VOLUME 51 / NUMBER 1 • MARCH 2018

A PUBLICATION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

The PROSECUTOR

MICHAEL O. FREEMAN
NDAA President

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THE IMPORTANCE OF A CONVICTION INTEGRITY UNIT

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The Prosecutor encourages its readers to submit articles of interest to prosecutors for possible publication in the magazine. Send articles to Nelson Bunn, nbunn@ndaajustice.org.

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View *From the Hill*

By Nelson O. Bunn, Jr.
NDAA Executive Director

Nelson O. Bunn, Jr.

Congress is fully engaged in the circulation of Dear Colleague letters supporting appropriations for programming across government agencies. As we get closer and closer to the election, fewer and fewer pieces of legislation will move in either chamber with more messaging bills being introduced.

As always, NDAA members are encouraged to contact Nelson Bunn on any policy or legislative issues that arise. He can be reached at nbunn@ndaajustice.org or at 703-519-1666.

Below is a snapshot of issues acted on since the last update to NDAA members:

Appropriations

- Congress passed an omnibus spending bill to avert a government shutdown that would have occurred on March 23. The omnibus funds the government through the end of the current fiscal year ending September 30, 2018.

- A Dear Colleague letter is circulating in the Senate in support of the John R Justice Student Loan Repayment Program. The letter is being led by Senator Inhofe (R-OK) and Senator Durbin (D-IL).

- A Dear Colleague letter is circulating in the Senate in support of the Byrne Justice Assistance Grant (JAG) program. The letter is being led by Senator Grassley (R-IA) and Senator Cantwell (D-WA).

Electronic Evidence Issues

- NDAA recently signed a letter with other national law enforcement groups in support of the CLOUD Act to address the issue of data stored in overseas servers (Microsoft case issue), but warning against any attempts to attach the Email Privacy Act to the legislation, which would update the Electronic Communications Privacy Act (ECPA).

- NDAA recently joined with several other law enforcement organizations in meeting with staff at

the White House regarding electronic evidence access and the need to balance security and privacy concerns with any legislation moving forward in this space.

Forensic Science

- NDAA continues to push congressional offices to cosponsor legislation crafted by NDAA to authorize a carve-out of 5-7 percent of funding from a portion of the Debbie Smith DNA Backlog Elimination Act to enhance the capacity of State and local prosecution offices to address the backlog of violent crime cases in which suspects have been identified through DNA evidence. The legislation has garnered support from numerous stakeholder groups. To learn more, check out the one-pager for the legislation.

- On March 19, the chair of NDAA's Forensics Working Group attended a Rapid DNA Symposium hosted by the FBI in Washington, DC. As a follow-on to that meeting, NDAA will be participating in at least one task force to look at ways to move forward with rapid DNA technology.

Human Trafficking

- Bipartisan legislation recently passed both chambers of Congress to amend the Communications Decency Act to hold companies liable for facilitating online sex and human trafficking. NDAA previously sent a letter to House leadership encouraging them to support the legislation and accept an amendment adding important provisions from the Senate version of the legislation (SESTA) to the broader package.

- NDAA attended a reception in the Capitol with Senators and other key stakeholders to acknowledge all the work that went into the passage of the Fight Online Sex Trafficking Act.

Miscellaneous

- NDAA was invited to testify at a recent Senate Judiciary Committee hearing on reauthorizing the Violence Against Women Act (VAWA). San Diego County Deputy District Attorney and Chief of the Family Protection Division, Tracy Prior, testified on behalf of NDAA and highlighted the prosecutor perspective on protecting victims and best practices from the field in prosecuting domestic violence cases. Tracy's full testimony can be found here.

- In the coming weeks, members of the Senate plan to introduce reauthorization language for the Victims of Child Abuse Act. NDAA has been asked to review the legislation and will be providing staff with feedback.

Questions or feedback: Please contact Nelson Bunn at nbunn@ndaajustice.org or at 703-519-1666.
For a list of the NDAA Legislative Committee members, please visit
http://www.ndaajustice.org/members/pdf/ NDAA%20Committees-2016-2017-v7.pdf.

The Prosecutor

The Opioid Epidemic and White Collar Drug Users: Spotting the Subtle Signs

Wendy L. Patrick

By Wendy L. Patrick

The investigation of non-violent or white-collar crime often involves interaction with suspects who are drug users of a different type than those typically encountered on the street. "White collar" users might be flying high right under the well-trained noses of their coworkers. Literally.

