this gang-related homicide case. The Supreme Court affirmed the conviction, finding that the limitations on disclosure and on defense access to the witnesses during the pretrial phase did not deprive the defendant of a fair trial.

40 In United States v. Ruiz, 536 U.S. 622 (2002), the Supreme Court upheld the constitutionality of "fast track" plea bargaining in which the defendant waives the right to be provided with impeachment evidence and the identities of witnesses and informants, observing that prohibition of such plea bargains "could force the Government to abandon its 'general practice' of not 'disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses.' " *Id.* at 632. While *Ruiz* holds that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant," there is a split in authority whether *exculpatory* evidence must be disclosed prior to a guilty plea. *Id.* at 633. *Compare* Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007) (*en banc*) (noting that *Brady* evidence material to a decision to plead guilty must be disclosed) *with* United States v. Conroy, 567 F.3d 174, 178-79 (5th Cir. 2009) (guilty plea precludes defendant from claiming that failure to disclose exculpatory information was *Brady* violation that made plea not "knowing and voluntary," and rejecting argument that *Ruiz* requires a different result). *But see* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (concluding in *dicta* that "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea."). Since it is likely that most information the prosecutor would seek to withhold for witness safety reasons prior to a plea would constitute impeachment evidence, at most, rather than exculpatory evidence, *Ruiz* would seem to permit most agreements waiving discovery of such information.

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- **ONGOING INVESTIGATION/COMMUNICATION**

  Follow-up investigation and regular communication with victims and witnesses should be ongoing throughout the pretrial period. Cases involving intimidation can change rapidly, with a witness who is cooperative one day becoming uncooperative by the next meeting. Victims and witnesses should receive regular updates about the status and any important developments in the case. The investigator or prosecutor should also "check in" with witnesses on a regular basis to see if anything has changed, in terms of evidence or safety concerns, or if there have been any suspicious incidents that may have seemed too minor to report. Any acts of intimidation that may be discovered should be thoroughly investigated.

  If a previously cooperative victim or witness suddenly stops returning phone calls or seems reluctant to talk with the investigator or prosecutor, that may be an important indicator that intimidation is occurring. Efforts to maintain regular contact may provide the first indications to the prosecutor that a victim or witness may not appear at trial. If the witness can no longer be found at his or her address, or workplace or school, the investigator can immediately begin attempts to locate the witness.

  Be sure that the assigned investigator maintains a careful record of all contacts with victims and witnesses, including unsuccessful attempts to locate the witness, or to speak or to meet with the witness. This record of contacts, including refusals or unsuccessful attempts, may be critical in establishing that all reasonable efforts were made to secure the witness's attendance at trial, which will be necessary to establish "unavailability" of the witness in the event it is necessary to introduce out-of-court statements under the doctrine of forfeiture by wrongdoing.

- **Document all recantations**

  It is not unusual, of course, for intimidated victims and witnesses to recant their statements or previous reports to law enforcement, to downplay the seriousness of the crime, or to falsely assume responsibility for the crime (*e.g.*, "I was out of control, trying to attack him—he was just trying to calm me down."). Prompt action in the form of an empathetic conversation with the witness can sometimes bring an intimidated witness "back on board," but it is important to document any recantations, even if they are immediately abandoned. All recantations, however incredible they may be, and however brief, must be documented and turned over to the defense as exculpatory evidence pursuant to *Brady v. Maryland*.[41]

- **Interview family and friends**

  Family and friends of the victim, and even employers or landlords,[42] may have important information about the history of the parties' relationship, including prior acts of intimidation, threats, or assaults. Such witnesses can be an important source of evidence of other crimes or "bad acts" evidence that may be relevant to prove the defendant's motive, intent, common scheme or plan, absence of mistake or accident, or consciousness of guilt under Rule 404(b). Evidence of these acts may also help to support a motion to admit hearsay under the forfeiture doctrine.

  Family and friends are also a good source of nontestimonial statements by the victim, who may have confided in them about the abusive relationship or about the source or circumstances of injuries they have received. If these statements fall within an exception to the hearsay rule, they can be admitted without cross-examination even in the absence of a finding of forfeiture by wrongdoing. Admission of such statements when the victim is unavailable for trial does not offend the Confrontation Clause under *Crawford*.

41 Brady v. Maryland, 373 U.S. 83 (1963)

42 Before reaching out to interview an employer or landlord, it is best to discuss your intention to do so with the victim. The victim may have legitimate fears that such interviews would adversely affect his or her employment or housing situation. It is important to take care that the investigation does not create additional danger to the victim.

- **Monitor communications between the incarcerated defendant and the victim/witness or third parties**

  Many jails now routinely record telephone conversations made from the jail, with the exception of calls from a defendant to defense counsel. Some jails routinely make these recordings available to the prosecution upon request; others may require a subpoena or other process to release the recordings. Communications between incarcerated defendants and victims or witnesses often reveal instructions not to go to court, advice for how to avoid testifying, or "coaching" of testimony so the defendant can avoid criminal responsibility. While listening to these recordings can be labor-intensive, the evidence they provide can be invaluable and very powerful when presented at trial. Perhaps your office has interns or volunteers who can be enlisted to listen to recordings for the purpose of identifying calls intended to manipulate or intimidate witnesses.

  Jails and prisons also may have procedures intended to restrict inmate mail communication, such as requiring outgoing mail (other than legal mail to a court or to an attorney) to be written on postcards or otherwise be made subject to inspection. Alert the institution's administration of witness intimidation issues so that outgoing written communication can be monitored for intimidation attempts.[43]

  Visitor logs from the jail may also yield important information, particularly where third-party intimidation is suspected. Security cameras in visitor areas may be a source of evidence where personal contact is used for intimidation purposes.

  It is worth keeping in mind, too, that some tech-savvy inmates may devise methods of circumventing restrictions on Internet or telephone communications to contact their victims. Although inmate access to the Internet is generally severely restricted or prohibited, some inmates are able to gain access through the use of smuggled smart phones. In addition, as institutions implement programs that permit limited (and usually closely supervised) access to the Internet for job-training programs or other legitimate purposes, these may present additional opportunities for intimidation by electronic means.

- **Preserve electronic evidence of intimidation**

  Evidence of intimidation may also be found in text messages; emails; and postings on social networking sites, blogs, or forums. Avoid relying on printouts of such items—printouts can easily be faked, and it is important to be able to establish their authenticity. It is not unusual for a defendant to forge communications from the victim, to make it appear that the victim is harassing, threatening, or stalking the defendant. These "communications" must, likewise, be carefully investigated so their fraudulent nature can be proved.

  It is worthwhile to have at least one investigator in the prosecutor's office who is thoroughly trained in the proper way to document the content of such messages and to prove their origin so they can be tied to the defendant. If your office does not have an investigator with such expertise, your State Police department most likely has investigators with the necessary training. The U.S. Attorney's Office also has designated Assistant U.S. Attorneys who can provide assistance in such investigations.[44]

43 Many institutions have "security threat group" coordinators who monitor inmate communications/activities particularly as they relate to gang activity. Such coordinators may be able to provide assistance in restricting or monitoring the communications of suspected intimidators.

44 Each U.S. Attorney's Office has a designated Computer Hacking and Intellectual Property (CHIP) Attorney, who can provide assistance in obtaining evidence in cyber investigations. In addition, on-call assistance (both general and case-specific) is available from the duty attorney in the U.S. Department of Justice's Computer Crime and Intellectual Property Section (CCIPS), who can be reached during regular hours at (202) 514-1026, and after hours at (202) 514-5000.

Any text messages, voicemail messages, emails, or posts on social networking or other websites that are evidence of intimidation must be properly preserved and investigated. The first step should be for the investigator to observe and document the communication *on the victim's device or computer*. Even if the evidence is later accidentally deleted or if records of the communication cannot be obtained with a subpoena, search warrant, or court order, the investigator can testify to what he or she observed. Text messages on cell phones should be photographed (as it may not be possible to obtain evidence of their content from the wireless provider), and the contents of the phone should be backed up to digital media if possible. Emails should be printed out, with the header information (showing the source of the message in the form of an IP address) included.[45] Although the victim or witness can print out the information, for purposes of establishing authenticity it is preferable for the investigator to preserve and/or print out such communications after first observing them on the victim's computer or device. Web pages, such as posts on Facebook or Twitter, or on a blog, can be saved as a "web archive"[46] and can be the basis for a search warrant or other process to the service that hosts the website.

Social networking sites have legal departments that will respond to requests from law enforcement, including requests to preserve the contents of a user's account pending the issuing of formal process such as a subpoena, court order, or search warrant. These departments can explain what information is available, how long it can be preserved, and the form of process they require in order to release it. Data contained in the account of the victim or witness can be obtained with his or her signed consent. In emergencies, where immediate information is necessary to preserve the life or physical safety of the witness, Internet providers and services may waive the requirement of formal legal process. Details about investigations involving electronic communication are beyond the scope of this monograph, but there are several helpful resources to assist investigators in obtaining evidence in such cases.[47] Information obtained from Internet providers and social networking sites can constitute probable cause for a warrant to search the computer used by the defendant. A search of the computer may reveal troves of evidence of intimidation.[48]

Even if the investigation reveals that an intimidating message or post originated from a public computer, such as one in a library, the library or other facility may keep a log of users or have security video that will prove the defendant's use of that computer. In addition, even without direct evidence that the defendant was the source of a threatening message, authorship can often be proved by means of traditional circumstantial evidence, including the content and timing of the message.

