The PROSECUTOR

PART IV

Witness Intimidation in the Digital Age: *Discovering* Witness Intimidation

By Margaret O'Malley

The goal of this series is to provide an overview of the current landscape of witness intimidation crimes, with particular attention to the profound effect that technological advances have had on how these crimes are perpetrated, investigated and prosecuted.

Part I provides an introduction to the series on the current state of witness intimidation. Part I of this series can be found in Volume 48, Number 3, July/August/September 2014 issue of this magazine.

Part II provides an overview of the various sources and types of witness intimidation, who is intimidated, who intimidates, how witnesses are intimidated and when intimidation occurs. Part II of this series can be found in Volume 48, Number 4, October/November/December 2014 issue of this magazine.

Part III examines how various components of the pretrial process may present serious challenges for prosecutors in the protection of witnesses and presents strategies to counteract or mitigate intimidation. Part III of this series can be found in Volume 49, Number 1, January/February/March 2015 issue of this magazine.

Part IV discusses the problem of discovery as a tool for witness intimidation and recent legislation aimed at limiting the distribution of discovery material to third parties.

Part V reviews the challenges presented by the use of Internet and cellular technologies to intimidate victims, witnesses, jurors and judicial officials.

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Although most state statutes, and even ABA Standards, provide that discovery is to be used only to prepare a defense,1 it is, in fact, often used to identify, locate, threaten, and to kill witnesses. According to a recent Washington Post article, based on police and court records, at least 37 people in Washington, D.C. and Maryland have been killed since 2004 for cooperating with law enforcement. Of the 18 killed in the District, at least five were killed after defense attorneys provided witness names or other identifying information to their clients. According to the Post, in one case, a lawyer tipped off a defendant that prosecutors wanted to interview the witness. Six days later, the witness was found dead.[2] There is little doubt that these numbers grossly underestimate the true extent of the problem.

Multi-part investigative reports in The New York Times,[3] Philadelphia Inquirer,[4] and Denver Post[5] have exposed dozens of cases of witness intimidation but have seldom highlighted the connection between witness interference and discovery. The tension between a defendant's constitutional rights and the criminal misuse of discovery information is extremely sensitive for criminal justice professionals and seldom publicly addressed.

In a notable exception, last year in Erie County, New York, District Attorney Frank A. Sedita III confronted the issue both directly and publicly. In the fall of 2014, in advance of a pretrial hearing for Ricky Grace, charged with three counts each of attempted murder, assault and related weapons charges, the identity of one prosecution witness was disclosed to the defense. Soon after, Grace's "associate" threatened to kill the witness if he did not recant his prior testimony – going so far as to provide an affidavit for the witness to sign. The remaining witnesses, whose identities were not disclosed until trial, were not targeted, and Grace was convicted.

According to Sedita, the early disclosure of a witness's identity directly led to the harassment. "[U]nder current law, a defendant is entitled to pretrial evidentiary hearings and a wealth of information about the prosecution case early in the process and well before trial begins. Delaying the identification of civilian witnesses until the time of trial … correctly balances the right of the accused to confront his accusers in a court of law with the right of witnesses to be free from being harassed and intimidated. This case once again illustrates what occurs when violent thugs are provided with information that identifies witnesses too far in advance of courtroom proceedings."[6] In a separate interview he added, commenting on proposals to revise New York's discovery rules: "…If some of the legislation that's being proposed in Albany is passed, it will be lights out for the prosecution of violent crime in this county and probably all the other counties across the state."[7]

Intimidation works — and the worst offenders know it.

Discovery as a Witness Intimidation Problem

The majority of misdemeanor and felony cases crossing a prosecutor's desk are unlikely to involve witness interference or obstruction of justice issues. Most proceed through the pretrial process and discovery without serious incident. In contrast, prosecutors generally expect intimidation in domestic violence, sexual assault and stalking cases. There, although the danger to victims and witnesses is real, providing discovery is not a key issue because the perpetrators generally know the victims and witnesses. The challenge lies in keeping them safe, both physically and emotionally.

