

Evading Justice: The Pervasive Nature of Witness Intimidation

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Violent criminals routinely evade justice by intimidating the witnesses to their crimes. Intimidation crimes range from crude to complex and, when successful, evade the purview of the justice system, which allows the criminal behavior to continue unchecked. The pervasive nature of these crimes is devastating to victims and community confidence in the justice system's ability to keep victims safe and hold offenders accountable.

Criminal justice professionals,² community leaders,³ and researchers⁴ have declared witness intimidation a national concern⁵ and a challenge to administering justice.⁶ The U.S. Department of Justice's Office of Community Oriented Policing Services and the National Institute of Justice each report that witness intimidation is pervasive and increasing,⁷ affecting every type of crime from homicides, gang crimes, and domestic abuse; to institutional, corporate, and criminal whistle blowing investigations;⁸ to Wall Street fraud and embezzlement cases.⁹

WHAT IS WITNESS INTIMIDATION?

Witness intimidation can include any conduct that discourages witnesses from meaningfully participating in the various stages of the criminal justice process including reporting, investigating, charging, prosecuting, and monitoring the intimidator. Meaningful participation occurs when a victim or witness is involved in the investigation, prosecution, and decision making of a case, desires justice, and, if necessary, is able to testify candidly. Intimidation can include isolation, control, threats, and actual violence. Often, witnesses are discouraged from participating through manipulation and guilt or even by inducements not to participate. Intimidators will often exploit any vulnerability the witness may have whether cultural, economic, social, or religious, such as immigration status, child custody issues, housing issues, and social stigma. Additionally, navigating the unknown criminal justice system itself can be unintentionally intimidating for victims and witnesses.

WHO INTIMIDATES?

Typically, the perpetrator of the underlying crime is responsible for preventing victims and witnesses from meaningfully participating in the criminal justice process, but intimidation and manipulation can come from many sources, both directly and indirectly. Often, the offender's family members and friends will become involved in intimidation by pressuring victims not to go forward or delivering messages from the offender that include threats or inducements not to testify, such as apologies or promises to change or make amends.¹⁰ Gang members and associates also deliver messages not to participate in the criminal justice system through "Don't Snitch" campaigns; graffiti; appearing at home, school and work; implied and direct threats; and actual physical violence. There is also a great deal of unintentional intimidation included in the criminal justice system for those who are unfamiliar with the system, e.g., testifying in open court and testifying in the presence of the offender. In addition, when attorneys, law enforcement officers, and other members of the criminal justice system do not respond appropriately to intimidation and fail to correct system deficiencies that enable opportunities to intimidate they become inadvertent accomplices to intimidators.¹¹

WHO ARE THE TARGETS OF INTIMIDATION?

Offenders target anyone for intimidation whose lack of meaningful participation is perceived as having a favorable impact on a case. The actual victim or witness to a crime will generally be the primary target of intimidation but those associated with the victim or witness may also be the subject of implied or direct threats.¹² The victim's or witness' immediate family, including spouses, children, and pets,¹³ can be targets. Other family members, friends, or employers may also be targets as long as the offender believes he or she can gain an advantage. Victim advocates and counselors and any others who provide emotional or other material support to victims and witnesses may also find themselves in the offender's crosshairs. Another often overlooked or disregarded target of intimidation can be the very practitioners in the criminal justice system sworn to administer justice, such as police, prosecutors, defense attorneys, judges, and jurors.

WHERE DOES INTIMIDATION OCCUR?

Intimidation can and does occur everywhere that a victim, witness, or criminal justice practitioner is located. Intimidators will go anywhere to gain access to the target, including in or near the target's neighborhood, work, or at court. The vast majority of intimidation, however, occurs at the victim's or witness' home. In domestic violence cases, intimidators can easily commit intimidation because he or she may share a home, children, or property with the victim. In sexual assault cases, most victims know the offenders, and these prior relationships provide offenders with information that can later be used to facilitate intimidation. In gang cases, intimidation can be so pervasive that it is essentially sewn into the fabric of the neighborhood such that offenders can count on individuals' refusal to participate in the criminal justice process.¹⁴ For victims or witnesses who are incarcerated, intimidation is a real and constant threat.

HOW DOES INTIMIDATION IMPACT THE CRIMINAL JUSTICE SYSTEM?

Unfortunately, witness intimidation is challenging to study,¹⁵ as it is a crime that is generally reported only when unsuccessful.¹⁶ Several studies, however, have established that intimidation reduces the meaningful participation by victims and witnesses,¹⁷ resulting in decreased offender accountability, access to justice, and public safety. The majority of victims and witnesses find themselves involved in the criminal justice system through no fault of their own. Intimidation prevents victims and witnesses from coming forward and reporting crimes. Even when identified and summoned to court, many victims and witnesses fail to appear, give testimony that minimizes the criminal behavior, change material portions of their account of the crime, feign memory loss, or completely recant. In the worst cases, victims or witnesses are murdered to prevent their participation. Left unaddressed, intimidation causes reduced access to justice, increased delays and costs to the system, decreased community confidence in the criminal justice system, and impairment of the system's ability to protect the community. Victims and witnesses deserve and should expect to be protected as participants in the court system.

