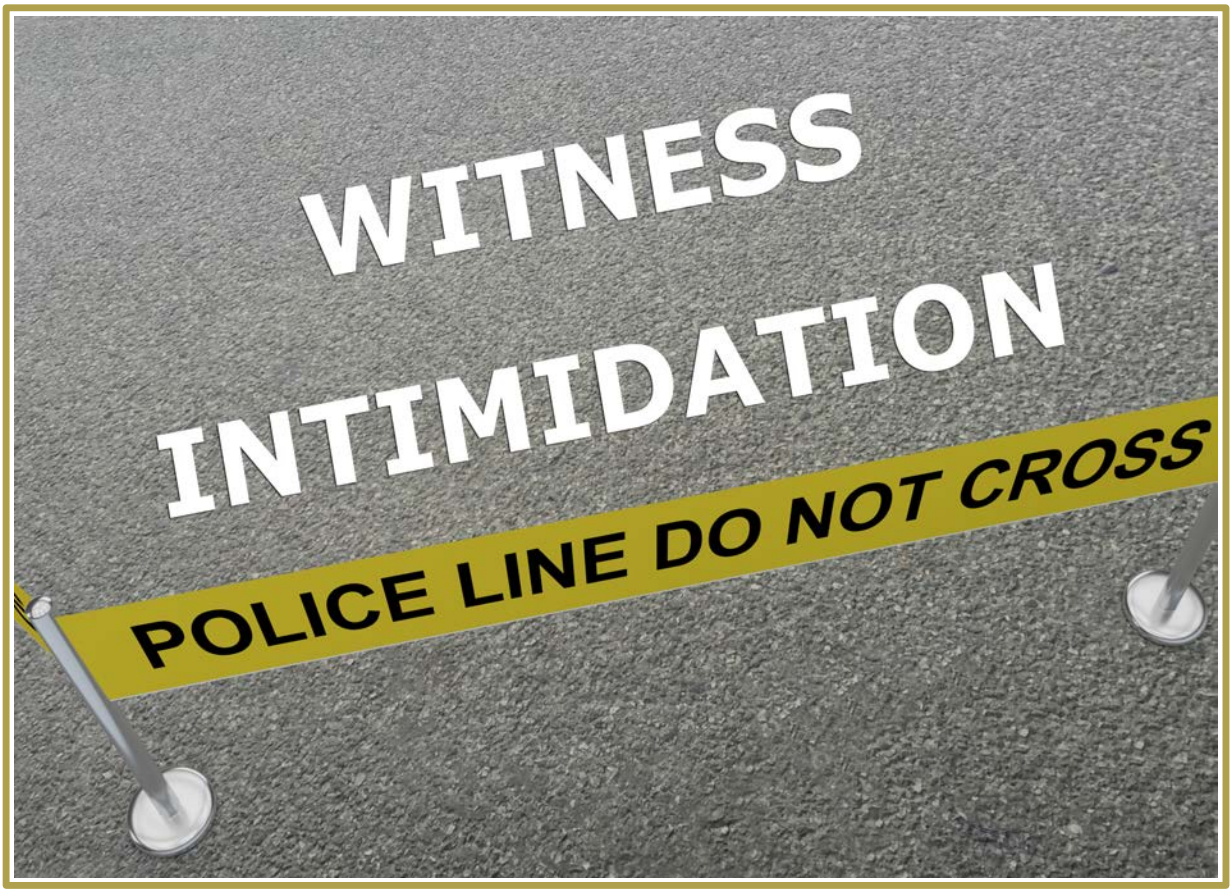
WITNESS INTIMIDATION

WHAT YOU CAN DO TO PROTECT YOUR WITNESS



Prosecutors' Center for Excellence

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INTRODUCTION

Witness intimidation and witness tampering can occur in any case, from simple misdemeanors to homicides. It has a variety of consequences from the silencing of an entire community, to the murder of a witness, to the recantation of truthful testimony. Though witness intimidation is an insidious problem, there are strategies throughout the investigation and prosecution of a case that can help to keep a witness safe and reduce the impact of intimidation.

This outline focuses on victims and witnesses of violent crime; it does not address specific issues that are raised in family violence cases or sexual assaults. Additionally, although legal references are provided in the footnotes, this is not intended to be a comprehensive legal analysis. For the sake of convenience, victims and witnesses will be referred to collectively as "witnesses."[1]

INITIAL MEETING AND SAFETY ASSESSMENT

The first meeting that a prosecutor has with a witness to a violent crime is a critical time for anticipating and dealing with potential witness intimidation. In addition to gathering information about the case, prosecutors should utilize the first meeting to establish a rapport with the witness and do a safety assessment. Developing a relationship of trust with a witness will go a long way in assuring the witness's willingness to cooperate and see the case through to the end. This can take time. If the witness is amenable, the initial interview may be lengthy so

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[1] The authors of this article are Kristine Hamann, the Executive Director of Prosecutors' Center for Excellence (PCE), and Jessica Trauner, a contract attorney with PCE. Specific thanks go to New York County Assistant District Attorneys Armand Durastanti, Linda Ford, Evan Krutoy and Michelle Warren for their insights and wisdom based on decades of experience with violent crime cases. Thanks also to Georgetown Law School students Laura Donnelly, Noel Ejaz, Sandra Ghobriel and Elizabeth Paukstis who assisted with the research. Ms. Hamann's work was supported by the New York County District Attorney's Office and Ms. Trauner's work was supported by Grant No. 2013-DB-BX-K005 awarded by the Bureau of Justice Assistance/Department of Justice to the New York Prosecutors Training Institute (NYPTI). The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in these materials are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

that a comprehensive assessment can be made. Depending on the circumstances, it may be beneficial to conduct the initial interview with an investigator or someone else present. This can be especially helpful if the witness later changes his testimony or alleges some mistreatment during the interview.

In addition to gathering information about the crime, the initial interview should also cover the following areas:

- **Contact Information**: Collect all contact information from the witness including home addresses, business addresses, email addresses, cell phone numbers and places frequently visited (e.g. religious institutions, community centers, day care centers where children are dropped off).
    - **Contact Information for Family and Friends**: Obtain contact information for the witness's family and friends and other emergency contacts.
    - **Alternative Methods of Communication**: Ask the witness how he communicates with friends and get access to that information as well. This may include communicating through social media or other applications. If the witness stops cooperating, it may be possible to locate the witness by subpoenaing these alternative methods of communication.
- **Waiver of Confidentiality**: The prosecutor or office advocate can consider obtaining a waiver of confidentiality from the witness during this meeting that will enable the prosecutor to access various relevant records, including if the witness receives government benefits. In the event that the witness becomes uncooperative, this waiver will permit the release of personal information about the witness or records of activity that may assist in the finding the witness's location.
- **Risk Assessment of the Witness**: From the first meeting, law enforcement and prosecutors should assess a witness's risk of intimidation. This assessment should be reviewed continually throughout the case.[2] This assessment is particularly important if the witness shows signs of reluctance in cooperating.[3] In any case where intimidation is a factor, "timely actions can make the difference between a successful prosecution and an unsuccessful one."[4] In assessing the risk of intimidation, a prosecutor may

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[2] Teresa M. Garvey, *Witness Intimidation: Meeting the Challenge*, AEQUITAS, 14-19 (2013), http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf.
[3] *The Prosecutors' Resource: Witness Intimidation*, AEQUITAS, 4 (2013), http://www.aequitasresource.org/The-Prosecutors-Resource-Intimidation.pdf.
[4] *Id.*

consider the following risk factors that can be predictors of possible future witness intimidation. (As every case is unique, this list is not exhaustive.)
  - The defendant is in a gang that has a reputation for violence.
  - The witness or a member of the witness's family has a relationship with the gang or is in a rival gang.
  - The witness and the defendant have friends or family in common.
  - The witness lives near the defendant or members of the defendant's family.
  - The witness and the defendant are incarcerated in the same facility. [5]
- **Preserving the Witness's Statement**: Law enforcement and prosecutors can consider recording the witness's statement in anticipation of the witness becoming uncooperative later in the case. In some instances it might be prudent to take the witness's statement under oath. A notary can administer an oath to a witness, which may be helpful later if the witness becomes uncooperative.[6] Confer with a supervisor to determine the best course of action. (See section on Uncooperative Witnesses and Evidentiary Considerations for information on the admissibility of a witness's prior statement.)
- **Explain the Process**: In simple terms, educate the witness about how a case moves through in the criminal justice system and outline next steps for the witness.
- **Develop a Safety Plan**: After assessing the risks to the witness, a safety plan should be developed to minimize the risk of intimidation.
  - **Access to Law Enforcement**: Where there is a concern about possible witness intimidation, the witness and the witness's family should be advised to call 911.[7] The witness should also be given contact information for the case detective, witness aid services and the assigned prosecutor.
    - **Cell Phone**: If the witness does not have a phone, provide a cell phone to contact the witness and to allow the witness to call if they need help.

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[5] Garvey, *supra* note 2, at 30.

[6] Most states have statutes governing notaries, and some states have allowed notarized statements of witnesses to be used in criminal cases. *See, e.g., Crawford v. Virginia*, 55 Va.App. 457 (2009), aff'd by Crawford v. Commonwealth, 282 Va.84 (Va.2011) (upholding the trial court's admission of a sworn affidavit by a domestic violence witness, which had been filled out in support of a protective order in a domestic relations court prior to her death and detailed assault incidents by her husband, as being non-testimonial and not in violation of *Crawford v. Washington*, 541 U.S. 36 (2004), holding on right to confrontation).

[7] John Anderson, *Gang-Related Witness Intimidation*, NATIONAL GANG CENTER BULLETIN, 5 (2007), https://www.nationalgangcenter.gov/content/documents/gang-related-witness-intimidation.pdf.

- **Release from Corrections Alert System:** Sign up the witness for alerts that will provide notification of the defendant's release from jail or prison.[8]

- **Office Social Worker or Victim/Witness Advocates**: As soon as practicable, connect the witness, and possibly the witness's family, with the office's witness advocate (the "office advocate"). Between court appearances, the office advocate may be the main person in contact with the witness. Office advocates are often more available to the witness and can help with a variety of issues that could enhance the witness's cooperation, such as housing, childcare, and medical issues.
  - **Brady/Giglio Obligations and Witness Statements**: Office advocates should be discouraged from interviewing the witness about the facts of the case. However, if for some reason the advocate has notes on statements made by the witness regarding the case, it may be discoverable in whole or in part. Brady and Giglio considerations apply to work done by office advocates. As a result, it is important that the office advocate have an understanding of what materials must be turned over to the prosecutor who will then turn them over to the defense, including:
    - **Brady/Giglio Material**: Exculpatory evidence and impeachment material must be preserved and turned over to the prosecutor.[9]
    - **Benefits to the Witness or Others**: Benefits provided to the witness or the witness's family from the prosecutor's office are

[8] Witnesses can sign up for notification of a defendant's release through an online or phone victim notification system, sometimes called "VINE" or "VINES." The website, VINElink, provides links to the 50 states' victim notification information systems. Those systems allow witnesses to be notified through phone, email, text message and/or TTY (where available) of a defendant's custody status and/or criminal case status. *VINE, Victims Have the Right to Know*, VINELINK, https://www.vinelink.com/#/home (last visited Apr. 5, 2016).
(Note that witnesses can also sign up directly through their participating state or county toll-free number. *See*, *e.g.*, *VINENY*, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, http://www.doccs.ny.gov/vine.html (last visited Apr. 5, 2016).)

[9] New York: New York Rules of Professional Conduct, Rule 3.8(b) requires prosecutors to timely disclose "… existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal." N.Y. RULES OF PROF. CON. 3.8(b) (Mckinney 2013). *See* N.Y. CRIM. PROC. LAW §§ 240.20(1)(h) (McKinney 1989) (referring to Brady and other federal and state constitutional disclosure obligations of prosecutors). *See also People v. Geaslen*, 54 N.Y.2d 510 (1981) (the Court of Appeals found that the prosecutor's failure to disclose certain grand jury testimony to the suppression court was a due process violation where the evidence was of a "material nature which if disclosed could affect the ultimate decision on a suppression motion"). Prosecutors may also wish to consult and consider whether their offices have internal policies on disclosures.

considered Giglio material and they must be disclosed. These benefits can include witness fees, housing costs, relocation of the witness or witness's family, clothing or other services provided by the office advocate.

- **Notes of the witness's statements**: Some non-case related notes may be confidential, such as information about the witness's medical condition, but other witness statements about the case must be disclosed.

- **Special Needs of the Witness**: The prosecutor should inquire about issues that may affect a witness's ability to cooperate or could make them more vulnerable to intimidation. For example, does the witness have children that need to be cared for when he comes to court, or does the witness have an illness that requires special treatment? Simply asking the witness if he has any special concerns or needs may reveal an issue that otherwise would not be discovered.
- **Drug or Alcohol Problems**: A witness addicted to drugs and/or alcohol is particularly vulnerable to intimidation and may be less likely to cooperate. In some instances, the office advocate can explore various treatment options.