In all too many violent felony and gang cases, communitywide and targeted intimidation has become so pervasive that locating even a single witness willing to cooperate has become a nearly insurmountable obstacle.[8] Intimidation works — and the worst offenders know it. Every time a defendant successfully uses intimidation to escape prosecution, finding anyone brave or, perhaps, foolish enough to

1 *ABA Standards for Criminal Justice Discovery and Trial by Jury Standard,* 3rd ed. (1996), 11-14.

2 Thompson, C., "Dozens of witnesses in D.C. area were slain in past decade," *Washington Post*, Jan. 11, 2015.

3 Kocieniewski, D., "Scared Silent," *The New York Times*, February 27 - Dec. 30, 2007.

4 McCoy, C., Phillips, N., and Purcel, D., "Justice: Delayed, Dismissed, Denied," *Philadelphia Inquirer*, Dec. 13 -16, 2009.

5 Olinger, D., "Dying to Testify," *Denver Post*, September 30, Oct. 1, and Oct. 7, 2007.

6 Erie County District Attorney's Office, "Witness Intimidation Efforts Fail as Jury Convicts Gunman in Brutal Triple Shooting," press release, Oct. 8, 2014.

7 Sedita, F.A. III, "Witness intimidation failed to stop conviction," comment referring to S. 4089-2013 on WGRZ Buffalo, Oct.9, 2014.

8 *See, e.g.*, Kocieniewski, D. "A Little Girl Shot, and a Crowd that Didn't See," *The New York Times*, July 8, 2007.

testify becomes monumentally more difficult. The proof is in the number of cases some career criminals have managed to have stalled, settled for minor charges or dismissed. In a recent federal/state roundup of 32 members of a crack-cocaine ring in Hamilton County, Tennessee, one defendant had 40 prior cases *dismissed in that county alone*. Although the gang leader had only 12 prior cases dismissed, he had a reputation on the streets for being a violent killer who had a witness beaten in jail and another shot.[9] The pattern is so common that there isn't a single prosecution office that couldn't identify a dozen or more similar cases. Often, the only hope of getting a case to trial lies in preventing defendants from discovering the identity of witnesses.

Prosecutors have limited tools to protect witnesses. High bail, pretrial detention and protective orders are of limited utility and most jurisdictions simply do not have the infrastructure or funding to provide meaningful, long-term witness protection.[10] Even when offered, many witnesses and victims find moving away from family, jobs and community too difficult and refuse to relocate. Still others accept protection and then return, however briefly, and end up dead within hours.[11] In some cases, protecting the identity of key witnesses for as long as possible, until the middle of trial if necessary, is the only way to protect them.

Information is Power. State and federal defense bars and other organizations continue to advocate for "open file" discovery: the mandatory, automatic and early delivery to defense counsel (and to defendants) of all discovery, including witness information.[12] Many advocates cite state rules that require redaction of "identifying" witness information[13] or prohibit disclosure of a witness's address or telephone number[14] as sufficient to safeguard witnesses. This did little to protect witnesses a decade ago, and almost nothing today.

Anyone familiar with police reports and witness statements knows that even if names are excised, both context and content make it easy for defendants to identify them. Witness statements "… may unavoidably refer to a particular witness's romantic jealousies, professional rivalries, criminal record, or role in a conspiracy, all of which may allow the defense to figure out the witness's identity." A person's presence in a particular neighborhood at the time of a crime alone may be enough to identify them. With little more than Internet access and a name, anyone can discover the address, telephone numbers, email, social media accounts, place of employment, school and the identity of family members.[16] The more time a defendant or his supporters have to research and track down witnesses, the greater the threat.