- **Adjust the safety plan as necessary**

  Where investigation reveals that the risk to the safety of the victim or witness has changed, consider whether changes to the safety plan, including temporary relocation, may be necessary.

45 An "IP address" is a three- to nine-digit number, usually expressed in the form xxx.xxx.xxx, that uniquely identifies a computer or network from which the message was sent. In order to identify the source of an email that has been received, it is necessary to determine which Internet provider (*e.g.*, Comcast, Earthlink, etc.) owns the originating IP address, and which customer had leased that IP address at the time the message was sent. Email headers will show the originating and receiving IP address, as well as the exact date and time it was sent. Each email "client" program (*e.g.*, Outlook, Thunderbird, Apple Mail, etc.) will have its own way of displaying header information. Once the header is displayed, the email can be printed out and used as a basis for issuing a subpoena or other process to obtain information about the origin of the email. Office of Legal Education, Executive Office for United States Attorneys, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (2009), *available at* http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.

46 A web archive is a file that contains all of the information, including embedded text and images, of a particular web page.

47 *See, e.g.*, Nat'l Inst. of Justice, Electronic Crime Scene Investigation (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/219941.pdf; Office of Legal Education, Executive Office for United States Attorneys, supra.

48 For example, the computer may contain traces of messages or images that were created or sent or searches conducted over the Internet (*e.g.,* searches for surveillance equipment used in stalking or searches for personal information about the victim).

- **CHARGING DECISIONS**

  The decision to charge particular offenses in the indictment or information can have a significant impact on what evidence will be admissible at trial. Conversely, the available evidence will dictate what crimes can be proven at trial and, thus, may dictate what offenses are appropriate to charge. If there is not sufficient *admissible* evidence to prove a particular charge beyond a reasonable doubt, even if there is sufficient probable cause to secure an indictment, it is generally unwise, if not unethical,[49] to pursue the charge.

  In evaluating the quantum of admissible evidence available to support a charge at trial, it is essential to take into account the limitations on admissible hearsay pursuant to *Crawford v. Washington*[50] and its progeny. If you know that a witness will be unavailable for trial (as in the case of a deceased witness or one who has clearly gone into hiding), only out-of-court statements of the witness that are nontestimonial, or testimonial but subject to prior opportunity for cross-examination, will be admissible, unless a motion to admit evidence under the doctrine of forfeiture by wrongdoing is successful.

  In deciding what charges to bring by indictment or information, consider what charges will best serve your overall theory of the case and will explain any later recantation or failure to appear on the part of the witness. In domestic violence cases, for example, it is often strategically wise to present evidence of other crimes or "bad acts" pursuant to Fed. R. Evid. 404(b) (or its equivalent) to prove the defendant's motive, intent, common scheme or plan, absence of mistake or accident, or consciousness of guilt. If you intend to present such evidence of crimes that occurred within the applicable limitations period, which have not yet reached final disposition,[51] it is usually best to include those offenses as criminal charges in the indictment or information. By trying those offenses together with the original offense, it will not be necessary to file a 404(b) motion, nor will it be necessary for the court to give a limiting instruction with regard to evidence of those offenses.

  If there have been acts of criminal intimidation (*e.g.*, witness tampering, witness retaliation, subornation of perjury, threats, criminal mischief, obstruction of justice), those, too, should be charged in the same indictment or information. Acts that occur during the pretrial period after the initial charging instrument has been returned may be combined with the original charges in a superseding indictment or information.

  Do not overlook the advantage of filing stalking charges when acts have been committed over a span of time that constitute a "course of conduct" satisfying the elements of the stalking statute. A stalking charge may encompass a host of conduct or acts, including those that might not individually amount to criminal conduct. To the extent that these discrete acts are included within the scope of a stalking charge, neither a 404(b) motion to admit evidence of those acts, nor limiting instructions to the jury, will be required for the jury to consider evidence about them.

- **CONSIDER RETAINING EXPERT WITNESSES**

  Expert testimony may be useful in cases involving witness intimidation because it can help to explain why a victim may recant, testify for the defense, or refuse to testify. Without such expert testimony, the jury might conclude that the crime did not occur or was not nearly as serious as alleged.

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49 *See* American Bar Association, CRIMINAL JUSTICE STANDARDS RELATING TO THE PROSECUTION FUNCTION, Standard 3-3.9(a) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.").

50 Crawford v. Washington, 541 U.S. 36 (2004).

51 These may include previously dismissed charges, or incidents that were never the criminally charged, so long as there is sufficient evidence to proceed and the acts were within the limitations period.

Academic credentials, or a degree in psychology or psychiatry, are not always necessary for a witness to be qualified as an expert in the common effects of abusive relationships on victims of abuse.[52] An advocate, investigator, or social worker who has worked with a large number of cases involving domestic violence may be well-qualified by virtue of specialized training and extensive experience to testify about common victim behaviors and attitudes that may otherwise strike the jury as counterintuitive.[53]

In meeting with a potential expert witness, you should emphasize that you are not asking the witness to testify to an opinion as to whether the victim in your case is a victim of abuse, nor whether the victim is behaving in a particular manner because of the abusive relationship. Rather, you are seeking to have the witness explain some of the common behaviors that many survivors of violence may exhibit—excusing or minimizing the abuse, returning to the abuser, lying to protect the abuser, or refusing to cooperate with the prosecution of the abuser—that many jurors would consider counterintuitive. Preferably, you should provide the expert with only enough information about the facts of the case to allow the expert to understand what factors may impact the victim's behavior in your case. For example, a desire not to separate the children from their father would not be relevant in a case where the victim and defendant are childless. But if the victim in your case is claiming responsibility for the violence, the expert might be asked to explain how victims often believe that the abuse is their fault.

Where there is intimidation involved in the case, be sure to discuss with the expert how intimidation or manipulation can affect victim behavior, so the expert can be prepared to testify about that aspect of offender/victim dynamics, and to emphasize the impact of intimidation and manipulation on victims.

Domestic violence cases are not the only ones that can benefit from expert testimony to explain victim behavior. Cases involving human trafficking involve similar dynamics of coercive control that an expert in that field could explain to a jury. In cases involving gang violence where witnesses are affected by community pressure not to "snitch," an expert in gangs may be useful to explain how community-wide gang intimidation can impact the willingness of witnesses to cooperate. In cases involving violence in prisons or other institutions where there may be a similar culture of silence, an expert in prison culture or in the culture of another institution (such as a church or other religious organization) may help the jury to understand the institutional pressures placed on an uncooperative victim or witness. An expert in certain ethnic cultural traditions likewise may be helpful where those traditions had a significant impact on the dynamics of the relationship or on the victim's behavior. Expert testimony may be helpful in any case where it is essential for the jury to understand the motives of witnesses who recant or refuse to cooperate, lest those behaviors be misinterpreted.

In addition to experts in victim behavior, other types of experts may be necessary depending upon the evidence in a particular case. For example, technical experts may be necessary in cases involving intimidation by electronic communication (*e.g.*, text messaging, email, social networking or other Internet postings, GPS/tracking devices). Identifying and retaining such experts as soon as practicable will help to expedite the proceedings.

52 "Battering and its effects" or a similar term is preferable to qualifying a witness as an expert in "battered women's syndrome." The latter term has been abandoned by many professionals in the field, although some state court decisions insistently continue to use the term. The "syndrome" involves an actual diagnosis—an expert opinion that a specific individual displays specific characteristics as a result of a particular pattern of abusive conduct. By contrast, the expert testimony referred to here is not based upon a diagnosis, and preferably does not involve any kind of opinion as to the effect an abusive relationship may have had on your specific victim. Rather, this testimony is offered to explain to a jury the many ways in which an abusive relationship may affect victims of abuse. These may include fear of retaliation for reporting the abuse, self-blame for the abuse, a feeling of entrapment and inability to escape the abuse, and a desire (for a variety of possible reasons) not to see the defendant go to jail.

53 Sample questions, *Expert Testimony on Victim Behavior: Qualifying the Expert*, available from AEquitas, upon request.

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- **PRETRIAL MOTIONS**

  Cases involving intimidation often will require one or more pretrial motions, particularly motions to determine what evidence will be admissible at trial. Court rules, the rules of evidence, or even the preference of individual judges will frequently dictate the timing of such motions. Whenever possible, file the motion and obtain a ruling at the earliest possible time. The results of motions may sometimes facilitate resolution of cases by guilty plea, since both the State and the defendant will have a clearer idea about the likelihood of success at trial based upon what evidence will be admissible. Even where such motions cannot be determined well in advance of the trial date, it is best to seek a ruling before opening statements so both parties will know what anticipated evidence can be mentioned in their respective openings.

  Pretrial motions *in limine* typically include motions to admit evidence of other crimes or "bad acts" pursuant to Rule 404(b), motions to admit evidence pursuant to the doctrine of forfeiture by wrongdoing, motions to admit (subject to exceptions to the hearsay rule) nontestimonial hearsay statements of witnesses who are not testifying, or motions to admit testimonial hearsay statements of unavailable witnesses where there has been a prior opportunity to cross-examine the witness. Although evidence rulings concerning such *Crawford* issues (other than motions to admit evidence under the forfeiture doctrine) may not *require* a pretrial motion, a motion *in limine* prior to trial is nevertheless good practice because it will clarify what evidence ultimately will be admissible.