- **Safety Plans for Home and Work:** Consider advising the witness to adopt safety measures such as alerting security at the witness's home or work and suggesting that the witness change routines such as shopping patterns and routes to work or school.[10]
- **Social Media Awareness and Training**: The prosecutor, the office advocate or law enforcement should discuss the dangers associated with social media and keeping an online presence. The prosecutor should ask the witness about any on-line profiles and other postings to determine if they could reveal information about the witness or the witness's family. Consider Googling the witness to see what information is easily available to the public. Witnesses should be advised to refrain from posting personal information online or posting information about the case, which defendant and his associates could see. Prosecutors should consider following the witness's social media accounts as well to see if there is interaction between the witness and the defendant, his family or his associates. This may indicate that intimidation is occurring.
- **Community Based Witness Services**: It may be possible to provide additional support to the witness through community-based social services. Consider connecting the witness with trustworthy community victim/witness advocate groups, local social services, community groups

[10] *The Prosecutors' Resource: Witness Intimidation, supra* note 3, at 9.

such as religious institutions, and extended family. The prosecutor's office may also consider contracting with a reliable community based organization for more sustained assistance with a variety of issues including housing, other government services, health and treatment issues, etc.[11] Hospitals may also have some support for the victims that are being treated for injuries related to the case.[12] When referring a witness for these services, a safety analysis should be done to determine if the referral could endanger the witness.

- **Stay in Touch with the Witness**: Since a case may take months or years to resolve, simply checking in with the witness on a regular basis and giving the witness an update on what is happening will go a long way towards maintaining a positive relationship. It can also be helpful to invite the witness to the office or to some neutral location to see how the witness is doing, to see if the witness needs anything and to provide case updates. This will keep the witness connected to the case and will allow the prosecutor to determine if there are any concerns about witness intimidation or witness tampering. If the witness does not return phone calls and falls out of touch, this could be a sign of intimidation.

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[11] California: In Orange County, California, the District Attorney's office has worked with the Gang and Hate Crime Victim's Services program, which is part of the Community Service Program serving Orange County. They offer assistance such as crisis intervention, emergency assistance (food, clothing, shelter, and medical care), orientation to the criminal justice system (i.e. explaining how the court process works and accompanying the witnesses to court), helping witnesses retrieve property that was taken by law enforcement, restitution assistance, language translation services, outreach, and community workshops against gang violence. *Gang and Hate Crimes Victim Services*, Community Service Programs (2016), https://www.cspinc.org/Gang%20Victims. The National Gang Center states that a witness's participation in the program and receipt of its benefits is contingent on cooperation with the prosecution. Anderson, *supra* note 7, at 5.
Massachusetts: In Boston, Massachusetts, Operation L.I.P.S.T.I.C.K. is a coalition of faith and civic leaders, elected officials, social service workers and law enforcement professionals that work to keep women and girls from "engaging in high risk behavior involving guns." The group uses "peer-to-peer education and leadership models to inform women and girls about the dangers of buying, hiding and holding guns illegally, showcase positive role models, and change norms around gun carrying." *Ladies Involved in Putting a Stop to Inner City Killing*, LIPSTICK, http://operationlipstick.org/ (last visited Mar. 16, 2016).

[12] Pennsylvania: For example, a program in Philadelphia, Healing Hurt People, places trauma counselors in hospitals to assist victims of violent crimes. The counselors interview the victims to assess all of the issues that the victims are dealing with. Thus, in addition to assessing counseling needs, the counselors can assist victims with housing, employment and health insurance. *Healing Hurt People*, Center for Nonviolence and Social Issues (2014), http://www.nonviolenceandsocialjustice.org/Healing-Hurt-People/29/; *discussed by* Penny Ray, in *Breaking the Cycle of Violence*, THE TRENTONIAN (Oct. 20, 2015), http://www.thecrimereport.org/news/articles/2015-10-breaking-the-cycle-of-violence (discussing this program).

- **Visiting the Witness in a Neutral Location:** To stay in touch with the witness, it may be helpful to visit the witness at a location other than their home, their office, or the prosecutor's office. This may be a safer location for the witness.
- **Be Careful of Sending the Police to the Witness's Home or Business:** Having a police officer arrive at a witness's home or place of business can signal to the community that the witness is cooperating and can be very dangerous for the witness. Similarly, when a witness has to come to court, it may be safer to send a car service to pick up the witness rather than sending a detective, who could alert the neighborhood that the witness is cooperating with the police.
- **Develop a Plan for Communicating**: Develop a plan with the witness about how to stay in touch in a way that will not endanger the witness. As previously mentioned, providing the witness with a cell phone may be necessary to ensure the witness can call for help if needed. Be mindful that in some instances, the witness could be jeopardized if it is known that he has regular contact with law enforcement.
  - **Discoverable Communications**: Note: texts, emails and other communications between the prosecutor and the witness may be discoverable. All communications with a witness or a witness's family should be professional and written with the assumption that they might be turned over to the defense.

- **Witness Relocation**: The prosecutor should be familiar with the options for relocation as the need can arise suddenly and unexpectedly at any point before, during or after the trial.
  - **Short Term**: Particularly at critical junctures in the case, a witness can be moved to a hotel for a short period of time when the risk of harm is greatest. This may occur when the case is first charged, or later when the case goes to trial.
  - **Long Term**: In extreme circumstances, the witness and his family may have to be relocated for long periods of time. This can range from moving the witness to a new apartment in a housing development to putting the witness into the federal witness protection program. Limited resources and personnel make these options difficult to obtain and require a great deal of planning.
  - **Note**: Any benefits provided to the witness, such as relocating the witness or the witness's family, must be disclosed to the defense at the time of trial.
- **Advice about Contact with Defense Attorney**: Before the end of the first meeting is a good opportunity to advise the witness that, once an arrest

has been made and the defendant has an attorney, the attorney or his investigators, may seek to contact the witness. The witness should be apprised of this possibility.

- **Sample Explanation to the Witness**: This explanation is a suggestion; check with a supervisor regarding the preferred approach.

  "During or after this case, lawyers representing the defendant, defense investigators or reporters seeking to discuss the case may approach you. Defense attorneys have an obligation to represent the best interests of the defendant and to investigate the case. They have a right to speak with you. However, you are not required to speak with the defense attorney or his investigator or the press. You can speak with them if you wish to do so. Be aware that what you say to others may be recorded or memorialized and may be used in court during cross-examination. If you are approached by anyone other than prosecutor office staff, the arresting officer/detective, or me, please check the person's identification so you know who he or she is. You can then decide if you would like to speak with that person. Please let me know as soon as possible if you have been contacted and who has contacted you."

- **Ethical Rules for the Defense**: Under the Model Rules of Professional Conduct, when speaking with a prosecution witness, a defense attorney and his investigator cannot "state or imply" that they are "disinterested" in the criminal matter. Seemingly innocuous proclamations to the witness about who the defense attorney or investigator represent without clearly stating representation of the defendant may be prohibited. Further, if it appears that the witness does not understand the defense attorney and investigator's role, the Model Rules require that the attorney make "reasonable efforts to correct the misunderstanding." Additionally, the defense attorney must make "reasonable efforts to ensure that the [investigator's] conduct is compatible with the professional obligations of the lawyer."[13]

- **Document Witness Intimidation or Witness Tampering**: Begin to keep a log or record of all concerns about witness intimidation or witness tampering. A cumulative record of events, large and small, that are aimed at intimidating or influencing the witness, can be helpful in future requests for increased bail, prosecution for witness intimidation, or admission of the witness's prior statements. (See section on Uncooperative Witnesses and Evidentiary Considerations below.)

[13] *See* MOD. RULES PROF. CON. Rules 3.4, 4.3 and 5.3(b) (adopted in 1983, amended in 2005).

- **Release of Witness Information in the Press**: Particularly in high profile cases, where the release of various kinds of information may endanger a witness, prosecutors and law enforcement should coordinate on what information about the witness, if any, can or should be released to the press.

CONSIDERATIONS FOR SEARCH WARRANTS

A case may involve the issuance of a search warrant that is based on information provided by a witness who is at risk if his identity is revealed. This witness could be a co-defendant, a confidential informant, or simply an eyewitness.[14] A number of steps can be taken to protect this witness.

- **Request that the Search Warrant Affidavit be Sealed**: To further protect the witness, a request should be made on the record for the judge to seal the search warrant and affidavit so that they are not publicly available through the court file. The basis for sealing, such as protecting the witness or protecting an on-going investigation, must be fully articulated on the record.[15] Some judges routinely seal a search warrant affidavit based on an

[14] This section focuses only on protecting a witness who provides information for a search warrant application. It does not address the many other issues involved in working with a confidential informant.

[15] The following are state law examples on when a search warrant may be sealed:
New York: N.Y. CRIM. PROC. LAW § 690 (McKinney 1999) governs search warrants, but does not address sealing. (Section 240.50 allows for protective orders to be granted upon motion application, including where there is a danger of "intimidation" and those to protect a CI's identity.) New York courts, particularly in Manhattan, grant the immediate sealing of search warrants after issuance when it is requested. *See, e.g., People v. Castillo*, 80 N.Y.2d 578, 581 (1992) (the Court of Appeals mentioned that the magistrate immediately sealed the search warrant after it was issued and they did not address or criticize the immediate sealing by the magistrate). Note that the courts' practice of sealing search warrants on a pro forma basis in Manhattan may not be so common in other locations around New York.
California: CAL. PENAL CODE § 1534(a) (West 2013) states that "documents and records of the court relating to the warrant need not be open to the public until the execution and return of the warrant or the expiration of the 10-day period after issuance." Typically, though, the search warrant and affidavit sealing extends through the period upon which an in camera review by a trial court can be done following a motion to suppress. *See People v. Hobbs*, (1994) 7 Cal.4th 948, 1246 [30 Cal.Rptr.2d 651].
Massachusetts - MASS. GEN. LAWS ANN. ch. 276 § 2B (West 1998) provides that search warrant materials are presumptively public. Judges may restrict access to judicial records through impoundment, however, "where 'good cause' is shown, an assessment that requires a careful 'balanc[ing of] the rights of the parties based on the particular facts of each case.'" Impoundment is an exception to the rule and must be limited to the facts and circumstances of the case. *Commonwealth v. George W. Prescott Publ'g Co.*, 463 Mass. 258, 263 (2012).
Maryland - MD. CODE ANN., CRIM. PRO. § 1-203(e)(2)(ii)(3) (West 2014) allows the sealing of a search warrant for a finding of "good cause" which may be established by a showing of evidence that

oral motion, with the understanding that the prosecutor may have a copy of the search warrant and affidavit; other jurisdictions may have written search warrant sealing orders for the court.[16] (For more information on sealing, see Discovery section below.)

- **Security Issues for Meeting the Judge**: If a police officer or prosecutor needs to bring the witness or confidential informant before a judge, always consider the witness's safety in the courthouse. For example, bring the witness in through a back door or a lightly travelled area, clearly away from other witnesses, defendants, and defense attorneys. Law enforcement and prosecutors should reach out to the court in advance of the meeting to discuss logistics that will protect the witness.
- **Anonymous Witness**: Consideration can be given to making the search warrant informant anonymous by eliminating any references to the witness's name, gender or other identifying information. However, particularly in complex search warrants, this can lead to a confusing application that may undermine probable cause. Thus, this is rarely done and preference may be for an application for an immediate sealing order before the court, followed by a protective order. (See previous section on Sealing and later section on Discovery and Protective orders.)[17] A commonly used substitution for a person's name is, "Person known to the deponent."

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the failure to maintain the confidentiality of the investigation "would jeopardize the safety of a source of information."

[16] California: In Alameda County, California, law enforcement use a Search Warrant Sealing Order which the affiant can present to the court along with the search warrant and affidavit requesting sealing to protect the informant or the investigation. This affidavit allows the affiant to specify the reasons for seeking sealing. If granted, the court signs the order and it is retained by the Clerk of the Court in a secure place in a sealed envelope. *Forms for Officers*, OFFICE OF THE DISTRICT ATTORNEY, ALAMEDA COUNTY (2006 – 2016), http://le.alcoda.org/files/SW_Sealing_Order1.pdf.

[17] The following are various state statute and case examples supporting search warrants based on information provided by a confidential informant to establish probable cause:
New York – *Aguilar-Spinelli* test. N.Y. CRIM. PROC. LAW § 690.35(3)(c) (McKinney 1999); *People v. Griminger*, 71 N.Y.2d 635, 637, 639-640 (1988) (a confidential informant can provide probable cause for a search warrant when the informant: (1) is reliable, and (2) has a basis of knowledge for providing the information).
California – *Gates* test. CAL. PENAL CODE § 1524 (West 2015), *amended by* 2015 CAL. LEGIS. SERV. Ch. 118 (West 2016) (amendments are non-material to basic law allowing a confidential informant to establish probable cause for search warrants and *Gates* analysis); CAL. EVID. CODE § 1042 (West 1969). *See also People v. Rochen* (1988) 203 Cal. App. 3d 684, 688 [250 Cal.Rptr. 73] (a confidential informant can provide probable cause for a search warrant where, in consideration of the totality of the circumstances, including the veracity and basis of knowledge of the informant, there is a fair probability that contraband or evidence of a crime will be found. Independent police work can serve to corroborate details of the informant's information). Note that California leans heavily in favor of protecting a confidential informant's identity and safety. Section 1042 of the Evidence Code states that law enforcement "is not required to reveal to the defendant official information or the identity

- **Segregate Information about the Informant:** Consider segregating all information about the informant in one part of the affidavit, so that if a protective order is granted it will be easier to redact the information.[18]

ARREST TO ARRAIGNMENT

Accusatory Instruments and Notices

When preparing an accusatory instrument, police officers and prosecutors may:

- **Withhold the Witness's Name in the Accusatory Instrument**:
  - **No Reference to the Witness**: Ideally it is best to draft an accusatory instrument without any reference to the victim. If probable cause can be based on other evidence unrelated to the victim or witness, that is the best course of action.
  - **Anonymous Witness**: If naming the witness or victim is required for legal sufficiency of the accusatory instrument, then the witness can be kept anonymous by referring to him as "a person known to the deponent" or something similar. If the witness's signature is needed on the document, then the witness may also sign in a manner that will not reveal his identity.[19]

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of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it" when the search warrant is valid on its face.
Massachusetts – *Aguilar-Spinelli* test. MASS. GEN. LAWS ANN. ch. 276 § 2B (West 1998); *Commonwealth v. Bakoian*, 412 Mass. 295, 300 (1991) (a confidential informant can provide probable cause for a search warrant when (1) the underlying circumstances for the informant's information is established, and (2) law enforcement can prove that the informant was reliable or credible).
Maryland – *Gates* test. MD. CODE ANN., CRIM. PROC. § 1-203 (West 2014); *Tamburello v. State*, 67 Md.App. 180 (1986) (a confidential informant can provide probable cause for a search warrant where, given all the circumstances set forth, including the veracity and basis of knowledge of the informant, there is a fair probability that contraband or evidence of a crime will be found. Warrants should be interpreted in a common sense, not a "hypertechnical," manner).