Even when the prosecution is able to withhold the name of a witness until trial, some defendants will go to extremes to preclude their testimony. In Salt Lake City, a defendant in a RICO case against Tongan Crip Gang members was shot and killed by U.S. marshals after he attempted to attack a witness — while he was testifying in federal court. The witness's name was, quite justifiably, omitted from court documents until just prior to trial due to anticipated retaliation.[17]

Often, the only hope of getting a case to trial lies in preventing defendants from discovering the identity of witnesses.

[9] "132 of Chattanooga's 'worst' criminals arrested in round-up," *Chattanooga timesfreepress.com*, Nov. 5, 2013; South, T., "Chattanooga officer's testimony alleges murder, intimidation of 1 of 32 charged in drug conspiracy," *Chattanooga timesfreepress.com*, Feb.26, 2014.

[10] In states, such as South Carolina, that do not have state witness protection programs, the federal WITSEC program may be used to protect witnesses. *See, e.g.*, Knapp A., "Shooting of a federal witness in Walterboro drug ring case highlights intimidation problem," *South Carolina Post-Courier*, March 4, 2014.

[11] "Philly files 2,000 charges of witness intimidation," *Philadelphia Tribune*, Feb. 26, 2014, http://triblive.com/state/pennsylvania/5669310-74/witness-intimidation-philadelphia.

[12] *See, e.g.*, S. Res. 2197, 112th Cong. (2012) *Fairness in Disclosure of Evidence Act* and New York State Senate, Bill S4089-2013 (2013).

[13] *See*, Tex. Crim. P. 39.14(f).

[14] *See*, Cal. Pen. Code §1054.2.

[15] U.S. Congress, Senate Jud. Comm., "Ensuring that Federal Prosecutors Meet Discovery Obligations," on S. 2197 Fairness in Disclosure of Evidence Act, *Hearings*, 2012, 112th Cong. (Statement of S. Bibas, Professor of Law and Criminology, Univ. of Penn. Law School).

[16] *See, e.g.*, Trapani, G., "How to Track Down Anyone Online," *Lifehacker*, http://lifehacker.com/329033/how-to-track-down-anyone-online; *Instant CheckMate*, http://www.instantcheckmate.com/?src=GLE&mdm=search&cmp=TAKBS&cnt=SPI&s4=find+someone; People Search, *Intelius*, www.intelius.com; *Zaba Search*, http://www.zabasearch.com; *PeopleFinders.com*; *Pipl*, www.pipl.com;

Discovery as a Wanted Poster. One way in which discovery is misused is direct and powerful. Copies of police reports, witness statements — even those covered by discovery protection orders — have been delivered to witnesses and posted in public. The mere delivery sends a clear message: *we know who you are and what you are doing*. Threats of assault or worse are absolutely unnecessary to instill fear. In 2009 in Baltimore, Kareem Guest, a federal witness in several drug-related killings, was executed after FBI reports detailing his cooperation were tacked to telephone poles and basketball hoops throughout his Westport neighborhood — a virtual wanted poster.[18]

The reports were provided to two of the defendants' attorneys as part of discovery. Notwithstanding the discovery agreement prohibiting all dissemination, one attorney provided copies to his client and to his client's mother.[19] After seeing the reports, Antonio Hall, a narcotics dealer with a long history of beating charges in Baltimore, including attempted murder, assault, illegal weapons, and drug-related crimes,[20] killed Guest in retaliation for providing information to the Baltimore City Police and the FBI about drug trafficking and firearms in Westport. According to prosecutors, no one wanted to testify against Hall, who also had a history of killing "snitches" and many of those interviewed initially lied about his involvement. In 2011, Hall was found guilty of murder, weapons violations and conspiracy to distribute crack cocaine and sentenced to four life terms.[21]

More recently, grand jury transcripts and discovery documents have been posted on social media (Facebook, Twitter), photo sharing (YouTube, Instagram) and "no-snitching" websites (whosarat.com). The material, often annotated with the derogatory "snitch" or "rat," is distributed with the specific intention of frightening and intimidating witnesses so that they will recant or refuse to testify — or to retaliate for cooperation. Over the past 10 years, individuals in Cleveland, Santa Fe, Philadelphia, Buffalo,

17 Really, P., "Gang member shot, killed after lunging at court witness," *Deseret News*, April 21, 2014.

18 Hermann, P., "Federal witness killed after his name is leaked." *Baltimore Sun*, June 24, 2010.

19 "Man sentenced to life for killing federal witness in Westport," *Baltimore Sun*, Nov. 17, 2011. The lawyer, Michael Carithers Jr., was disbarred in Maryland for unrelated conduct.