  A motion *in limine* is also appropriate where there is a risk that the defense may attempt to introduce personally embarrassing information about the witness that has no legal relevance to the case or to the witness's credibility. Some defendants routinely threaten victims that if a case goes to trial, the defendant will testify that the victim had an abortion, for example, or was sexually abused as a child, for the sole purpose of discouraging the victim from testifying. An advance ruling from the court prohibiting any questioning or testimony about such irrelevant matters will make the witness feel safer about testifying, and will provide the court with a basis for punishing the defendant if the order is ignored.

  Any special motions concerning security measures during the trial should also be filed early so the court has ample time to consider the available options. In gang-violence cases, and in certain other cases where the defendant has a number of allies and supporters who are willing to engage in witness intimidation, special security measures may be warranted. Such measures might include separate metal detectors at the door of the courtroom or at the entrance to the hallway, prohibition of cell phones in the courtroom, requiring all spectators to provide identification, and extra security staff in the courtroom.

  In cases where a witness would suffer serious emotional harm as a result of testifying in the presence of the defendant, a motion to permit the witness to testify via closed-circuit television may be an appropriate solution.[54] Expert testimony is necessary to establish the harm that the witness is likely to suffer if required to testify in the defendant's presence. If the court finds that the witness is likely to suffer such severe emotional harm, the attorneys may be permitted to conduct their examinations of the witness in a separate room, with a live video feed to the courtroom. Remote examinations of this type should not be conducted without a hearing as to the necessity of doing so.

  In some cases where there are grounds for a forfeiture motion, some of the hearsay statements might also be admissible (even without the forfeiture motion) because they are nontestimonial statements that fall within an exception to the hearsay rule. In such cases, it is best to file a motion that asks the court to rule on the two grounds of admissibility in the

54 Confrontation via closed-circuit television pursuant to the rule set forth in Maryland v. Craig, 497 U.S. 397 (1990), continues to be acceptable after *Crawford*. *See also* United States v. Kappell, 418 F.3d 550 (6th Cir. 2005). Note that the circumstances permitting such alternative modes of testimony are strictly circumscribed, and the trial court must make explicit findings of necessity under the test set forth in *Craig*. United States v. Yates, 438 F.3d 1307, 1312-18 (11th Cir. 2006).

alternative. By having the court rule on both grounds, you will have a complete record for appellate review, potentially avoiding a remand for additional findings or, worse yet, a new trial. Evidence that is admissible under either theory may allow the appellate court to uphold a conviction.

If the court denies a motion to admit hearsay statements of an unavailable witness, consider whether the statements are so critical to your proofs that you cannot prove your case without them. In such a case, it may be worthwhile to seek to take an interlocutory appeal of the adverse ruling.[55] Such appeals are typically discretionary, and you may have to seek leave of the trial court before filing a notice of appeal. Consult your appellate rules, or contact the attorney general's office for guidance on this issue.

This *Resource* will not discuss in detail the law governing forfeiture by wrongdoing, nor the nuances surrounding the admissibility of hearsay statements of non-testifying witnesses under *Crawford* and its progeny. Rather, the focus in this *Resource* is upon strategic considerations in satisfying the predicates for admission of hearsay statements under either of these legal theories. AEquitas has published *Resources* on both of these topics that discuss the relevant legal issues in detail.[56]

- **Special considerations for motions requiring a showing of witness unavailability (forfeiture or testimonial statements admitted after opportunity for cross-examination)**

  Successfully litigating a motion to admit evidence under the doctrine of forfeiture by wrongdoing, or one to admit testimonial hearsay where there has been a prior opportunity for cross-examination, requires a showing that the witness is unavailable for trial.

  Of course, a pretrial motion to admit statements of an unavailable witness presupposes that you *know* that the witness will be unavailable for trial. In some cases, such as one where the witness is deceased, or where the witness has asserted a valid claim of privilege, you will be certain of the witness's unavailability. In other cases, the witness may have simply "disappeared" and evaded all attempts to locate him or her. If all leads have been exhausted, it should be possible for the prosecutor to file, and for the court to rule upon, a pretrial motion. In other cases, such as those where the witness has merely expressed a refusal to testify, or is unresponsive to communications, though the witness's whereabouts are known, the motion may have to be delayed until immediately prior to trial, or even after the trial begins, to see what the witness's response is to a subpoena and/or a direct order from the court to testify.[57] If you have doubts about a witness's willingness to appear for court and to testify, it is good practice to subpoena the witness for the day of the final pretrial conference or the beginning of jury selection. If the witness fails to appear, after being properly served with a subpoena, or appears but states he or she refuses to testify, you can then proceed with a forfeiture motion before the jury is sworn. If the witness does appear, be sure to personally serve the witness with a subpoena for the date the witness is to testify.

  If the witness fails to appear in response to a properly served subpoena, but his or her whereabouts are known, you must decide whether to seek a bench warrant to bring the witness to court. It is *not* good practice to arrest a

55 The potential need to appeal an adverse evidentiary ruling is another sound reason to file motions *in limine* well in advance of the trial date.

56 *See* AEquitas, The Prosecutors' Resource on Crawford and Its Progeny; AEquitas, The Prosecutors' Resource on Forfeiture by Wrongdoing.

57 As noted previously, the unavailability of the witness may not be apparent until after the trial has commenced; this is the reason for creating the "forfeiture file" in your trial file or notebook as described in Part I of this *Resource*, *supra*. In such cases the motion cannot be filed until the witness has become unavailable, but the file will ensure that you have the necessary supporting evidence available to go forward with the motion on short notice after the trial has begun.

reluctant *victim*. The victim has already been harmed, and arrest only causes the victim additional harm and may cause him or her to avoid reaching out for help in the future. It is important to note that although recantations must be disclosed to the defense as exculpatory evidence pursuant to *Brady v. Maryland*,[58] a witness's refusal to testify is not exculpatory. There is, therefore, no ethical prohibition against negotiating a plea agreement without disclosing to the defense the witness's reluctance or refusal to testify.[59] If no resolution by plea is possible, and the only way to prove the case is to arrest the victim, the better course may be to dismiss the case. If jeopardy has not yet attached (in a jury trial, once the jury has been sworn), it may be possible to reinstate the case at a later time if the victim later reconsiders, or if other evidence becomes available.

If the witness agrees to come to court to state his or her refusal to testify on the record, assuming there is no valid privilege, it may be necessary in some jurisdictions for the court to order the witness to testify under threat of contempt before the victim can be held to be "unavailable."[60] There is no need for the court to actually punish the contempt, but the threat of contempt may still have to be communicated to the witness before the witness is deemed unavailable for trial. If the trial judge decides to punish the victim for contempt—a matter within the trial court's discretion—again, it is almost always the better course at that juncture to dismiss the case than to criminally punish a reluctant victim for refusing to testify.

Where witness unavailability is based upon an inability to locate the witness, it will be necessary for the State to show that it made all reasonable efforts to produce the witness for trial. This may require testimony by the assigned investigator as to what efforts were made to locate the witness. Unless the prosecution had every reason to believe the witness *would* appear, desultory efforts to locate the witness, or those not made until the eve of trial, may lead the court to conclude that the State has failed to show that the witness is actually unavailable.[61] This is why it is critical to document all witness contacts—including those that were unsuccessful—during the pretrial phase.

- **Consideration for forfeiture motions**

  Forfeiture by wrongdoing generally requires the State to prove, by the applicable standard of proof (a preponderance of the evidence in most jurisdictions; clear and convincing evidence in Washington,[62] Maryland,[63] and New York[64]), (a) that the defendant engaged in wrongdoing or (b) acquiesced in wrongdoing (c) that caused the witness to be unavailable for trial and (d) intended that result. See Fed. R. Evid. 804(b)(6).[65]

58 *Brady*, 373 U.S. 83.

59 There is, however, an ethical obligation not to be untruthful with defense counsel if asked directly about a witness's availability. MODEL RULES OF PROF'L CONDUCT 3.3, 4.1, and 8.4(c) all forbid making false statements or misrepresentations in various circumstances. Rule 4.1(a) generally prohibits making a false statement of fact or law, and Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law." Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Of course, the defense may already be aware of the witness's reluctance or refusal to testify and therefore may insist on going to trial.

60 *See, e.g.,* State v. Byrd, 967 A.2d 287, 304 (N.J. 2009).

61 United States v. Tirado-Tirado, 563 F.3d 117 (5th Cir. 2009).

62 State v. Mason, 160 Wash. 2d 910 (2007).

63 MD. CODE ANN., CTS. & JUD. PROC. §10-901 (West 2011).

64 People v. Geraci, 85 N.Y.2d 359, 649 (1995).

65 Some States have additional requirements, such as the requirement of a showing that the statement to be admitted is reliable. *See* State v. Byrd, 967 A.2d 285, 304 (N.J. 2009).

- **Proving wrongdoing**

  "Wrongdoing" is easily proved where the defendant has made threats or otherwise caused criminal harm to a victim or witness. However, "wrongdoing" in the forfeiture context may include more subtle acts of manipulation intended to dissuade the victim from testifying.[66] Such acts may include declarations of love, promises to marry, promises to get counseling or treatment for a drug or alcohol problem, or plays for sympathy. The court may need to be educated about the role of this kind of manipulation in abusive relationships. Expert testimony at the forfeiture hearing from an expert in the dynamics of abusive relationships may help the trial court to understand how such seemingly innocuous acts are used by abusers to control the actions of their victims, which will enable the court to make a finding that the defendant has engaged in wrongdoing.