[18] California: California, for example, allows law enforcement to present two affidavits to the judge if they only want a portion sealed; thus, one affidavit contains information that may be disclosed, while the other contains information that would be subject to the sealing order. *See Hobbs*, 7 Cal.4th at 962-63 (… "whereby those portions of a search warrant affidavit which, if disclosed to the defense, would effectively reveal the identity of an informant, are redacted, and the resulting 'edited' affidavit furnished to the defendant").

[19] New York: *See People v. Mercado*, 123 Misc.2d 775 (Crim Ct, NY County 1984); *People v. Sanchez*, 47 Misc.3d 612 (Crim Ct, NY County 2015) (courts have held a variety of marks, as well as initials, typewritten initials, and printed signatures following the General Construction Law § 46, where a signature is defined as "any memorandum, mark or sign, written, printed, stapled, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument or writing").

- **Sever Case from Co-Defendant**: Where one of the witnesses is a co-defendant, the case can be severed so that the co-defendant-witness does not have to appear in court with the person against whom he is testifying. This may also provide protections at the discovery stage.[20] (See Discovery section below.) The downside of this approach is that it will reveal the cooperation of the co-defendant. The best course of action is a case-by-case decision.
- **Withhold the Witness's Name from Notices**: The witness's name does not have to be included with any notices that must be given at arraignment. For example, when serving notice that the defendant was identified, the notice does not have to include the name of the identifying witness.[21] (For more information, see the Discovery section below.)

Initial Arraignment

- **Initial Arraignment**: When the defendant is arraigned on the initial accusatory instrument, the prosecutor should consider:
  - **High Bail or Remand**: Advise the court of the risk or actual occurrence of witness intimidation and request high bail or that the defendant be held without bail where appropriate.

California: In *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121 [99 Cal.Rptr.2d 149] the court, in its discussion of the California Penal Code's and Proposition 115's intent of protecting witness identities, upheld the trial court's decision allowing the prosecutor to withhold the disclosure of witness identities pretrial. *Id.* at 160. In its discussion, the court referred to the prosecutor's practice of having identified the witnesses by number instead of their actual names in the indictment, and the court ultimately had no objection to the prosecution having done so. *Id.* at 153-154. (Note that Alvarado dealt with whether a court could allow a prosecutor to permanently withhold the identities of certain witnesses in a Mexican mafia case where a witness was attacked in jail. The permanent nondisclosure was ultimately struck down, but the court stated that a trial court could alternatively fashion a limited order of nondisclosure so long as it did not interfere with defendant's right to confront the witnesses and prepare for trial. *Id.* at 172.)

[20] *See* N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 1989).

[21] There do not appear to be higher court cases on this issue specifically, but most state courts generally recognize a prosecutor's pretrial nondisclosure of witness identities based on the threat of witness intimidation, typically after a prosecutor moves for a protective order. *See, e.g., id.* at 160; FN 27. Thus, a prosecutor's request to withhold an identifying witness's name in a state's statutory pretrial notice provision, such as identification notice, pretrial should also be recognized.
New York: for example, lower courts have ruled that it is not a failure of the requirements of N.Y. CRIM. PROC. LAW § 710.30(1)(b) (McKinney 1976) to leave the witness's name off of the notice that the witness identified the defendant. *See*, *e.g.*, *People v. Rodriguez,* 156 Misc.2d 949, 951 (Sup Ct, Bx County 1993), *citing People v. Ocasio*, 183 A.D.2d 921, 922 (2d Dept 1992) (finding that identification notice was still sufficient even where prosecutor erroneously gave the wrong name of the identifying witness, and the incorrect name did not change substance of notice).

- **Order of Protection**: If the witness and the witness's address is known to the defendant, an order of protection can be requested requiring the defendant to stay away from the witness, as well as the witness's home and place of business. The witness and the local police should be made aware of the order of protection.
  - **Note**: If the defendant does not know the witness, then an order of protection may not be a safe course of action as it could jeopardize the witness's safety by revealing the witness's identity.
- **Condition of Release**: If the witness is unknown to the defendant, and the defendant is not incarcerated, the judge can order the defendant to stay away from a particular location as a condition of the defendant's release.[22] This will avoid disclosing the witness's name, but will be a way to keep the defendant away from the witness. In some instances, however, this may not be the right approach, as this will reveal the general area where the witness lives or works. The witness and the local police should be given a copy of the order or the transcript, which outlines the conditions of release. If defendant violates the conditions, the order will provide a basis for taking the defendant into custody. GPS monitoring may be an effective way to make sure the defendant abides by the conditions imposed.
- **Parole and Probation Hold:** If the defendant is on parole or probation and has a technical violation, parole or probation should be contacted to determine if they have a "hold" on the defendant. This may keep the defendant incarcerated, even if he makes bail on the arrest

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[22] Following are examples of state statutes that the court may apply requiring the defendant to stay away from certain areas to protect a witness, both in the form of order of protection and condition of release:

Order of protection:

New York: *See* N.Y. CRIM. PROC. LAW § 530.13(1)(a) (McKinney 2015), the court may issue an order of protection that requires the defendant to "stay away from the home, school, business or place of employment of the victims of, or designated witnesses to, the alleged offense."

Condition of release:

Massachusetts: *See* MASS. GEN. LAWS. ANN. ch. 276 § 42A (West 2014), when a criminal complaint involves certain crimes, such as assault and battery or threat to inflict physical harm upon a person or his family, the court may, in addition to or in lieu of "any terms of bail or personal recognizance, and after a hearing and finding, impose such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence." The statute further states that the "terms and conditions shall include reasonable restrictions on the travel, association or place of abode of the defendant as will prevent such person from contact with the person abused."

Indiana: *See* IND. CODE ANN. § 35-33-8-3.2 (West 2012), a court may impose certain conditions to assure the defendant's appearance at legal proceedings, "or, upon a showing of clear and convincing evidence that the defendant poses a risk of physical danger to another person or the community, to assure the public's physical safety...(3) Impose reasonable restrictions on the activities, movements, associations, and residence of the defendant during the period of release."

charge. If there is a violation hearing on the technical violations, make sure that the hearing does not require evidence about the current arrest and investigation. If the "hold" is for the current arrest any violation hearing should be postponed so that the witness's identity and other information about the case is not revealed.

The Preliminary Hearing and Grand Jury

The preliminary hearing and grand jury are excellent opportunities to test the witness's credibility, record the witness's statement under oath and to give the witness a preview of the court system.

- **Safety in the Courthouse**: Law enforcement must ensure that the at-risk witness will be safely transported to court. Contact the court in advance to develop a safety plan. Utilize police escorts, office advocates, investigators, or other prosecutors to assist in transporting the witness and to remain with the witness while in the courthouse. (See further section on Preparing for Hearing and Trial, Transportation to and from the Courthouse.)
- **Advantages of the Grand Jury**: Since the Grand Jury is secret, with only the prosecutor and the Grand Jury in the room, this can provide a safe environment for the witness to testify. Also, the witness's testimony is under oath and may be admissible later at trial if the defendant has caused the witness's future unavailability to testify.
- **Advantages of the Preliminary Hearing**: A preliminary hearing can be used to test a witness's credibility and willingness to testify, while also securing the witness's testimony under oath, with the opportunity for cross examination. However, this will reveal the witness's identity at an early stage in the case and may require disclosure of some documents to the defense that may otherwise be withheld until later in the case. If the witness becomes unavailable due to the actions of the defendant or some other circumstance, the witness's preliminary hearing testimony may be admissible at trial. (For further information see section on Uncooperative Witnesses and Evidentiary Considerations below.)
    - **Anonymous Testimony of the Witness**: The prosecutor can seek a protective order from the court to allow the witness to testify anonymously.[23] Anonymous testimony can include testifying under an

[23] Undercover police witnesses routinely testify before the Grand Jury using only their shield number when they are sworn, and there is case law that suggests that civilian witnesses may testify anonymously in the Grand Jury.

assumed name or a number. Though the witness is anonymous, the defense counsel has a right to information that will allow for cross-examination of the witness.[24] Prosecutors should consult with a supervisor and be aware of the legal requirements in their own jurisdiction before utilizing this approach. (See also sections on Discovery - Witness's Name, Pedigree and Statements and Hearing and Trial - Motions In Limine and Anonymous Witnesses.

- **When the Witness Does Not Testify:** In jurisdictions where hearsay is admissible at the preliminary hearing or in the Grand Jury, or if for some other reason the witness does not have to testify personally, it may still be necessary to protect the witness's identify.[25] Though the witness does not testify, other witnesses, most likely the police officer, may have to make reference to the witness during his testimony. Where there are concerns about that witness's safety, an application can be made to the judge to keep the witness's name and pedigree anonymous. If the protective order is granted, the police officer will have to be carefully prepared regarding what can and cannot be revealed during his testimony, both on direct and cross-examination.

New York: courts have upheld the closure of courtrooms to the public at trial when an undercover police officer, who is still active in undercover police work, testifies. *People v. Glover,* 57 N.Y.2d 61, 65 (1982).
California: in *Alvarado*, while reviewing whether the prosecution could withhold witness identities at trial, the court also discussed the Grand Jury transcript in which the witnesses were identified only by number. The court did not disagree with this approach taken by the prosecution to protect its witness identities in the Grand Jury. 99 Cal.Rptr.2d at 153.

[24] New York: *see, e.g.*, *People v. Stanard*, 42 N.Y.2d 74, 84 (1977) ("Where the defense seeks to question a prosecution witness about his identity, address and occupation, such questions must be permitted absent a showing that a cognizably valid interest of the State or the witness is involved…"); *People v. Andre W.*, 44 N.Y.2d 179 (1978) (finding that there should have been a hearing on the materiality of the non-disclosed witness).

[25] Note that while many jurisdictions allow the admissibility of out of court statements of a witness, thus allowing hearsay testimony (in which case, a police officer may be able to testify as to what a witness stated), that is not the case in every jurisdiction.
Jurisdictions that permit out-of-court statements of a witness at preliminary hearings include:
Wisconsin: WIS. STAT. § 970.083(1) (West 2016).
Alabama: ALA. R. OF CRIM. PROC. § 5.3(c)(3) (West 2015).
Pennsylvania: PA. CODE § 542 (E) (West 2013).
California: CAL. PENAL CODE § 872(b) (West 2014).
Colorado: *See People v. Quinn,* 183 Colo. 245, 516 P.2d 420 (1973).
A jurisdiction that does not allow out-of-court hearsay statements of a witness is New York. *See* N.Y. CRIM. PROC. LAW § 180.60(8) (McKinney 1975). (Except that New York will allow reports of experts and technicians, such as drug testing reports, ballistics reports, as well as sworn statements confirming no permission or authority, such property was owned by witness and defendant did not have permission or authority to take property. *Id.* §§ 190.30(2) and (3).)

Felony Arraignment

- **Re-Assessment of Potential Witness Intimidation**: At the time of the felony arraignment, there should be a re-assessment of the risks faced by witnesses. The applications made at the initial arraignment (see above) may have to be re-litigated or amended before the new judge.
- **Discovery**: Protective orders regarding discovery may be litigated at this stage.

DISCOVERY AND PROTECTIVE ORDERS

Protective orders that delay or deny disclosure to ensure the safety of witnesses are a well-established practice throughout the United States. The following are strategies for prosecutors to use in requesting protective orders as well as important considerations associated with this practice.