20 Smith, V., "Man Indicted for Murdering Witness Kareem Kelly Guest," *Baltimore City Paper*, June 4, 2014.

21 Bishop, T., "Baltimore man found guilty of killing federal informant," *Baltimore Sun*, Aug. 11, 2011.

Chicago, Boston and St. Louis, have been charged with intimidation crimes for posting photos, identifying information, grand jury testimony and statements of witnesses in pending criminal cases on social media sites, encouraging retribution against "snitches."[22] In 2013, a Philadelphia teen was charged with intimidation and making terrorist threats for posting photos of shooting victims and confidential court documents on Twitter.[23] Also in the Philadelphia area in 2013, Instagram account "rats215," with nearly 8,000 followers, identified more than 30 witnesses and posted their photos, police statements and testimony.[24]

A Buffalo, New York, drug defendant obtained grand jury testimony and witness statements from his attorney. He had his girlfriend post them on Facebook on the eve of trial, calling the witnesses out as "snitches." The witnesses and their family members were threatened and one refused to testify. Although the defendant successfully avoided the original drug charges, he was convicted of intimidating and tampering with a witness.[25] Erie County Judge Sheila A. DiTullio told the defendant at sentencing that if she could, she would have sentenced him to more than the two to four years in prison allowed for intimidating and tampering with a witness, adding "[m]aybe the State Legislature will take a look at the law."[26]

Distributing discovery material in this fashion is *de facto* retaliation intended to publicly vilify and mark witnesses as traitors in their community. It is also intimidation because it instills fear in witnesses, that should they continue to cooperate, they, their families and friends will be in danger. Even worse, it serves as an open invitation to anyone, regardless of association with the defendant, to harass, threaten or harm victims and witnesses. It becomes as wanted poster, regardless of whether it contains threatening language.

Remarkably few published opinions speak to the legal consequences of misuse of discovery to intimidate or eliminate witnesses, and yet, prosecutors encounter this type of conduct regularly. Where states do not restrict delivery of discovery by defense counsel to their clients or to third parties, there is no misconduct. Even where the delivery of witness information to defense counsel closely coincides with actions taken against witness, it is extremely difficult to definitively prove a causal relationship.

Discovery Rules: The What and When

Although there is no constitutional right to discovery in criminal cases,[27] state and federal laws mandate the disclosure information to defendants in criminal cases. State discovery systems may be governed by any combination of statute, court rules and common law. A single set of criminal discovery rules may apply to all prosecutions,[28] be tailored to particular courts[29] or tied to the level of the offense.[30]

The more traditional state statutory schemes mirror Federal Rule 16 and related statutory and common law.[31] Under Rule 16, prosecutors are not required to provide the defendant with the names of witnesses before trial.[32] Currently, only 13 states continue to track this model with respect to the automatic disclosure of witness information.[33] Thirty-one states[34] specifically require the prosecuting agency to disclose the names, addresses and statements of all persons with knowledge of facts underlying the charged offense[35] or statements of persons the state intends to call as a witness at trial.[36] The remainder of the states fall somewhere in the middle.