- **Proving the defendant's involvement/acquiescence in third-party wrongdoing**

  Where the intimidating conduct was actually committed by a third party (a friend, relative, or criminal associate of the defendant), the defendant will have forfeited his right to cross-examine the witness only if the defendant either instigated the intimidating conduct or acquiesced in it. Acquiescence implies both knowledge and approval of the act. Be certain you can prove such knowledge and approval, at least circumstantially.

- **Proving the defendant's wrongdoing caused the witness's unavailability**

  Because the forfeiture rule requires that the defendant's wrongdoing be the cause of the witness's unavailability for trial, it may be important to show that the witness did not have reasons of his or her own not to appear for trial. For example, showing that the absent witness left his or her home and employment abruptly, for no apparent reason other than the defendant's wrongful conduct, would probably be sufficient to establish the causation element of forfeiture.

- **Proving the defendant's intention to cause the witness's unavailability for trial**

  The majority and concurring opinions in *Giles* indicate that proof of a "classic abusive relationship" in which the victim was intentionally isolated to discourage the victim from reaching out for help, including help from law enforcement, can be used to prove, circumstantially, the defendant's intent in committing an act that caused the victim's unavailability for trial. Thus, evidence of prior acts of violence or coercive control, including isolation from family or friends, threats about what would happen if the victim reported the violence, prior criminal charges that were dismissed for failure of the victim to appear, or prior restraining orders that were dismissed at the victim's request would all tend to show that this type of "classic abusive relationship" existed and, inferentially, that the defendant intended by his conduct to similarly prevent or discourage the victim from reaching out for help by testifying at trial.

- **Jury Instructions**

  If the court grants the motion to admit the unavailable witness's hearsay statements, a special jury instruction may be appropriate. A suggested jury instruction is provided in Appendix D.

66 *See, e.g.,* People v. Byrd, 855 NYS.2d 505 (Supreme Court, App. Div. 2003) (hospital visits and hundreds of phone calls constituted "wrongdoing" in context of abusive relationship); People v. Santiago, 2003 N.Y. Slip Op. 51034[U] at *17, 2003 WL 21507176 (2003) (apologies and promises constituted "wrongdoing" in context of abusive relationship).

- **PLEA NEGOTIATIONS**

  Plea negotiations are often ongoing throughout the pretrial period. Shortly before trial, there may be a final round of negotiations in which the strength of each party's bargaining position may be substantially different from what it was early in the case. Sometimes the State's case will be much stronger than it was previously due to thorough investigation and careful management of witness safety. Sometimes the case will be weaker for a variety of reasons, including successful attempts at witness intimidation by the defendant. The outcome of pretrial motions also impacts the relative strength of each party's case.

  In conducting these final pretrial negotiations, it is important not only to consider the strength of the State's case, but also to weigh the reasons that favor taking the case to trial despite the challenges presented by witness intimidation. Remember that defendants engage in intimidation for the purpose of securing a favorable outcome for themselves. Even if a defendant does not succeed in weakening a case to the point of dismissal, offering an extremely favorable plea as a result of intimidation tactics only rewards those tactics. From the standpoint of public policy and justice, it may be better to try cases weakened by the defendant's acts of intimidation than to plead them for a sentence substantially less than the crime would warrant. When cases are taken to trial, regardless of the defendant's attempts at intimidation, it sends a message to the defendant and to the community that intimidation will not be rewarded. Trial of these cases also benefits the court and the prosecutor, as they become more adept at addressing the recurring issues that arise in cases involving intimidation.

- **THEORY OF THE CASE AND TRIAL STRATEGY**

  If there is an intimidation issue in your case, it is best to work that issue into the theme of the case you intend to present at trial. Try to touch on that theme in the testimony of every witness you call that may be able to support or corroborate it. Even if the intimidated witness testifies at trial, and testifies in a manner favorable to the State's case, witness intimidation is strong evidence of consciousness of guilt. The jury can be reminded over and over, through witness testimony and other evidence, that this defendant did everything in his power to prevent the truth from reaching their ears.

  Be sure you develop a coherent theory of the case, and present your evidence in a manner that will allow the jury, at the conclusion of all of the evidence, to understand what happened and why—the motive of the defendant in committing the crime, the reasons for the victim's behavior, and the explanations for any puzzling aspects to the case. Juries that do not understand why events occurred as they did are unlikely to be convinced of the defendant's guilt beyond a reasonable doubt.

- **FINAL WITNESS PREPARATION**

  Intimidation often ratchets up just before the trial begins, as the defendant becomes more desperate and determined to control the outcome of the trial. If there is reason to believe the victim or witness is in serious danger, consider relocating the witness until the trial is over, or at least until the witness has testified (unless there is a likelihood of retaliation, in which case longer-term measures may have to be considered). Short-term relocation possibilities may include staying with a relative or friend, or staying at a motel or shelter.

  Plan to meet with all of your witnesses a week or so before the scheduled trial date. Explain to your lay witnesses what to expect in terms of testifying. Review what kinds of questions you will be asking them, and what they can anticipate will be asked on cross-examination. Intimidated witnesses should be reminded to look at you while they are testifying on direct, not at the defendant (other than briefly while identifying the defendant for the record). While testifying on cross-examination, if they need to avoid looking in the direction of the defendant, they can look at the jury.

Find out whether the witness would like to have a friend or advocate in the courtroom to provide moral support. Typically a sequestration order will be in effect, so the witness should preferably choose someone who is not expected to testify at trial.[67]

Remind witnesses that they should answer *only* the questions they are asked, and not volunteer additional information—assure them that if anything needs to be clarified, either on direct or on cross-examination, you will go back and ask them more questions on re-direct. Tell them what to do if they observe the defendant or anyone else in the courtroom engaging in intimidation—staring, making faces or gestures, or mouthing comments: tell them to turn to the judge and say, "Excuse me, I need to speak with the court, please." At that point, after the judge excuses the jury, the witness can explain to the court and the attorneys what the problem is.[68] You can reassure the witness that the courtroom staff is aware of the intimidation problem and will act to protect everyone in the courtroom.

At trial, a *pro se* defendant is entitled to personally cross-examine any witnesses who testify for the State. This scenario is rife with opportunities for the defendant to intimidate the witness. You should thoroughly prepare the witness prior to testimony, and assure the witness that appropriate objections will be made if the examination becomes abusive. Again, if the intimidation tactics are too subtle for anyone else to observe, the witness should ask to speak with the judge, and a sidebar conducted.[69]

Be sure that the witnesses understand their obligations under any court orders, rules of evidence, or case law to refrain from alluding to certain matters (*e.g.*, a prior jail term or the existence of a restraining order). If you are calling expert witnesses to testify, be sure that they understand any court rulings limiting the extent of their testimony, as well as any limitations you may have already discussed (*e.g.,* not offering an opinion as to whether the victim was abused; not offering an opinion as to the victim's veracity).

Arrange for an advocate or investigator to transport intimidated witnesses to court, if possible, or to meet them at the prosecutor's office and accompany them to court, staying with them until they are escorted from the courthouse for the day. In the case of incarcerated witnesses, be sure that the institution arranges for prosecution witnesses to be kept separate from the defendant and any defense witnesses when being transported to court or while being held pending their testimony.

- **FINAL PRETRIAL CONFERENCE**

The final pretrial conference before trial begins is the time to review all of the charges to be sure you are proceeding only with charges you believe the State has the ability to prove beyond a reasonable doubt. It is also the time to be sure that any security measures, which should already have been discussed with the court and defense counsel in advance, are implemented or at the ready if they should be needed. Review with the court, and with your adversary, all preliminary rulings on evidentiary issues that may have been the subject of preliminary hearings. If the court has

67 Exceptions are sometimes made for child witnesses, who may need the presence of a parent or other support person who also happens to be a witness. The trial judge should make appropriate findings as to the necessity of allowing a witness to be in the courtroom during another witness's testimony and should place those reasons on the record. The judge should ask the jury not to draw any inferences from the presence of the support person who is also a witness, but the jury should be permitted to consider the fact that one witness was present during the other's testimony to the extent it might bear on witness credibility.

68 Emphasize that this is the *only* reason for interrupting the testimony, and that it should not be done simply because the witness does not care for the line of questioning, the tone of defense counsel, or any other reason.

69 The trial judge should be alerted that the prosecutor has instructed the witness to ask to speak with the judge if intimidation is occurring, so the judge can excuse the jury at that time, thereby avoiding a possible mistrial.

postponed ruling on any of the evidentiary motions until the evidence is more developed at trial, ask the court for an order that neither party allude to the disputed evidence until it has been finally ruled upon.

Advise the judge that you have instructed any victims or intimidated witnesses to ask to speak with the judge if they observe any intimidating behavior on the part of the defendant or anyone else in the courtroom during their testimony. Ask if the court can excuse the jury if this should occur and whether it can permit the witness to communicate with the court and both counsel at sidebar. Assure the court that you want to avoid a potential mistrial by ensuring that any perceived intimidation is initially addressed outside the presence of the jury.

Depending upon court rules or the judge's preference, the final pretrial conference may also be the time to present any proposed jury instructions, including proposed limiting instructions for any evidence you can anticipate before trial (*e.g.,* for Rule 404(b) evidence) or special instructions, such as a "consciousness of guilt" instruction for acts of intimidation. Jury instructions are discussed further in Part III, *infra*.