WHAT CAN BE DONE TO ADDRESS INTIMIDATION?

By recognizing intimidation including when and where it occurs, we can begin to address and reduce its impact on the criminal justice system. Traditional responses to witness intimidation include vigorous prosecutions, witness relocation programs, intensive monitoring of offenders, and enhanced courtroom safety.¹⁸ But there is more we can do to address this issue. Educating criminal justice practitioners and allied professionals to recognize intimidation is the first step. Once criminal justice professionals can identify intimidation, they can better serve and support the victims of these crimes by taking steps to prevent opportunities for intimidation and more effectively responding to it when it occurs. They can more effectively inquire about and document intimidation or manipulation and can educate victims and witnesses to do the same. Thorough documentation reveals often overlooked evidence, such as proof of electronic communications, jail telephone call recordings, and additional witnesses. This process promotes more effective prevention and response efforts to intimidation. Investigation and prosecution of these crimes is improved, through evidence-based prosecution and the preparation and litigation of forfeiture by wrongdoing motions.¹⁹

Intimidation is more effectively addressed in bail motions, no-contact orders, and throughout the trial and sentencing. By collaborating with community-based organizations, attorneys can ensure that victims are supported through advocacy, counseling, danger assessments, safety planning, and, if necessary, witness relocation. Finally, offender intervention and reentry programs that include education on the consequences of intimidation not only support offender rehabilitation but protect victims and the community as well.

ENDNOTES

- ¹ John Wilkinson, Christopher Mallios, and Rhonda Martinson are Attorney Advisors at AEquitas: The Prosecutors' Resource on Violence Against Women.
- ² *Making Communities Safer: Youth Violence and Gang Interventions that Work, Hearing before the S. Subcomm. on Crime, Terrorism, & Homeland Security, 110th Cong. 51-58 (2007)*(testimony of Paul Logli, Chairman of the Board of the National District Attorneys Association), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hrg33314/html/CHRG-110hrg33314.htm>.
- ³ Press Release, United States House of Representatives, Elijah Cummings, Congressman Cummings and State's Attorney Jessamy Call for Federal Resources to Protect Witnesses (July 17, 2007), available at <http://www.highbeam.com/doc/1P3-1346578871.html>
- ⁴ KERRY MURPHY HEALY, NAT'L INST. OF JUSTICE, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES (Oct. 1995), available at <https://www.ncjrs.gov/pdffiles/witintim.pdf>.
- ⁵ David Kocieniewski, *Few Choices in Shielding of Witnesses*, N.Y. TIMES (Oct. 28, 2007), <http://www.nytimes.com/2007/10/28/nyregion/28witness.html?pagewanted=all>.
- ⁶ JOHN ANDERSON, NAT'L GANG CENTER GANG-RELATED WITNESS INTIMIDATION, at 6 (Feb. 2007), available at <http://www.nationalgangcenter.gov/Content/Documents/Gang-Related-Witness-Intimidation.pdf>.
- ⁷ KELLY DEDEL, U.S. DEP'T OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, WITNESS INTIMIDATION, PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES NO. 42 (2006) available at <http://www.cops.usdoj.gov/files/ric/Publications/e07063407.pdf>.
- ⁸ Sam Hananel, *Feds Fear Witness Intimidation in Mine Probe*, ASSOCIATED PRESS (May 4, 2010), http://www.boston.com/business/articles/2010/05/04/feds_fear_witness_intimidation_in_mine_probe/.
- ⁹ David Cay Johnston, *Executive Accused of Tax Fraud and Witness Intimidation*, N.Y. TIMES (June 20, 2006), <http://www.nytimes.com/2006/06/20/business/20tax.html>.
- ¹⁰ *Supra* Note 7, at 6.
- ¹¹ In addition, some victims and witnesses have reported that even when simply executing their duties, law enforcement officers, prosecutors, defense attorneys and judges can be intimidating.
- ¹² *Supra* Note 4, at 11.
- ¹³ *Facts About Animal Abuse and Domestic Violence*, AMERICAN HUMANE ASSOCIATION, <http://www.americanhumane.org/interaction/support-the-bond/fact-sheets/animal-abuse-domestic-violence.html> (last visited Oct. 19, 2012).
- ¹⁴ U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE, February (2009), available at <http://www.cops.usdoj.gov/Publications/e030919195-Stop-Snitching.pdf>.
- ¹⁵ NATHAN JAMES, CONG. RESEARCH SERV., RL33473 JUDICIAL SECURITY: COMPARISON OF LEGISLATION IN THE 110TH CONGRESS (2008) available at <http://www.fas.org/srg/crs/misc/RL33308.pdf>.
- ¹⁶ *Supra* note 4.
- ¹⁷ *Supra* note 7.
- ¹⁸ *Supra* note 6, at 6.
- ¹⁹ See, Sarah Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295 (2010), available at <http://law.asu.edu/LinkClick.aspx?fileticket=S6ivWVxgWk%3d&abid=803>.

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