When discovery must be provided also varies. Several states require discovery be provided within days of charging by indictment or information,[37] while an equally small number mandate disclosure within one week prior to

22 *See, e.g.*, A[1] See, e.g., Afolayan, I., "Intimidation Gone Digital: Victim and Witness Intimidation in the Age of Social Media," *Criminal Law Practioner*, http://wclcriminallawbrief.blogspot.com/2013/11/intimidation-gone-digital-witness-and.html, Nov. 26, 2013; Davis, K., "Digital Witness Harassment," *ABA Journal Magazine*, http://www.abajournal.com/magazine/article/witness_harassment_has_gone_digital_and_the_justice_system_is_playing_catch/, Aug.1, 2013.

23 Lu, F., "Facebook Being Used to Intimidate Witnesses," *FindLaw Blotter*, http://blogs.findlaw.com/blotter/2013/01/facebook-being-used-to-intimidate-witnesses.html, Jan. 9, 2013.

24 "The "rats215" account on Instagram has posted pictures, Philadelphia police statements and testimony identifying more than 30 witnesses since February," *AP*, Nov. 8, 2013.

25 Staas, J., "Man convicted of witness intimidation after grand jury testimony is posted on Facebook," *NY. Post Disc*, Oct. 30, 2013;

26 Staas, J., "Buffalo man gets maximum for witness tampering through Facebook," *Buffalo News*, Jan.14, 2014.

27 *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837 (1977).

28 *See e.g.*, Ariz. R. Crim. P. 1; Colo. R. Crim. P. 1; Fla. R. Crim. P. 3.01.

29 *See e.g.*, Alaska R. Crim. P. 1.2; Me. R. Crim. P.1.

30 *See e.g.*, Hawaii R. Penal P. 16(a); 16.1; Ga. Code Ann. § 17-16-2(a); Ill.Sup.Ct.R. 411.

31 Fed. R. Crim. P. Rules 16 and 26; 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972) and The United States Attorney's Manual (USAM §9-5.001).

32 Rule 16(2) Information Not Subject to Disclosure. ... "Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500."

trial.[38] Most states require disclosure at some point between the probable cause proceedings and 30 days prior to trial.

In practice, prosecutors, state and federal, generally deliver as much discovery material to defense counsel as can be safely provided early in the process. Many use letter agreements or stipulations detailing restrictions on the disclosure of discovery material to the defendant or any third party. When entered as a court order, any violation of that agreement is technically subject to sanctions provided by contempt or discovery statutes, or inherent in judicial powers. In reality, however, these provisions are only as good as the intentions of the people who are bound by them.

Balancing Broad Discovery and Witness Security. Regardless of when discovery is provided, the key question is to whom that material is disclosed and how it is used. In 1996, the ABA Discovery Standards eliminated the requirement that material obtained during discovery remain in the "exclusive custody" of the attorney "…[b]ecause the restriction unduly hampers the attorney's ability to prepare his or her case, which may require providing discovery materials to investigators, experts, consultants, or others in addition to the attorney himself or herself."[39] Although this does not specifically mention the need to provide copies to defendants, states adhering to that model avoid imposing any restrictions on providing copies of discovery to *defendants* or unrelated third parties.

A number of states[40] retained statutes modeled on the 1980 ABA Discovery Standard, which requires that any materials furnished to an attorney "shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case."[41] In Illinois, attorneys are not permitted to furnish defendants with copies of discovery or permit them to take discovery materials out of their possession. Illinois Rules of Court, Rule 415(c) was enacted with the comment that, "If the materials to be provided were to become, in effect, matters of public availability …. the administration of criminal justice would likely be prejudiced. Accordingly, … material which an attorney receives shall remain in his exclusive custody. … he is not permitted to furnish them with copies or let them take it from his office."[42]

The rule has been upheld in a number of appellate cases. In *People v. Savage*,[43] while the defendant was in custody awaiting trial, the State's Attorney suspected incidents of witness intimidation were based on information contained in police reports in the possession of jail inmates. Citing Rule 415(c), correctional officers conducted searches and confiscated pretrial discovery found in the possession of inmates. The trial and appellate courts upheld the search, as it was based on a suspected violation of law and also held that Rule 415 did not violate defendant's right to due process, to confront witnesses or assist in his own defense. The rule was rationally related to its stated purpose and an effective way to reach its stated goal of protecting discovery materials from public availability.[44]

Illinois appellate courts also considered a motion for sanctions for violation of Rule 415(c) when a defense attorney uploaded a (discovery) video to YouTube and Facebook.[45] The trial court found that the video was material furnished pursuant to Rule 415(c) and the attorney, by his own admission, violated that rule. The appellate court affirmed. Nevertheless, the court imposed no sanctions on the attorney, provided that he remove the video from the Internet.