III. TRIAL

Trials can be unpredictable, and most prosecutors have learned to expect just about anything from the witness stand once a trial begins. Trials of cases involving witness intimidation, however, may be even less predictable than most. The best "defense" a prosecutor can have in such cases is careful preparation to meet whatever issues may arise in the course of the trial, and a certain mental flexibility to adjust trial strategy as the case unfolds in whatever way that it does. Successful prosecution of a case involving witness intimidation requires practice of the legal equivalent of jiu-jitsu: using the defendant's efforts at intimidation as a weapon against him. Creative trial techniques can make this a powerful weapon indeed.

If intimidation is a factor in the case, it should be part of the theme of the prosecutor's case, and should be addressed during *voir dire*, the opening statement, and summation. Before mentioning any anticipated testimony or other evidence in front of the jury, the prosecutor should obtain rulings through motions *in limine* if there is any doubt about its admissibility.

- **JURY SELECTION/*VOIR DIRE*[70]**

  In cases involving witness intimidation, it is important to select a jury that will keep an open mind and consider reasons why victims or witnesses may be absent or reluctant to testify, why an injured victim might testify on behalf of the defendant, or why the State is proceeding with criminal charges against the wishes of the victim. Often jurors of the kind traditionally favored by the prosecution—the "law and order" type—do not make favorable jurors in these kinds of cases. Such jurors may judge victims and witnesses harshly if they ignore subpoenas, if they have lied to investigators or lie on the stand to protect the defendant, if they have engaged in prostitution or other criminal activity, or if they have the kind of mental health or substance abuse problems that victims sometimes develop as a result of repeated exposure to abuse.

  Voir dire is the prosecutor's first opportunity to speak to the jurors, to begin their education about the unique issues involved in the case. Be sure prospective jurors understand that unlike a civil lawsuit, where one party has brought a claim against another party, in a criminal case it is the State that determines whether a violation of its laws should be criminally prosecuted, and it is the State that is the real party in interest. Prospective jurors should be questioned about their ability and willingness to convict a defendant without the victim's testimony, provided the State presents sufficient evidence to prove the defendant's guilt of the offense beyond a reasonable doubt.

70 Sample *voir dire* questions are provided in Appendix C.

Jurors should also be closely questioned about the existence of any firmly held beliefs based upon myths about domestic violence, human trafficking, and the victims of such offenses. Where expert testimony is to be presented, jurors should indicate a willingness to set aside any previously held beliefs if the evidence shows that those beliefs are based upon incorrect assumptions.

- **OPENING STATEMENT**

If the victim or another key witness is definitely not available to testify, the prosecutor's opening statement should tell the jury that the witness will not be testifying, and should preview for the jury what evidence will be presented to explain the witness's absence. Often, particularly in domestic violence cases, the prosecutor will have no idea whether, or how, the victim will testify. Recantation (or, conversely, return to the original statement) can happen in the midst of trial. If there is any possibility that the victim will recant, will refuse to testify, or will testify on behalf of the defendant, the prosecutor should be cautious not to predict what that testimony will be. Instead, the opening should focus primarily on the other evidence in the case that will prove defendant's guilt.

Be sure to talk about any evidence you will present of the defendant's intimidation or manipulation of the victim or witnesses. You can also ask the jury to consider, as they listen to the evidence, what effect the defendant's intimidation might have had on the witness. By emphasizing the intimidation in your opening, the jury can be on the alert for that evidence as it comes in at trial and can be prepared to put the pieces together when you are giving your summation. The jury should hear the evidence within the context of the abusive relationship and the intimidation that accompanies it. Waiting until the other facts have been presented, or waiting to talk about it until summation, is risky; the jury will likely already have formed a negative opinion about the victim's or witness's behavior and may view intimidation arguments with skepticism—as an excuse for a weak case.

If you are calling an expert to testify about the effects of abuse, be sure to mention in your opening that you will be calling someone who can help the jury understand why the victim or witness behaved in a way that might seem to go against the jury's idea of common sense.

Finally, remind the jury that it is the State that is bringing this case, not the victim, and that at the conclusion of the evidence it will be the State that asks the jury to return a guilty verdict if the State has presented sufficient evidence to prove the defendant's guilt beyond a reasonable doubt.

- **TRIAL TESTIMONY**

It is usually best to call any intimidated witness to the stand as early in the trial as practicable, though you may wish to first set the stage with one or two other witnesses who can testify to objective facts about the crime or its immediate aftermath (*e.g.,* a police officer or emergency medical technician), and a witness who can testify about the abusive nature of the relationship or its history. By calling the intimidated witness early, perhaps on the first day, you retain maximum flexibility to structure your questioning of your remaining, more predictable, witnesses in a way that will advance your theory of the case. In addition, once the witness has testified the defendant will have less incentive to continue to engage in intimidation attempts.

Try to present all evidence of intimidation, regardless of whether, or how, the intimidated victim or witness testifies at trial. If you litigated a forfeiture motion outside the presence of the jury, much of the same evidence presented at the hearing can and should be presented at trial in your case in chief, regardless of whether the motion was granted or not. If your victim or an important witness is not present at trial, you do not want the jury to speculate about the reasons for the witness's absence—to infer, for example, that the witness feared that a false accusation would be exposed.

You want to make it clear that it was the defendant's conduct that kept the witness from the courtroom, and it should be permissible to argue that point even if the court denied the forfeiture motion and the hearsay statements of that witness were not admitted. If your witness testified favorably for the defense, you want the jury to understand why. And even if your witness testified truthfully on behalf of the State, evidence of intimidation often indicates consciousness of guilt on the part of the defendant, and should be so argued during summation.

As noted previously, admission of some acts of intimidation may require a motion under Fed. R. Evid. 404(b) as well as an appropriate limiting instruction. Of course, if the victim or witness is not available to testify, or if the victim testifies on behalf of the defendant, evidence of intimidation will help to explain the witness's absence or recantation. Failure to present such evidence will leave the jury to speculate about the reason for the victim's failure to testify on behalf of the State.

Where the witness does testify at trial, the admission of that witness's prior inconsistent statements (in the event of a recantation at trial) does not present Sixth Amendment confrontation issues under *Crawford* and its progeny. However, whether such statements can be admitted as substantive evidence depends upon the evidence rules of the particular jurisdiction, and their admissibility may depend upon specified indicia of reliability (such as their having been made under oath, or in a writing or recording under circumstances evidencing their reliability).[71] The prosecutor must be prepared to satisfy any predicate conditions for admission of such prior statements, and a preliminary hearing under Fed. R. Evid. 104(a) may be required before such statements are elicited.

Throughout the trial, it is important to request that the court issue limiting instructions whenever appropriate, regardless of whether they are requested by the defense. When you know that certain kinds of evidence (*e.g.,* Rule 404(b) evidence, or expert testimony) will require a limiting instruction, it is best for the court to give the instruction immediately before or after the testimony (or both, particularly if the testimony is lengthy), as well as at the conclusion of the case. Even if an appellate court later determines the evidence should not have been admitted, a strongly worded limiting instruction may be sufficient to result in a finding of harmless error, allowing the conviction to stand.

Where prior statements of a witness are admitted, take care to present as much evidence as possible that corroborates those statements. A victim's call to 911 or statement to an investigator in which the victim describes a violent assault might be corroborated with crime scene photos and the testimony of the police officer about observations at the scene that are consistent with the victim's account of what occurred. If the jury is faced with a decision about whether to believe the original account versus a later recantation in which the victim claims to have lied to the police, evidence corroborating the original account simplifies the choice of which version to believe.

- **INTIMIDATION ATTEMPTS DURING TRIAL**

  Victims and witnesses vulnerable to intimidation should come to court accompanied by an advocate or investigator whenever possible. If there is not a secure waiting area for witnesses in the courthouse, someone should wait with the witness until it is time to testify. The witness should not be left alone in the courthouse, where he or she may be confronted or watched by the defendant or the defendant's allies. The investigator or advocate can serve as a witness to any such acts if they do occur. The escort should also be alert for anyone who appears to be photographing or recording the witness at any time.[72]

71 *See, e.g., Byrd,* 967 A.2d at 304.

72 In and around the courthouse, cell phones, particularly those with cameras and recording capability, and "smartphones" pose serious security threats to witnesses. Defendants, or others acting on their behalf, may attempt to photograph witnesses or to record and/or transmit their testimony to others who may use it as a basis to intimidate them. Use of these devices (even in "silent" mode) should be banned within the

Courtroom staff—security personnel, clerks, and others—should be asked to observe the defendant and the gallery during the trial, and to promptly bring any suspicious conduct to the attention of the judge. Courtroom security staff should promptly remove anyone who appears to be engaging in acts of intimidation during witness testimony. Such acts may include staring, making faces, making gestures, or attempting to photograph or record testimony in the courtroom.[73]

Rarely should the courtroom be closed to all spectators, and only in situations where the court states on the record the reason the courtroom must be closed, the reason that alternative measures are not sufficient, and where the closure is as brief as necessary to maintain security.[74] It is usually permissible, however, to exclude specific individuals, such as the defendant's family, who pose a risk to the witness's safety or security during that witness's testimony.[75]

Some intimidation attempts that occur during trial should be called to the attention of the jury. Where there is evidence that the defendant is responsible for the intimidation, evidence of such acts should be admissible to the same extent as any intimidation that occurred before trial. If there were no other witnesses to the act, the intimidated witness can testify to what occurred and why it was intimidating.

Where third-party intimidation cannot be linked to the defendant, it may be unfairly prejudicial to the defendant to present evidence of the act to the jury.[76] If the act occurred in the jury's presence (*e.g.*, a threatening outburst from a spectator), it may be necessary for the court to issue a limiting instruction to disregard the act.