- **Protective Order**: Oppose discovery motions that could endanger the witness.[26] When necessary, make an in camera motion outside the presence of the defendant or the defense attorney to protect the identity of the

[26] As previously mentioned in FN 21, most states sanction the issuance of protective orders to protect disclosure an at risk witness's identity up until the trial.
New York: "The court … may, upon motion of either party, or of any affected person, or upon determination of a motion of either party for an order of discovery, or upon its own initiative, issue a protective order denying, limiting, conditioning, delaying or regulating discovery … for good cause, including constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, … or embarrassment to any person…" N.Y. CRIM. PROC. LAW § 240.50(1) (McKinney 1985). (Note that witness statements, names and addresses and search warrants are not discoverable items (*see* N.Y. CRIM. PROC. LAW § 240.20 (McKinney 1989)); although case law may require witness names and statements be disclosed, subject to a protective order, prior to the witness's testimony at a hearing or trial. *Id.* § 240.44(1) (McKinney 1999). Also, when co-defendants are tried jointly, statements made by a co-defendant are discoverable under Section 240.20(a), including statements made by cooperators.)
California: while witness names, statements, and addresses are to be disclosed, (CAL. PENAL CODE §§ 1054 (1)(a) and (1)(f) (West 2015)), the purpose of the statute is "to protect victims and witnesses from danger, harassment, and undue delay of the proceedings." *Id.* § 1054(d). Thus, prosecutors may refuse to disclose the witness's identity where it is deemed against the public interest. CAL. EVID. CODE § 1041(A)(2) (West 2014). Additionally, where a search warrant is valid on its face, prosecutors are not required to reveal the identity of the witness. *See id.* § 1042(b) (West 1967); *Hobbs*, 7 Cal.4th at 959. A party may request disclosure of a CI's identity on the ground that the witness is "material" on the issue of guilt or innocence. In this case, the court will hold a hearing, which may be in camera, depending on the circumstances, and following the procedures in this statute. *Id.* § 1042(d) (West 1967).

witness.[27] (See section on Motions in Limine below for more information.) The types of protective orders that can be requested include:

- **Witness's Name, Pedigree and Statements**: A request should be made for limited, delayed or redacted disclosure of the witness' statements and the witness's name, pedigree and gender. In some instances the court will allow the information to be turned over immediately before the witness is scheduled to testify.[28] An alternative is to substitute a number for the witness's name in the documents. At the time of trial, the prosecutor can provide the defense with a key revealing what number is associated with which witness. (See also section on Anonymous Witnesses in the Hearing and Trial section below.)
  - **Basis for Protective Order**: Support for the protective order can include information about specific threats, examples of prior threats by the defendant against others, and the proximity of where the witness lives to the defendant and his associates.
- **Search Warrant Affidavit**: Frequently, highly sensitive information is contained in the search warrant affidavit that could reveal the witness or confidential informant's identity. Thus, a request to avoid or delay disclosure of the affidavit or redaction of the affidavit may be necessary.

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[27] New York: *See* N.Y. CRIM. PROC. LAW §§ 240.50(1) (McKinney 1985); N.Y. CRIM. PROC. LAW 240.90(3) (McKinney 1979) (determining that the prosecutor may apply ex parte or submit testimony at an in camera hearing for a protective order). *See also People v. Frost*, 100 N.Y.2d 129, 134-135 (2003) (where the court allowed the closure of the courtroom and held an in camera hearing outside the presence of the defendant and his attorney to hear the prosecutor's motion for a protective order to protect the identity of civilian witnesses at trial.)

[28] New York: *See People v. Boyd*, 164 A.D.2d 800, 802 (1st Dept 1990) (holding that when a witness "is in danger of being intimidated or harmed, the court in the exercise of sound discretion may delay discovery of a witness's name and address until trial, or even conceal a witness's identity during trial").

California: *See People v. Valdez* (2012) 55 Cal.4th 82, 108 – 111 [144 Cal.Rptr.3d 865] (holding that a trial court's tightly managed plan for protecting witness identity and nondisclosure orders, where the crucial witness identities were disclosed two days before they testified and defense counsel had ample information previously disclosed to impeach these witnesses, including information gathered from previously interviewing the witnesses a year prior to trial was valid).

When seeking a protective order for a disclosure delay, it is important that the defendant's right to prepare his defense and cross-examine the witness is not significantly impaired. For example, in *Alvarado*, the California Supreme Court held that, although the 6th amendment does not establish an absolute rule that a witness's true identity always must be disclosed, the trial court erred where that court permanently withheld from a defendant a witness name and allowed the witness to testify anonymously at trial where the witness was crucial to the prosecution and withholding the witness's identity impaired significantly the defendant's ability to investigate and cross-examine the witness. 99 Cal.Rptr.2d at 167-8.

- **Police Paperwork**: Similarly, police reports may contain statements of the witness that might reveal the identity of the witness. If so, delay disclosure and redaction of this paperwork as necessary.

- **Limiting Disclosure to the Defense Attorney Alone**: If disclosure is ordered, a request can be made to limit disclosure to defense attorney only, with a prohibition against showing the materials to the defendant.[29] This may be particularly useful if a co-defendant is the cooperating witness. Some jurisdictions have added a distinctive watermark to the discovery materials provided to the defense, so that if the documents are uncovered in the hands of the defendant or other, it can be traced to the materials provided to the defense attorney.[30]
- **Redaction**: To the extent allowed by law, redact all personal information pertaining to the witness, including the witness's name, address, date of birth, phone number, and email from police reports and other records prior to disclosure. As mentioned previously, with the consent of the court, in some instances, numbers or initials can be substituted for references to a witness in the materials. Double check the redactions before turning

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[29] New York: in *People v. Contreras*, 12 N.Y.3d 268 (2009), the court issued a protective order preventing defense counsel from showing defendant notes belonging to a witness. *See also People v. Mojica*, 244 A.D.2d 138, 140-141, 144 (2d Dept 1998) (the 2nd Department upheld a trial court's protective order for a witness who was a relative of defendant. The order prevented defense counsel from discussing the identity of the witness until shortly before he was called to testify and left the witness's name off the witness list that was read to the jury panel. The 2nd Department stated, "… where there was a founded fear that a prospective witness for the prosecution would be subject to intimidation, it was an appropriate exercise of discretion for the court to issue an order protecting the identity of the witness until shortly before he was scheduled to testify, while permitting defendant full and complete access to his attorney on all other matters. The court also insured that defendant would get the name of the witness and documents with sufficient time to consult with counsel and to allow counsel to prepare for cross-examination of the witness after such consultation. Consequently, defendant's right to counsel was not violated by the court's directive." *Id.* at 145.)
California: The CAL. PENAL CODE provision on disclosure of prosecution witness names and addresses prior to trial also states that defense counsel is prohibited from revealing this information to defendant and other parties. § 1054.2(a)(1) (West 1990).
Maryland: Rule 4-263(i) states that on motion and for good cause shown, the court may order that disclosure of state witness' names and addresses for hearing and trial be limited. MD. RULE 4-263(i) (West 2016). In *Coleman v. State*, 321 Md. 586 (1991), the court upheld a protective order that prevented defense counsel from disclosing to their co-defendant (clients) the identity of two key prosecution witnesses.

[30] Pennsylvania: In the Philadelphia District Attorney's office, in cases where the court has ordered the defense attorney not to share notes and paperwork with the defendant, some prosecutors have made a practice of placing watermarks on these documents prior to disclosing them to defense counsel. If the documents make their way out into the public, the prosecutor will know the defense counsel was the source.

documents over to the defense, as it can be easy to miss something particularly when there are many documents that must be disclosed.

- **Search Warrant Affidavits**: If the prosecutor has been ordered to disclose the affidavit, there should also be a request for a protective order to redact any information in a search warrant affidavit that could reveal the witness's identity.
- **Photographs and Videos**: Redact images of the witness's face and any distinguishing and identifiable body marks from copies of photographs and videos that must be disclosed.
- **Police Paperwork**: Redact information from police paperwork that could reveal the identity of a witness or confidential informant.
- **Body Worn Cameras**: Recordings from police body-worn cameras may contain images of a witness, the witness's home or family. If the police use body-worn cameras, the recordings should be checked to see if they contain images of witnesses, and if so, the faces and audio should be redacted prior to disclosure. The recording may even include pedigree information that the witness provided when first giving a report to the police. In that case, this audio must be redacted as well.

- **Recantations**: Recantations can occur at any stage of a case. Law enforcement and prosecutors must thoroughly investigate and document any recantations to prepare for necessary disclosures to defense attorneys as Brady material[31] or to prepare for a motion to introduce the uncooperative witness's prior testimony. A recantation can be evidence of witness intimidation, it may be the truth, or it can simply demonstrate that the witness is confused. Recantations will likely trigger litigation and should be immediately conferenced with a supervisor to discuss the disclosure obligations to the defense.
- **Giglio considerations**: Prosecutors should be especially mindful of Giglio obligations when there is a protective order in effect delaying disclosure of the witness's identity. If prosecutors do not reveal the Giglio material until the night before the witness is scheduled to testify at the same time that the witness's identity is to be disclosed, the defense attorney may be able to argue that he was not provided sufficient time to do a background investigation on the witness. Thus, prosecutors may consider disclosing Giglio material, if possible, earlier than than disclosing the witness's identity. Needless to say, care must be taken to protect the witness's identity up until the ordered disclosure.

[31] When investigating a recantation, prosecutors must be familiar with the laws and ethical rules in their state that governs exculpatory and impeachment material as a recantation is likely to trigger a disclosure requirement.

HEARINGS AND TRIAL

The greatest risk of intimidation for a witness may occur during or immediately before hearings and trial, when the consequences for the defendant are most apparent and looming. This is also a time when the witness and the defendant and his family are all in the same place – the courthouse. Keeping witnesses safe at this stage of the proceeding requires careful, advanced planning. Below is a list of strategies that should be considered as the hearings and trial approach.

Preparing for Hearing and Trial

- **Re-Evaluate Witness Safety:** Assess the witness's current situation at home and at work to determine if the witness is safe. Make sure that the witness has support from the office victim advocate, social services or other community groups, where needed. Keeping in touch with the witness during the pendency of the case, which in some instances could be months or years, will provide valuable insights about the witness's safety needs and his or her willingness to cooperate. Be particularly vigilant if the witness stops returning phone calls or emails or is unresponsive to other methods of communication.
- **Information Disclosed to the Defense**: Do a thorough review of any paperwork or recordings that will be disclosed to the defense prior to trial to make sure they are properly redacted. If there is new information about witness intimidation, seek additional protective orders to limit, delay or prevent disclosure of information that may jeopardize a witness' safety.
- **Monitor Jail Calls and Jail Visits**: As the hearings and trial approach, the defendant may be more focused on preventing the witness from testifying. Even if earlier jail calls were not monitored, it may be prudent to monitor jail calls and jail visits at this stage.
    - **Note**: While most jail and prison facilities monitor inmate phone calls for institutional security, there may be limits on the ability of a prosecutor to use these statements at trial if the inmate was previously unaware that the phone conversations could be disclosed to the prosecutor.[32]

[32] New York: *See*, *e.g.*, *People v. Johnson*, No. 37, 4/5/16, N.Y. Ct. of Appeals. Though the claim was unpreserved, the Court of Appeals noted that if the defendant was not notified that his jail calls would be introduced in a prosecution, then they may have been inadmissible. The court suggested that the concern could be cured if there was an express notification to the defendant that the calls could be turned over to the District Attorney.

- **Transportation To and From the Courthouse**: Assess in advance how the witness will arrive in the prosecutor's office and how the witness will get to court. Be mindful of the dangers associated with sending law enforcement to a witness's house and consider sending a car service for the witness instead, so as not to alert people in the neighborhood of the witness's cooperation. Also make sure to have the witness use safe, non-public entrances to the courthouse at all times when possible, such as using the judges' entrances.
    - **Disguising the Witness**: If the witness can only get to court through public spaces, consider having the witness cover up in some way so as not to be recognizable.
    - **Incarcerated Witness** Witnesses in custody are at high risk for intimidation and assault.[33] The incarcerated witness cannot simply be produced to court at the same time as the defendant using regular procedures. Instead, arrangements can be made for a police officer or investigator to take the witness directly out of the jail facility. In some instances an order to produce the witness for an unrelated matter can be used, though steps must be taken to separate the witness from the defendant. (See Incarcerated Witnesses section below for further information.)
- **Preparing the Witness About Concerns in the Courtroom:** Let the witness know that if the witness is concerned about possible intimidation in the courtroom while he is testifying, he should ask the court for a recess to discuss the matter with the court.
- **Emergency Witness Relocation**: If the witness is at high risk, consider relocating the witness during the pendency of the trial. Relocating a witness is complex and time consuming. Often other members of the witness's family must also be relocated. Other considerations such as the witness's job or medical condition can make relocation even more difficult. Typically, relocation means moving the witness to a hotel before and during the time when the witness is required to testify. In other instances, the witness might need to be moved permanently. Public housing has some provisions to move a witness from one apartment to another in an emergency.
- **Documentation of Possible Witness Intimidation**: Continue documenting any event that may indicate intimidation of a witness. This

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[33] Robert Faturechi, *Inmate Killed Weeks After Judge Asked That Sheriff's Officials Review his Safety*, L.A. TIMES (Mar. 26, 2011), http://articles.latimes.com/2011/mar/26/local/la-me-jail-strangling-20110327.

could form the basis for seeking to introduce the witness's testimony if the witness becomes uncooperative.

- **Subpoena the Witness to Testify in Court:**
  - Subpoenas must be served on the witness in person. Though not a foolproof means of securing a witness's testimony, a subpoena serves a number of purposes:
    - It can be used to compel the witness to testify. It demonstrates to the witness that testifying is required and not optional.
    - It is documentation that the witness can use to explain absence from work or school.
    - If the witness does not appear, the service of a subpoena demonstrates to the court that efforts were made to secure the witness's attendance. The refusal can also be part of the factual basis for obtaining a Material Witness Order or seeking to admit the prior statements of a witness. (For further information, see Trial section on Compelling the Witness to Testify.)