Changes in Discovery Statutes. Recently, states enacting more liberal discovery schemes have taken steps to balance access with measures to prevent discovery documents from being used for intimidation. In 2010, Ohio revised its crim-

33 *See e.g.*, Alabama; Delaware, Georgia, Kansas, Kentucky, New York, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia and Wyoming.

34 Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Wisconsin.

35 *See, e.g.*, Alaska Crim. P. Rule 16 (b)(1)(i) (i) (The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements).

36 *See, e.g.*, Arizona Rules Crim. P. 15 (b)(1) (The names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements).

37 *See, e.g.*, Arizona and Massachusetts.

38 *See, e.g.*, Nevada (5 days) and New Hampshire (7 days).

39 *ABA Standards for Criminal Justice Discovery and Trial by Jury Standard*, 3rd ed. (1996), 11-6.4, Commentary..

40 *See, e.g.*, Alaska, Arkansas, Connecticut, Illinois, Minnesota and Vermont.

41 *ABA Standards for Criminal Justice, Discovery Standard*, 2nd ed., § 4.3 (1980).

42 Illinois Superior Court Rule 415(c), Committee Comments.

43 *People v. Savage*, 361 Ill. App. 3d 750, 838 N.E.2d 247 (4th Dist. 2005).

44 *See also, People v. Shores*, 975 NE 2d 774 (Ill. App. Ct. 5th Dist. 2012) and *People v. Davison*, 292 Ill. App. 3d 981, 686 N.E.2d 1231 (4th Dist. 1997).

45 *People v. Fulmer*, 984 NE2d 591 (Ill. App. Ct. 4th)(2013).

inal discovery rules to require the prosecution to provide discovery of statements by any witness they reasonably anticipate calling either during its case-in-chief or in rebuttal.[46] Recognizing the need to protect victim and witness information in certain cases, the new statute permits the prosecution to designate any discovery materials as "counsel only" without court action. Defense counsel may "orally communicate" the contents of such material to the defendant, but is prohibited from showing them to the defendant and from disseminating the materials in any way.[47]

The prosecution may also withhold material from discovery upon certification that specific circumstances exist, including the potential for witness intimidation.[48] To deter defendants from firing an attorney in order to gain access to *all* discovery material, counsel is required to return "counsel only" and court-protected material[49] when the attorney-client relationship is terminated "prior to trial for any reason."[50]

In 2013, Texas passed the Morton Act[51] to provide broad discovery to criminal defendants, including witness statements "as soon as practicable after receiving a timely request from the defendant."[52] During the legislative process, prosecutors expressed concern over defense counsel's ability to act responsibly with full discovery disclosure. In response, the new law expressly prohibits the distribution of discovery material outside the defense team.[53] Defendants or any potential defense witnesses may *review* redacted discovery material,[54] but are prohibited from possessing physical or electronic copies of any witness statements, other than their own.[55] Pro se defendants may inspect, but not duplicate, discovery documents.[56] To date there are no published cases that deal with these new provisions and it remains to be seen whether any violations will be investigated and, if substantiated, result in meaningful consequences.

Protecting Discovery: Court Orders

State jurisdictions with comprehensive criminal discovery schemes generally authorize courts to order a party to provide discovery and permit a party to withhold discovery. In common-law jurisdictions, the trial court's discretionary authority similarly permits it to defer or deny discovery for protective purposes.