- **Summation**

Summation is your final opportunity to speak directly to the jury about the case that has just been presented. Remind the jury that its job is to examine the evidence and to decide the defendant's guilt or innocence based upon the evidence presented. Remind the jury that it is the State, not the victim, that is responsible for prosecuting the case. The absence of the victim from trial, or the victim's eventual recantation, should be addressed matter-of-factly, and unapologetically, as an unfortunate consequence of the defendant's conduct—criminal conduct that was intended to have that precise result.

Review in detail any evidence of intimidation and manipulation that was presented during the trial, as well as any evidence that was presented about the effects those acts had on the victim or witness. Review with the jury any expert testimony that was presented. Remind the jury of every tactic the defendant engaged in to escape accountability and to prevent the jury from hearing the truth. Argue to the jury that the victim's reluctance is understandable under the circumstances.

It is important to take care not to interject into the summation your own knowledge about the dynamics of domestic violence or other crime—any comment you make in summation must be based solely upon the evidence presented

courtroom, and photography or recording should not be permitted anywhere in the courthouse. These restrictions should be prominently posted at the entrance and throughout the courthouse, and any observed use of camera or recording capabilities should be promptly addressed by security personnel.

73 Third parties who engage in intimidation during the trial should be charged with appropriate acts of intimidation—obstruction, harassment, or other offense—so they can be identified and questioned by an investigator concerning the incident. Regardless of whether the defendant solicited the act, the third party should be held accountable for the act of intimidation.

74 *E.g.*, State v. Bobo, 770 N.W.2d 129, 139-41 (Minn. 2009) (closure of courtroom during testimony of single intimidated witness was reasonable after court made findings of necessity and no reasonable alternative); *see also* Waller v. Georgia, 467 U.S. 39 (1984) (closure of a judicial proceeding must advance an overriding interest and be no broader than necessary to protect that interest; court must consider reasonable alternatives to closing the proceeding and make findings adequate to support the closure).

75 *E.g.*, Commonwealth v. Conde, 822 A.2d 45 (Pa. Super. 2003) (upholding exclusion of defendant's fiancée and friends due to intimidating conduct during testimony).

76 If you wish to present evidence of third-party intimidation not linked to the defendant—for example, to explain a witness's fearful demeanor or sudden reluctance to testify while on the stand—be sure to request a strongly worded limiting instruction to ensure that there is no unfair prejudice to the defendant.

at trial or upon reasonable inferences to be drawn therefrom. Be cautious about asking jurors to put themselves in the victim's position. Such remarks can be considered improper appeals to sympathy, and thus, prosecutorial misconduct. However, there is nothing wrong with asking the jury to imagine how *this* victim probably felt, considering the circumstances (*e.g.*, the history of violence, the history of intimidation, the fact that the parties have children together), about coming to court and testifying against the defendant. Such an argument is based upon reasonable inferences that can be drawn from the evidence.

If the victim's prior statements recounting the crime, such as 911 calls, statements to medical professionals, or a taped statement to investigators, were admitted at trial, emphasize in your argument any evidence that corroborates those statements. Argue that the original statements are far more credible than any subsequent recantations, which are readily explained by evidence of manipulation or intimidation.

Even if the victim or witness appeared at trial, and testified consistently with prior statements, you should nevertheless argue that any attempts on the part of the defendant to intimidate or manipulate the witness indicates consciousness of guilt—that an innocent person would not resort to such tactics.

- **JURY INSTRUCTIONS**

  You should draft for the court appropriate cautionary or limiting instructions whenever evidence is admissible only for a limited purpose under Fed. R. Evid. 404(b). These limiting instructions should be given at the time the evidence is admitted, and again at the time of the final jury charge. Such instructions will substantially reduce the risk of any unfair prejudice, and thereby reduce the risk of reversal on appeal based upon the possibility that the jury considered the evidence for any improper purpose.

  For Rule 404(b) evidence, it is best to request a restrictive limiting instruction that directs the jury to consider the evidence only as proof of knowledge or intent, absence of mistake, or for some other permitted purpose, and not as evidence of the defendant's bad character. To the extent that evidence of intimidation is admitted on the issue of consciousness of guilt, the instruction should be drafted like a standard flight instruction. Typically, such an instruction tells the jury to decide whether the conduct occurred and, if so, to decide whether the conduct indicates a consciousness of guilt or whether it has an innocent explanation.[77]

  If hearsay statements of an unavailable witness were admitted under the doctrine of forfeiture by wrongdoing, a jury instruction on how the jury is to consider such evidence may be advisable, as well.[78]

  Most jurisdictions have standard jury instructions on the jury's consideration of expert testimony. In cases where an expert has been used to explain the dynamics of domestic violence, child abuse, human trafficking, or other crime for the purpose of explaining the victim's behavior, be sure that the instruction reminds jurors that ultimate responsibility for judging the credibility of trial testimony or any prior statements of the witness rests with them, and that the expert testimony may be used, if they accept it, only to assist them in making such determinations of credibility.

- **VERDICT**

  If the jury returns a guilty verdict, immediately move to revoke bail if a sentence of imprisonment is likely to be imposed. If the defendant is acquitted, or if bail is not revoked, request that the court order the defendant to remain in the courtroom

77 *See* suggested jury instructions on consciousness of guilt, Appendix D.
78 *See* suggested jury instruction on forfeiture by wrongdoing, Appendix D.

until the victim has an opportunity to safely leave the courthouse. In cases where there is risk of third-party intimidation or retaliation, ask the judge to order spectators to remain in the courtroom briefly, as well. If the defendant remains free on bail, or if the defendant is likely to post bail, ask the court to remind the defendant that all bail conditions remain in effect, including any no-contact conditions. An advocate or investigator should escort the victim from the courthouse.

Whether the verdict is guilty or not guilty, arrange to spend some time with the victim or witness after the trial to discuss the verdict. Explain what the verdict means, particularly if it is not obvious, as when the jury returns a guilty verdict on lesser-included offenses. It is important to reassure the victim or witness that a verdict of "not guilty" does not mean that the jury disbelieved the testimony. The jury could have been almost certain about the truth of the witness's testimony, and yet had a reasonable doubt about the defendant's guilt of the crime.

Explain, too, that a not-guilty verdict does not affect the continued validity of any restraining order that the victim may already have. If the victim did not have a restraining order because of the defendant's incarceration, and if the defendant has now been found not guilty or is likely to be released due to a lesser bail (such as where there was a verdict on a lesser-included offense), explain to the victim how to get a restraining order if desired.

Explain to the victim what will happen at sentencing, and what kind of input the victim may have at that proceeding. The victim usually has the option of addressing the court in person at the time of sentencing, submitting a victim impact statement (including a request for restitution), or both. An advocate can help the victim prepare such a statement and assist in pulling together the necessary documentation to support a request for restitution. Also remind the victim of the opportunity to request that the court impose any special conditions of post-conviction supervision, such as drug or alcohol evaluation (and treatment, if necessary), conditions of no contact with the victim or any specific members of the victim's family that may need protection, batterers' intervention treatment, or other appropriate conditions. Explain what range of sentences is available to the court, in view of the defendant's criminal history and the seriousness of the crime, so that the victim will have a realistic idea of what to expect at sentencing.

- **SENTENCING**

  Submit to the court a detailed sentencing memorandum in support of whatever sentence you want the court to impose. Where the defendant has been convicted of crimes of intimidation in addition to the original charges, you can make a strenuous argument that those crimes should result in consecutive sentences, since witness intimidation otherwise carries no risk to the defendant. Even where the defendant has not been convicted of separate crimes for acts of intimidation, such acts may nevertheless be argued as aggravating factors that should result in a lengthier sentence. Even if a defendant has been acquitted of any charged intimidation crimes, the standard of proof for facts relevant to sentencing is much lower, and it is therefore generally proper for the court to take such acts into account in imposing sentence.[79]

  Be sure that the court has received any victim impact information that may have been submitted. If there is a dispute as to the correct amount of restitution, a hearing on that issue may be necessary. The victim usually has the right to address the court personally at the time of sentencing. If the victim is urging a non-custodial sentence where such a sentence is clearly inappropriate, acknowledge on the record your understanding of the victim's feelings and wishes, but explain to the court why the custodial sentence is appropriate.

  If a probationary sentence is imposed, urge the court to impose appropriate conditions that will maximize the continued safety of the victim. Such conditions may include no-contact conditions, barring the defendant from certain

79 United States v. Watts, 519 U.S. 148 (1997).

locations frequented by the victim, and barring the defendant from contact with fellow gang members or criminal associates. In addition, conditions such as batterer's treatment, substance abuse or mental health treatment, and restrictions on computer usage (where the defendant used technology for intimidation) may address factors contributing to the abuse or intimidation of the victim.

- **POST-CONVICTION PROCEEDINGS**

  Because ordinary criminal appeals are based upon the trial record, witness recantation is usually not an issue at the appellate stage of the proceedings. Defendants who engage in intimidation during this time are often simply continuing a pattern of abuse, or are engaging in reprisals against witnesses for cooperating during the investigation or trial. Once the direct appeals are exhausted, however, defendants may once again engage in tactics of intimidation for witness-tampering purposes in an effort to secure a new trial. Witnesses may suddenly recant their trial testimony or may claim that they were coerced by the State into testifying falsely, and may sign affidavits to that effect. Defendants or their attorneys may provide to the court or to the prosecutor statements of third parties claiming that a trial witness has admitted committing perjury at trial. In such cases, an investigator should promptly contact the witness for an interview in an effort to determine what has caused the change in testimony. Any new acts of witness intimidation, whether retaliatory or motivated by an effort to secure false testimony, should be investigated and prosecuted.