Hearings

Protective Orders: Undercover police officers, confidential informants and other vulnerable witnesses may have to testify at a pre-trial hearing. Some will not have to testify at trial but are only needed for the hearing. Various types of protective orders can be requested at the hearing stage to protect these witnesses. When considering a protective order application, a judge must decide upon a solution that is least restrictive of the defendant's rights. A full and detailed outline of the facts must be placed on the record to support the issuance of a protective order. (See also earlier Discovery section.)

- **Closing the Courtroom to the General Public**: The standard for closing the courtroom to the public usually requires:
  - The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
  - The closure must be no broader than necessary to protect that interest;
  - The trial court must consider reasonable alternatives to closing the proceeding; and
  - The court must make findings adequate to support the closure."[34]

[34] Federal law: Under federal law, closing the courtroom will violate the defendant's 6th Amendment rights unless the court advances an overriding interest that is "no broader than necessary to protect that interest." *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Most state jurisdictions have upheld partial courtroom closures, and, in some cases, a total closure depending on the situation. In reaching these decisions, courts typically apply the *Waller* standard: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher

- **Undercover Police Officer**: If an undercover police officer testifies at a hearing or trial, an application can be made to close the courtroom to the public or to provide other methods of security. The closing of the courtroom can be based on concerns for the officer's safety as well as the need for confidentiality of on-going or future investigations[35]. The officer may also be allowed to testify using his undercover number, rather than his real name.
- **Partial Closing of the Courtroom**: The court can decide whether to close the courtroom to everyone but the parties, including the defendant's family and friends, or the court can partially close the courtroom only to certain designated people, such as those who live in the neighborhood where the undercover conducts his investigations.[36] This will require court personnel to screen those seeking to enter the courtroom.

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values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 45.

New York: New York has ruled that a trial court may exclude the public from the courtroom in a criminal case, including both where an undercover police officer testifies and where a civilian witness fears for his life. *People v. Hinton*, 31 N.Y.2d 71, 75-6 (1972). (Note that Hinton dealt with an undercover police officer's testimony, but the Hinton court also referred to an earlier decision by the court where they sanctioned closing the courtroom during a civilian witness's testimony where the witness "feared for his life if he testified publicly." *Id.* at 75, *quoting People v. Hagan*, 24 N.Y.2d 395 (1969). The Hinton court reaffirmed the "inherent discretionary power of the trial court to close the courtroom," and stated, "we need only point out that the discretion be sparingly exercised and then, only when unusual circumstances necessitate it." *Id.*) For a more recent case concerning the closing of the courtroom, *see People v. Jones*, 96 N.Y.2d 213, 216, 219 (2001) (the Court of Appeals upheld a trial court's total closure of the courtroom where the court posted an officer outside the courtroom when an undercover was testifying and inquired of all spectators, except for defendant's family and attorneys, their identity and interest in entering the courtroom). *See also People v. Floyd*, 45 A.D.3d 1457, 1458 (4th Dept 2007) (the court held a Hinton hearing ex parte and determined that closing the courtroom was appropriate during a civilian witness's testimony where the witness was threatened twice by strangers asking him not to testify and where the witness earlier failed to comply with a Grand Jury subpoena because he feared for his safety.)

[35] New York: *See*, *e.g., Castillo*, 80 N.Y.2d at 586; *Frost*, 100 N.Y.2d at 134.

[36] New York: in *People v. Nieves*, the Court of Appeals discussed the *Waller* standard and stated that where the trial court is aware that defendant's family members are present, they can only be excluded if it is necessary to protect the interest advanced by the prosecutor in support of closure. The court found that while the trial court was justified in closing the courtroom to the general public, excluding the defendant's wife and child as well when the undercover testified was broader than necessary where the undercover expressed no fear of defendant's family. Further, defendant's residence in proximity to undercover officer's area of operations was never discussed or raised at the Hinton hearing, so it could not be relied on as a basis for exclusion. 90 N.Y.2d 426, 430-1 (1997).
California: the California Court of Appeals discussed the Waller standard in deciding whether excluding two friends of defendant's during a seven-year-old's testimony was justified in *People v. Esquibel* (2008) 166 Cal.App.4th 539, 552 [82 Cal.Rptr.3d 803], *modified on other grounds by* 2008 Cal. App. LEXIS 1471 (Cal. App. 2d Dist. Sept. 29, 2008). The court noted that the identity of the person

- **Ex Parte or In Camera Suppression Hearings:** In some instances, there can be an ex parte hearing without the defendant. The defense counsel usually appears, but in rare circumstances defense counsel may decide not to attend the hearing.[37]

- **Anonymous Witness**: An application can be made to allow the witnesses to use a fictitious name or a number during testimony at a hearing. (See also earlier section on Witness's Name, Pedigree and Statements in Discovery.) This application is typically made in hearings on search warrants, where the probable cause was based on the testimony of a confidential informant. Some information about the witness will have to be turned over the defense so they have an opportunity to cross-examine.
- **Police and Other Witnesses**: If the court issues a protective order to restrict the disclosure of the witness's name and pedigree, the protective order should also include a provision that similarly restricts the testimony of others from revealing the witness's identity. Even if the witness does not testify personally, a request can be made for other witnesses, such as police officers, to only refer to the witness using a fictitious name.[38] This

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to be excluded is "highly relevant." *Id.* at 553. The basis alleged by the prosecution for exclusion was that the mother of the witness was concerned that the friends of defendant were gang members and they would recognize the child from the neighborhood. *Id.* at 554. Despite there not being any evidence of threats or intimidation, the court found that the trial court's exclusion of two of these friends of defendants was not a violation of defendant's 6th amendment rights as it was only these two individuals who were excluded and defendant's family remained in the courtroom. *Id.*

[37] New York: In New York, there are typically two situations where suppression hearings can be held ex parte: (1) when the defendant is challenging a search based on information provided by a confidential informant, and (2) when the prosecutor can articulate a safety concern for a witness testifying. For the first scenario, *see People v. Darden*, 34 N.Y.2d 177, 181 (1974) (the Court of Appeals sanctioned an in camera hearing to examine a confidential informant, outside the presence of both defendant and defense attorney, where there is insufficient evidence to establish probable cause aside from the arresting officer's testimony about communications from the informant); *Castillo*, 80 N.Y.2d at 586 (the Court of Appeals upheld the trial court's in camera hearings outside the presence of defendant and his attorney to examine the informant and determine whether informant's life would be in danger if the warrant and affidavit were disclosed and to examine informant's credibility). Note that hearings excluding both defendant and defense counsel are rare.
For the first scenario, *see People v. Moise*, 110 A.D.3d 49, 51-2, 54 (1st Dept 2013). Here, the Appellate Division found that, based on a prosecutor's motion that the safety of an undercover would be compromised if he testified at the hearing in front of the defendant, the trial court's subsequent exclusion of defendant during a Wade hearing was justified and appropriate. The court stated: "The People showed that defendant's presence would compromise the safety of an undercover officer and others, and undermine legitimate law enforcement objectives." (Note that ultimately the First Department reversed the case because they found error with the court's exclusion of defense counsel's colleague during the hearing, particularly when defense counsel had previously alerted the court that his colleague would be coming.)

[38] Federal law: Federal courts have allowed a witness to testify anonymously at hearings. *See, e.g.*, *Siegfriedt v. Fair*, 982 F.2d 14, 17 (1st Cir. 1992) (the First Circuit did not find any violation of the

restriction would limit the defense cross-examination regarding the pedigree or gender of the endangered witness.

- **Sealing of Hearing Transcript**: Request sealing of the hearing transcript as necessary, or, alternatively, request that the transcript be only reviewed by the attorney, not defendant or other third parties.[39]
    - **Note**: A request can be made after trial for the release of a witness's transcript, including Freedom of Information requests. This may make it more urgent to take steps to protect the witness's identity in the transcript.

Trial

Motions in Limine

Pursuant to discovery rules, prosecutors must disclose witness lists, as well as other relevant documents about the witness, to defense counsel. The timing of the disclosure differs depending on statutes and tradition. If there are concerns about witness intimidation, however, various in limine motions can be made to protect the witness.

- **Protective Orders**: Motions for protective orders can be made at the trial stage to protect a witness. Some of these may have been made at earlier points in the case but may have to be re-litigated at the trial stage. In ruling on the motion, the court will have to balance the concerns for witness safety against the defendant's right to prepare a defense and cross examine the witness. These motions can be heard ex parte excluding the defendant.[40] In very rare instances where the defense attorney may be implicated in the intimidation, then the court may entertain the motion out of the presence of the defendant or the defense counsel.

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defendant's right to confrontation where the prosecution witness testified under a pseudonym at a probable cause hearing, but the true identity of the witness was known to the defendant prior to trial, allowing the defendant "effectively to investigate and impeach the declarant").
New York: *See*, *e.g.*, *Frost*, 100 N.Y.2d at 136 (stating that fictitious names may be used at a suppression hearing and at trial).

[39] New York: *See Matter of Crain Communications v. Hughes*, 74 N.Y.2d 626, 628 (1989) (the Court of Appeals upheld the lower court's denial of petitioner access to public documents filed in a separate action and sealed by a court order. As the court remarked, courts "… have the inherent power to control the records of their own proceedings…" and the decision to seal or disclose later must "involve the balancing of competing interests…")

[40] New York: *See Frost*, 100 N.Y.2d at 133 (the Court of Appeals upheld the trial court's conducting ex parte hearings on four occasions throughout the trial to determine if the courtroom should be closed during certain witnesses' testimony).
California: *See Valdez*, 55 Cal.4th at 102 (the initial trial court held an in camera hearing on the protective order for certain witnesses and nondisclosure of their identities).

- **Delayed or Limited Disclosure:** See Discovery section above for motions to delay or limit the disclosure of witness statements, pedigree or gender.
- **Testifying Anonymously at Trial**: As previously stated, the prosecutor can move to have witnesses testify anonymously, by using a number or a fictitious name, assuming the prosecutor has met the legal and constitutional standards. A detailed record must be made to support these applications and steps must be taken to give defense counsel information to evaluate the credibility of the witness. Some courts have allowed witnesses to testify while wearing a disguise, although it is not common.[41] Other courts have even allowed complete witness anonymity, though this is also very uncommon.[42]
- **Limiting Defense Questioning**: A motion to limit the scope of defense questioning regarding personal, identifying information of the witness can also be requested.[43] However, if the witness testifies

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[41] Federal law: *See United States v. Martinez*, No. 06 CR. 0591 (RPP), 2007 U.S. Dist. Lexis 68400, at 2 3 (S.D.N.Y. Sept. 14, 2007) (the district court judge allowed an officer to testify in disguise where the officer was in danger of being recognized by defendant's family and friends. Despite there being no evidence that the anyone in the courtroom would take this action, the court found that there was still a risk.)
New York: *See People v. Smith*, No. 7063/01, 2006 WL 1132409, at 3 (N.Y. Sup. Ct. Mar. 14, 2006), aff'd, 869 N.Y.S.2d 88 (1st Dept 2008)(upholding a trial court's decision to allow a witness to testify in a closed courtroom disguised by a fake beard, mustache, and wig because of danger to that witness in a case where another prosecution witness had been killed and there was evidence that the defendant would recognize this witness on sight).

[42] Complete anonymity has been authorized in cases concerning national security, important governmental interests and danger to a witness's life. Lisa I. Karsai, *You Can't Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience*, 79 TENN. L. REV. 29, 38-39 (Fall 2011).
Federal law: *See*, *e.g.*, *United States v. Zelaya*, 336 F.App'x 355, 358 (4th Cir. 2009) (the 4th Circuit upheld the complete anonymity of Salvadoran police officers who testified in support of the government's theory that there were connections between the defendants and the MS-13 gang in El Salvador).
New York: in New York, *People v. Frost* is an example of complete witness anonymity. Here, the Court of Appeals found the trial court lawfully concluded that "the witness's concerns for safety outweighed defendant's interest in obtaining information concerning Knight's true identity for purely collateral impeachment purposes." 100 N.Y.2d at 137.

[43] New York: *See Stanard*, 42 N.Y.2d at 83-4 (holding that, while questions about background and identity must generally be permitted, the right to cross-examine is not entirely unlimited. In order to allow a witness to testify anonymously, the steps outlined in *Stanard* here must be followed. The witness may be excused from answering a question with a "showing that the question will harass, annoy, humiliate or endanger the witness." *Id.* Factors to be considered include: "(1) the extent to which the right to cross-examine is infringed, (2) the relevance of the testimony to the question of guilt or innocence, (3) the nature of the crime charged and the quantum of proof established aside from the testimony of the witness, (4) the nature and significance of the interest or the right asserted by the witness, and (5) the nature of and extent to which the proposed cross-examination would produce evidence favorable to that party and, of course, whether such evidence would be merely

anonymously, the court may still require that the defense attorney (and not the defendant) be provided with the witness's name and date of birth, so the attorney can do his own investigation of the witness. Prior to turning over this information, the prosecutor must also do a thorough review of the witness's background.

