

Witness Intimidation: Meeting the Challenge



ÆQUITAS

THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN



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Witness Intimidation: Meeting the Challenge

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Witness intimidation can hinder the investigation and prosecution of any criminal case, but it presents predictable challenges in certain categories of crime.² Where the defendant has a pre-existing relationship with the victim, or in cases involving gangs or organized crime, the defendant often has the ability, directly or indirectly, to continue to inflict harm upon, or to exercise influence over, the victim or witness long after the precipitating criminal act. Victims of domestic violence are routinely threatened and manipulated by their abusers to drop charges or to refuse to cooperate with law enforcement. Family members may pressure victims of elder abuse or child victims of sexual assault to recant their allegations. Victims of human trafficking, or cooperating witnesses in such cases, are vulnerable to threats by the trafficker or the trafficker's associates. Victims of, or witnesses to, organized crime or gang-related violence, who often must continue to reside in the same neighborhood—a neighborhood that may be under the *de facto* control of the gang or criminal organization—are labeled “snitches” and thereby made targets for intimidation and reprisal. Victims of crimes that occur in institutional settings, such as schools, hospitals, or prisons, may be forced to continue interacting with associates of their abusers on a daily basis.

Witness intimidation can, and often does, result in failure to report crimes, refusal to speak with investigators, recantation of statements previously given, and refusal to testify at trial. Some victims will testify in favor of the defendant—actively opposing the prosecution's case and claiming that they lied to police or were coerced by police into falsely implicating the defendant. Some witnesses will claim a Fifth Amend-

ment privilege in an effort to avoid testifying, even when there is no basis for asserting the privilege. Some witnesses will simply disappear prior to trial, fearing for their own safety or that of their families if they testify against the defendant.

Although witness intimidation most often occurs before trial or during the trial itself, intimidation and reprisal do not necessarily end when the defendant is found guilty and sentenced. Whether the case results with a noncustodial sentence or imprisonment in a maximum-security facility, the defendant may continue to stalk, threaten, or intimidate victims and witnesses, with the aim of securing a post-conviction recantation, to retaliate for their cooperation with law enforcement, or to send a message to others about the consequences of cooperation.

Witness intimidation is “behavior which strikes at the heart of the justice system itself.”³ When intimidation is permitted to occur, and when it is not effectively addressed by the system of justice, victims and witnesses suffer additional harm, defendants escape accountability for their actions, and the general public becomes cynical and loses confidence in law enforcement. Criminals become emboldened, confident in their ability to continue their criminal activities with impunity, while victims and witnesses decide it is not worth the risk to report crimes or to cooperate with law enforcement. Law enforcement professionals become discouraged and frustrated by witnesses who withhold information or recant the statements they have already given. When witness intimidation results in a mistrial or disturbs a conviction, the result is a costly re-trial. To allow witness intimidation to go unchecked is to hand over the criminal justice process to the ruthlessness, ingenuity, and determination of the criminal. That result is unacceptable on all levels.

To effectively address the problem of witness intimidation requires the participation of police, prosecutors, investigators, judges, and advocates; healthcare, social services, and corrections professionals; and probation or parole officers—all of whom may come into contact with victims or witnesses who are vulnerable to intimidation or with defendants who intimidate. This monograph is intended to help all of these

allied professionals understand the issues presented by witness intimidation and to guide them in best practices to prevent its occurrence and to respond effectively when it does occur.

AEquitas has undertaken a special initiative, Improving the Justice System Response to Witness Intimidation (Initiative on Witness Intimidation/IWI). This Initiative is a field-initiated project funded by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. Commenced in September of 2010, IWI's mission is to improve the quality of justice in intimidation cases by developing, evaluating, and refining justice system practices that raise community awareness and increase victim safety and offender accountability. Three pilot sites were selected for the project: Duluth, Minnesota;⁴ Knoxville, Tennessee;⁵ and San Diego, California.⁶ These communities, each of which had previously undertaken a "safety audit" to evaluate systemic responses to violence against women, agreed to partner with AEquitas to utilize this process once again, this time to investigate the occurrence of and systemic response to witness intimidation in their communities.⁷ Practitioners at the IWI sites in Duluth, Knoxville, and San Diego undertook investigative activities such as court observations, practitioner interviews, victim interviews, and file reviews. Following that investigation, they reported their findings in relation to witness intimidation and witness safety issues, identified gaps in witness safety and offender accountability, and made recommendations to address those gaps. Findings, examples, and recommendations from these Pilot Project Reports are cited throughout this monograph.

Part I of this monograph will explore the forms—sometimes subtle—that witness intimidation can take, identify victims and witnesses who are most likely to be subjected to intimidation, as well as examine where and when intimidation is likely to occur. The subsequent parts of the monograph will identify and discuss:

- II. Recommendations for training, cross-training, and collaboration among allied professionals and agencies that will prepare them to meet the challenges presented by witness intimidation

- III. Strategies that will help to prevent intimidation or minimize its effects, by minimizing or managing the interactions between defendants and witnesses and by depriving defendants of access to some of the tools they use to intimidate
- IV. Strategies to uncover the presence of intimidation in the context of individual cases, and investigative strategies and techniques to secure the evidence to prove it
- V. Strategies for effective response to intimidation occurring within the context of individual cases, ranging from informal resolution to the prosecution of intimidation as a discrete offense that may be separately punished to achieve maximum deterrent effect
- VI. Trial strategies for cases involving witness intimidation, including the use of forfeiture by wrongdoing as a means of admitting hearsay statements where a defendant has caused a witness's unavailability for trial.

Although this monograph is focused on intimidation perpetrated by defendants or by others acting on their behalf, law enforcement professionals should keep in mind that the criminal justice system itself is (usually unintentionally) intimidating to many victims and witnesses. Police, investigators, and prosecutors should always deal with victims and witnesses in a respectful and sensitive manner. Police departments, prosecutor's offices, and courts should provide victims and witnesses with secure and comfortable waiting areas, ready access to advocacy and other services, information and explanations about the status of the case, and accommodation of personal schedules and other everyday concerns (including those that are culturally-specific) whenever possible. Victims and witnesses who are made to feel safe, secure, understood, and respected will be more likely to cooperate with the prosecution and to remain physically and emotionally safe throughout the proceedings.

I. THE SCOPE OF THE PROBLEM

Accurate statistics on witness intimidation are hard to come by, in part due to the difficulty of identifying and interviewing those witnesses who are subject to the worst, most effective forms of intimidation. The studies that have been done have involved samples of victims and witnesses in a single jurisdiction over a discrete period of time.⁸ Nevertheless, police and prosecutors frequently identify witness intimidation, or witness reluctance or refusal to cooperate, as a significant problem in successful prosecution of crimes, particularly those involving domestic violence or gang-related violence.

A. What is intimidation?

Witness intimidation can take many forms, and it may be direct or indirect. Regardless of the form it takes, its purpose is invariably the same: to allow the offender to escape justice by preventing witness testimony or other cooperation with law enforcement (*e.g.*, providing information or physical evidence, or even obtaining medical treatment that might result in disclosure). Common forms of intimidation include acts of physical violence, verbal and nonverbal communication of threats, threats implied by conduct, and emotional manipulation. Acts of intimidation may be in full view of many witnesses (as in gang-related or human trafficking cases, where the perpetrator wishes to impress more than a single witness—or the community at large—with the consequences of cooperating with the police), in private with no outside witnesses, or in public but concealed or disguised so that only the intended target understands the message. The defendant may engage in intimidation personally, or the intimidation may come from the defendant's family, friends, or criminal associates. Such third-party intimidation is usually, but not always, with the knowledge and consent of the defendant, if not on his or her explicit instructions.

Physical violence

Direct intimidation may consist of actual violence, with or without accompanying verbal threats. The most extreme example, of course, is the killing of a witness to prevent him or her from cooperating with the

police or from testifying in court. This ultimate act may serve a criminal purpose beyond the elimination of that witness's testimony, however. Particularly in cases involving gangs or other organized criminal activity, such a killing may have the intended purpose, and often has the effect, of serving as a warning that will deter other witnesses from coming forward or cooperating with law enforcement. In that kind of context, such acts may also result in the intimidation of potential jurors in a case, creating ensuing difficulty selecting and empanelling a jury,⁹ and the potential for mistrial or reversal on appeal if juror fears voiced during the trial or deliberation affect the ability of the jury to remain impartial.¹⁰

Short of causing the actual death of the witness, lesser acts of violence can be just as effective in preventing witnesses from cooperating. A beating, wounding, or brutal sexual assault carries at least the implicit threat of continued or more severe violence if the witness persists in cooperating with the police or prosecution. A battered woman, thrown across the room once the police leave the scene without making an arrest, does not need to have the significance of that act spelled out for her. In neighborhoods dominated by gangs or organized crime, acts of violence against witnesses not only discourage witness cooperation in that specific case, but discourage any kind of witness cooperation with respect to any future crimes that may be committed, thereby allowing the criminal organization to operate with impunity, and enhancing the fearsomeness of its reputation among rival gangs or criminal organizations.

Verbal and nonverbal communication

Even if no physical violence is utilized, explicit or implicit threats may effectively silence a witness. A defendant may spell out for the victim or witness exactly what consequences are in store if the witness reports the crime to the police or cooperates in any other way. In gang- or organized-crime-dominated neighborhoods, the mere threat to disclose the fact of cooperation may be sufficient to put the witness in fear, not only of the perpetrator and the perpetrator's criminal associates, but of the witness's own friends, neighbors, or family

members, who may pressure the witness not to get involved. A detective at the IWI site in San Diego observed, “Even if not intimidated by threats of rival gangs, witnesses are intimidated by their own families or peers not to snitch. It’s not always a threat—it’s often a reminder not to violate the values in their families or communities. Larger scale matters like dealing with the Mexican cartels—it’s the reputation behind the threat even if there is no actual event or action.”¹¹ Another investigator noted that gang members may offer an apology to a neighborhood victim or witness to a gang crime or promise to pay the resulting expenses, ostensibly as a way to resolve the case short of testifying in criminal court, but also serving as an implicit threat that the matter be taken no further.¹² The “Stop Snitching” motif popularized over the past few years in rap music, graffiti, and fashion carries the clear message that informants and witnesses cooperate with law enforcement at their own risk and that that cooperation is socially unacceptable.¹³

The threat need not be one to commit an act of violence; threats to disclose embarrassing facts or lies about the victim, threats to report criminal activity (real or fabricated), and immigration-related threats (“If you leave me, you will be deported”) may be effective. In the family setting, abusers may threaten to take away the custody of children or to use their superior legal resources to leave the victim in financial straits. If the family is no longer together, the abuser may threaten to report the victim to child welfare authorities. Victims of elder abuse may be threatened with physical or financial abandonment.

A member of the Duluth IWI team concluded that witnesses in several cases had recanted their initial reports to police because they feared discovery of their own involvement in drug activity.¹⁴ Two participants in a victim focus group in Duluth recalled being blackmailed by their abusers’ threats to report their drug use to the police. The threats prevented them from calling the police, cooperating with prosecutors, or objecting to the abuser’s child visitation and custody demands. One said her abuser was the one who bought drugs for her and contributed to her addiction, and then used it against her by threatening, “I won’t give this to you if you call,” and “Now I will call the cops on you and say

you are using.” The abuser also video-recorded her using drugs and threatened to send the clip to police and child protective services if she reported his abuse.¹⁵

Modern technology makes it possible to communicate threats using blogs, social media (*e.g.*, Facebook, Twitter), text messages, email, and voicemail. A victim advocate at the San Diego IWI site reported that offenders’ family members and friends use social media such as Facebook to call names, vent or threaten the victim, stage Facebook confrontations or carry out “Facebook shunning”—the marshaling of mutual friends to “un-friend” or ignore the victim.¹⁶ Cell phones and “smartphones” smuggled into jails and prisons are a growing problem. The number of phones confiscated by the federal Bureau of Prisons has doubled from 2008 to 2011; across the United States, inmates use smuggled phones and social networking sites and “apps” to harass their victims or accusers and intimidate witnesses.¹⁷ The source of these communications may be concealed, or spoofed (faked), requiring proper evidence-gathering techniques to connect them to the defendant.

Nonverbal communication without an explicit threat is another effective form of intimidation. Readily understood threats include gestures, such as making a slashing motion across the throat, mimicking the firing of a gun, or miming the snapping of the witness’s photograph while in the courthouse to testify. In cases involving domestic violence, human trafficking, or gang-related violence against a victim who is associated with the gang, there may be a history of violence against the victim such that a “code” word or phrase, an outwardly ambiguous gesture, or a facial expression associated with previous assaults is sufficient to communicate the threat. Some threats are symbolic (*e.g.*, a dozen yellow roses delivered to a victim who has been told that the day she receives a dozen yellow roses is the day she will die). Cross burnings have been used for years as symbolic threats against African American victims in parts of the South. Perpetrators affiliated with gangs or with organized crime may deliver symbolic threats in the form of dead animals or utilize some other object or sign, such as graffiti, that the victim will recognize as a threat.

In addition to making threats against the witness personally, a defendant or a third party may direct threats against the witness's family and loved ones, including children and pets. Victims and witnesses who are immigrants may be threatened with reprisals against family members in distant countries, particularly in gang-related or human trafficking cases, where the defendants may have associates or official influence in those countries.

Threats implied by conduct

In addition to physical violence and verbal or nonverbal threats, menacing conduct, such as stalking behavior, is often used to intimidate victims. Such conduct communicates to victims and witnesses that they are being watched by the perpetrator, and discourages continued cooperation with investigators or prosecutors. A witness may receive repeated hang-up calls or calls playing music or with strange sounds. Gang investigators at the Knoxville IWI site reported frequent witness intimidation "drive-bys"—not necessarily shooting but simply rolling up and down streets where witnesses and their family members live. They further noted that gang members easily round up four or five men willing to stand on a corner in a witness's neighborhood and stare.¹⁸ Vandalism and property damage, including graffiti, window breaking, or shooting up a witness's home or car sends a clear message. Practitioners and witnesses at all IWI sites reported witnesses being intimidated at the courthouse by offenders staring, standing close by, or making loud noises. Gang members may fill the courtroom while a witness is on the stand, and their visible presence may frighten the witness into silence.

Emotional manipulation

Finally, more subtle forms of pressure, some of which may not facially appear to be intimidation, can be used to manipulate victims in an effort to dissuade them from cooperating with law enforcement.¹⁹ Abusive partners in intimate relationships have an advantage that many defendants do not—they know precisely what their victims' emotional vulnerabilities are. Victims of intimate partner violence may be the recipients of tearful apologies, declarations of love, assurances that the

abuser will change if only the victim will be forgiving, promises to quit drinking or using drugs, or promises to marry or to attend counseling sessions. These are common tactics that play upon the victim's desperate wish not to be in the position of being responsible for the criminal conviction of someone the victim once loved, and for whom the victim may still care deeply—someone with whom the victim may have children. The defendant may convince the victim that if the case goes away, the defendant will finally change, having received an important “wake up call.” Other offenders play more to the emotion of guilt than love. Practitioners and domestic violence victims at the IWI site in San Diego reported that abusers made victims feel guilty by crying, by threatening suicide, or by telling victims that criminal charges will cause them to lose their jobs or to be discharged from the military.²⁰ Offenders also lied to victims in an effort to make them feel guilty so they'll drop charges: “They've got me in a cell with a rapist” and “I'll go away for 20 years.”²¹

This kind of emotional pressure may come not only from the abuser, but also from family members of both parties, particularly when, as so often happens, the abuse has been hidden from others. Abusers are often very skilled at presenting a calm, reasonable, and loving appearance around family and friends, and are frequently adept at gaining their sympathy and support at the expense of the victim, who is often intentionally isolated from other potential sources of support. In such cases, it is possible that the individuals exerting the pressure may be unaware that they are advancing the abuser's scheme to silence the victim. Domestic violence victims at the San Diego IWI site reported they were intimidated during court appearances by the abusers' families, who called them names or otherwise harassed them while in the courthouse. A victim advocate at this locale explained, “Families do so to 'help' the defendant not contact the victim; that is, they vent or threaten on his behalf.”²²

Children are particularly vulnerable to emotional manipulation. Children of an abusive relationship may be co-opted by the abuser, who will blame the victim for the arrest and incarceration and will encour-

age the children to pressure the victim to drop the charges. Sometimes boys will emulate their fathers' treatment of their mothers and become surrogate abusers in their fathers' absence or support their fathers in other ways. For example, a participant in a victim focus group at the Duluth IWI site reported that her abuser told their son that she ran over his foot, which was untrue; however, her son repeated the allegation to a child protection services worker as if he had witnessed it and he was believed. Another participant in this group noted that children were one of the "many reasons people don't leave; and kids are scared [the abuser] will be mean to their mother."²³ The children thus are placed squarely in the middle: they are both manipulated by the abuser and used as a means to manipulate the other parent, the domestic violence victim.²⁴

In cases involving child sexual assault by a parent or other relative, emotional manipulation to prevent disclosure is often an integral part of the abusive conduct. At a court appearance in Duluth, a perpetrator of a child sexual assault admitted during his plea hearing that he had prayed with his eight-year old victim after the assault.²⁵ The non-abusing parent or other relatives may be in denial that the abuse could have occurred, and may threaten the child's security by blaming the child for breaking up the family. The child may be threatened with placement in foster care or a group home, or may be blamed for provoking the abuse. The child may ultimately recant the report of abuse or "forget" what happened to regain his or her sense of security.²⁶ Children may also be bribed with promises or gifts to change their testimony.