CONCLUSION

Defendants engage in witness intimidation because it works. To the extent that prosecutors are successful in making witness intimidation a losing proposition for defendants, who will be convicted in spite of their efforts and punished more severely as a result, defendants will be deterred from such attempts. By engaging victims and witnesses early, and on an ongoing basis throughout the proceedings, prosecutors can earn their trust, thereby increasing the likelihood of their continued cooperation. By educating the fact-finders—judges and juries—in the dynamics of witness intimidation, prosecutors can help them to fully understand the realities in these cases. Sound prosecution practices in these challenging cases are necessary if prosecutors are to fulfill their most solemn duty—to do justice.

Appendices

Appendix A: Additional Resources

AEquitas: The Prosecutors' Resource on Violence Against Women, Annotated Bibliography of Resources on Witness Intimidation (forthcoming 2014).

AEquitas: The Prosecutors' Resource on Violence Against Women, Statutory Compilation on Witness Intimidation (2012), *available upon request at* http://www.aequitasresource.org/library.cfm.

AEquitas: The Prosecutors' Resource on Violence Against Women, The Prosecutors' Resource on Crawford and its Progeny (Oct. 2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf.

AEquitas: The Prosecutors' Resource on Violence Against Women, The Prosecutors' Resource on Forfeiture by Wrongdoing (Oct. 2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

Amy E. Bonomi, et al., *"Meet me at the hill where we used to park": Interpersonal Processes Associated with Victim Recantation*, 73 Soc. Sci. & Med. 1054 (2011).

Kerry Murphy Healey, Victim and Witness Intimidation: New Developments and Emerging Responses, National Institute of Justice: Research in Action, (Oct. 1995), https://www.ncjrs.gov/pdffiles/witintim.pdf.

Improving the Justice System Response to Witness Intimidation, AEquitas: The Prosecutors' Resource on Violence Against Women, http://www.aequitasresource.org/Improving-the-Justice-System-Response-to-Witness-Intimidation.cfm (last visited Aug. 19, 2013).

Jennifer Gentile Long & Teresa M. Garvey, *No Victim? Don't Give up: Creative Strategies in Prosecuting Human Trafficking Cases using Forfeiture by Wrongdoing and other Evidence-Based Techniques*, 7 Strategies (Nov. 2012), http://www.aequitasresource.org/S_Issue_7_No_Victim-Dont_Give_Up.pdf.

Jessica Smith, UNC School of Government Administration of Justice Bulletin Understanding the New Confrontation Clause Analysis: Crawford, Davis and Melendez-Diaz (2010), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf.

John Anderson, National Gang Center Bulletin, Gang-Related Witness Intimidation (2007) http://www.nationalgangcenter.gov/Content/Documents/Gang-Related-Witness-Intimidation.pdf.

John Wilkinson, Christopher Mallios &Rhonda Martinson, *Evading Justice: The Pervasive Nature of Witness Intimidation* 16 Strategies in Brief (Mar. 2013), http://www.aequitasresource.org/Strategies_in_Brief_Issue_16.pdf.

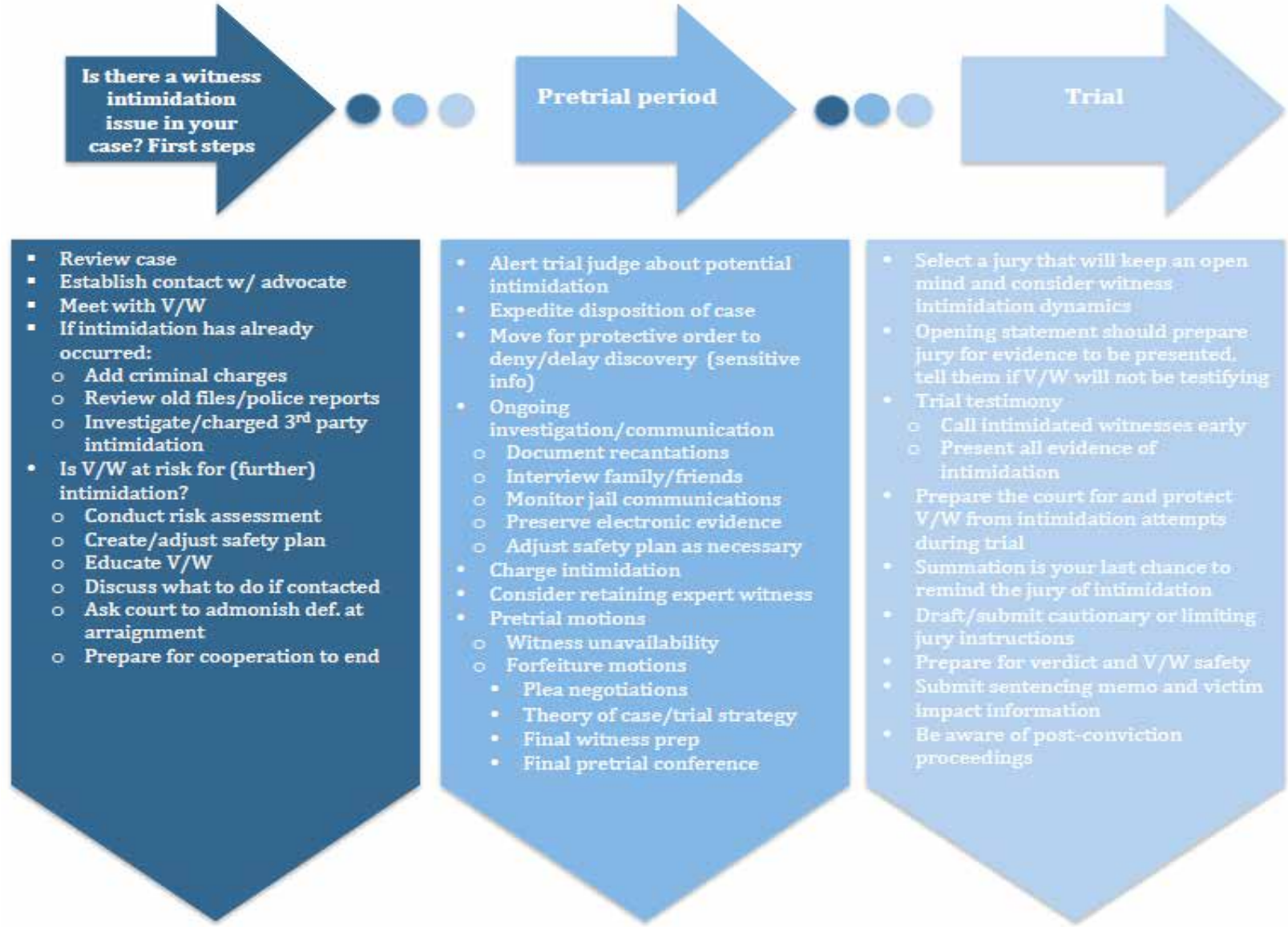
Kelly Dedel, Community Oriented Policing Services, U.S. Dep't of Justice, Witness Intimidation (2006), http://www.cops.usdoj.gov/Publications/e07063407.pdf.

Teresa M. Garvey, AEquitas: The Prosecutors' Resource on Violence Against Women, Witness Intimidation: Meeting the Challenge (2013), http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf .

Vera Institute of Justice, Enhancing Responses to Domestic Violence, Promising Practices From the Judicial Oversight Demonstration Initiative – Prosecuting Witness Tampering, Bail Jumping, and Battering From Behind Bars (2006), http://www.vera.org/sites/default/files/resources/downloads/Prosecuting.pdf.

Viktoria Kristiansson, *Identifying, Investigating, and Prosecuting Witness Intimidation in Cases of Sexual Abuse in Confinement*, XX Strategies in Brief (2014) (forthcoming).

Appendix B: A Quick Look at Prosecuting Cases Involving Witness Intimidation



Appendix C: Sample Voir Dire

"The jury selection process is the first opportunity for a prosecutor to begin educating jurors…and allows prosecutors to identify and strike jurors whose biases will interfere with their ability to follow the law and render a fair verdict."

~ Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases, Part I: Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES (July 2010).

Asking intimidation-specific questions during *voir dire* can give prosecutors the opportunity to begin to educate judges and juries on the subtle and even overt forms of intimidation. This is also an opportunity to lay the groundwork for your case on three fronts: 1) where the victim will be unavailable at trial; 2) if he or she recants; or 3) to show the intimidator's consciousness of guilt. The below questions are designed as a starting point for a prosecutor to develop his or her own questions. If you would like to discuss your specific case or have any questions regarding this resource, please contact an AEquitas Attorney Advisor at http://www.aequitasresource.org/taRegister.cfm.