While many people are able to smell alcohol and marijuana from a mile away, most people cannot detect the symptomology of opiates. This is particularly the case when dealing with prescription drugs as many users have developed a tolerance and don't show visible signs of addiction or substance use. Facing this reality is important, because stereotyping is rampant when it comes to making on the job judgments about what type of suspects, victims, and witnesses use drugs.

White Collar Users Continue "Business as Usual"

For white collar users, opiate addiction is created and maintained not by a drug dealer, but a doctor. Many people become hooked not through a crooked pill mill clinic, but a legitimate pain medication regimen, which leads to unintended consequences due to the misconception that "legal means safe."

The resistance to self-identifying as having a problem with prescription drugs causes many users to continue to show up to work as if nothing has changed, while suffering from compromised judgment, emotions, and manual dexterity—including their ability to operate a vehicle safely while driving to and from work each day.

Investigating cases involving such individuals requires a more detailed examination of subtle signs of impairment we might not otherwise spot because these white-collar witnesses do not fit the profile of a drug addict. Yet in all instances, the drug use by the individual impacts public safety and those in the environment around them.

Drugs Increase Danger

In the field, threat assessment requires quick decision making when confronted with potentially dangerous people, especially when they are under the influence. Many of us have seen devastating crimes

Wendy Patrick is a San Diego Deputy District Attorney in the Special Operations Division. She is president of the Association of Threat Assessment Professionals (ATAP) San Diego Chapter, and an ATAP Certified Threat Manager. She lectures about threat assessment and public safety both domestically and internationally.

perpetrated by suspects high on methamphetamine or PCP.

Yet, so-called "hard drugs" are not the only substances that compromise public safety. "Party" drugs, "designer" drugs, prescription drugs, and newly legalized drugs are involved in a significant amount of criminal activity. Opiates now fall into this same category.

While not always observable, people under the influence of opiates frequently suffer from compromised attention spans and poor judgment not only at work, but also throughout the course of their day. Driving, childcare, and other routine, daily activities can be impacted, resulting in unfortunate, sometimes tragic consequences. Withdrawal, especially after sustained heavy use, also poses a risk to safety as individuals look to acquire their next fix, often times through theft and other offenses.

As law enforcement professionals, we pride ourselves in our ability to spot strangers under the influence, focusing on physical symptoms such as dilated pupils, dry mouth, or muscle rigidity.

Detecting Potentially Compromised Employees

As law enforcement professionals, we pride ourselves on our ability to spot strangers under the influence, focusing on physical symptoms such as dilated pupils, dry mouth, or muscle rigidity. Unfortunately, users of opiates don't necessarily exhibit the common signs law enforcement professionals have been trained to detect throughout their careers.

Opiate abuse off the clock is manifested by behavioral changes on the clock. Assuming a baseline of familiarity with coworkers and staff, here are some potential signs to look for:

- ***Decreased productivity:*** Reduction in the volume of assignments performed can be a consequence of compromised concentration and alertness.
- ***Quantity over quality:*** At the other end of the spectrum, an increase in routine, mindless tasks can masquerade as productivity, when it is actually a cover for reduced output.
- ***Disassociation as a disguise:*** Opiate abuse can be a lonely experience, manifested in disassociation from lunch/workout partners and colleagues.
- ***Alienation of others:*** One step beyond disassociation is alienation, where a co-worker´s increased aloofness may signal dependence-fueled defensiveness and distrust.

We Cannot Say Something Unless We See Something

The proliferation of opiate abuse has required law enforcement professionals to master an expanded range of symptomology. Yet, even the most pronounced visual or behavioral indicators will fly under the radar if no one is paying attention.

While a swerving car on the freeway at midnight captures our full attention, more subtle occurrences in the workplace are often overlooked or go unnoticed. Because opiate symptomology can be subtle, its detection requires a greater amount of attention.

The bottom line is that although not everyone in the law enforcement community is a certified drug recognition expert (DRE), we should all be familiar with common signs and symptomology of opiate use. We should make it a point to look and pay attention to our surroundings and those individuals we interact with on a daily basis in our lives. Let us all be good neighbors and work together to battle this epidemic.

Editor's note: *Portions of this text were published in* Law Enforcement Quarterly.

The Prosecutor

Atlanta Area DA: We Need to Do Something about Gangs

Vic Reynolds

Michael Scott Carlson

By Vic Reynolds and Michael Scott Carlson

Editor's Note: This article first appeared on MerionWest.com on 2/20/2018.