Legal intimidation

In addition to family, friends, and criminal associates, a defendant has another potential source of third-party intimidation: the legal defense team. While ethical defense attorneys routinely abide by court rules and orders, and refrain from conduct whose only purpose is to harass and intimidate a victim or witness, all too often attorneys who are heedlessly overzealous, or who fail to control their investigative team, conduct the defense in ways that serve the defendant's intention to prevent the victim or witness from testifying.²⁷ At the IWI sites in San Diego and

Duluth, practitioners reported that some defense attorneys told victims and witnesses that nothing would happen to them if they didn't show up for court.²⁸ Other inappropriate tactics such as repeatedly harassing the victim for an interview (when the desire not to speak with the attorney or investigator has been clearly communicated), invading the privacy of a victim by seeking personal or confidential information that has no possible relevance to the proceedings, or seeking unwarranted psychiatric or physical examinations of the victim may cause that victim to cease all cooperation with the proceedings or even to go into hiding to avoid the intrusiveness of the defense investigation. Unethical defense attorneys may share with their clients personal information about a victim or witness obtained in discovery that has been restricted to the attorney only by virtue of a protective order.²⁹

B. Who is vulnerable to intimidation?

Although victims and witnesses can be intimidated in almost any kind of criminal case, including those involving white-collar crime and official corruption, certain categories of victims and witnesses are particularly likely to be subjected to intimidation attempts. Where such witnesses have multiple factors that make them vulnerable (*e.g.*, a victim of domestic violence who is also a recent immigrant), the opportunities for intimidation, and the kinds of threats to which they may be subjected, increase accordingly.

Victims of domestic violence

Victims of domestic violence are almost always subjected to some form of intimidation or manipulation during the course of criminal proceedings, as are their children. Often others close to the victim, such as families and friends, are subjected to efforts by the abuser to discourage them from cooperating with the investigation or from providing emotional or material support to the victim.

Witnesses to organized-crime- or gang-related violence

Witnesses to violence perpetrated by a criminal organization are frequently subjected to intimidation tactics in connection with their having provided information or cooperation to law enforcement. More-

over, criminal organizations such as gangs are likely to perpetrate an atmosphere of fear and intimidation in the neighborhoods where they operate. This kind of community-wide intimidation contributes to the “no snitching” credo that frustrates the ability of law enforcement to effectively investigate and prosecute such crimes.

Human trafficking victims

Human trafficking victims in the sex-trade or forced-labor markets are, like domestic violence victims, subjected to intimidation and threats on an ongoing basis as part of the trafficker’s scheme to ensnare them and then to keep them enslaved. The level of intimidation only increases with the prospect of a victim’s cooperation with an investigation of the trafficker. For victims of “gang pimping,” in which gang members cooperate in sex-trafficking activities, the intimidation can be overwhelming. San Diego Deputy District Attorney Gretchen Means told an interviewer from *America’s Most Wanted* that gangs use social media sites to glorify the pimp-prostitute lifestyle for the purpose of luring impressionable and vulnerable girls into the trade. Once in, these victims are trapped—gangs can have hundreds of members. As Means explained, “If you think how coercive and manipulative it could be to have this relationship with one person, multiply that by 400 and add all of the layers of the intimidation and violence that is inherent in a criminal street gang.” Means further observed that the girls are not only trapped, but they may be marked for life. “It is common for pimps to brand their girls or tattoo them. It is a way for her to not just advertise who she belongs to and whose property she is, but also as a way to remind her that she’s not hers, she’s his.”³⁰

Trafficking victims often share characteristics with other vulnerable groups, as when the victim is also involved in an intimate relationship with the trafficker or when the victim is an immigrant, potentially subject to deportation or whose family members in his or her home country may be threatened with harm.

Immigrants

Victims who are immigrants, particularly those who have only recently arrived in this country, may be subjected to threats of deportation. In cases involving gangs with a presence in the victim's home country, or human traffickers with contacts and influence in the victim's home country, the victim may be threatened with harm to family members who remain in that country. The vulnerability of immigrant victims increases when there are barriers of language and of culture that prevent them from seeking support services or from understanding, or trusting, law enforcement and the criminal justice process.

Child and juvenile victims and witnesses

Child witnesses and victims are particularly vulnerable to threats and emotional manipulation. Because of their dependence on the adults in their lives, including the abuser in cases of family violence and sexual abuse, children may ally with the abuser for their own physical and emotional safety. Child victims of human trafficking are isolated from responsible adults, such as teachers and healthcare providers, who might otherwise assist them.

Juvenile victims of, or witnesses to, gang violence are often members of a gang, themselves—either members of the same gang as the defendant(s), or members of a rival gang. As such, they are subjected to an even higher degree of pressure, threats, and retaliation than victims or witnesses who have no connection to gang activity. Juvenile gang members, moreover, are likely to have little support from parents or contact with trustworthy adults such as teachers or counselors. Juvenile witnesses to gang violence present unique witness management problems, since their social and emotional ties to the gang may be so strong that they resist efforts by law enforcement to protect them during and after the criminal investigation. Most law enforcement agencies are presently ill-equipped to provide the services that these young witnesses need for their ongoing safety.³¹

Victims and witnesses in institutional settings or insular communities

Victims of abuse or violence occurring in institutional settings, such as

schools, prisons, hospitals, or group homes are particularly vulnerable to intimidation, regardless of whether the assailant is a staff member or another student, inmate, patient, or resident.³² Where the abuser is a staff member, that individual typically has tremendous power over the life and well-being of the victim. An abuser who is removed from the institution may leave behind friends who are in a position to intimidate or to retaliate against the victim for disclosing the abuse. When the assailant is another student, inmate, patient, or resident, that defendant also may have allies who are able and willing to intimidate the victim or any witness courageous enough to speak out. In correctional institutions, the institution itself may effectively “punish” the victim or witness by placing him or her in isolation from others for the witness’s own protection. Such segregation may result in the loss of privileges enjoyed by individuals in general population, and may even backfire by highlighting the fact that the witness is cooperating.

Incarcerated witnesses to crimes committed outside the institution often face risks from the defendant against whom they are cooperating and from the defendant’s incarcerated associates. Even transfers to other institutions may not assure the safety of such witnesses where the prison grapevine can rapidly communicate information between institutions about who is cooperating against whom. Such witnesses are sometimes directly threatened while they are being transported for court appearances or placed in holding facilities while waiting to testify.

Institutional vulnerability exists not only in the brick-and-mortar institutions described above, but also where crimes are committed within social, governmental, or religious groups such as the military, churches or other religious bodies, insular religious or cultural communities, police departments, or youth organizations. In such settings, victims and witnesses may be subjected to tremendous pressure from third parties to remain silent for the “good” of the larger group, or to protect the reputation of a defendant who holds a position of leadership or authority. An advocate at the San Diego IWI site, a community with a significant military population, reported that many victims are reluctant to report abuse out of fear that their reports of abuse at the hands of ser-

vice members, widely regarded as heroes, will be disbelieved. She has observed several instances of service member abusers wearing their uniforms to court in an apparent effort to enhance their credibility and to further intimidate their victims.³³ Similarly, in Knoxville, there were several observations of victims being intimidated when their abusers attempted to bolster their credibility by bringing the family minister to court appearances.³⁴

Participants in the criminal justice system

Although threats against criminal justice professionals and jurors are not as widespread as those against civilian witnesses, they do occur. Criminal defendants may make threats, or may plan or carry out acts of violence, against police, investigators, prosecutors, jurors, and judges involved in the criminal proceedings, and sometimes even against their own lawyers.³⁵ An assistant county attorney in Duluth reported she was threatened by a defendant she was prosecuting for witness tampering.³⁶ Domestic violence defendants sometimes threaten or commit acts of violence against the opposing attorney in matrimonial or child custody cases, or against the judges presiding over such cases. These targets are, however, much more likely to report the intimidation and to cooperate with any investigation and prosecution of such attempts.

In addition to the more overt acts or threats, intimidation against practitioners or jurors can be subtle or implicit. A team member at the Knoxville IWI site recalled reporting for jury duty in a criminal case and observing a woman who appeared to be a girlfriend or family member of the defendant writing down potential jurors' names. The team member said, "I've been a law enforcement officer for many years and I found that intimidating – not just for me but thinking of my family, my address being in that person's hands . . ." ³⁷ A detective from the Knoxville IWI site recalled how he felt while testifying at the parole revocation proceeding involving a violent offender. Throughout the detective's testimony, the offender fixed him with "the thousand mile stare." The detective explained his belief that suspects and offenders who gesture, swear, get loud, etc. were often "just venting." But he believed that someone who engaged in an unblinking, hate-filled stare for

an entire hearing is someone thinking, planning, and capable of fixating on not only him (the detective) but also other ways to get at him, such as attacking his family.³⁸ A victim advocate at the Duluth IWI site described incidents in which defendants had called her a bitch, had spat upon her, and had followed her for several blocks.³⁹

C. Where does intimidation occur?

Intimidation attempts can occur anywhere the witness may be located. For this reason, many law enforcement professionals agree that witness relocation is the most reliable way to prevent intimidation.⁴⁰ However, as will be discussed further *infra*, relocation is often not practicable for a variety of reasons, and even when it is accomplished, witnesses may find themselves unable to strictly abide by its terms and thus may undermine its effectiveness.

Witness intimidation may occur at the scene of the crime, with the defendant or criminal associates directly warning victims and witnesses not to report what has happened. After the crime, victims and witnesses may be subject to intimidation attempts in their homes, while at school or at work or while traveling to and from those locations, while going about their other day-to-day activities (*e.g.*, shopping, going to the gym, dropping off children at school or for day care), at the hospital while being treated for their injuries, at the police station, on their way to court, at the courthouse, or in the courtroom itself, as well as in the visiting areas of jails or prisons. Technology has made it possible to convey intimidating messages through cyberspace, so that witnesses may be subject to intimidation any time they log onto their computers or use their cell phones.

Although intimidation most often occurs out of the view or hearing of other witnesses, defendants in cases involving gang activity may commit public acts of violence for the purpose of intimidating other gang members (including rival gangs) or the entire community. Likewise, a trafficker may threaten or assault a victim in view of other victims as a warning of what is to come if any of them speak out.

D. When does intimidation occur?

Intimidation commonly occurs prior to and throughout the criminal justice proceedings. It most often occurs during or immediately after the crime, during the time between arrest and trial (often peaking just before trial), and while the trial is in progress.

To a somewhat lesser extent, however, intimidation also may occur during the time between the verdict and sentencing, while the sentence (custodial or non-custodial) is being served, and even beyond. Post-verdict intimidation is often an effort to secure a recantation by the witness or to manufacture “newly discovered evidence” (*e.g.*, to obtain false testimony in support of an alibi) in support of a motion for a new trial or post-conviction relief. Victims may be subject to renewed intimidation around the time of parole or early-release hearings, to prevent their filing an objection to the defendant’s release from prison. Actual violence against a witness following a conviction may be simple retaliation or it may be intended as a message to others about the consequences of cooperation with law enforcement.

II. PREPARING TO MEET THE CHALLENGE: TRAINING, CROSS-TRAINING, AND COLLABORATION AMONG LAW ENFORCEMENT AND ALLIED PROFESSIONALS

The most dedicated of professionals cannot effectively address the problem of witness intimidation unless they know how and when it is likely to occur, how to recognize it and investigate it, and how to respond in a manner that protects the witness while holding the offender accountable—not only for the original crime, but for the efforts to obstruct justice. Law enforcement and other professionals must be trained in best practices to achieve this goal. Moreover, the exchange of information and expertise, through ongoing cooperation and collaboration among law enforcement and allied professionals, is critical if they are to successfully meet the challenges presented by witness intimidation.

A. Training

Officers and investigators must be trained to conduct their investigations and interviews in a manner that protects witnesses whose safety would be compromised if their cooperation became known, and trained in witness protection and management strategies that help to prevent intimidation and make witnesses feel safe and secure. Those assigned to specialized units (*e.g.*, domestic violence, human trafficking, or gang violence units) should receive training in the dynamics of the relationships between offenders and victims, and in the intimidation tactics commonly used in particular types of criminal activity. They should be trained to recognize which victims and witnesses are most likely to be subjected to intimidation, which will be most vulnerable in terms of risk to their safety or the risk that they will recant or refuse to testify at some point in the proceedings, and how those risks can be minimized or managed. For investigators, training in proper evidence-gathering and documentation techniques is critical to evidence-based prosecution, which permits successful prosecution even without the participation of the victim.⁴¹ Specialized training in the investigation of electronic or digital communication and surveillance is crucial to the investigation of cases involving stalking, and to the investigation of intimidation that makes use of those technologies.

Prosecutors must be trained in techniques that will allow them to effectively prosecute cases involving intimidation. They should be familiar with all of the options available to address the issues surrounding witness intimidation, including the availability of proceedings to preserve witness testimony, proper preparation of witnesses for hearings and trials, the legal constraints imposed by the Sixth Amendment Confrontation Clause as interpreted in *Crawford v. Washington*⁴² and its progeny, the law in their jurisdiction concerning forfeiture by wrongdoing, state statutes under which witness intimidation conduct may be charged, available motions to redact sensitive personal witness information, available bail and sentencing conditions to promote the safety of victims and witnesses, *voir dire* techniques and appropriate jury charges to address the issue of recanting or absent victims and witnesses, and effective trial strategies to employ in presenting their cases to a jury.

Correctional institution administration and staff should be trained to monitor inmate communications with those outside the institution, whether in writing, by phone, or during visits, to deter and detect intimidation attempts, as well as to monitor and control inmate communications within and between institutions. Institutional staff at jails, prisons, hospitals, schools, and group homes should further be trained to understand that any form of retaliation or pressure against a victim in a case involving abuse by other staff, inmates, patients, students, or residents cannot be tolerated, and should be trained in proper documentation and prompt reporting of any such incidents.

Probation and parole officers should be trained to carefully monitor the offender's compliance with conditions such as no-contact provisions, batterers' intervention programs, alcohol or substance abuse treatment, mental health treatment, and restitution. Effective monitoring requires that such officers maintain contact with victims to assess, on an ongoing basis, whether the offender is complying and whether there are ongoing risks to the victim.

Healthcare professionals and hospital staff involved in treating victims should be trained in practices that will protect the victim's physical safety and privacy while under their care and promote the victim's ongoing safety upon discharge. They should also be trained in proper documentation of injuries and of statements made by the victim for purposes of receiving medical care.⁴³

Advocates should be trained in threat assessment and safety planning techniques, and should be familiar with eligibility requirements to access the various resources and services, such as housing or relocation assistance, counseling, substance-abuse treatment, financial assistance, and immigration or other civil legal assistance, that may be available to help protect and assist victims and witnesses throughout the criminal proceedings and beyond.

B. Cross-training and collaboration

Police, prosecutors, advocates, probation and parole officers, corrections personnel, healthcare professionals, and social services professionals all can play important roles in the prevention and detection of, and response to, witness intimidation. Each of these groups has a unique perspective on the problem, and each has specialized expertise and resources of value to the others in their common mission. Because each of these groups of professionals intersects with victims and witnesses in different contexts, and at different points in the criminal justice process, it is essential that they communicate with each other, that they cross-train each other, and that they cooperate in a coordinated fashion to minimize the opportunities for intimidation and to maximize the effectiveness of their responses. Such cooperation allows professionals to share expertise and resources, to recognize additional resources worthy of development, to recognize and address any systemic “gaps” that allow intimidation to occur, and to exchange information and intelligence that bears on witness safety. A coordinated effort will help to ensure that victims and witnesses remain safe, while encouraging their continued cooperation with the criminal justice system. Coordination also facilitates the evidence-based prosecution practices that will permit successful prosecution even if the victim or witness later becomes uncooperative or unavailable for trial.