In any type of witness intimidation case:

- Can anyone explain the difference between a criminal case and a civil lawsuit?
- Do you understand that in a criminal case, it is the State that is prosecuting, and not the victim of the crime?
- Do you understand that the prosecutor in a criminal case represents the State and does not represent the victim?
- Can you accept the idea that a criminal prosecution does not require the agreement or participation of the victim?
- If the State presents enough evidence to convince you beyond a reasonable doubt that the defendant is guilty of committing the crime, would you be able to convict the defendant even if the victim minimizes or denies what happened?
- If the State presents enough evidence to convince you beyond a reasonable doubt that the defendant is guilty of committing the crime, would you be able to convict the defendant even if the victim fails to testify?
- If the State presents enough evidence to convince you beyond a reasonable doubt that the defendant is guilty of committing the crime, would you be able to convict the defendant even if the victim testifies for the defense?
- What are some of the reasons that a victim or other witness in the case might be reluctant to go to court to testify against the defendant?
- Are there other ways beside physical violence that someone can use to intimidate a victim?
- Have you ever heard the phrase "Stop snitchin"?
- Have you ever seen graffiti with the phrase "Stop snitchin"?
- Have you ever seen someone wearing a t-shirt with the phrase "Stop snitchin"?
- What does the phrase "Stop snitchin" mean?
- If the victim or other witness lives in the same neighborhood as the defendant or the defendant's family or friends, how do you think that might affect the witness's willingness to come to court and testify?
- If the evidence shows that the defendant or the defendant's friends have authority over the victim or witness in some fashion, might that affect the witness's willingness to come to court and testify?
- Do you think an innocent person charged with a crime would have to hide evidence or try to keep witnesses from testifying to the truth?
- If the judge tells you that you can consider a person's out-of-court statements as evidence, even if the person does not testify, can you follow that instruction?
- If the judge tells you that you can consider a person's out-of-court statements as evidence, even if the person's in-court testimony is inconsistent, can you follow that instruction?

As an example for tailoring voir dire to specific offenses, the following questions may be asked in domestic violence cases:

- Do you have any idea how someone might feel after being abused by a loved one?
- Does it make sense to you that a victim might have conflicting feelings about an abusive intimate partner?
- Do you think perpetrators of domestic violence might try to use a victim's conflicting feelings to manipulate the victim?
- Do you think perpetrators of domestic violence might try to get the victim to later testify in court that it didn't happen as originally reported?
- Do you think a victim of domestic violence might be afraid of the person inflicting the abuse even while remaining in a relationship with that person?
- Could a domestic violence victim feel intimidated by the abuser?
- Do you think that abusers might use threats about money or child custody or revealing personal information to intimidate their victims?
- Would it surprise you that a victim might minimize or deny the abuse in testimony about what happened as a result of being intimidated or manipulated?
- Would it surprise you that a victim might not appear in court as a result of being intimidated or manipulated?
- If there were credible evidence that the defendant tried to get the victim to avoid coming to court, or to be untruthful in testimony about what happened, would that indicate to you an awareness of guilt on the part of the defendant?

Appendix D: Sample Jury Instruction

The following are ***suggested*** jury instructions. Most court rules require the parties to draft and propose any special jury instructions not contained in the model rules. Since most jurisdictions don't have model rules on these topics (or the model rules are inadequate), prosecutors have to be prepared to provide a proposed instruction to the court. This is important because inadequate jury instructions are a common basis for reversal on appeal. If you would like to discuss your specific case or have any questions regarding this resource, please contact an AEquitas Attorney Advisor at http://www.aequitasresource.org/taRegister.cfm.

Jury Charge for Forfeiture by Wrongdoing

The State has introduced evidence of statements made by _____, a witness who did not testify at trial. You should consider this evidence as you would consider any other evidence introduced at trial. It is your responsibility to determine whether such statements were in fact made and, if made, whether they are true.

In making these determinations, you should consider the credibility of the witness who testified about the statements, as well as any circumstances that may affect the credibility of the statements themselves. These circumstances may include such factors as the setting in which the statement was made, the person to whom it was made, the reason the statement was made, whether there is other evidence supporting or contradicting the truth of the statement, and whether _____ had any motive to make a false statement. If you find that the statement was made, and that the statement was true, you may consider it just as if _____ had testified at trial. On the other hand, if you find that the statement was not made, or if you find that the statement was not true, you should disregard it.

Jury Charge for Consciousness of Guilt

In this case the State contends that the defendant [made numerous phone calls to _____, or engaged in whatever the act may have been] for the purpose of dissuading the witness from testifying at trial in this matter, and that such conduct demonstrates a consciousness of guilt. You must decide first, whether you believe that such conduct took place, and second, if it did take place, whether it demonstrates a consciousness of guilt on the part of the defendant. In determining whether conduct demonstrates a consciousness of guilt, you must consider whether the conduct has an innocent explanation. Common experience teaches that even an innocent person who finds himself or herself under suspicion may resort to conduct which gives the appearance of guilt. The weight and importance you give to evidence offered to show consciousness of guilt depends on the facts of the case. Sometimes such evidence is only of slight value, and standing alone, it may never be the basis for a finding of guilt. If, however, you find that the defendant did engage in this action, and that it does demonstrate a consciousness of guilt, you may consider it as you would any other evidence of guilt presented by the State.

Appendix E: Documentation Guide for Reports of Witness Tampering

Criminal justice professionals should be prepared to investigate, document, and respond to reports by victims and witnesses of contact, pressure, coercion, threats, or other intimidating behavior by defendants or their associates. This resource is intended to provide guidance on how to communicate with victims and witnesses during the course of a case, what information to pursue, and what evidence to document for purposes of prosecution arising out of such criminal conduct. Criminal justice professionals should adapt the information here to their own jurisdictions' laws, policies, and practices.[80]

Remember:

- Educate victims and witnesses about the potential for intimidation and the importance of preserving evidence of intimidation.
- Encourage victims and witnesses to prepare for intimidation and to call police when they have been intimidated or pressured not to contact police/prosecutors or not to testify in court.
- Witnesses reporting intimidation should be connected with a victim advocate for safety planning.

	Things to consider
Who *Identify the perpetrator of the intimidation to appropriately safety plan and to bring criminal charges.*	• Defendant • Defendant's family member • Defendant's friend/associate • Defense attorney/investigator/paralegal • Does witness know the intimidator? • Can witness identify the intimidator? • Are there documents/electronic data or other evidence proving the intimidator's identity? • If third-party intimidator, can act of intimidation be linked to the defendant?
What *Intimidation can be overt or subtle, and includes manipulation intended to influence the witness not to cooperate. Educate victims and witnesses on the different kinds of intimidation and ask about any specific behavior that is occurring for purposes of safety planning and lethality assessment, and to identify what crimes may be chargeable.*	• Force or violence • Threats (explicit or implied) • Property damage, graffiti • Break-in or theft • Coercion or extortion/blackmail • Harassment or stalking • Bribery • Emotional manipulation
When *Be aware of the common opportunities for intimidation throughout the justice system; educate and reach out to victims and witnesses at those points.*	*Before, during or after:* • Call to 911 • Police response • Charges issued • Pretrial • Hearing or trial • Verdict • Sentencing *During:* • Probation • Parole

80 For more detailed information on dynamics and strategies for investigating and prosecuting intimidation, see TERESA M. GARVEY, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, WITNESS INTIMIDATION: MEETING THE CHALLENGE (2013), http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf.

Where *Intimidation can happen anywhere. Professionals should be aware of opportunities for intimidation within their control, should educate victims and witnesses about common opportunities outside of the justice system, and should work with victims and witnesses to safety plan.*	*Within Professionals' Control* • Response at crime scene • Appointments associated with being a witness (police, prosecutor, advocacy, etc.) • Jail phone calls/visits • Court *Outside Justice System* • Home • Work or school • Socializing • Running errands
Why *Understanding an intimidator's motives can help to keep individuals safe and also to help hold offenders accountable by providing evidence for new charges or for a motion to introduce evidence under forfeiture by wrongdoing.[81] Preparing for, identifying, and responding to intimidation is important because it has been found to be a factor in risk assessment for lethality.*	• Is there an open case? • Was there a crime not yet reported? • Is the defendant currently on probation/parole? • Did the intimidator give a reason for his/her actions (*e.g.,* retaliation for previous report/testimony)? • Does witness have suspicions regarding the intimidator's reason?
How *Ask about the ways in which offenders are communicating with victims and witnesses. There may be potential retrievable evidence or further investigation necessary.*	• In person (words, gestures, intimidating actions) • Via third party • Voice (phone calls, voice mail, etc.) • Writing (letters, emails, texts, social media) • Technology (stalking, GPS tracking, hacking, etc.)
Evidence Collection *Investigators must preserve evidence of intimidation as contemporaneously as possible—some electronic evidence is preserved for a limited time, and without a preservation request, websites may be altered and content deleted. Note that some requests may result in the intimidator's being alerted to the investigation.*	• Recorded statement of intimidated witness and any witnesses to act of intimidation • Crime scene photos if appropriate • Collect letters, notes, other writings • Photograph images of text messages; download/backup content of phone if possible • Download web archive for web pages • Download email with complete header information • Preservation request to website hosting content (*e.g.,* Facebook, Twitter, other provider) • Legal process to obtain subscriber data for intimidator's cell phone, ISP, content of website account (e.g., Facebook, Twitter, other provider) (may require search warrant) • Obtain written consent from victim for victim's own phone records/ Internet account/social media account data • If appropriate, obtain warrant to search offender's cell phone/computer

81 "If a defendant causes a witness to be unavailable for trial through his wrongful acts, with the intention of preventing that witness from testifying, then the introduction of the witness's prior "testimonial" statements is not barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution." Depending on your jurisdiction, forfeiture by wrongdoing may also be an exception to rule on hearsay by statute or case law. AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING[1] (Oct. 2013), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

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