Even a cursory examination of American gang crime undeniably establishes that our country is in a state of crisis. In 2011, the federal government, in statistics that are widely regarded as "lowballed" and plagued by underreporting, estimated the number of gang members in the nation at 1.4 million. This represented a rise in 400,000 gang members from just two years prior. Sounding even greater alarms, academic studies place youth gang membership at triple the federal calculations.

This monstrous population of gang members is hauntingly matched by gangs dominating the very crimes Americans fear most. Federal reports determine that criminal street gangs are responsible for an average of 48 percent of violent crime in a majority of jurisdictions and up to 90 percent in others. In terms of drugs, United States government assessments conclude that gangs are America's prevailing street-level distributor of illegal narcotics. Another federally-funded study revealed that an estimated 85 percent of sex trafficking was gang-related.

Can it be any wonder, then, that, in 2016, the Federal Bureau of Investigation estimated the number of murders in the United States rose 8.6 percent from 2015, and 16.1 percent from 2012?

Commensurate with the pervasive ascendancy of gang-motivated crime is another sobering reality: the lack of political and media attention that gang criminality receives. Federally, there is no specifically tailored gang prosecution law on the books. Many state attorneys general do not prosecute gangs or gang crime. Even with high-profile congressional hearings, no one appears to contemplate an investigation into whose failings are responsible for the explosion of gang membership and skyrocketing levels of gang crime.

Regardless of any perceived political leanings, refusal to accurately report on gang crime seems to unite media outlets of all stripes. Editorial writers apparently have topics of more concern than precipitously expanding gang membership that already

Vic Reynolds is the District Attorney for the Cobb Judicial Circuit in Metro-Atlanta, Georgia. Mike Carlson serves as the Deputy Chief Assistant District Attorney for District Attorney Reynolds' Gang Prosecution Unit. Both have been honored by the Georgia Gang Investigators Association for their efforts against criminal street gangs.

exceeds the population of a number of states. The fact that this progression occurred under the watch of both political parties justifies recriminations against all segments of the Fourth Estate.

The political and media dereliction could be seen as pollyannaish. Others might compare it with Nero and his lyre. Deliberate ignorance, political correctness, intransigence, and downright deceit may all play roles. No matter what the allegory or explanation, however, gangs benefit from the dedicated inattention. Victims increase. Communities suffer. Gangs continue to rampage and recruit.

In the midst of this milieu, however, highly motivated individuals can make positive in-roads. Experience in Georgia proves that certain fundamental components must exist for any jurisdiction to even begin the process of ending gang crime within its borders. Examining some of the key factors is important in enhancing, enabling, and evaluating any community's efforts:

■ **Eliminate Ego:** All too often, law enforcement and prosecution officials believe that if they "admit" to the presence of gangs in their community, it somehow immediately translates into a failure on their part. The result is that, all too often, those same officials downplay or ignore gang crime in their jurisdictions, diverting resources and attention elsewhere. This only emboldens and encourages gangs at the expense of public safety. Proactive, effective leaders educate their communities on the perils of gangs, and implement impactful strategies to overcome them.

■ **Never Defend the Indefensible:** Communities do not have "gang problems." America has a gang crisis. Minimizing the severity of this danger will not empower the means or commitment to subdue it. The one million-plus gang members operating in this country do not and will not honor jurisdictional boundaries. They grew in size and criminal intensity precisely because alarms were not sounded. There should be no disjunctions between the language used to describe their threat and the imperatives necessary to protect against it.

■ **Recognize the Goal:** Proper gang investigations and prosecutions must focus on bringing down the organizations themselves. Convicting individual gang members should be seen as a means to an end, not an end in-and-of-itself. In other words, the objective is to slay the Hydra (the mythical serpent which grew back two heads whenever one was cut off), not feed it. This enhanced paradigm often drastically alters the practices and philosophies underlying law enforcement and prosecution programs. Regardless, it is imperative for forward progress. Integrated community-wide initiatives against gangs would also be effective.

Criminal street gangs are responsible for an average of 48 percent of violent crime in most jurisdictions, yet the mainstream media gives almost no attention to the issue.