Although specialized investigative units have many advantages—most notably the development of significant expertise in the investigation of certain kinds of criminal activity—such units must not hesitate to draw upon the expertise of others when appropriate. Many cases of domestic violence, sexual violence, and human trafficking involve defendants, victims, or witnesses who have connections to narcotics or gang activity. Conversely, many drug dealers and gang members engage in domestic violence, commit acts of sexual violence,⁴⁴ or are involved in human trafficking. Investigators in these specialized units should regularly coordinate and share information and intelligence with those in other units. Information and intelligence about the gang affiliation of a defendant or witness, that individual’s status in the gang’s hierarchy, and the history or reputation of the gang and of the defendant for violence may

enable investigators to more realistically assess the threat that the defendant and other gang members or criminal associates pose to particular witnesses in the case. Such threat assessment will enhance safety planning, and will permit the allocation of witness protection resources where the threat is the greatest. In addition, intelligence gathering may reveal the existence of conspiracies designed to silence witnesses, which in turn may be investigated, dismantled, and prosecuted.

Law enforcement collaboration with other allied professionals is equally important. Collaboration with healthcare professionals will help to ensure that victims are safe while they are being treated for their injuries, and that important corroborating information is documented in medical records. Victim focus group participants and victim advocates at the Knoxville IWI site reported that victims were sometimes accompanied by their abusers to medical facilities for treatment of their injuries. The abusers prevented them from saying anything to medical staff about the cause of their injuries and from asking anyone to contact police. In some instances, abusers provided a false explanation to medical providers about the cause of victims' injuries. Victims said that no one "picked up" on what was going on and that no one separated the parties to talk to victims privately.⁴⁵

Collaboration with advocates and with social service providers, ideally using inter-agency cooperative agreements enabling assistance to be provided on short notice and with the proper degree of confidentiality,⁴⁶ will facilitate provision of support services such as relocation assistance, counseling, substance-abuse treatment, financial assistance, and civil legal assistance that victims and witnesses may need in order to safely cooperate with law enforcement throughout the investigation. Collaboration with the judiciary⁴⁷ can help to ensure that policies promoting the safety of victims and witnesses will be implemented in the courthouse. Collaboration with institutions such as jails,⁴⁸ prisons, schools, hospitals, and group homes can facilitate the development of policies and procedures that will protect cooperating victims and witnesses within the institution, as well as those on the outside, by deterring such incidents and by ensuring proper documentation and prompt reporting of any that do occur. Collaboration with probation

and parole officers can promote the effective monitoring of convicted offenders throughout their supervised release so that any special conditions, such as batterer's intervention programs, alcohol/substance abuse or mental health treatment, and restitution, will be appropriately enforced.

While any of these collaboration efforts can be undertaken on an *ad hoc* basis, the designation of an individual or a unit within the prosecutor's office to coordinate such efforts may be the most efficient way to ensure that regular communication and training opportunities are made available to all concerned professionals. Such a coordinator can act as a clearinghouse, through which available resources can be accessed, notification of training opportunities can be distributed, and recurring problems or issues addressed. A working group or committee, comprising representatives of all concerned groups of professionals, could help to ensure that cooperation continues on an ongoing basis.

III. PREVENTING INTIMIDATION AND MINIMIZING ITS EFFECTS

Because intimidation can be both pervasive and subtle, and because it can span such a lengthy period of time and can involve so many different forms of coercion, law enforcement and allied professionals must be vigilant in eliminating as many opportunities for intimidation as possible and in denying defendants access to the tools by which it can be accomplished. Obviously, it is not possible to eliminate all opportunities for witness intimidation, but certain practices can reduce the frequency of its occurrence, and can ameliorate the effect of such attempts on the safety and security of victims and witnesses as well as the effect on their willingness to cooperate. Moreover, many of the same practices that help to prevent witness intimidation also contribute to the ability of law enforcement to detect and investigate it and to respond effectively when it does occur.

The following sections discuss practices that can be implemented by law enforcement and allied professionals that will help to prevent or minimize intimidation attempts throughout the criminal proceedings.

Although the sections are organized according to the profession or function that typically would assume responsibility for particular practices, local considerations may dictate that responsibility be allocated in a different fashion.

A. Law enforcement practices

Community Oriented Policing

Police and investigators dealing with gang violence are well aware of the reluctance of witnesses to cooperate in providing information, testimony, or other evidence in such cases. Such reluctance is, in part, a product of fear deliberately induced by the gangs, both in connection with a specific crime of violence and as an element of their territorial control of the neighborhood in which they operate. This kind of community-wide intimidation enables the gang to engage in a variety of criminal activities with relative impunity. However, the reluctance of witnesses in gang-dominated neighborhoods to come forward and to cooperate with the police is not attributable solely to fear of the gang. Community residents and researchers alike have observed that the “no-snitching” mindset permeating many of these neighborhoods is a product not only of intimidation, but also of a widespread mistrust of police and a lack of confidence that law enforcement can and will protect the community from intimidation and violence.⁴⁹ Investigators of gang crime and gang intelligence at the Knoxville IWI site described a neighborhood culture of not snitching: “In areas we work, gang intimidation is the general culture. The ‘stop snitching’ thing is preventative. It’s not trying to target a specific witness; it’s to discourage anyone in the area from saying anything. We don’t have witnesses coming forward. You’ll have 100 people around a shooting, and no one will say anything.” A prosecutor who was then prosecuting a firearms charge against a serious offender agreed: “There is a culture of intimidation that exists in some of the housing projects. Everyone is close-knit. Everybody knows everybody. Drug dealers do what they can to protect their turf. Intimidation is a ‘workplace policy’ and so is not calling police - it’s an unspoken rule.”⁵⁰

Community oriented policing, in which officers and investigators establish a relationship with members of the community on an ongoing ba-

sis, not just in response to a crime that must be solved, helps to build an atmosphere of trust and enhances the willingness of witnesses to cooperate.⁵¹ In addition, sensitivity to safety concerns during the course of the investigation will do much to allay fears. Officers and investigators should use care that witnesses are interviewed or transported for questioning discreetly, that all safety concerns are taken seriously, and that acts of intimidation are investigated and addressed promptly.⁵²

Responding to the scene of the crime

Officers and investigators conducting on-the-scene investigation in a neighborhood dominated by gang and other organized criminal activity must be discreet about the manner in which they elicit information from potential witnesses. Officers should take care that any canvassing does not appear to single out any witnesses as potentially cooperating. In some communities, officers who canvass the neighborhoods will offer potential witnesses a business card with the investigator's phone number, but advertising a service, such as an auto repair shop. The recipient can safely keep the card for later contact without fear of being discovered with the investigator's card in his or her possession.⁵³ This strategy may also be effective in human trafficking cases, where the victim or witness will have to return to a residence or other location shared with others who might report their cooperation to the trafficker. Investigators should arrange to meet with witnesses at neutral locations to avoid calling attention to the fact that they are speaking with the police.

Discretion is equally important in on-the-scene investigation of crimes that occur in the home. Responding police should be alert for the presence of intimidation when responding to any crime potentially involving domestic violence, child abuse by a family member, or elder abuse. Interviews of victims and witnesses should be conducted in private, where the witnesses cannot be observed or overheard by the suspect or others. When responding to a private residence, officers should be particularly alert to subtle interactions between the parties that may indicate that the victim or witness has already been warned about talking to the police.

During the private interview at the scene, officers should ask about any intimidation that has occurred, not only on the present occasion, but in the past, as well.⁵⁴ The witness's responses to these questions should be documented in the police report. It can be safely assumed that in almost all cases of domestic violence, child abuse, or elder abuse, threats or other kinds of intimidation will have occurred; it is good strategy for the officer's interview to proceed on that assumption, asking the victim or witness what he or she has been warned or led to believe will happen if the abuse is reported.⁵⁵ Waiting until a formal interview is conducted, perhaps hours or days later, may be too late to get a truthful, complete response to these questions about intimidation. This information is critical to threat assessment and safety planning, as well as providing a basis for the State to request an appropriate bail with appropriate conditions that will minimize the opportunities for further intimidation.

Where the victim discloses recent intimidation, police should charge the defendant with those offenses as well as the underlying crimes. Charging intimidation offenses at the earliest opportunity will help to ensure an appropriate bail and will help to keep the focus of any follow-up investigation and subsequent prosecution on the issue of intimidation.

Restraining orders/orders of protection

Where the victim is eligible for a restraining order or order of protection, police should assist the victim in obtaining such an order. Although such orders do not prevent a determined abuser from attempting to intimidate or manipulate the victim, they do provide certain important safeguards. Any violation of the no-contact provisions of an order should, in most cases, result in immediate arrest of the offender. This enables police to act before simple contact evolves into a greater threat. In addition, such orders usually provide the victim with temporary custody of children, may prevent or restrict visitation by the abuser, and may provide the victim with temporary economic support.

Generally, only the victim can obtain a restraining order; law enforcement, or even concerned family members, usually cannot apply for an order on a victim's behalf. There may be an exception, however, where the victim has been injured so severely as to be incompetent to apply for an order, or even to make a decision whether to do so. In such cases, an officer should attempt to apply for an order on behalf of the victim pending sufficient recovery to make a decision whether to apply for one.

Assistance in obtaining medical treatment/shelter

Responding officers should encourage victims to obtain medical evaluation and treatment for any injuries, particularly in cases involving strangulation, where life-threatening effects may not be apparent until hours or days after the assault.⁵⁶ If necessary, officers should provide transportation to the hospital. Regardless of who transports the victim, however, officers should be sure to communicate with the hospital about any potential safety concerns that may arise during or after the victim's treatment. It is essential that criminal suspects and their associates be prevented from having access to the victim while at the hospital and that the discharge plan includes provisions for the victim's safety upon release. Communication with medical providers allows them to take all appropriate steps to ensure the victim's safety while in their care and upon discharge.

If no medical treatment is needed or accepted, officers should assist the victim with transportation to a shelter or other safe location, if necessary and desired by the victim.

Threat assessment and safety planning

If at all possible, officers should arrange for the victim to meet with an advocate, preferably with an in-person handoff from the officer to the advocate, for additional assistance and for safety planning. If no advocate is immediately available, the officer should conduct a preliminary threat assessment and interim safety plan to help assure the victim's safety until a more comprehensive assessment and planning can be conducted.

Follow-up investigation should include a detailed history from the victim, covering not only the history of violence between the parties, but also prior acts of intimidation and manipulation, focusing on prior incidents that may not have been reported and on prior charges that may have been dropped or dismissed, including restraining orders/orders of protection that were dismissed⁵⁷ at the victim's request. Some of these incidents may have occurred in other jurisdictions, and police reports (if any), statements, and other relevant information should be obtained from the police department or prosecuting authority handling the prior case. This history will aid in assessing the threat posed by the defendant to the victim's physical and emotional safety, and will provide important clues to what intimidation tactics may be used in the present case. Such information also may be invaluable later if it becomes necessary to file a motion to admit evidence under forfeiture by wrongdoing, since it will help to prove the defendant's history of intimidating or manipulating the victim and, thus, to show that any future failure to appear or refusal to cooperate is most likely the result of the defendant's actions.⁵⁸

Several threat-assessment instruments have been developed for use in domestic violence cases, including the Spousal Assault Risk Assessment Guide (SARA),⁵⁹ MOSAIC,⁶⁰ the Danger Assessment,⁶¹ the Domestic Violence Screening Instrument (DVSI)⁶² (or its revised version, the DVSI-R),⁶³ and the Ontario Domestic Assault Risk Assessment (ODARA).⁶⁴ Investigators and prosecutors specializing in gang-related violence have suggested that the threat to witnesses of gang violence can be ranked according to the relationship the witness has with the gang or with the neighborhood, ranking the threat from lowest to highest: (1) witnesses who are strangers to the gang and to the neighborhood; (2) witnesses who live in, or frequent, the neighborhood but have no direct connection to the gang; and (3) witnesses who are members of the gang, or of a rival gang.⁶⁵ In addition, the history of the gang or particular gang members, and their reputation for violence, may be factored into the assessment of the likely danger to the witness. The United Nations Office on Drugs and Crime has proposed factors to be considered in assessing risk to victims of human trafficking.⁶⁶

B. Medical personnel/hospital practices⁶⁷

Security during medical treatment

Victims may be vulnerable while at the hospital for emergency treatment after an attack where the defendant has not yet been arrested, or in gang-related cases where the defendant's associates remain free to act. Where the victim is being treated at the emergency room, or admitted for treatment at the hospital, hospital staff should be informed of the situation so that no information, including the victim's condition or room number, or perhaps even the fact that the victim is at the hospital, is inadvertently released. In appropriate circumstances, it may be necessary for the victim to be admitted for treatment under an assumed name. If that is done, it is essential for police or for the hospital to document somewhere, in some fashion, the name under which the victim was admitted; otherwise it may be difficult to later obtain necessary medical records for use in the investigation and prosecution of the crime.

Treating professionals must also take special precautions with respect to patient privacy and access if the patient is a victim of domestic violence. Ordinarily, a spouse is considered next of kin and can obtain information about the victim, may be allowed in the victim's room during treatment, and may have the victim released to his or her care following discharge. In such cases, even if there is no restraining order, the hospital should refuse to allow the abuser access to the victim or any information about the victim's condition or discharge plans.

Discharge planning

Hospitals and treating professionals should question patients treated for injuries, suicide attempts, or drug/alcohol overdose and intoxication, even if they have not presented as victims of domestic violence, as to their safety upon release. If the patient is fearful for his or her safety at home, a social worker or advocate should assist the patient in making alternative living arrangements or other interim plan to enhance safety until a more permanent plan can be made.

C. Victim advocate/witness protection practices

Where funding and staffing resources permit, a dedicated unit within the prosecutor's office to handle issues of witness protection is desirable. When witnesses have been identified to be at high risk for serious intimidation, such a unit can be invaluable in providing relocation (on an emergency, temporary, or long-term basis) and related services. This can be a complex undertaking requiring management of myriad aspects of the lives of witnesses and their families. A specialized unit can facilitate the interagency cooperation previously discussed, and can act as a clearinghouse for resources to assist intimidated witnesses. Where a separate unit is not practicable, or where the caseload involving serious threats of violent intimidation is not great enough to justify the existence of a separate unit, there are a variety of ways in which these services can be managed. An excellent resource covering many aspects of witness management and protection can be found in the National Institute of Justice's publication, *Preventing Gang- and Drug-Related Intimidation*,⁶⁸ much of which is applicable in other cases involving violent intimidation.

Whether witness protection issues are handled by a dedicated witness protection unit, by a general victim advocacy unit, by the lead investigator in the case, or by some other agency, threat assessment and safety planning must be an ongoing process, with continual re-evaluation to respond to any new developments affecting the witness's safety and security. Other assistance, including provision of, or referrals to, victim compensation funds, other forms of financial assistance, counseling, substance-abuse treatment, and immigration or other civil legal assistance, will enhance a witness's ability and willingness to continue to cooperate with law enforcement.

Threat assessment and safety planning

Victims and witnesses potentially vulnerable to intimidation should be counseled about safety planning as soon as possible. Each safety plan will be unique, depending upon the witness's circumstances and the nature of the threat posed by the defendant. Threat assessment tools may help to determine the degree of danger. While such tools are not

foolproof, and are limited to an assessment of physical danger (as opposed to the risk that the witness will be subjected to intimidating conduct), they still assist in evaluating the relative danger.

Victims and witnesses may need to be educated about what to expect in the way of intimidation or manipulation by the defendant. Victims of domestic violence, in particular, may be so accustomed to their abusers' techniques of intimidation and manipulation that they may not recognize such acts for what they are. A focus group of victims at the Duluth IWI site recognized this need, suggesting that there should be a support group for victims whose abusers were incarcerated, to support them through the inevitable jail calls and other pressures to renew the relationship and to refuse to cooperate with prosecutors.⁶⁹

Advocates should discuss the likelihood of intimidation with a domestic violence victim at the earliest opportunity. As discussed previously, the initial investigative interview with the victim should include questions about any history of dropped charges, threats, promises, or retaliation that may have occurred in the past. It should be explained to the victim that these same kinds of acts are likely to occur as a result of the present crime. The attempts may be more determined and desperate if the consequences to the offender are greater than on previous occasions, and may escalate if they do not immediately achieve the desired result. Advocates and investigators should emphasize that law enforcement will take action to shut down any such intimidation, but that this can only be accomplished if the witness reports it.

In discussing safety concerns with victims and witnesses, it is important to strike an appropriate balance between emphasizing practical safety measures and inducing excessive, and perhaps unwarranted, fear or panic. The discussion should be both calm and honest, and the victim or witness should be encouraged to actively participate in the planning. Advocates and investigators should be truthful about what they can and cannot do to assure the witness's safety, but at the same time reassure the witness that his or her safety will be a primary consideration as the case moves forward. At the same time, witnesses should be encouraged

to be honest about what kinds of measures they are willing to comply with. A safety plan is only as good as the willingness of the witness to follow it. A good safety plan takes into account the relative merits and limitations, advantages and disadvantages, of available strategies for the particular witness's situation. The victim is often an accurate judge of what actions may escalate an abuser's violence.

As already noted previously, relocation of witnesses may be the most effective way to prevent intimidation. 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.⁷⁰ In appropriate cases, however, witness relocation programs provide very effective protection to the participating witness.