Protective order statutes follow a similar pattern. Either party may seek a protective order to limit, but not entirely deny, discovery to which the party is entitled.[57] Like Federal Rule 16(d), state statutes authorize courts to order that specific disclosures be restricted or deferred and retain discretion to determine the period of time for which a protective order is to remain in effect.[58] Several state statutes provide that all material to which a party is entitled must be disclosed in time to permit the party to "make beneficial use thereof."[59] They are generally granted upon a showing of "good cause," including protecting witnesses and others from physical harm, threats, bribes, economic reprisals, and intimidation.[60] The prosecution need not demonstrate a specific threat where the danger is inherent in the situation.[61] A motion may be made ex parte[62] and based, in whole or in part, on written statement(s), and inspected in camera.[63]

When granting discovery protective orders, courts may require accommodations, such as making witnesses available for interview, granting continuances to prepare for cross-examination and may include orders that defense counsel not provide copies of witness statements or reports to defendants or any other persons.[64]

In some states, discovery protective orders are routinely sought and granted, particularly in gang cases.[65] In California, where the state's highest court has provided clear and detailed guidance, the trial courts, even in relatively small communities, have become accustomed to the practice.[66] In *People v. Valdez*, a California gang-related multiple murder case, prosecutors sought and received extensive protective orders due to the threat of retaliation by the Mexican Mafia. The California Supreme Court approved

46 Ohio R. Crim. P. 16(B).

47 Ohio R. Crim. P. 16(C).

48 Ohio R. Crim. P. 16(D)(1)-(5).

49 Ohio R. Crim.P. 16(L)(2). This includes any work product derived from this material. (Ohio R.Crim.P. 16(L)(3)).

50 Ohio R. Crim.P.16(L)(3).

51 Texas State Senate Bill 1611, amended Article 39.14, Texas Code of Criminal Procedure.

52 Tex. Crim. P. 39.14(a).

53 The "defense team" includes the attorney, an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant. (Tex. Crim. P. 39.14(f)). *Pro se* defendants may inspect, but not duplicate, discovery documents. (Tex. Crim. P. 39.14(d)).

54 The address, telephone number, driver's license number, Social Security number, date of birth, and any information that make it possible to identify a victim or witness must be redacted.

55 Tex. Crim. P. 39.14(f).

56 Tex. Crim. P. 39.14(d).

57 *See, e.g.*, N.Y. C.P.L. 240.50.

58 *See, e.g.*, Fla. R. Crim. P. 3.220 (l); Minn. Crim. P. 7.04 Subd. 5.

59 *See*, Colo. Crim. P. 16, Part III (D)(d); Washington Crim. R. 4.7(h)(4); Fla. Crim. P. 3.220(l).

60 *See e.g.*, Michigan allows the court to consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats as well as the risk that evidence will be fabricated. (Mich. Ct. R. 6.001(E)).

61 *Commonwealth v. Holliday*, 50 Mass. 794 (2008) (It was sufficient that the alleged crimes were committed in a gang-controlled neighborhood where

trial court's orders withholding witnesses' true identities, even from defense counsel, until several days before they were scheduled to testify, prohibited all disclosure of witness names to defendant or other third parties, and ordered witnesses be referred to only by number in open court and all court records.[67]

Protective orders, like discovery statutes that prohibit the release of witness information to defendants or third parties, are effective only to the extent that attorneys choose to comply with them. Lawfully released witness information is *only* dangerous in the hands of someone willing to act to silence a witness and end a criminal prosecution. In such cases, should defense counsel become aware of such plans, attorney-client privilege and state bar rules severely limit the actions that they may take. Even where counsel's conduct falls outside the scope of applicable rules and there is a clear and proven violation of ethical duties, the conduct rarely results in meaningful professional sanctions, much less criminal charges.