■ **Embrace Methods of Success, Shun Those of Failure:** Despite the overwhelming statistics, many in law enforcement and prosecution stubbornly cling to outmoded approaches to combating gangs. On the other hand, established "best practices" do exist. Gang activity charges should always be brought where the evidence supports them. Investigations and charging instruments should prioritize anti-gang offenses. "Comprehensively indicting" gang members to the full extent of the law is key. Anti-gang charges should never be bargained away. Placing the totality of a given gang's pending criminal acts and members into a single charging instrument—referred to as "omnibus indicting"—is a practice that has generated dramatic achievements.

■ **Utilize Productive Metrics:** These authors have maintained that the three most reliable measures of any jurisdiction's efforts against criminal street gangs

involves a threefold determination of the following numbers: (1) individuals arrested for anti-gang act offenses; (2) individuals charged in anti-gang act indictments; and (3) individuals sentenced for anti-gang act charges. These calculations reveal much about levels of commitment and effectiveness and do so across law enforcement and prosecution boundaries. They create accountability and encourage communication and systemic partnerships, as well as focus toward a common goal.

For jurisdictions that do not have anti-gang prosecution laws, some adjustments could be made. Many have racketeering statutes. Calculating the number of RICO cases involving or naming gangs could serve as a substitute. Where gang enhancement statutes that increase criminal penalties for cases involving gang activity are available, an accounting of how many defendants have been sentenced under such provisions would also be telling.

More importantly, however, employing these three factors has the potential to stimulate positive legislative upgrades that would represent the ultimate "best practice." For the federal government, this would be the passage of a federal gang prosecution law. At the state level, it could translate into the enactment of similar provisions, where needed, and lead to state attorney generals universally prosecuting gangs across the country.

The stark realities of gang crime and devastating import of gang statistics eviscerate any credibility when it comes to defenders of the status quo.

The stark realities of gang crime and devastating import of gang statistics eviscerate any credibility when it comes to defenders of the status quo. While current racketeering laws and sentence enhancing provisions may lead to intermittent attainments, the unyielding proliferation of gangs demonstrates that a specific set of laws aimed directly at gangs is needed. Immigration statute enforcement will not impact the hundreds of thousands of gang members who are United States citizens. Truncating attention to a single jurisdiction or specific gang will fail to contend with the nationwide menace that the legion of gangs inhabiting our borders comprise.

Georgia is fortunate in that it has the strongest anti-gang laws in the nation. Georgia's Street Gang Act provides substantive offenses to prosecute those who criminally participate in gangs. It also enhances sentences for gang defendants. Critically, Georgia's anti-gang laws provide specific conduits for the admission into evidence of any given defendant's past gang criminality and the totality of the crimes of the gang itself. This allows Georgia juries to receive not only the truth—but the whole truth—about gang members and their gangs.

When Georgia's anti-gang statutes are utilized, and best practices followed, the results are inspiring. Georgia jurisdictions consistently report that when comprehensive and omnibus indicting plans are implemented, the chilling effect on gang crime is palpable. Regularly, activity from the gang in question tends to cease at the point that the indictment is returned—even prior to the defendants being sentenced. Gang members seek out law enforcement officers and prosecutors, eager to plead guilty and provide information on their gangs. Gang culture is, accordingly, shattered. The consequence here is so palpable, that Georgia gang members have admitted that they avoid entering jurisdictions that engage in these best practices.

Undoubtedly, there is still more work to be done in Georgia, as there is around the country. Adoption of best practices should become widespread and commonplace. Hopefully, Georgia's successes and forward momentum will infuse support for the federal government and other states to push for policy improvements that will face the existential threat of gangs head on, once and for all.

And defeat them.

The Prosecutor

PART 1

Witness Intimidation: What You Can Do To Protect Your Witness

By Kristine Hamann and Jessica Trauner

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]

[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.

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 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

[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.

From the first meeting, law enforcement and prosecutors should assess a witness's risk of intimidation.

unsuccessful one."[4] In assessing the risk of intimidation, a prosecutor may 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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[4] *Id.*

[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 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

[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.

The prosecutor should inquire about issues that may affect a witness's ability to cooperate or could make them more vulnerable to intimidation.

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 the 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 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

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

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.

• **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 busi-

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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).

Develop a plan with the witness about how to stay in touch in a way that will not endanger the witness.

ness 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]

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.

— *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.)

— *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

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

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 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 on page 27.)

■ **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

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[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 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.

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."

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]

■ **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

[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 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").