Depending upon the circumstances, however, less drastic forms of relocation may be just as effective in reducing the opportunities for witness intimidation. 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.⁷¹

In many cases, however, relocation is either impractical or unacceptable to the witness. Other measures can often provide sufficient ad-

ditional safety and security to the witness. Security in the witness's home can be upgraded, with new locks, security cameras, and alarm systems. Witnesses can be provided with a portable panic alarm (often marketed for medical emergencies) or a cell phone to summon police help immediately if they are threatened. Additional police patrols can be assigned to the witness's neighborhood. The schools attended by the witness or by his or her children can be notified so they can take any necessary special precautions. Security staff at the witness's apartment building can be similarly notified. Witnesses may be advised to alter their personal routines by taking different routes to work or to the gym, by changing where they shop or take walks, or by altering their schedules. Witnesses can change their phone numbers, email addresses, and online account information to make it more difficult for defendants, or anyone acting on their behalf, to contact them.

Witnesses must also be cautioned against actions that may undermine their own safety, such as talking about the case to others or posting personal information on social networking sites or blogs. In particular, they should be counseled 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. Witnesses should be advised to maximize the available privacy settings on any personal social networking profiles, and should be cautioned about posting personal information that could be used by the offender to stalk, harass, or threaten them. A sex-crimes prosecutor at the San Diego IWI site said that defense attorneys had intimidated victims and witnesses by scrutinizing their Facebook pages for references to drug use or other facts that might diminish their credibility. The prosecutor now carefully admonishes sexual assault victims about their Facebook usage.⁷²

It is critical that witnesses be instructed about how to proceed if and when they are contacted by defendants or by others acting on their behalf. While preservation of evidence is important, witnesses and victims are not investigators and should not engage in conduct to elicit such evidence except (where appropriate) under the control and supervision of law enforcement.⁷³ The safety of the witness takes precedence over the collection and preservation of evidence. Witnesses should, however, be provided with a logbook to document any instances of attempted intimidation or unwanted contact as they occur. Not only will the logbook assist in the effort to prove such attempts at trial, it further engages witnesses in the criminal justice process; prompt follow-up by police in response to any intimidation attempts will increase witnesses' confidence that their safety is taken seriously.

If the victim or witness knows that the defendant or someone allied with the defendant is calling on the phone, the witness should be instructed not to answer the call, but to note the time and date of the call, and instructed not to erase the phone's call history or any voicemail that might be left on the phone. In the event of contact by text message, the witness likewise should not reply to the text, but should preserve the text message for documentation by police as soon as possible.⁷⁴ If communication is received by email, the witness should be instructed not to reply, but to preserve the entire email message intact for documentation by law enforcement as soon as possible. Where communication is received via a social networking site, such as Facebook or Twitter, or if intimidating comments are posted on a blog or other website, the witness should be instructed not to delete the message or post, but to contact police so it can be documented. If the witness inadvertently answers a call or responds to some other communication from the defendant or an ally, the communication should be terminated and the details recorded in the logbook.

It is crucial for law enforcement to maintain communication with vulnerable witnesses throughout the proceedings. Not only should witnesses have a way to contact the local police department to respond to any immediate threats, they must also be provided with the name and contact information for an individual investigator and/or advocate

to address any safety concerns that may arise during the course of the case. Likewise, it is important that the lead investigator respond to such communications immediately, as well as proactively checking in with the witness on a regular basis to ascertain whether there are any new safety issues that need to be addressed.

Victims and witnesses vulnerable to intimidation must be notified immediately when a defendant posts bail or is otherwise released from custody. They should be advised of any bail conditions, and provided with information about whom to contact when those conditions are violated so that any violations can be addressed promptly before they escalate into greater threats.

Other forms of assistance for victims and witnesses

Other available services, such as victim compensation to assist with medical bills and other necessary expenses, legal services, welfare or immigration assistance, employment services, and counseling should be offered as soon as practicable. Advocates should be familiar with available resources and ready to assist witnesses in accessing those resources. A victim who is not fearful for his or her economic, legal, physical, and emotional well-being is far less vulnerable to intimidation than one who must depend upon the abuser for such needs. Where the victim or witness is subject to possible deportation or other adverse immigration consequences, Homeland Security can provide information regarding the victim's status and the availability of a U-Visa or other form of relief.⁷⁵

Advocates should be available to accompany the victim or witness to court for hearings or for trial and sentencing, minimizing the opportunities for the witness to be approached and intimidated on the way to or from the courthouse, or in the courthouse itself. Moreover, advocates provide important emotional support by providing reassurance that the witness is doing the right thing by testifying. The advocate's presence in the courtroom during formal court proceedings can provide a calming effect, allowing the witness to focus on someone other than the defendant.

D. Prosecution practices

Because the prosecutor's office usually has the longest and most comprehensive continuing involvement with a criminal case, and is a central repository of information about the defendant and witnesses, that office appropriately plays a central role in the prevention, deterrence, investigation, and punishment of witness intimidation. The prosecutor's office should take a leadership role in coordinating the efforts of other agencies such as police departments and social service providers to accomplish these goals. By making a commitment to the safety and security of victims and witnesses—by demonstrating its willingness to allocate funds and other resources to protect witnesses and to hold offenders accountable—the prosecutor's office sends a clear message to communities, as well as to victims, witnesses, and defendants, that witness intimidation will be neither tolerated nor permitted to succeed.

Charging decisions

Prosecutors should encourage police departments to make the investigation of intimidation part of every investigation where it is, or may be, a factor. Early charging of intimidation crimes where there is probable cause to do so enhances the ability of the State to secure an appropriate bail amount with appropriate conditions, and helps to keep the focus on the issue of intimidation throughout the trial proceedings.

Review of prior cases

Prior cases involving the same parties, whether or not they proceeded to final disposition, should be reviewed at the earliest opportunity. Cases that were previously dismissed due to victim/witness non-cooperation should be evaluated for possible reinstatement if sufficient evidence now exists to move them forward (*e.g.*, where current investigation has provided evidence to show the prior dismissal was due to witness intimidation) and the limitations period has not yet run. Where prosecution of such offenses is not possible, the files may nevertheless yield important evidence of motive or intent that may be admissible under Fed. R. Evid. 404(b). Such cases may also provide important information to assist in obtaining an appropriate bail, and may shed light on the patterns of intimidation and control that might be expected in the new case.

Cautioning the defendant

In cases not involving gang- or organized-crime violence, an official admonishment from the court at the time of arraignment, or a personal visit from an investigator, cautioning the defendant against contacting or attempting to intimidate or influence the victim or witnesses in the case, *may* discourage such attempts. Accordingly, prosecutors should request that the court include such a warning as part of the arraignment proceedings, and should arrange, where permissible and appropriate, for a similar caution from an investigator. The investigator should advise the defendant that any such attempts will be investigated, prosecuted, and otherwise used against the defendant in the case on the underlying charges. Family members of the defendant should be similarly warned that any such efforts on their part are likely to backfire, and may result in their prosecution along with the defendant's. While such warnings will not deter all attempts at intimidation, they will discourage at least some, particularly those by family members.

Bail sets and bail conditions

Many jurisdictions permit bail to be set in an amount appropriate not only to ensure the appearance of the defendant at subsequent proceedings, but also to protect the public.⁷⁶ Victims and witnesses are members of the public. Moreover, a defendant with a history of intimidating victims or witnesses (which may be reported during preliminary interviews with these witnesses) is a poor risk for complying with the requirement to appear as ordered, just as a defendant with a lengthy history of convictions is. Thus, any history of intimidation can be argued in support of a high bail, and accompanying strict bail conditions, even in jurisdictions where the only permissible consideration is the risk of nonappearance.

Bail conditions should include a no-contact provision, unless the victim specifically requests otherwise. Regardless of any "no contact" conditions, however, defendants who pose a threat of intimidation should be closely monitored during the pretrial period. Some jurisdictions permit the use of bracelet monitoring so that the defendant's whereabouts are known at all times.⁷⁷ In cases involving stalking behavior, the defendant

may be barred from certain locations frequented by the victim, including the victim's place of employment and the children's schools. Where the defendant is a member of a gang or other criminal organization, contact with other members or criminal associates should be barred. A condition requiring regular reporting to a probation officer may also help to control the defendant's behavior prior to trial. As with restraining orders, bail conditions cannot guarantee a victim's safety; however, violations of such conditions can result in substantial increases in the amount of bail, revocation of bail, or additional criminal charges, depending upon the nature of the violation and the law of the jurisdiction.

Vertical prosecution

Vertical prosecution of crimes with a high potential for intimidation is desirable whenever possible. When cases are transferred from one prosecution team to another, there is always a risk that critical details affecting the safety of victims and witnesses will fall between the cracks or be overlooked due to unfamiliarity with the case. Case transfers also result in delays while the new investigator or prosecutor becomes familiar with the case; such delays widen the window of opportunity for offenders to intimidate witnesses.⁷⁸ When victims and witnesses can deal with the same prosecutor and investigator throughout the proceedings, a relationship of trust can be built, and they will be more engaged in the process and more likely to report any intimidation that may occur. The prosecutor and investigator will be thoroughly familiar with the history of the case, including any history of prior acts of intimidation and current threats, as well as the specific needs of the victim or witness in order for them to feel, and be, safe from intimidation and manipulation. Vertical prosecution also allows prosecutors and investigators to develop a high level of expertise in sensitive cases, and permits them to take full advantage of cooperative relationships with the allied professionals who provide collateral support services to these victims and witnesses.

In offices where vertical prosecution is not possible or practicable, it is especially important that case files be documented with information pertaining to any history of intimidation and ongoing investigation of

suspected intimidation, as well as any other information relevant to the victim's or witness's safety, including information concerning threat assessment, current safety plans, and contact information for trusted friends and family members. The file should also identify any outside professionals providing treatment, counseling, or other assistance. An advocate can be of tremendous help in maintaining regular contact with victims and witnesses, keeping them informed of case developments and court proceedings, and relaying any concerns to the prosecutor, as well as helping to coordinate the efforts of other professionals providing assistance. Files should be updated on a regular basis, with particular care to ensure all information is current before the case is transferred to a different prosecutor or investigator.

Protective orders and sealed documents

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.⁷⁹ However, when a defendant is unaware of the witness'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.⁸⁰ The prosecutor must set forth articulable reasons for the order, which should be no more restrictive than necessary to accomplish its purposes. Where the present location of the witness is to be protected, the prosecutor may need to make some provision to allow defense counsel to request an interview (which the witness is, of course, not obligated to grant).⁸¹ 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.

A recent California Supreme Court case provides an example of implementation of this strategy. In *State v. Valdez*,⁸² 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.

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 the prosecutor to resolve the case without ever disclosing the witness's name or information.⁸³ If this strategy is used, the prosecutor 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. The defendant's understanding of these terms of the agreement should be placed on the record through personal questioning to forestall post-conviction claims that the plea was less than knowing and voluntary.

Keeping the trial judge informed of any anticipated witness intimidation concerns

If the prosecutor has reason to believe that witness intimidation will be a factor during the proceedings, the trial judge should be alerted to the issues as soon as possible so the judge can be prepared to rule on any necessary motions before or during the trial, and so arrangements can be made well in advance for any special courtroom security needs.

Expedited criminal proceedings

Lengthy criminal proceedings, drawn out over the course of many months, greatly exacerbate the problems posed by witness intimidation. The defendant has more time to locate witnesses and to formulate and carry out tactics designed to prevent them from cooperating

and testifying. Even witnesses who successfully resist early attempts at intimidation or manipulation may become worn down by repeated attempts over the months leading up to the eventual trial and may ultimately succumb to those efforts. Indeed, a number of victims at the Duluth and Knoxville IWI sites reported that repeated continuances delaying disposition of their cases made them feel unsafe and mistrustful of the system.⁸⁴ Victims also experienced feelings of frustration and intimidation resulting from family court delays in matters such as custody proceedings.⁸⁵ Moreover, the financial and other costs incurred by law enforcement and other agencies to provide witness support and protection will only continue to mount as the case drags on without resolution. Expedited disposition of cases involving witness intimidation allows fewer opportunities for defendants to engage in intimidation tactics, reduces the likelihood of their eventual success, and reduces the cost of witness management and protection.

E. Institutional practices in jails/prisons

Correctional institutions have the dual responsibility of protecting victims and witnesses in their custody, and ensuring that defendants and their associates behind bars are unable to engage in intimidation of witnesses against them, either within or outside of the institution. Cooperating codefendants and informants must be kept separate from the offender and any associates, and defendant-inmates must be closely monitored to prevent them from engaging in plots or conspiracies to silence the witnesses against them.

Although prosecutors should seek high bail for defendants who are likely to engage in intimidation, pretrial confinement does not guarantee that a defendant will not continue to harass and attempt to intimidate victims and witnesses. As a deterrent and as a means of uncovering intimidation, many jails record all outgoing telephone calls from the jail, with the exception of phone calls from a defendant to defense counsel.⁸⁶ Typically both parties to a phone conversation are advised, by a recorded message, that the call is being monitored and/or recorded.⁸⁷ Even when they have been so advised, however, defendants frequently call their victims with demands that they drop the charges or recant

their initial reports to police, sometimes advising them exactly what to say and sometimes explicitly threatening them with harm if they fail to carry out the instructions. Aside from communicating directly with victims or witnesses, defendants may also use the telephone to communicate with third parties with the intention that such individuals will take some sort of action to intimidate victims and witnesses. Some defendants will resort to speaking in “code” or in a different language, particularly when speaking with criminal associates on the outside, in an attempt to evade detection.

In addition to the monitoring of phone calls, some institutions have implemented a policy of requiring all correspondence, other than letters sent to the defendant’s attorney, to be written on a postcard or otherwise be made subject to inspection. This, too, can deter or reveal attempts at victim/witness intimidation.

Monitored phone calls and mail may increase the incentive for inmates to resort to the use of smuggled cell phones to contact victims or witnesses or associates on the outside. When the phone is a “smartphone” capable of Internet access, the opportunities for menacing communication increase dramatically. Defendants are able not only to communicate directly with the victim, but also to communicate via blog posts, social media, text messages, or email. Measures to prevent smuggling of cell phones, and sanctions for their possession within the institution, should be stringent. Some institutions have implemented technology that blocks the functionality of cell phones throughout the institution in an effort to cut off this avenue of illicit communication.⁸⁸

Staff at the jails should be trained to carefully monitor visits at the jail and to be alert for any indication that a visitor is being subjected to intimidation during the visit. Suspicious behavior should result in an immediate end to the visit, and an interview with the visitor to find out what, if anything, occurred. Any attempts at intimidation discovered within the institution should be thoroughly documented and promptly reported to police and to the prosecutor, who may wish to seek an increase in bail or additional charges. Visits should also be monitored

for communication intended to facilitate intimidation through a third party.

Victims and witnesses who are, themselves, in custody are particularly vulnerable to intimidation, and are uniquely prevented from exercising the kind of autonomy that civilian witnesses can for purposes of promoting their own safety. Institutional agencies and administrators should review their policies and practices to ensure that, to the extent practicable, any institutional transfers or protective custody classifications do not unfairly punish the victims or witnesses who are cooperating, do not place them in settings where they can be victimized by other inmates, and do not unnecessarily call attention to their cooperation. Particularly in the correctional setting, scrupulous care must be taken to avoid housing, holding, or transporting defendant-inmates together with witness-inmates who are testifying against them. By the same token, police and prosecutors must keep the institutions apprised of the status of witnesses so that the institution can take appropriate protective measures.

F. Judicial practices: Courthouse and courtroom security⁸⁹

Regardless of any restraints and limitations preventing a defendant's contact or communication with victims or witnesses during the pretrial period, there is one place defendants and witnesses are certain to be in proximity: at any court proceeding where both parties are required to be present. Victims have been threatened, assaulted, or killed in the immediate vicinity of the courthouse where they are seeking justice, and witnesses threatened in hallways and holding cells.

Ultimate responsibility for courthouse security procedures usually lies either with the presiding judge or with the sheriff's department, with those procedures being carried out by sheriff's officers or other courthouse security staff. In some jurisdictions, responsibility for security is divided between the judges, who control the courtroom, and the sheriff's department, which controls the common areas in and around the courthouse. Officers should be a visible presence throughout the courthouse, where they can observe and take action in response to any

suspicious behavior, and where victims or witnesses requiring their assistance can easily find them. Courtrooms and hallways should be monitored with security cameras. Any apparently inappropriate conduct or contact should be immediately investigated, documented, and reported to the judge and to the prosecutor.

Courthouses should provide secure, private waiting areas for victims and witnesses so they are not required to sit and wait within the view of the defendants they are there to testify against, or the family or friends of the defendants. The waiting area should have restricted access to prevent entry by unauthorized persons, and security cameras should monitor the entrance.