In 2014, Lorna Brown, a Berkeley, California defense attorney, was suspended from the practice of law for two years for smuggling documents out of jail on behalf of Yusuf Bey IV, later convicted in the murder of Oakland journalist Chauncey Bailey.[68] According to California State Bar records, in August 2009 Brown was appointed as counsel for Bey, who was indicted on three counts of murder.

During a March 2010 visit at Santa Rita Jail, Bey gave Brown legal documents, including grand jury and witness interview transcripts, as well as a card addressed to his common-law wife. Brown concealed the card in legal documents, removing it from the jail without permission and then gave the documents and the card to Bey's sister-in-law. According to Alameda County prosecutors, the card contained a "hit list" of witnesses that Bey wanted killed.[69] Brown placed the list of witnesses' names in an envelope so they could be passed along to Bey's "number one soldier" Gary Popoff. After a tip from a confidential informant, the witness list was recovered from Popoff.[70]

Initially, Brown denied removing the card from the jail and denied knowledge of the witness list, but ultimately admitted to lying. The State Bar requested disbarment if Brown was convicted of allegations that she broke ethical rules by smuggling documents out of jail, disguised as legal material protected by attorney client privilege. The State Bar Court declined to impose that sanction. The State Bar Judge wrote: "Respondent willfully ignored her duties as an attorney, as well as the health and safety of the witnesses who planned to testify against her client. And when the District Attorney's Office began investigating the matter and questioned respondent about her actions, she lied" … "All told, the ramifications of respondent's misconduct could have been devastating."[71]

The Bar Court decision did not discuss what evidence, if any, was presented on the issue of whether Brown knew that what she passed to Taylor was a "hit list" of witnesses that Bey prepared from discovery material. According to press reports, Brown had reached an agreement with the Alameda County District Attorney's office — she would retire from the practice of law in exchange for not being criminally prosecuted and then reneged on the deal. Neither Bey nor Brown was charged with a crime in the matter.[72]

Witness intimidation and obstruction of justice crimes are somewhat unique in that rarely, if ever, are they committed by persons who are not already guilty of a crime. They are willing to do almost anything to avoid conviction. The lack of serious sanctions for the misuse of discovery or violation of a discovery protection order makes it virtually a no-risk proposition. From the perspective of crime victims and the witnesses, however, having their identity exposed to violent criminals is not only terrifying, it is often fatal.

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the witnesses also resided.)

62 N.C. Gen. Stats. § 15A-908; Kan. Stat. Ann. 22-3212(e); Mich. Ct. R. 6.001(E).

63 *See, e.g.*, New Jersey (Rev. Ct. R. 3:13-3(f)) and Utah Crim. P. 16(f).

64 Courts may order that discovery be available only to counsel for the defendant. (N.Y. C.P.L. §240.50; Mass. R. Crim. P. 14(a)(6)).

65 Cal. Pen Code § 1054.7.

66 Howes, R. "Judge Orders Temporary Protective Order for Discovery in Gang Conspiracy Case," *Santa Maria Times*, October 8, 2014.

67 *People v. Richard Valdez*, 55 Cal.4th 82 (2012).

68 State Bar Court of California, Hearing Department — San Francisco, Case No. 10-O-06727-PEM, In the Matter of Lorna Patton Brown, July 12, 2013. The suspension term is officially for four years, with an actual suspension period of two years, pending satisfaction of specified conditions.

69 Peele, T., "Lawyer faces loss of license for allegedly smuggling hit list from jail for Your Black Muslim Bakery leader," *San Jose Mercury News*, April 22, 2013.

70 "California Supreme Court rejects proposed punishment for former attorney of Yusuf Bey IV," The Chancery Bailey Project, www.chaunceybaileyproject.org, July 11, 2012.

71 State Bar Court of California, Hearing Department — San Francisco, Case No. 10-O-06727-PEM, In the Matter of Lorna Patton Brown, July 12, 2013.

72 Peele, T., "Lawyer faces loss of license for allegedly smuggling hit list from jail for Your Black Muslim Bakery leader," *San Jose Mercury News*, April 22, 2013.