- **Substituting a Number in the Trial Transcript Even if the Witness's Name is Used at Trial:** Even if the witness has to testify by name in the courtroom, the prosecutor can move to have a number substituted in the trial transcript so that the witness's identity is protected if the trial transcript is released to others.[44]

- **Admissibility of Witness Intimidation as a Prior Bad Act**: Consider an application to admit evidence of defendant's prior acts of intimidation in the direct case to show defendant's intent or motive, to explain background evidence about the case, to establish a relationship between defendant and the witness, or to explain a witness's recantation. Typically an in limine motion to admit prior bad acts in the direct case includes:
  - A description of the evidence sought to be admitted
  - Reasons why the evidence is probative, including:
    - It proves an element of the crime.
    - It demonstrates the relationship between the defendant and witness.
    - It explains the witness's behavior, including a recantation.
    - The prior bad acts are inextricably interwoven with the facts of the current case.[45]

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cumulative." *Id.* After a hearing on the issue, the court must "… engage in a balancing process which compares the rights of the defendant to cross-examination, considering the extent to which this right is infringed, with the interest of the witness in retaining some degree of anonymity." *Id.*) As an example, *see Frost*, 100 N.Y.2d at 136 (the Court of Appeals upheld the trial court's protective order of a certain witness's address and occupation following an ex parte examination of that witness citing the *Stanard* case); *cf. People v. Waver*, 3 N.Y.3d 748 (2004) (the court of appeals reversed a lower court's ruling allowing undercover police officers to testify anonymously without having followed the procedures and test outlined in *Stanard*).
Illinois: *See People v. Kliner*, 185 Ill.2d 81 (1998) (upholding a trial court's limiting defense questioning of a witness about her personal information, even though the witness and defendant were known to each other, where safety was a concern and the witness had been placed in a witness protection program).

[44] California: *See Valdez*, 55 Cal.4th at 104 (the trial court permitted the witness's to be identified by name in court but by number in the transcript).

[45] This type of motion is codified in the Federal Rules of Evidence under F.R.E. § 404(b)(2) (2009) and all states have either case law and/or statutes supporting this to some degree.
New York: *See People v. Molineux*, 168 N.Y.2d 264 (1901); *People v. Ventimiglia*, 52 N.Y.2d 350 (1981).
California: CAL. EVID. CODE § 1101(b) (West 1967).
Illinois: 725 ILL. COMP. STAT./115/7.4 (West Supp. 2007); *People v. Dabbs*, 239 Ill. 2d 277, 283 (2010).
Pennsylvania: PA. CODE § 404(b)(2) (West 2013).

- **Admissibility of the Witness's Fear of Testifying**: Though typically evidence of a witness's fear of testifying is not admissible, evidence of threats of intimidation may be admissible to either (i) explain a witness's behavior on the witness stand and to aid jurors in evaluating the witness's credibility, or (ii) as evidence of defendant's guilt. [46] Additionally, events may occur during the trial that could open the door to such testimony. For example, if the defense seeks to introduce recanted testimony of the witness, evidence of threats may be admissible to rebut the credibility of the recantation.[47]
- **Admissibility of Prior Trial Testimony when a Witness Refuses to Testify**: A witness's prior trial testimony may be admissible at a subsequent trial when the witness refuses to testify, even though the witness is available. This most often occurs in re-trials following a mistrial or reversal on appeal when a witness is going to have to testify again.[48]

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[46] California: *See Valdez*, 55 Cal.4th at 135 ("An explanation of the basis for the witness's fear is likewise relevant to the jury's assessment of his or her credibility and is well within the discretion of the trial court. For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant"). *See also People v. Scott*, No. B191227, 2007 WL 2793357 (the court allowed the prosecutor to offer evidence of intimidation to explain why witnesses were reluctant to identify appellants. Evidence of intimidation included the presence of a gang member in court wearing a threatening t-shirt, as well as graffiti saying "Snitch Blocc" in the area after witnesses were persuaded to go to the police.).
Florida: *See Jones v. State,* 385 So.2d 1042 (Fla. Dist. Ct. App. 1st Dist. 1980) (the court allowed evidence of the defendant personally threatening the witness as it was evidence of defendant's guilt); *Koon v. State,* 513 So.2d 1253, 1256 (1987) (although there was no evidence directly tying the defendant to the threats made against the witness, the court allowed evidence of the threats as it beared on the witness's credibility).

[47] Massachusetts: *See*, *e.g.*, *Commonwealth v. Watkins*, 473 Mass. 222 (2015) (defense counsel at trial did not offer evidence of the witness's recantation, and the defendant raised an ineffective assistance of counsel claim on appeal. The appellate court ruled, however, that had the defense attorney attempted to offer the witness's recantation, then the trial court would have permitted the prosecution to offer evidence that the recantation was based on threats the witness received from the defendant's brother.).

[48] New York: *See People v. Mejia*, the 4th Department Appellate Division upheld the trial court's admission of a witness's (co-defendant's) prior testimony on the prosecution's direct case, even when that witness was still available, when the witness/co-defendant refused to testify against the defendant at the retrial because the witness/co-defendant did not believe that his plea agreement with the prosecution required him to have to testify twice. The court held the witness/co-defendant in contempt for his refusal to testify and found his refusal to testify constituted "incapacity." Thereafter, the prior testimony was admitted. 126 A.D.3d 1364, 1365 (4th Dept 2015). *See also People* v. *Knowles*, 79 A.D.3d 16 (3d Dept 2010) (the Appellate Division upheld a lower court's admission of prior testimony of a witness who briefly testified at a second trial but then recanted and stated that the witness's recantation and subsequent refusal to testify constituted incapacity).

- **Closure of the Courtroom**: An in limine motion can be made to restrict public access to the courtroom in various ways.

Compelling the Witness to Testify

- **Material Witness Order**: If a prosecutor has exhausted all means of securing a witness's attendance, including issuing subpoenas without success, a material witness order can be used to compel a witness's testimony.[49] If the witness continues to refuse to cooperate, such an order can lead to the witness's incarceration.[50] This is usually reserved for the most extreme situations. Though such an order can force a witness to testify, it can irreparably damage the relationship between law enforcement and the witness. It can also be used by the defense to argue that any testimony was coerced and is, therefore, unreliable. Thus a prosecutor should evaluate the case carefully before deciding to go this direction.
  - **Alternatives to the Issuance of a Material Witness Order**: Obtaining a material witness order should be a last resort. If a witness is becoming reluctant, the prosecutor, the detective or the judge can explain the consequences of refusing to comply with a subpoena to the witness, if the witness can be found. This may encourage the witness to testify without having to issue a material witness order.
  - **Note**: A material witness order in most states requires that the witness be brought before the court and not to the prosecutor's office.[51] The application for a material witness order and its subsequent execution is usually considered part of the investigative stage of the case. Thus, a prosecutor may only have qualified immunity for these actions, which will not fully protect a prosecutor if the material witness order is executed improperly and its validity later challenged by a witness.[52]

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[49] Federal law and New York: A material witness is a person who has material information concerning a criminal proceeding. The federal government and most states have statutes authorizing law enforcement to detain a material witness. *See, e.g.*, 18 U.S.C. § 3144 (1986); N.Y. CRIM. PROC. LAW § 620.20 (McKinney 1970).

[50] New York: *See*, *e.g.*, *id.* § 620.40(2) ("The court may further fix bail to secure [the material witness's] appearance upon such date or until the proceeding is completed and, upon default thereof, may commit him to the custody of the sheriff for such period.")

[51] New York: *See*, *e.g.*, *id.* § 620.30(2).

[52] New York: If a prosecutor obtains a material witness order and the witness is not brought to the court forthwith and is instead held for the purposes of an investigative interrogation, only qualified

Jury Safety

Jurors may also be at risk of intimidation or tampering often in high profile gang cases, drug cases, and organized crime cases. Thus, prosecutors can consider a number of options to manage the threat. These steps are taken very rarely, so a supervisor should always be consulted prior to making these requests:

- **Sequestration of the Jury:** A request to sequester the jury if there is a fear of jury tampering or intimidation will keep the jury together and under guard during deliberations.[53]
- **Anonymous Jury:** A motion to empanel an anonymous jury is rare and typically reserved for extraordinary circumstances only.[54]

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immunity will apply to the prosecutor, not absolute immunity. *Simon v. City of New York*, 727 F.3d 167 (2d Cir. N.Y. 2013).

[53] All states appear to allow sequestration of jurors at certain times. For example:
New York: N.Y. CRIM. PROC. LAW § 310.10(1) (McKinney 2001) provides that jurors must be "continuously kept together" during deliberations, but § 310.10(2) states that, at any time after the jury has been charged and began deliberations, and "… after notice to the parties and affording such parties an opportunity to be heard on the record outside of the presence of the jury," the judge may order the jury to suspend its deliberations and separate for a reasonable period of time (thus allowing the jury not to be sequestered). Thus, whether a jury is going to be sequestered in New York is in the discretion of the trial judge but the prosecution and defense may make arguments either for or against sequestration. Sequestration is very rarely ordered.
Arizona: here, sequestration of a jury lies "within the discretion of the trial court." *State v. Cruz*, 181 P.3d 196, 205 (Az. Sup. Ct., 2008), 218 Ariz. 149, 158 (2008). The Arizona Supreme Court has stated, "When publicity is not sensational [or] inflammatory, there is no need to sequester the jury[,] particularly when the jury has been cautioned not to read the newspapers, listen to the radio or watch television during the trial and there is no indication that the court's instructions were violated." *Id.*
Georgia: in Georgia, the highest court ruled that the trial court did not abuse its discretion in failing to order jury sequestration in a capital case because it instructed the jury not to discuss the case among themselves or with any third parties. *Morgan v. State*, 575 S.E.2d 468, 472 (Ga. Sup. Ct., 2003), 276 Ga. 72, 75 (2003).

[54] Federal law: Federal circuit courts have allowed the use of anonymous juries, most frequently in organized crime prosecutions. *See*, *e.g.*, *U.S. v. Barnes*, 604 F.2d 121 (2d Cir. 1979). *See also U.S. v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003) (articulating five standards in determining whether to empanel an anonymous jury).
New York: There does not appear to be higher court case law on anonymous juries. In Richmond County, a Supreme Court judge denied the request for an anonymous jury, stating that N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 1997), which requires that juror names be read in open court, forbids the use of anonymous juries. *People v. Watts*, 173 Misc.2d 373, 376, 378 (Sup Ct, Richmond County 1997). The court stated, however, that a defendant *may* forfeit his right to learn the jurors' names and addresses under Section 270.15 when the prosecution presents sufficient evidence to predict that jury tampering will occur. *Id.* at 377-8.
New York's two relevant statutes dealing with juror personal information seem to conflict with one another: N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 1997) (requiring juror names to be read in open court and authorizing, in the court's discretion, jurors to complete questionnaires with personal

- **Other Safety Precautions**: Assess how the jury gets to the courtroom and where they assemble during a break in the proceedings. If these areas are shared with the defendant or his family and friends, then there might be a possibility of jury tampering. If there is no separate area for the jury to assemble, the prosecutor can request that court personnel or other law enforcement remain with the jury during times when they are in public areas. If tampering is suspected, consider obtaining surveillance videos from in and around the courthouse. This could reveal whether any jurors have been inappropriately approached.

Courthouse and Courtroom Security

A witness is at greatest danger as the trial approaches. On the day of the trial, the witness and the defendant, or the defendant's family and friends, will all be in the same place. This is a very volatile time and great caution should be taken. Various strategies can help to protect the witness in the courthouse and in the courtroom.

- **Accompany the Witness:** The witness must be accompanied at all times by an office advocate, a law enforcement official or a prosecutor who can focus on the witness's safety. This includes coming and going to the courtroom, in the courtroom, and in areas immediately outside the courtroom. Arrangements can be made to enter the courthouse through non-public entrances. Consider having the witness take extra security precautions when walking through the courthouse, such as having the witness wearing a hat and keeping his head down to avoid eye contact.

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information, with disclosure to the attorneys) *and* N.Y. JUD. LAW §509(a) (1998) (providing that juror information must be kept confidential and those seeking access must apply to the Appellate Division). (Note: one court has cited the Judiciary Law as the basis for denying the press, who petitioned for juror names and addresses after the close of a trial, the right to that information. *See Matter of Newsday, Inc. v. Sise*, 71 N.Y.2d 146 (1987), *affirming 2nd Dept. decision*; while another court has stated that the Judiciary Law is overly burdensome, and it authorized a defense counsel the right to secure the names and addresses of potential jurors several weeks before trial to enable counsel to investigate the jurors and advance his clients' right to an impartial jury. *People v. Perkins,* 125 A.D.2d 816, 818 (3d Dept 1986). Thus, whether a prosecutor can empanel an anonymous jury in New York may very much depend on the court hearing the case.)

California: Courts in California apply federal law in recognizing that anonymous juries may be constitutional when "warranted by the facts." *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1092 [69 Cal.Rptr.2d 576], *citing U.S. v. Salvatore*, 110 F.3d 1131, 1143-1144 (5th Cir. 1997).

Michigan: In Michigan, the Court of Appeals upheld a trial court's referral to jurors by number during voir dire to "protect jurors given defendant's violent criminal history," and that, in doing so, "jurors might benefit from measures to assure that they would not be harassed by the media and others." *People v. Good*, 2013 Mich. App. Lexis 1608 (2014).

- **Witness Rooms**: Some courtrooms have a witness room where witnesses can be kept separate from those waiting outside the courtroom. If there is a witness room, the witness should be brought to the room through the most secure route. If there is no witness room, then a prosecutor must seek out a secure space in advance of trial where the witness can wait away from the public. Even if cameras and phones are banned from a courtroom, there will be people in the hallways that can take pictures of the witness.