Many courthouses today have metal detectors and other procedures to prevent weapons from being brought into the building. Cell phones, particularly those with cameras and recording capability, and “smart-phones” can also pose 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. Because the vast majority of the public today regularly carries cell phones, most of which have at least a camera of some kind, and many of which have audio/video recording or Internet capabilities, it may be impractical to ban them entirely from the courthouse. Attorneys and representatives of the media, among others, have legitimate reasons to need such devices while in the courthouse. At the very least, however, use of these devices (even in “silent” mode) should be banned while in the 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. Acting on a tip, investigators at the San Diego IWI site obtained a warrant to seize and to search a cell phone in the possession of someone sent to record a witness’s testimony in court.⁹⁰ If such restrictions are not already in place, a meeting with the presiding judge and with the sheriff or chief of courthouse security may bring about the necessary changes. Prose-

cutors and investigators who regularly deal with crimes involving witness intimidation, and victim advocates, should be represented in any committees or task forces that deal with issues of courthouse security. Intimidation in the courtroom itself can be a problem during any proceedings involving testimony. Courtroom security personnel should be alert for any conduct or gestures on the part of the defendant or spectators that appear to be directed toward any witness on the stand. Any apparent acts of intimidation should be immediately addressed and reported to the judge and to both counsel so that appropriate remedial measures can be taken, including restrictions on who may enter the courtroom and, where necessary, curative instructions to the jury if there was any kind of visible disruption as a result of the incident. Only in the most unusual circumstances should the courtroom be closed to all spectators,⁹¹ but temporary exclusion of individuals such as the defendant's family or associates during testimony of intimidated witnesses is generally permissible.⁹² The trial judge should place on the record the reasons for any such closure or exclusion, which should be no more restrictive than necessary under the circumstances.⁹³

During witness preparation, the prosecutor should find out whether a 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 choose someone who is not expected to testify in the case.⁹⁴ The witness should be advised to avoid looking at the defendant (except when directly identifying the defendant on the record) or at courtroom spectators while testifying, and to direct his or her attention instead to the prosecutor or to the jury. The witness should be prepared for the possibility that the defendant may make facial expressions or subtle gestures intended to intimidate him or her, but should be reassured that courtroom security will ensure the witness's safety. If the witness observes specific conduct on the part of the defendant or anyone else in the courtroom that is intimidating, he or she should request to speak with the judge. At this point the prosecutor should immediately request a sidebar so the witness's concerns can be addressed.

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 to intimidate the witness. The prosecutor 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.⁹⁵

In cases where a witness would suffer serious emotional harm as a result of testifying in the presence of the defendant, testimony via closed-circuit television may be an appropriate solution.⁹⁶ 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.

After an intimidated victim or witness has testified, he or she still must be able to leave the courthouse safely; some witnesses have reported being followed by the offender and his/her associates out of courthouse and into parking lots or down the street.⁹⁷ Where an investigator or advocate is not available to escort the witness, courthouse security should be available to perform that function. Where the defendant is not in custody, the judge may order the defendant to remain in the courtroom for a reasonable time to enable the witness to safely depart. The judge may also order any courtroom spectators not to leave the courtroom for a brief period of time to enable the victim to leave in safety.

G. Probation and parole practices⁹⁸

Careful monitoring of offenders who are sentenced to probation or released on parole is critical. Probation and parole officers should contact victims prior to the offender's release. In domestic violence cases, the victim can provide valuable input into other issues that the offender

may have, including alcohol or drug abuse problems, mental health issues (suspected or diagnosed), which often accompany (but do not necessarily cause) domestic violence. Victims may also be aware of gang affiliations or other associations that may pose a continuing risk of new offenses, including intimidation or retaliation crimes. Safety planning for the victim should be included as part of the supervision plan, with appropriate conditions such as no contact with the victim, participation in a batterers' intervention program, and alcohol or drug treatment where necessary. Gang-affiliated offenders should be prohibited from contact with other gang members. GPS monitoring may be useful for enforcement of no-contact conditions.

The probation or parole officer should advise the victim of the conditions of supervision and inform the victim about the offender's planned living arrangements and other aspects of the probation or parole plan. The supervising officer should encourage the victim to report non-compliance with any conditions, and should regularly contact the victim to assess any ongoing safety issues. In addressing any violations with the offender, the officer must keep the victim's safety in mind to prevent further intimidation and retaliation as a result of providing information to the officer. The victim should be notified of any change in custodial status, such as arrests for violations or release on bail following such arrests.

IV. RECOGNIZING, DETECTING, AND INVESTIGATING INTIMIDATION

It is often said that law enforcement only learns about intimidation when it is unsuccessful. A truly successful act of intimidation will discourage the witness from disclosing it, just as it prevents the disclosure of evidence concerning the underlying crime. Fortunately, there are strategies that will encourage victims and witnesses to disclose attempts at intimidation and manipulation, as well as ways to uncover such attempts even when the witness is not forthcoming. Early and continual contact with victims and witnesses throughout the proceedings, with a special concern for issues of safety and intimidation, will help

to inspire confidence that law enforcement takes their safety seriously and will encourage them to continue to cooperate in the proceedings and to disclose attempts at intimidation as soon as they occur.

A. Educating victims and witnesses about intimidation

As noted previously, victims and witnesses should be educated about the various forms of intimidation and manipulation to which they might be subjected during the course of the criminal proceedings. These conversations should take place as early as possible during meetings with investigators and advocates, and should be part of the discussions about safety planning. Because intimidation can only be stopped if it is reported or otherwise discovered, witnesses must be instructed in how to recognize it and what steps to take if it occurs. Moreover, these conversations must be ongoing throughout the investigation and prosecution. Victims and witnesses may be traumatized and fearful immediately after the crime, and suffering from information overload, preventing them from absorbing or fully processing all that is said during these initial meetings. A folder or pamphlet that reminds them of what kinds of tactics might be used, what information to save and record, and how to report intimidation attempts, will help them to remember the importance of reporting such incidents and how to preserve evidence of those attempts.

Witness safety should take precedence over the documentation and preservation of evidence, but there is much that witnesses can do to assist in such documentation without any additional risk on their part. Witnesses should be provided with a log or notebook⁹⁹ to record the occurrence and details of any communications from the defendant or third-party intimidators, as well as any other suspicious occurrences. The witness should be instructed to record the date and time of the incident, the details of the incident, and any witnesses to the incident. Witnesses should be encouraged to maintain regular contact with the investigator so that any such occurrences can be documented and investigated promptly. It is important that witnesses have a way to immediately contact the investigator to report any threats to their safety, and that they be encouraged to call 911 in the event of an emergency.

Witnesses should also be reminded that it is important to inform any responding police officers of the ongoing case and the name of the lead investigator, so that police reports are promptly forwarded to the investigator, and do not languish in the police station or result in minor charges disposed of in another court without review by the prosecutor handling the primary case.

Witnesses should be instructed about how to preserve evidence of phone calls, text messages, letters, emails, online posts, or social media communications, but should be reminded that they should not invite such contact or attempt to conduct their own investigation. They should be advised not to respond to such overtures, but to preserve rather than delete such messages, to record details about the time and circumstances surrounding the communication (including any witnesses to the communication), and to contact the investigator at the earliest opportunity so that the communication can be further investigated.

B. Monitoring during the investigation

Investigators should check in with victims and witnesses vulnerable to intimidation on a regular basis; such contacts may well elicit reports of “minor” or suspicious incidents that the witness was not sure warranted a call to the investigator. Everyone involved with the victim or witness should be alert to any signs of intimidation (*e.g.*, increased fearfulness, increased reluctance to speak with investigators or with the prosecutor, failure to return phone calls as promptly as before), and should follow up with the victim or witness as to what may be occurring. Where the defendant is incarcerated, the defendant’s phone calls and outgoing correspondence should be checked, if possible, as well as jail visitor logs. The victim or witness should be asked not only about any contact from the defendant, but about any other suspicious incidents or communications, including those from the defendant’s family or friends.

Although the monitoring of phone calls and letters does not prevent all attempts at intimidation, threats in written form or recordings of threatening phone calls can be powerful evidence at trial, both on the

issue of forfeiture by wrongdoing (if the victim fails to appear) and as evidence of consciousness of guilt. Such letters and phone calls may, further, be a basis for additional criminal charges for witness tampering, obstruction of justice, or subornation of perjury. If the communication contains an admission, such as an apology or rationalization for the crime, it is, of course, admissible as direct evidence of guilt on the underlying charge.

In some instances, the defendant's behavior, especially stalking behavior (including persistent communication, following, or vandalism), can create problems for the victim with his or her landlord or employer. The victim is sometimes threatened with termination of employment or with eviction because of a perception that the victim is the cause of distractions or threats at the workplace or damage to a residence. Intervention by an advocate, prosecutor, or investigator can sometimes alleviate those problems, and not only save the victim from being fired or evicted, but may also result in obtaining additional evidence from the victim's employer, co-workers, or landlord about the defendant's acts of intimidation. Victim focus group participants at the Duluth IWI site described their abusers' attempts to intimidate witnesses who were neighbors or co-workers in an effort to prevent them from calling police. One abuser pulled a gun on downstairs neighbors who heard him assaulting his wife and tried to intervene. Another abuser came to his wife's workplace screaming at her, grabbing her by the hair and dragging her outside. Her co-worker told him not to come there anymore but her abuser said to the co-worker, "I'm not scared of you. It's my life, she belongs to me and I can do whatever I want with her." The co-worker did not call police.¹⁰⁰

Where intimidation involves threats in connection with an ongoing divorce or child custody matter, the prosecutor should speak with the victim's civil attorney (if any) to exchange information that may be useful in connection with both matters, where the victim consents to such disclosure. Sometimes the civil attorney will have communications from the defendant, or other kinds of evidence, such as *pro se* filings or responses to discovery requests, that will help to prove the intimidation or provide important corroboration.

C. Evidence gathering

Immediately after the crime, a detailed, formal statement from the victim or witness should be recorded, preferably by video recording, where possible. If the witness later recants or refuses to testify, such a recorded statement may be admissible as substantive evidence of the crime, depending upon the jurisdiction's evidence rules and court rulings on its admissibility.¹⁰¹ A video recording of the statement will document the witness's demeanor, which can greatly enhance the ability of a fact-finder to judge the statement as credible and reliable.¹⁰² The statement should include a complete history of any prior acts of violence, as well as any acts of intimidation or manipulation that may have resulted in failure to report crimes, dropped charges, dismissal of cases, or dropped restraining orders or orders of protection. Such details may help to establish evidence of a "classic abusive relationship"¹⁰³ in the event a motion for forfeiture by wrongdoing is necessary.

Separately from the recorded statement, the investigator should elicit and document detailed contact information for the victim or witness, including contact information for the witness's employer or school, and trusted family members and friends. If the witness fails to appear for trial, and the prosecutor must file a motion to admit prior statements under the doctrine of forfeiture by wrongdoing, the prosecutor will have to show that the witness is "unavailable," which will require proving that the State made reasonable efforts to produce the witness in court.¹⁰⁴ By obtaining detailed contact information, the investigator will later be able to make efforts to locate the witness and to document the results of those efforts.

In appropriate circumstances, where the right to counsel has not yet attached, a consensual intercept of a phone conversation between the defendant and the victim may yield incriminating statements, including apologies or rationalizations for the criminal conduct. Investigators must consult the wiretap laws in their own jurisdiction regarding the requirements and limitations surrounding such recordings.¹⁰⁵ In addition, participation in such calls may further traumatize the victim. An advocate should be available to support the victim if this tactic is used,

and a fearful or reluctant victim should not be forced or pressured to participate.

During the course of the investigation and pretrial period, any subsequent acts of intimidation or manipulation should be thoroughly investigated and documented, including, at a minimum, a supplemental investigation report and a recorded statement from the targeted victim or witness, as well as statements from any witnesses to the intimidation. The investigator must collect any physical or documentary evidence of the act.

Acts of intimidation in the form of threats, manipulation, assault, or stalking should be thoroughly investigated by the same investigator handling the primary case. The lead investigator is in the best position to understand the significance of the incident in the context of the original case, to give proper attention to what might otherwise appear to be a minor criminal act (or a non-criminal act), and to take any action necessary to protect the witness's safety. If the investigator has been in regular contact with the witness, it is far less likely that an act of intimidation will go unreported or that it will be reported to an agency unaware of its significance with respect to the original case. Moreover, if an intimidation crime is separately prosecuted and disposed of before the original underlying case, it will be impossible to include that crime in the indictment or other charging document for trial along with the underlying crime, for reasons of double jeopardy. This can result in the loss of the significant strategic advantage of trying the intimidation crimes as part of the larger criminal case.

Investigators should not advise victims or witnesses to record phone conversations or in-person conversations with the defendant. Doing so may violate the defendant's right to counsel if such actions are undertaken at the request of the State. In addition, wiretap laws may prohibit or limit such recording and could, if the law is not followed, result in civil or criminal liability for the witness. Such recording should only be attempted after consultation with the prosecutor to ensure that any recording does not violate the defendant's constitutional rights and that

it is in full compliance with the wiretap statutes. In appropriate circumstances, where it is the defendant who initiates the conversation, where the victim or witness is supervised to ensure that he or she is not intentionally eliciting incriminating statements, and where all provisions of the wiretap statutes are carefully observed, it may be permissible to record the conversation. The recording of conversations with third parties acting on the defendant's behalf do not present the same concerns about the right to counsel, but nevertheless are subject to the wiretap statutes and should only be undertaken with the knowledge and participation of the investigator after consultation with the prosecutor.

Investigators should be trained in proper evidence-gathering and preservation techniques for cases involving other forms of electronic communication, as well. 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.¹⁰⁶ Although the victim or witness can print out the information, it is possible to forge print-outs of such communications, so 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"¹⁰⁷ 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 con-

tents 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 a 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 victim, 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.¹⁰⁸ 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.¹⁰⁹

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.

V. RESPONDING TO INTIMIDATION

Once acts of intimidation or manipulation have been discovered and thoroughly documented and investigated, there are a number of possible law enforcement responses available. Selection of the most appropriate response(s) in a particular case may depend on a number of factors, including the quantum of proof of intimidation (including proof of the defendant's personal involvement), the seriousness of the danger to the victim or witness (including danger to the witness's emotional well-being), the impact of the conduct on the prosecution of the underlying crime (including whether the conduct has caused the witness to

recant or to refuse to testify), the availability of criminal or other consequences (such as a motion to admit prior statements under forfeiture by wrongdoing), the impact of the conduct on the community, and the likelihood that the conduct will be repeated.

A. Witness protection

Witness safety must always take priority over evidence gathering. Where there is immediate danger to the witness, action to protect the witness's safety must be the primary focus. The existence and level of intimidation may require adjustments to any existing safety plan, and in some instances may warrant relocation for the witness's safety. In addition to services that may be available through a dedicated witness assistance unit within the prosecutor's office, several states have some form of witness protection program that may provide financial and other forms of assistance to victims and witnesses who need to relocate due to intimidation. The rules and eligibility for such programs vary, as do their financial and other resources.

Relocation may be necessary only for a brief time, such as immediately prior to trial, or it may be necessary to relocate some witnesses on a long-term or even permanent basis. Witnesses may be temporarily housed in shelters, motels, or with friends or relatives, or they may be placed, on a more permanent basis, in public housing or "Section 8" (publicly subsidized) housing. Choices may be limited by available funding and other considerations unique to the witness and his or her needs. An exhaustive discussion of the considerations to be taken into account in planning witness relocation can be found in National Institute of Justice's publication, *Preventing Gang- and Drug-Related Intimidation*.¹¹⁰

Among the greatest challenges in utilizing long-term relocation is that it requires victims and witnesses to sacrifice their personal lives for the sake of their safety. Witnesses may be required to agree to have no contact with anyone from their neighborhoods, or with their family and friends, for an indefinite period of time. This may be too much for some

witnesses, who will initially agree to relocation only to later jeopardize their lives by revealing their location or by returning to their original home or neighborhood because of simple loneliness. Any witness who is relocated will require a substantial investment not only of funds, but also of attention from investigators, who must maintain close contact throughout the period of relocation to address any problems encountered by the witness that might lead the witness to jeopardize his or her safety.

Aside from relocation, other measures to provide extra protection to a witness who has been intimidated include extra patrols of the witness's neighborhood, installation of alarms and security cameras around the witness's home, and escorts for court appearances. A victim-witness coordinator at the San Diego IWI site observed that there is "strength in numbers," describing a case in which friends and family of an incarcerated defendant approached the victim as a group to intimidate her. This group continued calling and texting the victim constantly, and ultimately discouraged her from coming to court. An investigator working with a domestic violence victim who had been similarly threatened countered by coming to court with his own entourage to support the victim and to send a message to any parties who may have been loitering in the halls¹¹¹ to intimidate her.