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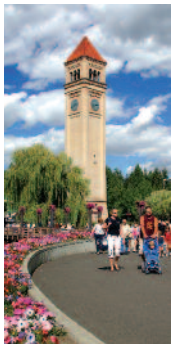

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best to draft an accusatory instrument without any reference to the victim. If probable cause can be based on other evidence unrelated to the victim or witness, that is the best course of action.

• **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]

• **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 on page 27.) 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 on page 27.)

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.

— *Order of Protection:* If the witness and the wit-

[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").
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).

ness'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.

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]

— *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 charge. If there is a violation hearing on the technical violations, make sure that the hearing does not require evidence about the current

[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."

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 in Part 2 in the April, 2018 issue.)

• **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 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

[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. 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).

and be aware of the legal requirements in their own jurisdiction before utilizing this approach. (See 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.

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.

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

[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).)

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 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's statements, 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

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.

[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).

[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.

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.

— *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 mate-

[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.

rials. Double check the redactions before turning 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.

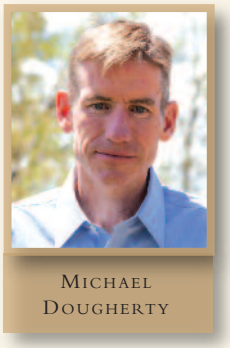
• **Recantations:** Recantations can occur at any stage of a case. Law enforcement and prosecutors must thoroughly investigate and document any recantations to prepare for necessary disclosures to defense attorneys as Brady material[31] or to prepare for a motion to introduce the uncooperative witness's 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.

The Importance of a Conviction Integrity Unit

By Michael Dougherty



Michael Dougherty

In the twenty years I have been a prosecutor, my guiding principle has been to seek justice in every case, without fear or favor. Now, as the District Attorney of Boulder County, I will maintain this mission for the District Attorney's Office. In practical terms, it means that every case is reviewed impartially, with the goal of reaching the just result for the victim, the accused, and the community. If a case warrants prosecution on behalf of a crime victim and our community, it will be undertaken using the highest standards of ethics and prosecutorial excellence.

I strongly believe a prosecutor's commitment to do justice must include a process to ensure that no one has been wrongfully convicted. This goal should be in mind throughout the entire prosecution process, including after a criminal conviction is secured through a trial or an offender's guilty plea.

For this reason, I am proud to introduce a Conviction Integrity Unit within the Boulder District Attorney's Office. This program will provide a sound, transparent and collaborative review mechanism for claims of wrongful conviction. I am excited to work with the Boulder Public Defender's Office, the private defense bar, and University of Colorado Boulder's Korey Wise Innocence Project in establishing the protocols and reviewing claims of innocence. A conviction integrity process should be built on partnerships between prosecutors and defense attorneys.

My family and I first moved to Boulder for me to start and oversee a wrongful conviction project. It was an honor to apply the skills I had learned from years as a prosecutor as the head of the Colorado DNA Justice Review Project (JRP). The JRP provided a non-adversarial, neutral review process for finding possible wrongful convictions in serious cases, such as rape and murder. I worked with members of the defense bar, district attorneys, laboratory analysts, law enforcement, and victim advocates to lead the review.

My first task with the JRP was to meet with all of the elected district attorneys across the state to request their cooperation, and allow the JRP to review their case files. Although our job was to re-examine the past work of their offices in the most serious cases, every single one of the twenty-two elected district attorneys gave us complete and unfettered access to their case files.

One case highlights the importance of this collaborative effort. On April 30, 2012, Robert Dewey was released from prison, exonerated of rape and murder, after DNA evidence was reviewed and retested in his case. Dewey had spent over seventeen years in prison for crimes he did not commit. He is now listed, among 2,161 others, on the National Registry of Exonerations.

Then, we helped advocate in the legislature for a law that would provide Mr. Dewey and other wrongfully convicted individuals with compensation for living expenses, healthcare, and tuition — none of which could repair the nightmare of sitting in a state prison while innocent.

The current Attorney General, Cynthia Coffman, chose to discontinue the statewide Justice Review Program shortly after she took office. As the Boulder DA, I believe that there should be a collaborative and thorough process for reviewing criminal convictions here in Boulder. That is why we are establishing the Boulder Conviction Integrity Unit, the first such program within a District Attorney's Office in Colorado. It has been a passion of mine for many years and it is a priority for our office. My hope is that our work serves as a model for offices throughout our state.

I am committed to preserving public safety while pursuing meaningful reform of the criminal justice system. The Conviction Integrity Unit will serve as an important component in ensuring that justice is done.

The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of NDAA or its members.

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