- **General Security from Court Personnel:**
  - **Brief Court Personnel**: Brief court officers and other courtroom staff about the possibility of intimidation or tampering from the defendant or his family and friends both inside and outside the courtroom during the witness's testimony. The court should have specially trained personnel that can deal with volatile situations.
  - **Extra Staff**: Extra staff may be needed both inside and outside the courtroom. Undercover security inside and outside of the courtroom may also be useful.
  - **Surveillance Video Outside the Courthouse**: If the courthouse has video surveillance of the perimeter around the courthouse or inside the courthouse and intimidation is suspected, obtain the recordings to review them for possible evidence of intimidation. These recordings can also reveal jury tampering if the jury is approached while waiting outside the courtroom. The court may require a subpoena to produce the recordings.[55]
- **Security at the Courtroom Door**: Make a request to the court or court personnel for enhanced security for the courtroom. Various measures can be taken, including:

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[55] A number of courts around the country have installed video camera surveillance due to violence in and around the courthouse.
New York: *See*, *e.g.*, *Security Camera Network Monitors Courthouses*, UCS BENCHMARKS, JOURNAL OF THE NYS UNIFIED COURT SYSTEM (Spring/Summer 2005), https://www.nycourts.gov/publications/benchmarks/issue1/cameras.shtml.
Arkansas: *See*, *e.g.*, *Arkansas Courthouses to Increase Video Surveillance, Access Control*, SECURITY SALES & INTEGRATION (Jun. 24, 2015), http://www.securitysales.com/article/arkansas_courthouses_to_increase_video_surveillance_access_control/access.
Maryland: *See*, *e.g.*, *Courthouse Security*, Sheriff's Office, Howard Co., M.D., http://www.co.ho.md.us/displayprimary.aspx?id=4294968029 (last visited Mar. 16, 2016).

- **Check Identification**: Court officers can ask for a valid form of identification for all individuals seeking to enter the courtroom.[56] The officers can also record the names of the people entering the courtroom.
- **Check for Metal Objects**: Court officers can use magnetometers or wands to search for metal objects on those individuals entering the courtroom.[57] Though the public may go through a magnetometer in the courthouse lobby, phones are usually returned. Additional screening at the courtroom door may be used to detect any unauthorized recording devices.
- **Exclude Cell Phones and Electronic Recording Devices from the Courtroom:** A motion to preclude cell phones and electronic recording devices inside the courtroom can be made.[58] This motion can be made even without a specific threat if there is general evidence that the defendant or the defendant's associates may want to intimidate witnesses. Simply holding up a phone and taking a photograph can easily convey a threat from someone in the courtroom. If possible, these

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[56] Massachusetts: In *Commonwealth v. Maldonado*, 466 Mass. 742 (2014), the Massachusetts Supreme Judicial Court upheld a trial court's order requiring that persons entering the courtroom provide identification to the court officers and sign in, as a permissible, partial closure of the courtroom. The court only made checking IDs a condition of entry and did not make any inquiry about the purpose for entering the courtroom (aside from seeing if they were on the witness list, in which case they were barred.)

Indiana: *See Williams v. State*, 690 N.E.2d 162, 170 (1997) (upholding court officer's right to check IDs and require a sign-in for those he did not know. This was not deemed unfairness or impinging on the defendant's 6th Amendment rights).

[57] Most courts in the US have adopted security measures to scan for metal objects on persons entering the courthouse. *See* Mark Waite, *The Case for Metal Detectors*, PAHRUMP VALLEY TIMES (Oct. 24, 2003), http://archive.pahrumpvalleytimes.com/2003/10/24/news/metaldetectors.html.

In jurisdictions that do not have magnetometers, court officers can use wands to look for metal objects on persons entering a courtroom on an "as needed basis." Kevin Grasha, *What Happened After Testimony Proved Deadly*, CINCINNATI.COM (May 18, 2015), http://www.cincinnati.com/story/news/2015/05/16/unprecedented-violence-leads-courthouse-security/27378409/.

[58] Some courthouses have banned cell phones, laptops and other electronic communication devices.

Example of state courthouse ban:

Illinois: *See "Frequently Asked Questions," Cell Phone and Electronic Communication Device Ban*, STATE OF ILLINOIS, CIRCUIT COURT OF COOK COUNTY, http://www.cookcountycourt.org/HOME/CellPhoneElectronicDeviceBan.aspx (banning phones and electronic communication devices at the Hon. George N. Leighton Criminal Court Building at 2600 South California Avenue in Chicago) (last visited Mar. 16, 2016).

Example of federal courthouse ban:

Federal, S.D.N.Y.: *See "Hours," Daniel Patrick Moynihan United States Courthouse New York, New York*, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, http://www.nysd.uscourts.gov/site_manhattan.php (prohibiting cell phones, tape recorders and cameras) (last visited Mar. 16, 2016).

devices should be checked in with court personnel before entry into the courtroom is allowed. Note that with evolving technology, photographs and videos can be taken with a variety of devices that do not look like cameras, so court officers and law enforcement should be extra vigilant.

- **Security Inside the Courtroom**:
  - **Indicia of Intimidation in the Courtroom**: In the courtroom, intimidation and threats can be conveyed in many ways, including the gathering of an unusually large group of individuals from a rival group, passing of notes, hand gestures, face making, and word mouthing in the direction of a witness. A clear threat can be communicated when an associate of the defendant brings a family member of the witness into the courtroom while the witness is testifying.
  - **Prohibit the Use of Cell Phones and Recording Devices in the Courtroom**: If the court will not authorize the exclusion of cell phones and recording devices from the courtroom, a prosecutor can request that the court instruct members of the public in the courtroom that they cannot use cell phones in any way in the courtroom and that no photographs or recordings may be taken. The court should repeat the admonition at the beginning of every court session.
  - **Law Enforcement Presence in the Courtroom**: Consider having extra law enforcement presence inside the courtroom, including Gang Intelligence officers or District Attorney's investigators.[59] With the permission of the court, law enforcement may want to take photographs of the people in the audience or outside the courtroom.
  - **Closure of the Courtroom During the Witness's Testimony:** Upon motion by the prosecutor, the court can order the courtroom closed to the public to protect the safety of the witness. The court can close the courtroom to everyone but the parties, or the court could order a partial closing of the courtroom that restricts only certain people from the courtroom. (See Hearing section for discussion of Closing the Courtroom.)
  - **Press in the Courtroom:** If there are concerns about witness safety, the prosecutor can oppose any recording in the courtroom. If, however, the press is allowed in the courtroom, the prosecutor can request that the court order the press not to photograph a witness, name a witness,

[59] New Jersey: The presence of increased police security has been held *not* to violate the defendant's right to a fair trial by an impartial jury. *See State v. Zhu*, 165 N.J. 544 (2000) (finding no unfair bias in the presence of uniformed officers to increase courtroom security during a murder trial, and granting wide discretion to the trial judge in determining the appropriateness of security measures within the courtroom).

give the witness's gender or describe a witness who may be at risk of intimidation.[60] The prosecutor's press officer can also prepare the press for these restrictions.

INCARCERATED WITNESSES

Incarcerated witnesses pose particular challenges for prosecutors and law enforcement. Whether a prosecutor seeks to have the incarcerated witness testify about first hand knowledge of the defendant's commission of the crime itself or to describe defendant's incriminating statements made to the witness in an institutional setting,[61] incarcerated witnesses are at great risk of intimidation since they are housed with other defendants. Thus, a prosecutor must carefully plan and coordinate with police and correction officers to ensure that the witness is protected from intimidation and violence while in jail, during transportation to the courthouse and while testifying. Protecting an

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[60] While courtrooms are presumptively public, most states have statutes or case law allowing the general public, which includes the press, to be precluded from either photographing or videotaping in the courtroom, when certain conditions are met.

New York: in New York, the rules of the Chief Judge preclude photographs, films or videotapes, or audiotaping, broadcasting or telecasting in a courtroom and courthouse unless the Chief Administrator of Courts or his/her designee gives permission. ADMIN. RULES OF UNIFIED COURT SYSTEM AND UNIF. RULES OF TRIAL COURTS, Part 29, § 29.1(a) (1996). Permission may be granted for several reasons, including, "there will be no compromise of the safety of persons having business in the courtroom or courthouse." *Id.* at § 29.1(a)(2).

Pennsylvania: here, judges should prohibit broadcasting, televising, recording or taking photographs in the courtroom, except that the judge may authorize the photographic or electronic recording and reproduction of appropriate court proceedings when certain conditions are met, including, when "the parties have consented; and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproductions." 201 PA. CODE RULE 1910(C)(2) (Supp. 2016).

Mississippi: in Mississippi, court rules preclude the photographing and videotaping of certain types of persons, including "police informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse." MISS. RULES FOR ELECTRONIC AND PHOTOGRAPHIC COVERAGE OF JUD. PROCEEDINGS Rule 3(d) (2003).

[61] Federal: Note that before admitting testimony of an incarcerated witness/informant about incriminating statements defendant made to him/her in a jailhouse setting, the court will do an analysis to decide whether the informant/witness was acting as an agent for the prosecution. *See Massiah v. U.S.*, 377 U.S. 201 (1964). If informant was acting on his own volition and provided statements about defendant's confession voluntarily to law enforcement, these statements are generally admissible. *Id.*

New York: "If the government is more than a passive auditor, such as where it actively inveigles a codefendant or fellow prisoner to inform … , the statements made to the informer should be suppressed ..." *People v. Cardona*, 41 N.Y.2d 333, 335 (1977). Courts have allowed testimony from known and previously used prosecution jailhouse informants where the record supported that the prosecution "passively received" the information the day before the trial began. *People v. Young*, 100 A.D.3d 1427, 1428 (4th Dept 2012).

incarcerated witness can be difficult, however, as it is very hard to know who in the institutional setting may pose a threat to the witness. Simply notifying authorities in the institution about the need for security can reveal the witness' status as someone who will be testifying. That alone can put the witness at risk. In order to protect an incarcerated witness, prosecutors and law enforcement should consider:

- **Separation Orders**: The prosecutor can obtain a "Separation Order"[62] so the incarcerated witness is always kept separate from the defendant against whom he is testifying. The existence of such an order, however, may pose a threat to the testifying witness as it reveals that he will be testifying and against whom. Greater precautions may need to be taken, as necessary.
  - **Different Jail System**: To provide greater safety, Separation Orders can require that the incarcerated witness be housed in a different facility in the same jail complex, or that the incarcerated witness be moved to a jail in a different county.[63] There are limited slots in jails from neighboring counties where incarcerated witnesses can be housed.
  - **Transportation to Court and Lodging in Court**: The separation order should include keeping the defendant and witness from going to court on the same bus. Similarly, arrangements must be made to keep the defendant and the incarcerated witness separate as they are being held in the courthouse.
- **Monitor Jail Calls, Mail and Visitor Logs**: Threats against the incarcerated witness may be uncovered by monitoring the incarcerated defendant and his associates. To uncover efforts to intimidate the witness, prosecutors can review the defendant's outgoing jail phone calls[64], request

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[62] Anderson, *supra* note 7 at 6.

[63] New York: The New York State Correction Law Section 504 provides for an inmate transfer to another facility under a Substitute Jail Order ("SJO"). *See* N.Y.S. CORR. LAW § 504 (2013) The New York City Code Rules and Regulations states that the parameters for which an SJO may be obtained include overcrowding, inability to maintain proper classification, natural or civil emergency, inmate disturbance, transfer to provide medical or mental health services, and safety, security and essential service delivery concerns for an individual or group of inmates. 9 N.Y.C.R.R. § 7300.5(a) (2016).

[64] There is ample case law supporting rules for jails and prisons that permit the recording and review of an inmate's outgoing phone calls (non-privileged).
Federal law: *See*, *e.g.*, *U.S. v. Willoughby*, 860 F.2d 15, 22 (2nd Cir. 1988).
California: *See People v. Kelley* (2002) 103 Cal.App.4th 853, 858 [127 Cal.Rptr.2d 203] ("So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent".).
New York: *See Jordan v. Schriro*, 96 A.D.3d 574 (1st Dept. 2012) (upholding DOC's recording of inmate telephone conversations under the regulatory authority of 40 R.C.N.Y. § 1-10(h) (2015),

to set up a "mail watch" or a "mail cover" to review the defendant's incoming or outgoing correspondence,[65] and subpoena records of defendant's visitor logs.
    - **Note**: While most jail and prison facilities monitor inmate phone calls for institutional security, there may be limits on the ability of a prosecutor to use these statements at trial if the inmate was previously unaware that the phone conversations could be disclosed to the prosecutor.[66]
- **Get Information from the Incarcerated Witness**: Ask the incarcerated witness if he knows of people in the institution that may pose a risk. Since people cycle in and out of a jail, the risks can change from day to day.
- **Protective Custody**: Consider requesting that the witness be placed in protective custody. This has pros and cons. Though the witness will be separated from the regular jail population, the witness could be isolated and alone, which can be a psychological burden for the witness. Protective custody can also be a flag to other inmates that the witness is cooperating and will be testifying.[67]

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which expressly authorizes it to "listen to" or "monitor" inmate telephone conversations, as permitting (also the) record[ing] such conversations).