Once the immediate safety of the witness has been addressed, some kind of further response that will stop or deter further attempts at intimidation is usually called for. In some cases, however, where there may not be sufficient proof of intimidation, where the witness's safety is not in jeopardy and where the witness is comfortable with the idea, watchful waiting may be the best response. Defendants sometimes become overconfident and careless, and repeated communications may build a stronger circumstantial case for proving intimidation.

B. Informal resolution

Any third-party intimidation, however subtle, that can be proved to have originated with the defendant should be prosecuted to the fullest extent practicable, as described in Section D, *infra*. Similarly, any indi-

vidual who engages in serious acts of third-party intimidation should be vigorously prosecuted. Sometimes, however, friends and family of the defendant may act without the defendant's provable involvement, and potentially without the defendant's knowledge or assent, engaging in emotional pressure or low-level harassment of the victim. As with acts committed by the defendant, it is important to consider the context of the act or communication to determine whether it is sufficiently serious to warrant prosecution.

In the case of less-serious conduct, an investigator's conversation with the friend or family member may be effective in stopping the communication or intimidating conduct. The investigator can explain that conduct directed toward a witness that is intended to discourage him or her from cooperating with law enforcement or from testifying in court is considered witness tampering, and that further communication or harassment may result in criminal charges against the instigator. This sort of low-key, informal response is only appropriate where it is likely to be effective, and where the conduct does not pose a serious threat to the victim or to prosecution of the case. Many family members and friends will decide that their willingness to assist the defendant in this manner ends where their own potential criminal liability is risked.

C. Motions to revoke/increase bail

Where a defendant engages in conduct that violates any bail conditions, an immediate motion to revoke or to increase bail should be filed. Even if the defendant's bail lacked a no-contact condition, serious acts of intimidating or threatening conduct impact directly on the defendant's risk of nonappearance and on the risk to public safety. Accordingly, a motion to revoke or to increase bail is warranted in those instances as well. The existence of new criminal charges based upon such conduct adds weight to the argument that the defendant's bail is currently inadequate to serve its intended purposes.

D. Criminal charges for witness intimidation crimes

Criminal charges for acts of intimidation should be filed, preferably in the same charging instrument as the underlying crime, where the

evidence clearly shows that the defendant is responsible for the intimidation. Where time permits, a superseding indictment should be obtained, if necessary, to add the intimidation charges. This will help to ensure that the prosecutor can present to the jury all evidence pertaining to the acts of intimidation, without the need for preliminary evidentiary rulings on its admissibility, and without the need for limiting instructions.¹¹² Possible charges in witness intimidation cases will vary from one jurisdiction to another, but may include crimes such as witness tampering, witness retaliation, obstruction of justice, and subornation of perjury, bribery, or interference with a 911 call, as well as substantive crimes such as assault, terroristic threats, criminal coercion, or stalking. In addition to widening the scope of admissible evidence at trial, such charges may result in the imposition of consecutive sentences after trial. The filing of additional criminal charges can have a substantial deterrent effect on further attempts at intimidation, can result in increased bail, and may ultimately tip the scales for the defendant's acceptance of a plea agreement.

Intimidation by third parties should result in criminal charges against those parties, as well. Such charges not only punish and deter the third party from committing further acts of intimidation, but may permit the prosecutor to negotiate a plea agreement offering leniency for the third party in exchange for cooperation against the primary defendant. Whenever third parties are arrested in connection with witness intimidation, they should be interrogated, if possible, to investigate the primary defendant's involvement in the act of intimidation.

E. Response to intimidation during trial

When the likelihood of intimidation during trial can be readily anticipated, the prosecutor should alert the trial judge and courtroom staff, particularly officers providing courthouse security, well in advance so that appropriate security measures can be put into place. Depending upon the type of case, and the kind of intimidation anticipated, the presiding judge and the chief of courthouse security may need to be consulted about the feasibility of implementing additional security measures, such as screening of all spectators in the courtroom¹¹³ and a complete ban on cell phones in the courtroom. Because of the way

most courtrooms are designed, and because the prosecutor will be pre-occupied with presenting the case, court staff are likely to be in a better position than the prosecutor to observe unusual or suspicious activity by the defendant or spectators. Any such activity should be brought to the attention of the judge immediately. It is critical that the trial judge maintain strict control of the courtroom at all times, and that any signs of intimidation occurring in the courtroom be addressed immediately. In addition to any other appropriate response, the court may hold in contempt any individual engaging in witness intimidation in the courtroom.

If intimidation is observed, security staff should prepare detailed reports about what occurred, and the details of the incident should be placed on the record outside the presence of the jury. If the jury observes an apparent disruption of any kind, the judge should confer with both counsel about how the incident should be addressed with the jury. The prosecutor should strenuously object to a motion for a mistrial based upon conduct by the defendant or any supporters. Defendants should not be rewarded for their disruptive conduct during a trial. Instead, an appropriate remedial instruction to the jury should be given, advising them to disregard the disruption.

In appropriate cases, the prosecutor should consider presenting evidence about intimidation that occurs during the trial, at least where such conduct is either clearly attributable to the defendant or where such evidence is relevant to explain a witness's fearfulness or evasiveness on the stand. In the latter case, where there is a lack of evidence linking the defendant to the conduct, an appropriate limiting instruction should be given to avoid any prejudice to the defendant's case. Where there is evidence that the defendant is responsible for the act of intimidation, however, the prosecutor should be permitted to argue that such conduct is evidence of consciousness of guilt. If an act of intimidation occurs during trial that is sufficiently effective to cause the witness to be unable to continue with his or her testimony, the prosecutor should move to allow the jury to consider the testimony given on direct examination, without cross-examination, under the theory of forfeiture by wrongdoing.¹¹⁴

F. Post-conviction intimidation

Because intimidation or retaliation may continue even after a defendant is convicted and sentenced, prisons housing convicted offenders should adopt practices similar to those used during pretrial confinement in order to deter and detect attempts to elicit recantations or other false testimony in connection with post-conviction proceedings, or attempts to retaliate against witnesses.

Any intimidation that is discovered while a defendant is serving a term of imprisonment should result not only in institutional disciplinary proceedings, but referral for new criminal charges. In addition, the prosecutor handling the original case should be notified, in the event that there are pending post-conviction proceedings involving recantations by victims or witnesses who testified at trial.

Violations of probation and parole conditions must be promptly addressed by the supervising parole or probation officer. Officers should contact victims on a regular basis to ensure their ongoing safety and security, and should ensure that the victim knows how to reach the officer in the event of any threats, harassment, or other forms of intimidation or retaliation. Any harassment or intimidation of victims or witnesses by a probationer or parolee should result in immediate revocation proceedings, and referral to the prosecutor's office for potential prosecution as a new intimidation offense. Violations of no-contact or other conditions, such as batterers' intervention programs, drug or alcohol treatment, or mental health treatment, should be evaluated through the lens of victim/witness safety. Where contact appears to be inadvertent, or probably inadvertent, changes to the probation or parole plan may be appropriate so such contact does not recur. Where there is no condition prohibiting contact (as where the victim has requested that contact be permitted and contact appears to be consistent with victim safety and prevention of new offenses), continued monitoring remains important. The probation or parole officer should consult with the victim on a regular basis to ensure that the defendant is compliant with other conditions, including refraining from committing further offenses. The supervising officer should address any high-risk behaviors on

the part of the defendant (including drug or alcohol abuse or contact with criminal associates) by making changes to the supervision plan or by initiating revocation proceedings as appropriate.

VI. TRIAL STRATEGIES FOR CASES INVOLVING INTIMIDATION

Presenting a criminal case that involves potential witness intimidation requires the prosecutor to be attentive to the intimidation issue throughout all phases of the proceedings, from the time the criminal complaint is referred to the prosecutor's office through sentencing, appeals, and post-conviction proceedings. There are several strategies that can be effective in minimizing the effects of intimidation on the prosecution of the case, and in turning the defendant's efforts to discourage victims and witnesses from cooperating into a strategic advantage for the State.

A. Early preservation of witness testimony

In cases where there is a substantial risk of witness intimidation, prosecutors should consider the strategy of preserving the witness's testimony in a manner that will ensure its later admissibility if the victim is not available for trial. Witness testimony given at any formal court proceeding (as well as most statements to law enforcement in the course of the investigation) is considered "testimonial" under *Crawford v. Washington*¹¹⁵ and its progeny. If the victim is unavailable for trial, such testimony will be admissible only if the defendant has had a prior opportunity for cross-examination. This requirement means that grand jury testimony usually will not be admissible, unless the prosecutor files a successful motion for its admission under the doctrine of forfeiture by wrongdoing.

Where the rules of criminal procedure permit, the prosecutor should consider insisting upon a bail hearing, or a preliminary probable-cause hearing, at which the witness can testify with the opportunity for cross-examination, with any available discovery passed to the defense prior to the hearing. The prosecutor should object to any defense re-

quests to waive the hearing, and should agree to any reasonably brief continuances to permit the defense to prepare to cross-examine the witness. Objections to cross-examination should be minimized so it is clear that the defendant has had a full and fair opportunity to cross-examine. When the defense has had the opportunity to cross-examine the witness, prior statements by that witness, including any formal statement taken by investigators, can be admitted at trial without offending the Confrontation Clause, provided that the witness is unavailable for trial.¹¹⁶ In addition to preliminary hearings and bail hearings, another option to preserve testimony where a witness's unavailability can reasonably be anticipated is to conduct a deposition of the witness where permitted by court rules. The availability of such a deposition and the procedural rules governing it will vary from one jurisdiction to another.

Although preservation of witness testimony does not directly prevent a defendant from committing acts of intimidation, it does eliminate any benefit that would otherwise accrue as a result of making the witness unavailable for trial. In that sense, such strategies reduce the incentive for defendants to engage in tactics designed to deprive the court of the witness's testimony.

B. Pretrial motions and hearings

In filing or responding to motions for bail, preliminary hearings, or discovery, the prosecutor should always take into account concerns about witness intimidation. As previously explained, bail hearings or probable cause hearings can preserve a witness's testimony for later admission at trial if the witness later fails to appear or recants, provided that the defendant has had a full and fair opportunity for cross-examination at the hearing. Bail should be set in an appropriate amount, with appropriate conditions to protect the safety of victims and witnesses. Motions for protective orders, sealed documents, or delayed discovery can help to preserve a witness's private information where there is a risk of intimidation. Where evidence of prior acts of intimidation may be necessary to explain victim behavior or the defendant's purpose or intent in the present case, a motion to admit evidence of prior "bad acts" may be necessary under Fed. R. Evid. 404(b). Any evidence admitted under

Fed. R. Evid. 404(b) should be accompanied by an appropriate limiting instruction, given at the time the evidence is admitted, and again during the final jury charge.

Where the State has provided material assistance to a witness, in the form of financial support, housing, or other services, or other kinds of special consideration that constituted a substantial benefit to the witness, the prosecutor should provide a summary of all such assistance to defense counsel as part of the pretrial discovery. Such benefits can be used for impeachment of the witness's testimony at trial, on the theory that the witness's testimony was favorably influenced. Of course, such questioning may backfire on the defense if it opens the door to testimony about the reasons the benefits were deemed necessary in the first place.

C. Retaining an expert

Depending upon the type of case, and the nature of the intimidation, the prosecutor should consider whether an expert witness may be useful in educating the judge and the jury about the dynamics involved in the case. An expert in domestic violence dynamics may be helpful to explain common victim behavior (such as minimizing the abuse, recantation, or refusal to cooperate with law enforcement), as well as common abuser tactics such as the use of emotional manipulation to discourage victims from reporting abuse or testifying in court. An expert in human trafficking, gang violence, or prison culture can be useful in explaining techniques used by traffickers or gang members to intimidate and control victims and witnesses in order to prevent them from testifying. Such experts may be used not only at trial, but also during preliminary proceedings, such as bail hearings, where their testimony may help to establish the dangerousness of the offender and the degree of risk to victims and witnesses in the case. Presentation of such testimony early in the case can be particularly helpful in educating the judge, who may be called upon throughout the course of the case to make rulings that may be affected by the existence and seriousness of witness intimidation.

The prosecutor must take great care in the presentation of expert testimony so that the type of testimony presented neither improperly intrudes upon the jury's function to resolve issues of credibility nor unfairly prejudices the defendant. At hearings outside the presence of the jury (*e.g.*, bail hearings, preliminary hearings pursuant to Rule 404(b), sentencing proceedings), there is little risk of unfair prejudice or intrusion on the judge's role as fact-finder. The judge is well-trained and experienced in giving only the appropriate weight to the testimony of an expert. At trial, however, the prosecutor generally should not elicit an opinion as to whether a victim or witness has been actually subjected to intimidation, or whether the victim or defendant is or is not a victim of battering, a batterer, involved in human trafficking (as a victim or as an offender), or involved in a gang. Nor should the expert opine about the credibility of a victim, a witness, or a defendant. Rather, the expert should be used to explain dynamics or culture, or explain what certain conduct, words, or actions may mean in the context of a situation with which jurors may be unfamiliar. An expert in gang violence may, for example, explain to the jury that it is not unusual for members of a gang to reach a joint decision whether to "green light" a "hit" against someone perceived as having betrayed the gang, if the State is introducing a recorded conversation in which a "hit" is being discussed. Similarly, a domestic violence expert may explain that victims often become adept at interpreting subtle behaviors they have come to recognize as threats and to respond (or to shut down) accordingly.

The prosecutor should meet with the expert before the report is prepared, and should clearly explain the scope of the expert opinion or explanatory testimony being sought. Usually the expert should not render an opinion based upon the specific facts of the case, but rather should prepare a report generally outlining the factors that can impact the freedom of the victim or witness to disclose and to cooperate with law enforcement. Even though the report is not based upon specific facts unique to the case, the prosecutor should outline in general terms what factors may be at work (*e.g.*, the fact that the parties have children in common or the fact that the victim is an immigrant with no family nearby). In this way, the expert can prepare a report that generally discusses

the effect those particular factors might have in a case involving domestic violence, gang violence, or human trafficking. The expert's report and testimony should touch upon the effects of intimidation, where relevant, in a manner that will support the overall theme of the case. During preparation, the prosecutor should caution the expert about avoiding giving any opinion about ultimate issues in the case, including credibility. Any additional limitations imposed by the court with respect to the proposed expert testimony should be carefully reviewed with the expert immediately before the hearing or trial so that the testimony does not stray beyond those bounds.

D. Motions to admit evidence under forfeiture by wrongdoing

Forfeiture by wrongdoing is a longstanding exception to a defendant's Sixth Amendment right of confrontation. If a defendant causes a witness to be unavailable for trial because of the defendant's wrongful acts, with the intention of preventing that witness from testifying, then the introduction of the witness's prior "testimonial" statements¹¹⁷ is not barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution. The federal courts, under Section 804(b)(6) of the Federal Rules of Evidence, and several states, by rule, statute, or application of common law principles, have established forfeiture by wrongdoing as an exception to the right of confrontation. While some states have not had occasion to formally recognize the doctrine, the New Jersey Supreme Court has pointed out that "[n]o court that has considered the forfeiture-by-wrongdoing doctrine has rejected it."¹¹⁸ Significantly, wrongful acts include not only crimes, such as murder, assault, threats, and other forms of intimidation, but also declarations of love, or promises to marry or to change, when they are intended as inducements for the victim not to testify.¹¹⁹

At a hearing to admit evidence under the doctrine of forfeiture by wrongdoing, the prosecution must prove that (1) the defendant acted wrongfully or acquiesced in wrongful acts that resulted in the witness's unavailability at trial; and (2) that the defendant intended to prevent the witness from testifying. In the majority of states, the standard of proof is a preponderance of the evidence; the standard is clear and

convincing evidence in the remainder of the states. Hearsay (including the statements sought to be admitted) is admissible in a preliminary hearing to establish forfeiture by wrongdoing.¹²⁰ There need not be a pending case at the time of the wrongful act for the forfeiture doctrine to apply.¹²¹

Prosecutors in cases involving potential intimidation should be proactive in preparing for the possibility that victims and witnesses will ultimately refuse to cooperate in the prosecution of the case, or that they will go into hiding or refuse to testify at trial. It is good strategy for prosecutors in such cases to create a “forfeiture” section of their trial file or notebook for each witness who may be vulnerable to intimidation. In that section should go any police reports, statements, or other evidence tending to show that the defendant, or persons acting on the behalf and at the behest of the defendant, have engaged in conduct designed to discourage the witness from testifying. At the IWI site in Duluth, for example, a Domestic Violence Response Team collects such information for the prosecutor shortly after an arrest.¹²² The prosecutor should be familiar with the law governing forfeiture by wrongdoing in his or her jurisdiction, and should be prepared to file and litigate a motion to admit hearsay evidence under the forfeiture doctrine if the witness refuses to testify or cannot be located.

In most jurisdictions, the State must provide notice of intent to admit evidence under the forfeiture doctrine in order to give the defendant a fair opportunity to respond. Hearings are usually conducted prior to trial under the provisions of Fed. R. Evid. 104(a).¹²³ However, prosecutors should be prepared to make an *ad hoc* forfeiture motion during the trial, if a witness unexpectedly fails to appear or refuses to testify.¹²⁴

E. Voir dire

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.

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. They 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, prospective jurors should indicate a willingness to set aside their previously held beliefs if there is evidence that those beliefs are based upon incorrect assumptions.

F. Opening statement

If the victim or other 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. If there is evidence of intimidation or manipulation by the defendant, it is best to allude to that during the opening, so the jury will not be shocked or surprised if defense counsel stands up and announces that his or her star witness is the victim.

G. Trial testimony

The prosecutor should seek to admit all evidence of intimidation, regardless of whether the victim or witness testifies at trial. Such evidence indicates consciousness of guilt on the part of the defendant, and should be so argued during summation. As noted previously, some acts may require a motion under Fed. R. Evid. 404(b), and 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).¹²⁵ 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.

H. Summation

During summation, the prosecutor should 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, and 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 as an unfortunate consequence of the defendant's conduct. The prosecutor should review in detail any evidence of intimidation and manipulation that was presented during the trial, and argue to the jury that the victim's reluctance is understandable under the circumstances. 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, the prosecutor should emphasize any evidence that corroborates those statements, and 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, the prosecutor should nevertheless argue that any attempts on the part of the defendant to intimidate or manipulate the witness indicates consciousness

of guilt. The prosecutor must take great care not to interject into the summation his or her own knowledge about the dynamics of domestic violence or other crime—any comment must be based solely upon the evidence presented at trial or upon reasonable inferences to be drawn therefrom.

I. Jury instructions

Prosecutors 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, the prosecutor should request a restrictive limiting instruction that directs the jury to consider the evidence only as proof of intent, absence of mistake, knowledge, or other permitted purpose, and not as evidence of the defendant's bad character. To the extent 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.

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, the prosecutor should 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.

J. Verdict

If the jury returns a guilty verdict, the prosecutor should move to revoke bail if a sentence of imprisonment is likely to be imposed. If bail is not revoked, the prosecutor should request that the defendant remain in the courtroom until the victim has an opportunity to safely leave the courtroom. In cases where there is risk of third-party intimidation or retaliation, the prosecutor should ask the judge to order spectators to remain in the courtroom briefly, as well.

K. Sentencing

The prosecutor should submit to the court a detailed sentencing memorandum in support of whatever sentence is being sought. Where the defendant has been convicted of crimes of intimidation in addition to the original charges, a strenuous argument can be made 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 the court can nevertheless properly take such acts into account in imposing sentence.

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

L. Post-conviction proceedings

Because ordinary criminal appeals are based upon the record of the trial proceedings, witness recantation is usually not an issue at the ap-

pellate 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.

VII. CONCLUSION

Knowledge about the kinds of cases in which victim and witness intimidation is most likely to occur, and the means by which it can be carried out, will enable police, prosecutors, and allied professionals to coordinate their efforts to prevent its occurrence, to promptly and effectively address it when it occurs, and to successfully prosecute cases in spite of defendants' efforts to prevent witnesses from cooperating.

Defendants engage in witness intimidation because it works. To the extent that law enforcement is 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. To the extent that law enforcement and allied professionals are able to build trust within the community, and to provide services and assistance to keep victims and witnesses safe, more witnesses will be willing to cooperate throughout the proceedings. Just outcomes can only be assured when witnesses are, indeed, "free to tell the truth" without fear of further victimization by criminal defendants and their allies or by the very system whose interests these witnesses serve.

ENDNOTES

- 1 Teresa M. Garvey is an Attorney Advisor with AEquitas: The Prosecutors' Resource on Violence Against Women. The author gratefully acknowledges the contributions and suggestions of AEquitas Director Jennifer Long, AEquitas Attorney Advisor Rhonda Martinson, AEquitas Associate Attorney Advisor Charlene Whitman, and AEquitas Visiting Researcher Michal Gilad, as well as the invaluable input of Senior Program Manager Franklin Cruz of the Justice Management Institute, and Assistant U.S. Attorney Christian Fisanick, Chief of the Criminal Division, U.S. Attorney's Office for the Middle District of Pennsylvania.
- 2 Among the most significant factors influencing whether a witness will be intimidated are: whether the initial crime was violent; whether the defendant has a personal connection to the witness; whether the defendant lives near the witness; and whether the witness is especially vulnerable (e.g., elderly, a child, or a recent or illegal immigrant). See PETER FINN & KERRY MURPHY HEALEY, NAT'L INST. OF JUSTICE, ISSUES AND PRACTICES, PREVENTING GANG- AND DRUG-RELATED INTIMIDATION 8 (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 1- 2 (Oct. 1995), <https://www.ncjrs.gov/pdffiles/witintim.pdf>.
- 3 *Devonshire v. United States*, 691 A.2d 165, 169 (D.C. 1997) (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)) (approving admission of hearsay statements by absent witness under doctrine of forfeiture by wrongdoing).
- 4 RHONDA MARTINSON & GRAHAM BARNES, IMPROVING THE JUSTICE SYSTEM RESPONSE TO WITNESS INTIMIDATION, PILOT PROJECT REPORT: DULUTH, MINNESOTA (2011) (draft report on file with AEquitas).
- 5 RHONDA MARTINSON & MARIJKA BELGUM-GABBERT, IMPROVING THE JUSTICE SYSTEM RESPONSE TO WITNESS INTIMIDATION, PILOT PROJECT REPORT: KNOXVILLE, TENNESSEE (2011) (draft report on file with AEquitas).
- 6 RHONDA MARTINSON, ELIZABETH WOFFORD, SANDRA TIBBETTS MURPHY, MARIJKA BELGUM-GABBERT, & JOHN WILKINSON, IMPROVING THE JUSTICE SYSTEM RESPONSE TO WITNESS INTIMIDATION, PILOT PROJECT REPORT: SAN DIEGO, CALIFORNIA (2012) (draft report on file with AEquitas).
- 7 A safety audit is a method for criminal justice practitioners and victim advocates in a community to work side by side to analyze how sectors of their criminal justice system organize the day-to-day routines of individual practitioners in a way that

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results in either centralizing or marginalizing attention to victim safety. For more information, see *Institutional Analysis/Community Assessment*, PRAXIS INTERNATIONAL: SAFETY AND ACCOUNTABILITY AUDITS, http://praxisinternational.org/praxis_institutional_analysis_community_assessment_home.aspx (last visited Mar. 19, 2013).

- 8 See, e.g., ROBERT C. DAVIS, BARBARA E. SMITH, & MADELINE HENLEY, VICTIM SERVICES AGENCY, VICTIM/WITNESS INTIMIDATION IN THE BRONX COURTS: HOW COMMON IS IT, AND WHAT ARE ITS CONSEQUENCES? (1990) (study in Bronx, NY), http://www.popcenter.org/problems/witness_intimidation/PDFs/Davis_etal_1990.pdf; Elizabeth Connick & Robert C. Davis, *Examining the Problem of Witness Intimidation* 66 JUDICATURE 439 (1983) (study in Brooklyn, NY), http://www.popcenter.org/problems/witness_intimidation/PDFs/Connick&Davis_1983.pdf. In the 1983 Brooklyn study by Connick and Davis, only 747 victims could be contacted from the list of 1,256 identified during the study period, and of those 747, 15% reported they had been threatened (researchers noting that witnesses who had been most severely threatened may have been among those who could not be contacted because they had relocated or changed their phone numbers). In the 1990 Bronx study by Davis, et al., of 136 victims who were interviewed at the time of their original court appearance during a nine-month period, and again after disposition of their cases, 32% of them reported at the time of the initial interview that they had been threatened in some manner, with an additional 5% who had been asked to drop the charges. At the second interview, following disposition of their cases, 41% of these victims reported they had been threatened, or otherwise discouraged from testifying, at some time during the course of the case.
- 9 FINN & HEALEY, *supra* note 2, at 16.
- 10 The federal courts, and some state courts, permit the empaneling of an anonymous jury in cases where, *inter alia*, the defendant is a member of a group with the apparent ability to harm jurors, where the defendant has a history of violence, and where the defendant has demonstrated a willingness to obstruct and corrupt justice. See, e.g., *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1990).
- 11 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 43.
- 12 *Id.*
- 13 See Jacob Honigman, *Can't Stop Snitchin': Criminalizing Threats Made in "Stop Snitching" Media Under the True Threats Exception to the First Amendment*, 32 COLUM. J.L. & ARTS 207 (2009). Variants of the theme proclaim that "Snitches wear stitches," or "Snitches end up in ditches." Suzette Hackney, *Living with murder: The agony of Detroit's neighborhoods -- and their cry for help (Part I of*

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III), DETROIT FREE PRESS (Nov. 13, 2011), <http://www.freep.com/article/20111113/NEWS01/111130533/Living-murder-agonny-Detroit-s-neighborhoods-their-cry-help>.

- 14 MARTINSON & BARNES, *supra* note 4, at 41.
- 15 *Id.*
- 16 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 57.
- 17 Don Thompson, *Inmates Harass Victims Via Facebook*, YAHOO! NEWS (Nov. 21, 2011), <http://news.yahoo.com/inmates-harass-victims-via-facebook-081733468.html> (last visited Mar. 6, 2013).
- 18 MARTINSON & BELGUM-GABBERT, *supra* note 5, at 74.
- 19 In a fascinating study of how emotional manipulation can produce recantation in domestic violence cases, researchers analyzed recorded telephone calls from 17 jailed defendants to their victims, who ultimately agreed to recant their report of the crime. Most of the victims eventually succumbed to the defendants' descriptions of their suffering in jail, and the prospect of their shared histories together ending. See Amy E. Bonomi, Rashmi Gangamma, Chris R. Locke, Heather Katafiasz, & David Martin, "Meet me at the hill where we used to park": *Interpersonal Processes Associated with Victim Recantation*, 73 SOC. SCI. & MED. 1054 (2011).
- 20 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 42.
- 21 *Id.* at 54.
- 22 *Id.* at 57.
- 23 MARTINSON & BARNES, *supra* note 4, at 54.
- 24 See generally, R. LUNDY BANCROFT, JAY G. SILVERMAN, & DANIEL RITCHIE, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2d ed. 2011).
- 25 Mark Stodghill, *Duluth Man Admits to Sex Assault on Girl*, DULUTH NEWS TRIBUNE (Apr. 6, 2012).

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- 26 See Roland C. Summit, M.D., *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983), available at <http://www.secasa.com.au/sections/for-students/the/the-child-abuse-accommodatin-syndrome/>.
- 27 Several Rules of Professional Responsibility govern the ethical responsibilities of attorneys in their interactions with witnesses. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.4 (Fairness to Opposing Party and Counsel); MODEL RULES OF PROF'L CONDUCT R. 4.3 (Dealing with Unrepresented Person); MODEL RULES OF PROF'L CONDUCT R. 4.4 (Respect for Rights of Third Persons).
- 28 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 63; MARTINSON & BARNES, *supra* note 4, at 45.
- 29 Where an attorney's conduct has *clearly* violated the Rules of Professional Conduct, a disciplinary complaint should be filed. Prosecutors, like all attorneys, have an obligation to police the profession, and disciplinary proceedings against unethical conduct by a defense attorney may deter others who are tempted to engage in similar conduct. Where there is evidence of *criminal* conduct on the part of an attorney, of course, that attorney should be aggressively prosecuted. Defense attorney (and former prosecutor) Paul Bergrin was recently convicted of murder, racketeering, witness tampering, and related charges based in part upon allegations that he conspired with his clients to have several witnesses murdered. Jason Grant, *Federal jury convicts Paul Bergrin of murder, racketeering, more than a dozen other counts*, THE STAR-LEDGER (Mar. 18, 2013), available at http://www.nj.com/news/index.ssf/2013/03/bergrin_trial_verdict_announce_1.html; see also *United States v. Bergrin*, 682 F.3d 261 (3d Cir. 2012). In another instance of attorney misconduct, a defense attorney was convicted of conspiracy, attempted obstruction of justice, and bribery, for conspiring with an informant to intimidate and bribe witnesses against his client. See *United States v. Simels*, 654 F.3d 161 (2d Cir. 2011), *cert. denied*, 132 S.Ct. 1725 (2012). One defense attorney, who was representing a client charged with stalking, filed a civil lawsuit against the victim and then offered to dismiss the civil complaint in exchange for favorable testimony in the criminal case. The attorney pled guilty to dissuading a witness, and agreed to disbarment as a condition of his plea. Arthur Blankstein, *Former 'bling ring' lawyer pleads no contest to attempting to dissuade witness in separate case*, L.A. TIMES, (July 14, 2010), <http://latimesblogs.latimes.com/lanow/2010/07/former-bling-ring-attorney-pleads-no-contest-in-separate-case-to-dissuading-witness.html>. An Iowa defense attorney was convicted of aiding and abetting a violation of a no-contact order, and subsequently suspended from the practice of law, as a result of his actions in representing his son on sexual offenses against the son's stepdaughter and on charges of kidnapping his wife and biological child. The defense attorney presented a letter from his son to the son's wife in knowing violation of a no-contact order, and offered the wife a favorable settlement in a pending divorce action if she were

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to testify favorably in the criminal matter. See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Gailey, 790 N.W.2d 801 (Iowa 2010). Anecdotal reports suggest that a few unethical attorneys develop such a reputation for providing information and advice useful in intimidation efforts that they are highly sought after by clients who are members of gangs or other criminal organizations.

- 30 *Gang Pimps Take Sex Trafficking to New Lows*, AMERICA’S MOST WANTED (June 1, 2012), http://www.amw.com/features/feature_story_detail.cfm?id=4302.
- 31 Michal Gilad, *Who Will Protect The Children?: The Untold Story of Unaccompanied Minors in Witness Protection Programs*, 12 WHITTIER J. CHILD & FAM. ADVOCACY 43 (2012).
- 32 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.
- 33 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 42-43.
- 34 MARTINSON & BELGUM-GABBERT, *supra* note 5, at 66-67.
- 35 NATHAN JAMES, CONG. RESEARCH SERV., RL 33473, JUDICIAL SECURITY: COMPARISON OF LEGISLATION IN THE 110TH CONGRESS, CONGRESSIONAL RESEARCH SERVICE (2008), available at <https://www.fas.org/sgp/crs/misc/RL33473.pdf>.
- 36 MARTINSON & BARNES, *supra* note 4, at 75.
- 37 MARTINSON & BELGUM-GABBERT, *supra* note 5, at 46.
- 38 *Id.* at 48.
- 39 MARTINSON & BARNES, *supra* note 4, at 75.
- 40 FINN & HEALEY, *supra* note 2, at 23.
- 41 Evidence-based prosecution involves the documentation of evidence that will be admissible at trial even if the victim or witness later becomes unavailable for trial. Detailed police reports with descriptions of all observations at the scene (including the demeanor of the victim and any witnesses), photographs, detailed hospital or medical records, 911 calls, detailed statements that include any prior history of violence or intimidation, and evidence that corroborates the witness’s original statement will enhance the likelihood of successful prosecution even without the

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witness's live testimony at trial. For an excellent discussion of the types of evidence that may be used to successfully prosecute domestic violence cases without the participation of the victim, and how that evidence can be effectively presented, see WISCONSIN DISTRICT ATTORNEYS' ASSOCIATION, WISCONSIN PROSECUTOR'S DOMESTIC ABUSE REFERENCE BOOK, PART IV (Trial Advocacy) (2012), http://oja.wi.gov/sites/default/files/WI_Prosecutors_Domestic_Abuse_Reference_Book_2012%20Complete.pdf. Similar types of evidence, and strategies, may be used in prosecuting other types of crime where the victim or witness is unavailable to testify at trial.

- 42 Crawford v. Washington, 541 U.S. 36 (2004).
- 43 Statements made for purposes of receiving medical care are generally admissible at trial as an exception to the rule against hearsay. FED. R. EVID. 803(4).
- 44 Gang members may commit acts of violence, including sexual violence, against intimate partners, female gang members, or female victims with no connection to the gang. Acts not involving an intimate partner may be related to gang-initiation rituals, punishment for some offense against the gang or one of its members, or may be opportunistic acts of random violence. A police officer at the Duluth IWI site recalled a case involving a woman who was brutally raped and beaten by members of a gang with which she had an association. She was intimidated into silence about the crime when members told her, "If you don't do this for us, we'll hurt other members of your family." MARTINSON & BARNES, *supra* note 4, at 52.
- 45 MARTINSON & BELGUM-GABBERT, *supra* note 5, at 55.
- 46 For example, cooperative agreements with public housing authorities may facilitate relocation of witnesses to alternative public housing or Section 8 (government subsidized) housing. See FINN & HEALEY, *supra* note 2, at 23-38; HEALEY, *supra* note 2, at 6-8.
- 47 See, e.g., PENNSYLVANIA COMMISSION ON CRIME AND DELINQUENCY, FREE TO TELL THE TRUTH - PREVENTING AND COMBATING INTIMIDATION IN COURT: A BENCH BOOK FOR PENNSYLVANIA JUDGES, (2011), available at http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_1040375_0_0_18/witness%20intimidation%20bench%20book%20final.pdf.
- 48 See, e.g., MARTINSON & BELGUM-GABBERT, *supra* note 5, at 75-82 (depicting the collaboration between the Knox County Jail's Security Threat Group Coordinator and other criminal justice system partners on dealing with witness intimidation perpetrated by inmates).