[65] Federal law: Reading non-privileged inmate mail, whether incoming or outgoing, is generally permitted if it furthers a legitimate penological purpose. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). Some jails and prisons allow for the creation of a "mail cover" or a "mail watch" so that prosecutors can directly read an inmate's non-privileged correspondence.
California: *See*, *e.g.*, INMATE MAIL POLICY, CONTRA COSTA CO. § 10(a) (policy allowing a mail watch to read non-privileged outgoing inmate mail).
Nearly every jail and prison, at a minimum, has policies and procedures clearly permitting the opening, inspection and reading of outgoing inmate mail pursuant to a search warrant or order by a warden of the facility.
New York: *See*, *e.g.*, the New York City Department of Correction's Directive 4001R-B, titled "Inmate Correspondence," states that non-privileged incoming and outgoing correspondence may not be opened or read except under certain circumstances, pursuant to a lawful search warrant or order by a warden "articulating a reasonable basis to believe that the correspondence threatens the safety or security of the facility, another person, or the public." N.Y.C. DEPT. OF. CORR. DIR. 4001R-B §§ (IV)(C) and (E)(1) (June 16, 2008). They also provide that privileged incoming or outgoing mail may be read only following a search warrant or court order. *Id.* 4001R-B §§ (IV)(D) and (E)(5).

[66] New York: *See*, *e.g.*, *People v. Johnson*, No. 37, 4/5/16, N.Y. Ct. of Appeals. Though the claim was unpreserved, the Court of Appeals noted that if the defendant was not notified that his jail calls would be introduced in a prosecution, then they may have been inadmissible. The court suggested that the concern could be cured if there was an express notification to the defendant that the calls could be turned over to the District Attorney.

[67] Every local jail and state prison provides protections for inmates who are at risk, often called "Protective Custody" (also known as "PC").
New York: In New York City, for example, the Department of Correction enacted Dir. 6007R-A, which codifies the policies and procedures for having an inmate placed into PC, including the

- **Housing the Incarcerated Witness Under a Different Name**: Consider having the witness incarcerated under a different name. Prosecutors should contact their local corrections department for advice and procedures on how this can be done.
- **Commissary:** It may be helpful to provide some commissary funds for the incarcerated witness**.** This will provide the witness with some autonomy and he will be less susceptible to pressure from others**.** The amount of funds deposited in the Commissary account must be revealed to the defense.
- **Moving Incarcerated Witness to Another County or to Federal Custody:** It may be possible to move an incarcerated witness to a jail in a nearby county. Some jails have space designated for this purpose. In rare instances, the witness may be moved to federal custody, particularly once the incarcerated witness has testified. The federal government has some facilities that are kept secret from even the prosecutor.

UNCOOPERATIVE WITNESSES AND EVIDENTIARY CONSIDERATIONS

If a witness becomes uncooperative or disappears, there are strategies for compelling the witness to testify or for introducing prior sworn statements of the witness.

- **Subpoena the Witness**: A reluctant witness should always be subpoenaed. As previously stated, this may encourage the witness to appear and, if not, the failure to comply with the subpoena can be the basis for seeking a material witness order.
- **Admissibility of a Witness's Prior Statement:** When a witness has become completely uncooperative or unavailable due to the actions of the defendant or his associates, the prosecutor can move to admit the witness's prior sworn statements in certain circumstances. In some jurisdictions this is called the doctrine of "Forfeiture by Wrongdoing."[68] Generally, in order to

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creation of housing for PC inmates who cannot be safely housed in less restrictive setting. *See* N.Y.C. DEPT. OF CORR. DIR. 6007R-A § II(A) (May 24, 2010). It is important to consider, prior to placing an incarcerated witness in PC, that PC generally results in the inmate/witness being kept in a more restrictive type of housing. Thus, prosecutors are advised to be familiar with the internal rules and procedures for placement in PC in jails and prisons in their respective jurisdictions and to communicate clearly the realities of being in PC with a witness.

[68] Federal law: Testimonial, out-of-court statements by witnesses are generally barred, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2003). (Crawford lays out examples of what statements are

use a witness's prior sworn statement, a prosecutor must make a motion to admit the statement. Typically, the prosecutor will have to prove at an evidentiary hearing outside the presence of the jury by either a preponderance of evidence or clear and convincing evidence (depending on the state) that the defendant caused the witness to be unavailable to testify.[69]

- **Motion on Notice**: The prosecutor must advise the court and defense counsel of the intention to offer the prior sworn statements so the defendant has a fair opportunity to respond.[70] The motion must provide

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considered "testimonial," which includes, but is not limited to, affidavits, custodial examinations, prior testimony that defendant did *not* cross-examine, statements taken by police officers during interrogations. *Id.* at 51 – 53.) However, when the witness is unavailable specifically due to the actions of the defendant or the defendant's associates, such as having the witness threatened or murdered, this rule does not apply and the defendant has waived his 6th Amendment right of confrontation. *See Davis v. Washington*, 547 U.S. 813, 833 (2006) (in recognizing the doctrine of forfeiture by wrongdoing, "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the [confrontation clause] does not require courts to acquiesce. While defendants have no duty to assist the [s]tate in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system").

[69] New York: In New York, the prosecutor must establish at a Sirois hearing by clear and convincing evidence that the witness is unavailable through defendant's intentional misconduct. *Holtzman v. Hellenbrand and Sirois*, 92 A.D.2d 405, 415 (2nd Dept. 1983). *See also People v. Geraci*, 85 N.Y.2d 359, 366-368 (1995) (affirming clear and convincing evidence standard, but also stating that the standard of proof imposed on the prosecutor has to be "high enough to assure a great degree of accuracy in the determination of whether the defendant was, in fact, involved in procuring the witness's unavailability for live testimony"). Note: Recently the New York Court of Appeals effectively raised the prosecutor's burden at a Sirois hearing, although that was not specifically stated. *People v. Dubarry*, 25 N.Y.3d 161 (2015). In People v. Dubarry, a day before the witness was called to testify, members of the defendant's religious institution approached the witness's brother who accused the witness of snitching, and the sister of the witness stated she heard through a third party that the religious group suspected the witness of snitching. *Id.* at 166. The court held that this evidence was insufficient to support an inference that the defendant had personally "planned or engineered" the threats or otherwise engaged in "misconduct." *Id.* at 171. According to the Court, even if it could be inferred that a communication concerning the eyewitness's prospective appearance had occurred, the inference that the communication was "intended and structured to procure the witness's unavailability" was "pure speculation." *Id.* at 172.

California: California has codified a clear and convincing standard under §1350 of the California Evidence Code; yet the California Supreme Court has repeatedly stated that the standard of proof for forfeiture by wrongdoing is a preponderance of the evidence. *The Prosecutors' Resource: Forfeiture by Wrongdoing*, AEQUITAS, 4 (Oct. 2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf, *referencing People v. Giles*, (2007) 40 Cal.4th 833, 838 n.8 [55 Cal.Rptr.3d 133], *vacated on other grounds*, 554 U.S. 353 (2008). *See also People v. Zambrano*, 163 P.3d 4, 50 n.21 (2007), *overruled in part by People v. Doolin*, (2009) 45 Cal.4th 390, 421 [87 Cal.Rptr.3d 209] (overruled regarding conflict of interest law standards); *People v. Banos* (2009) 178 Cal.App.4th 483, 492 n.12 [100 Cal.Rptr.3d 476] (declining to resolve apparent conflict, but observing that preponderance of the evidence appears to be the standard under California law), *cert. denied* 560 U.S. __ (2010).

[70] *The Prosecutors' Resource: Forfeiture by Wrongdoing*, *supra* note 70 at 4.

facts that show a "distinct possibility"[71] that the defendant caused the witness to become unavailable.

- **Hearing**: A hearing may be ordered to determine whether the prior statement is admissible. The hearing will address the witness's unavailability to testify and the connection of the defendant to that unavailability.[72]
  - **Proving Unavailability to Testify:**
    - **The Witness Testifies at the Hearing:** If the witness is physically available, the witness can be called to say that he refuses to testify or no longer remembers the event in question. This will establish "unavailability."[73] Additional evidence will be needed to establish that the defendant caused the witness's refusal to cooperate.
    - **The Witness Does Not Testify at the Hearing:** If the witness has disappeared entirely, evidence must be presented to show that reasonable efforts were made to locate the witness.[74]
  - **Evidence of the Defendant's Involvement in the Unavailability**: Whether the witness testifies or not, the prosecutor must establish by

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[71] Federal law: *U.S. v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982).
New York: *See Holtzman*, 92 A.D.2d at 415 (requiring the People to allege facts demonstrating only a "distinct possibility" that defendant's misconduct caused a witness not to testify to obtain a hearing, and permitting admission of grand jury testimony upon proof of misconduct and the absence of the witness in a manner suggestive of causation).

[72] New York: *See Geraci*, 85 N.Y.2d at 363-364 and 370-371 (the Court of Appeals upheld the trial court's finding that a witness's prior grand jury testimony was admissible on the prosecution's direct case where the defendant was "responsible for or had acquiesced in the conduct that rendered [the witness] unavailable for trial." The Court of Appeals discussed the trial court's conclusion, based on "concrete facts from which its conclusions naturally and reasonably could be drawn," namely, where prosecution investigators testified at the hearing that they were told that the defendant approached the witness after the indictment and asked him to come with defendant and speak to his lawyer, where the witness complained to investigators that "they" had a copy of his testimony and that he had been ratted out, and where the witness had received money from the defense and was told he would received more money when the trial was over. At the hearing, the witness denied nearly everything the prosecution investigators told the court and also denied having witnessed the crime).

[73] "Unavailability" in this context means that the witness persists in refusing to testify despite court orders to do.
New Jersey: *See*, *e.g.*, *State v. Byrd*, 198 N.J. 219 (2009). This testimony will be relevant in conjunction with other evidence of threats and intimidation to prove the defendant caused the witness to become, essentially, uncooperative. Other evidence may include law enforcement witnesses, third-party witnesses, such as, family members or advocates who could testify about prior conversations about defendant with witness or prior interactions, phone logs showing defendant phone calls, and letters from defendant to witness.

[74] Typically, a state investigator would testify as to the efforts made to locate the witness and procure testimony.

either a preponderance of the evidence or clear and convincing evidence (depending on the law in the requisite state) that that the defendant caused the unavailability of the witness. In addition to evidence regarding the current witness, the judge may allow evidence of prior acts of intimidation by the defendant or intimidation occurring during the trial.[75]

POST-TRIAL ISSUES

A trial conviction does not end the possibility of witness intimidation. After conviction, a defendant or the defendant's associates may seek retaliation or attempt to have a witness recant their incriminating testimony. These efforts can occur decades after a conviction. Some strategies to prevent post-conviction intimidation and tampering include:

- **Post-Trial Preparation of the Witness**: After obtaining a conviction, the prosecutor should alert the witness to the possibility that the witness might be contacted by the defendant, the defendant's associates or defense counsel and that they have a right not to speak with them, if they wish. Request that the witness notify the prosecutor of such contacts.
- **Continuing Contact with the Witness**: Where intimidation is a possibility, the prosecutor or the office advocate can maintain contact with the witness to make sure they are safe after the trial. Though the trial is over, the witness may still need services or assistance with relocation.
- **Document Any Efforts to Intimidate the Witness**: Any efforts to intimidate the witness should be documented. Consider whether witness intimidation charges can be brought against the defendant, or whether the defendant's action could be the basis for a parole or probation violation. Additionally, a prosecutor should consider the need to offer further help to protect a witness, such as relocation, counseling, and other assistance offered earlier in the case.
- **Recantations:** If the witness recants after a conviction, the matter should be immediately investigated. Determining whether the defendant's actions led to the recantation should be part of the investigation. Phone records, jail calls, correction visitor logs and social media can all be fruitful avenues for

[75] Michael James, *Witness Says Death Threat Made in Court, "I'm Going to Kill Your Family,"* BALTIMORE SUN (Oct. 16, 1997), http://articles.baltimoresun.com/1997-10-16/news/1997289120_1_darnell-jones-anthony-jones-ross. Here a defendant threatened the witness in court during a break while he was testifying, which was overheard by U.S. Marshalls and other attorneys, and the court allowed the witness to tell the jury that the defendant had threatened him.

the investigation. Recantations will likely trigger post-conviction litigation, such as a motion by defendant for a new trial,[76] and should be immediately conferenced with a supervisor to discuss the disclosure obligations to the defense.

- **Relocating the Witness:**
  - **Local Relocation**: If there is continuing concern about retaliation against the witness and his family, the witness may be moved to another housing development or another part of the city. Unfortunately, it is hard to quickly orchestrate such a move, so planning and involvement of multiple agencies may be necessary.
  - **Federal Witness Protection Program**: The Federal program is rare in state cases and is used in only the most extreme circumstances. The program will provide the witness with a completely new identity, relocate him in a new jurisdiction, and requires severing all ties with friends and family members. In order to enter the relocation program, the witness must pass a polygraph and take a psychological test to make sure that they are able to make such a break with their past. Note that incarcerated cooperating witnesses could serve their time out in a federal facility if they meet the criteria for the Federal program. This may be a good solution for protecting incarcerated cooperating witnesses who testify in state cases.

[76] States will consider evidence of threats of intimidation against a witness when considering a defendant's motion for a new trial based on the witness's post trial recantation to evaluate the veracity of the recantation.
New York: Courts consider a defendant's motion for a new trial under N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1983), which includes the discovery of "new evidence."
New Mexico: *See State v. Sena*, 105 N.M. 686 (1987) (after trial, a witness recanted and stated that she committed perjury in her trial testimony and that defendant never confessed to her. The court denied defendant's motion for a new trial, however, and found that there was evidence that defendant's family threatened violence against the witness and coerced her recantation, thus the recantation was deemed not credible).