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- 49 Natalie Pompilio, *Urban motto may be gone but ‘stop snitching’ lives on*, PHILADELPHIA METRO (Nov. 14, 2012), <http://www.metro.us/philadelphia/local/article/1156172--urban-motto-may-be-gone-but-stop-snitching-lives-on>; HEALEY, *supra* note 2; JULIE WHITMAN & ROBERT DAVIS, NAT’L CTR FOR VICTIMS OF CRIME, SNITCHES GET STITCHES: YOUTH GANGS AND WITNESS INTIMIDATION IN MASSACHUSETTS (2007), <http://www.victimsofcrime.org/docs/Root/Snitches%20FINAL.pdf?sfvrsn=0>.
- 50 MARTINSON & BELGUM-GABBERT, *supra* note 5, at 65.
- 51 KELLY DEDEL, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, WITNESS INTIMIDATION, (July 2006) *available at* <http://www.cops.usdoj.gov/files/ric/Publications/e07063407.pdf>.
- 52 HEALEY, *supra* note 2, at 10; FINN & HEALEY, *supra* note 2, at 18, 51.
- 53 Interviews by AEquitas Attorney Advisor John Wilkinson with Dana Greisen, Chief of the Gang Prosecution Unit, and Larry Davis, Commander of the Bureau of Investigations, San Diego County District Attorney’s Office (Central) (Apr. 25, 2012) and with Deputy District Attorney Bob Bruce and District Attorney Investigator Luis Rudisell, San Diego Country District Attorney’s Office (Northern) (Apr. 26, 2012).
- 54 The Police Department in Duluth, Minnesota has as part of its risk assessment protocol for domestic violence calls the question: “*How frequently and seriously does he intimidate, threaten, or assault you?*” MARTINSON & BARNES, *supra* note 4, at 57.
- 55 Such documentation can be critical if a later motion is filed to admit hearsay statements under the doctrine of forfeiture by wrongdoing. *See infra* discussion of forfeiture by wrongdoing.
- 56 Maureen Funk & Julie Schuppel, *Strangulation Injuries*, 102 WIS. MEDICAL J. 41-45 (2003), *available at* https://www.wisconsinmedicalsociety.org/_WMS/publications/wmj/pdf/102/3/41.pdf.
- 57 The history of dropped or dismissed cases or restraining orders may help to establish evidence of a “classic abusive relationship” in the event a motion for forfeiture by wrongdoing is necessary. *Giles v. California*, 128 S. Ct. 2678, 2695 (2008) (Souter, J., concurring in part); *see infra* discussion of forfeiture by wrongdoing.
- 58 A threat assessment can also be used to focus limited resources on cases posing the highest degree of lethality risk. For example, the Jeanne Geiger Crisis Center in Massachusetts has pioneered the Domestic Violence High Risk Team (DVHRT) Model, which employs a multidisciplinary team of core partners working in concert

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to increase victim safety in high-risk cases by monitoring and containing offenders and providing comprehensive victim services. For more information, see *What is the Domestic Violence High Risk Team Model?* DOMESTIC VIOLENCE HIGH RISK TEAM NETWORK JEANNE GEIGER CRISIS CENTER, http://www.jeannegeigercrisiscenter.org/dvhrtn_model.html (last visited Mar. 21, 2013).

- 59 *Spousal Assault Risk Assessment Guide (SARA)*, MULTI-HEALTH SYSTEMS, <http://www.mhs.com/product.aspx?gr=saf&prod=sara&id=overview> (last visited Mar. 6, 2013).
- 60 *What is Mosaic?* MOSAIC THREAT ASSESSMENT SYSTEMS, <https://www.mosaicmethod.com/> (last visited Mar. 6, 2013).
- 61 DANGER ASSESSMENT, <http://www.dangerassessment.org/> (last visited Mar. 6, 2013).
- 62 See Kirk R. Williams & Amy Barry Houghton, *Assessing the Risk of Domestic Violence Reoffending: A Validation Study*, 28 LAW & HUMAN BEHAVIOR 437 (2004), available at http://ace.ucr.edu/pubs_by_topic/2.Assessing%20the%20Risk.pdf.
- 63 See Kirk R. Williams & Stephen R. Grant, *Empirically Examining the Risk of Intimate Partner Violence: The Revised Domestic Violence Screening Instrument*, 121 PUBLIC HEALTH REPORTS 400 (2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525359/>.
- 64 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%20SPOUSAL-PARTNER%20CASES%20ALL.pdf.
- 65 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 106-07.
- 66 UNITED NATIONS OFFICE ON DRUGS AND CRIME, ANTI-HUMAN TRAFFICKING MANUAL FOR CRIMINAL JUSTICE PRACTITIONERS, MODULE 5 (2009), available at http://www.unodc.org/documents/human-trafficking/TIP_module5_Ebook.pdf.
- 67 Hospitals present numerous risks for violence against patients, visitors, and staff. See, e.g., N. Jean Schendel, *Patients as Victims: Hospital Liability for Third-Party Crime*, 28 VAL. U. L. REV. 419 (1993); Amy Baum Goodwin, *Striving for a Secure Environment: A Closer Look at Hospital Security Issues Following the Infant Abduction at Loyola University Medical Center*, 10 ANNALS HEALTH L. 245 (2001).
- 68 FINN & HEALEY, *supra* note 2.

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- 69 MARTINSON & BARNES, *supra* note 4, at 70.
- 70 *E.g.*, California’s Witness Relocation Assistance Program (CalWRAP) in the California Attorney General’s Office, which in fiscal year 2009-10 was allocated \$4,855,000 to financially support relocating intimidated witnesses in 870 cases in 33 counties. CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, CALIFORNIA WITNESS RELOCATION ASSISTANCE PROGRAM ANNUAL REPORT TO THE LEGISLATURE 2009-2010, 6-7, *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n2062_calwrap_annual_report_to_the_legislature_09-10_final.pdf.
- 71 For more details about relocation strategies for witness protection, see FINN & HEALEY, *supra* note 2, at 22-38; HEALEY, *supra* note 2, at 6-8.
- 72 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 63.
- 73 Where the right to counsel has attached, typically after arraignment, any efforts by a witness to elicit evidence at the direction of law enforcement will be suppressed as having been obtained in violation of the defendant’s Sixth Amendment right to counsel. *See, e.g.*, *Maine v. Moulton*, 474 U.S. 159 (1985). Consensual interception of phone conversations initiated by the witness, where permitted by law, should be conducted only before the right to counsel has attached.
- 74 Although wireless communication providers generally maintain records of telephone calls made to or from a particular phone number, they typically do not maintain any record of text messages sent or received. Documentation of text messages is best accomplished by photographing the screen of the phone and/or by backing up the contents of the phone for later retrieval.
- 75 A U-Visa is a special visa available to individuals who are cooperating in the prosecution of a criminal case. In addition to the U-Visa, victims of domestic violence may be permitted, under the Violence Against Women Act (VAWA), to apply for their own “green card,” and eventually for citizenship, without the cooperation of the abuser. Eligibility and procedural requirements for these types of relief can be complex, and the victim or witness should be referred to an immigration assistance organization that can assist him or her. *See* BATTERED WOMEN’S JUSTICE PROJECT, ASSISTING IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: LAW ENFORCEMENT GUIDE 3, 5, 8, <http://www.vaw.umn.edu/documents/immigrantdvleguide/immigrantdvleguide.pdf>.
- 76 *E.g.*, D.C. CODE § 23-1322 (2012), which provides for consideration of a defendant’s dangerousness, including the risk of witness intimidation, in setting bail.

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- 77 The capabilities of monitoring systems vary widely; if the system is not well designed, a judge may be lulled into a false sense of security, releasing a dangerous defendant based upon incorrect assumptions about the efficacy of monitoring to protect the victim. Prosecutors are well advised to be familiar with any limitations on the effectiveness of monitoring, and to bring any concerns in that regard to the attention of the court.
- 78 MARTINSON & BARNES, *supra* note 4, at 63-64.
- 79 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 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*).
- 80 *See, e.g., FED. R. CRIM. P. 16(d)(1); United States v. Aiken*, 76 F.Supp.2d 1339 (S.D. Fla. 1999).
- 81 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.
- 82 *State v. Valdez*, 281 P.3d 924, 941-60 (Cal. 2012).
- 83 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

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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 privacy purposes 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.

- 84 MARTINSON & BARNES, *supra* note 4, at 64-66; MARTINSON & BELGUM-GABBERT, *supra* note 5, at 46-47.
- 85 MARTINSON & BARNES, *supra* note 4, at 66.
- 86 *See* VERA INSTITUTE OF JUSTICE, PROSECUTING WITNESS TAMPERING, BAIL JUMPING, AND BATTERING FROM BEHIND BARS (2006), <http://www.vera.org/sites/default/files/resources/downloads/Prosecuting.pdf>.
- 87 Generally, so long as inmates are advised, in some fashion, that calls are subject to monitoring and recording, any inmate making a call will be deemed to have implicitly consented to such monitoring or recording for any calls made from the institution. *See, e.g.*, *Jackson v. State*, 18 So. 3d 1016 (Fla. 2009) (*per curiam*). Depending upon the law of the jurisdiction at issue, only one of the parties to the call may need to consent to monitoring or recording, obviating the need to disclose to the other party that the call is being recorded. *Compare* MD. CODE ANN. § 10-402 (requiring consent of all parties to conversation for interception of oral, wire, or electronic communication) *with* N.J. STAT. ANN. § 2A:156A-4(d) (requiring consent of only one party to conversation for interception of oral, wire, or electronic communication).
- 88 For more information on signal-blocking technology, see *Cell Phones in Prisons*, NAT’L. INST. OF JUSTICE, <http://www.nij.gov/topics/corrections/institutional/contraband/cell-phones/welcome.htm> (last visited Mar. 6, 2013).
- 89 The Commonwealth of Pennsylvania has developed a bench book to address the issue of witness intimidation in and around the courtroom. PENNSYLVANIA COMMISSION ON CRIME AND DELINQUENCY, *supra* note 47.
- 90 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 112.

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- 91 *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).
- 92 *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).
- 93 *Waller*, 467 U.S. 39.
- 94 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 inform the jury that one witness was present during another's testimony so that the jury can appropriately judge the credibility of the testimony.
- 95 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.
- 96 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).
- 97 MARTINSON & BARNES, *supra* note 4, at 71.
- 98 A detailed report of recommendations for probation and parole services to victims to enhance their security following release of an offender can be found at *Voice of the Victim: A Perspectives Spotlight Issue*, PERSPECTIVES (2012), http://www.appa-net.org/eweb/docs/appa/pubs/Perspectives_2012_Spotlight.pdf (last visited Mar. 6, 2013), and in the AMERICAN PROBATION AND PAROLE ASSOCIATION, OFFICE FOR VICTIMS OF CRIME, THE VICTIM'S ROLE IN OFFENDER REENTRY, <http://www.appa-net.org/eweb/docs/appa/pubs/VROR.pdf>.

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- 99 A log for stalking behavior offered by the National Center for Victims of Crime, Stalking Resource Center, can be readily adapted to record acts of intimidation occurring in any criminal prosecution. STALKING RESOURCE CENTER, STALKING INCIDENT AND BEHAVIOR LOG, http://www.victimsofcrime.org/docs/src/stalking-incident-log_pdf.pdf.
- 100 MARTINSON & BARNES, *supra* note 4, at 54.
- 101 *See* Part IV, Trial Strategies for Cases Involving Intimidation *infra*.
- 102 Where the victim’s demeanor on the video might appear counterintuitive to the judge or to the jury (*e.g.*, nervous laughter or flat affect following a serious act of violence), an expert may be called to explain such behavior. *See* Part IV, Trial Strategies for Cases Involving Intimidation *infra*.
- 103 *Giles v. California*, 128 S. Ct. 2678, 2695 (2008) (Souter, J., concurring in part).
- 104 *See, e.g.*, *Hardy v. Cross*, 132 S. Ct. 490 (2011).
- 105 In addition, where the defendant is known to be represented by counsel, such contact may violate rules of professional conduct regarding contact with represented parties or individuals. *See, e.g.*, MODEL RULES PROF’L CONDUCT R. 4.2 (2012).
- 106 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>.
- 107 A web archive is a file that contains all of the information, including embedded text and images, of a particular web page.
- 108 *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* note 106.

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- 109 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).
- 110 FINN & HEALEY, *supra* note 2, at 22-38.
- 111 MARTINSON, WOFFORD, MURPHY, BELGUM-GABBERT, & WILKINSON, *supra* note 6, at 55.
- 112 Where the acts of intimidation are not charged and tried together with the underlying crime, the court may consider evidence of such acts to be admissible only under FED. R. EVID. 404(b) (evidence of other “bad acts”), requiring a pretrial motion and limiting instructions.
- 113 Requiring all spectators to present identification before entering the courtroom has been upheld as a reasonable security measure where there is only a generalized threat. *See, e.g.*, *United States v. Smith*, 426 F.3d 567 (2d Cir. 2005) (identification requirement upheld as part of post-9/11 federal security when security threat exceeds a prescribed level).
- 114 At least one court has upheld such a procedure, and has affirmed the conviction where a mid-trial forfeiture hearing was held when the defendant’s associates had so intimidated the State’s witness that he was unable to continue his testimony. As a result of the hearing, the trial court permitted the jury to consider the testimony given on direct examination, the defendant having forfeited his right to cross-examination. *State v. Weathers*, 724 S.E.2d 114 (N.C. Ct. App. 2012).
- 115 *Crawford*, 541 U.S. 36.
- 116 *See California v. Green*, 399 U.S. 149 (1970). Note that even where there is no confrontation problem, prior statements may still have to satisfy the requirements for an exception to the rule against hearsay. *See generally* AEQUITAS, THE PROSECUTORS’ RESOURCE ON CRAWFORD AND ITS PROGENY (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf.
- 117 Statements considered to be “testimonial” are defined in *Crawford* and its progeny. In general, “testimonial” statements include those made to law enforcement with an objective expectation they will be used in later criminal proceedings, while “nontestimonial” statements are less formal, are made to allow law enforcement to respond to an emergency situation (*e.g.*, 911 calls or statements at the scene while the emergency is ongoing), or are casual remarks to family or acquaintances. If a witness is not testifying at trial, that witness’s prior nontestimonial statements can be admitted at trial without offending the Confrontation Clause, but prior testimonial statements are inadmissible unless (a) the witness is unavailable to testify at

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trial and (b) the defendant has had a prior opportunity to cross-examine the witness. AEQUITAS, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf.

- 118 *State v. Byrd*, 967 A.2d 285, 295-96 (N.J. 2009). Although the New Jersey Supreme Court did not apply the rule in *Byrd*, it immediately proposed a new Evidence Rule codifying the principle, which has since been formally adopted. N.J. R. EVID. 804(b)(9).
- 119 *See People v. Byrd*, 855 N.Y.S.2d 505 (N.Y. App. Div. 2008); *Commonwealth v. Szerlong*, 933 N.E.2d 633 (Mass. 2010).
- 120 *See, e.g.*, FED. R. EVID. 104(a).
- 121 For more details about motions to admit evidence under the doctrine of forfeiture by wrongdoing, see AEQUITAS, THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING (2012), available at http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.
- 122 Telephone conversation of AEQUITAS Attorney Advisor Rhonda Martinson with St. Louis County, Minnesota, Assistant County Attorney Jessica Smith (Feb. 14, 2013).
- 123 Rule 104(a) of the Federal Rules of Evidence sets forth the procedure for preliminary hearings to determine the admissibility of evidence.
- 124 In at least one jurisdiction, a forfeiture motion was heard in the midst of the witness's testimony, when in-court intimidation caused him to be unable to continue his testimony. The trial court found that the defendant was responsible for the witness's inability to continue, and allowed the testimony given on direct examination to stand without cross-examination, ruling that the defendant had, by his actions, forfeited his right to cross-examine the witness. The resulting conviction was upheld on appeal. *State v. Weathers*, 724 S.E.2d 114 (N.C. Ct. App. 2012).
- 125 *See, e.g.*, N.J. R. EVID. 803(a)(1); *State v. Gross*, 523 A.2d 215, 220-21 (N.J. Super. Ct. App. Div. 1987).



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