

# The PROSECUTOR

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## PART III

### Witness Intimidation in the Digital Age: *Intimidation in Pretrial Proceedings – The Philadelphia Experience*

BY MARGARET O'MALLEY

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**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 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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*“Witness intimidation pervades the Philadelphia criminal courts, increasingly extracting a heavy toll in no-show witnesses, recanted testimony — and collapsed cases ... fear has become an unspoken factor in virtually every court case involving violent crime...” ... “The worst thing is that the situation creates a climate of fear that the government can’t control the criminals that the police can’t control the criminals that the courts can’t control the criminals and that there is no hope.”<sup>1</sup>*

*(Witness intimidation) served as a powerful catalyst for the Pennsylvania Senate to establish an advisory committee to examine aspects of Philadelphia’s criminal justice system, identified as contributing to its near-collapse, and to develop solutions for them.*

**WITNESS INTIMIDATION FLOURISHES** within a community due to any number of factors — within and outside the criminal justice system. Antiquated facilities, outdated statutes, inefficient practices, mismanagement, underfunded programs and myriad other factors can and do inhibit victim and witness safety.

One of the most thoroughly documented examples is Philadelphia’s criminal justice system, which has been characterized as one of the most troubled in the nation since the 1980s. According to a 1990 report, as violent crime increased, the city suffered extreme fiscal pressure, an inefficient and overly expensive court system, shortages of police and judicial personnel, and a flawed bail system. Jail overcrowding prompted a federal court order mandating the release of thousands of criminal suspects.<sup>2</sup> By the end of 1989, there was a backlog of 12,199 criminal cases, with the average case taking 245 days from arrest to final disposition, twice the national norm.

The situation did not improve over the next two decades.

By 2009, this perfect storm of institutional, statutory and human factors was examined in a four-part Philadelphia Inquirer series “Justice: Delayed, Dismissed, Denied.”<sup>3</sup> The Inquirer tracked defendants arrested for certain violent crimes in 2006 and 2007 whose cases had been resolved by the end of 2008.<sup>4</sup> According to Inquirer research, conviction rates for violent crimes were alarmingly low, particularly in light of the number of violent felonies reported to the FBI.

During that two-year period, of 20,120 aggravated assaults reported to the FBI, 10,076 defendants were arrested and charged, and 862 were convicted of that crime by

the end of 2008, for a conviction rate of less than 10 percent. Of 21,229 robberies reported, 6,559 defendants were charged and 1,143 were convicted of robbery by the end of 2008, representing a conviction rate of 19 percent. Half of the robbery and aggravated assault cases filed were never set for trial because the cases were withdrawn by the district attorney or dismissed by the court at the preliminary hearing stage.<sup>5</sup>

The series also highlighted the stories of witnesses brutally murdered, before and after providing testimony — blatant, public and violent executions, most often with guns.<sup>6</sup> It served as a powerful catalyst for the Pennsylvania Senate to establish an advisory committee to examine aspects of Philadelphia’s criminal justice system, identified as contributing to its near-collapse, and to develop solutions for them.<sup>7</sup> Its findings were not unexpected:

- Witness fatigue resulting from repeated delays and rescheduling of hearings;
- Witness intimidation by defendants and their supporters inside court facilities;
- Court rules, procedures and inefficiencies that undermined the prosecution’s ability to complete preliminary hearings;
- Gamesmanship by defense attorneys in the conduct of preliminary hearings, calculated to wear down victims and witnesses and ultimately cause the courts to dismiss cases; and
- A broken bail system allowing repeat offenders to skip court appearances, delay the disposition of cases, and remain free to commit additional crimes and threaten witnesses.<sup>8</sup>

<sup>1</sup> Williams, W., police commissioner, City of Philadelphia, quoted in deCourcy Hinds, M., “Philadelphia Justice System Overwhelmed,” *New York Times*, August 15, 1990.

<sup>2</sup> *Id.* A federal court order required that the suspect be released without bail unless it was the suspect’s third arrest. Even then, bail may be waived with no consideration as to whether the suspect would show up for trial.

<sup>3</sup> McCoy, C. and Purcell, D., “Justice: Delayed, Dismissed, Denied,” *Philadelphia Inquirer*, December 13–16, 2009.

<sup>4</sup> According to data supplied by the Administrative Office of Pennsylvania Courts (APOC).

<sup>5</sup> An independent auditor confirmed data. “The Reform Initiative, Interim Report,” First Judicial District Criminal Courts, Commonwealth of Pennsylvania, July 2011.

<sup>6</sup> See, e.g., Vela, V. and Zealot, M., “How 2 Philly murders helped to stop slayings of criminal witnesses,” *Philadelphia Inquirer*, November 15, 2014.

<sup>7</sup> The General Assembly of Penn.: State Sen. Res. No. 344 (2010 Session).

<sup>8</sup> DeCaro, R., Phillips, W. M. Jr., “Grand Jury Subcommittee Report,” (2010).

## INTIMIDATION IN COURT FACILITIES AND JUDICIAL PROCEEDINGS

Witness intimidation is a crime against justice, and yet, some of the most effective intimidation occurs in and around court facilities. Intimidation is often a crime of opportunity — the most obvious being at the courthouse. Most court facilities were not designed to accommodate witness safety. Hostile contact is easily arranged in crowded court entrances, hallways, restrooms and waiting areas. It occurs quickly, quietly and in areas where they are least likely to be observed, making it nearly impossible to prove.

In 2007, the Pennsylvania Commission on Crime and Delinquency (PCCD)<sup>9</sup> found that *inside city court facilities* “Fear is often induced by threats relayed to witnesses or their families directly or, more commonly, in subtle, indirect ways. They are aimed at victims and witnesses as they are preparing to, or are presenting testimony.”<sup>10</sup> Similar tactics are observed all over the country: defendants’ supporters attend court, sometimes dressed in identical clothing or gang colors. They make threatening gestures, aim pointed looks at witnesses, have ostensibly “private” conversations insulting or threatening witnesses, or mouth-silent messages. Victims and witnesses understand these messages, regardless of their form.

**Responses to Court Intimidation.** Responsibility for court security is divided between the judges, who control the courtroom, and a state or local law enforcement agency, which controls common areas in and around court facilities.<sup>11</sup>

Witnesses and prosecutors have expressed frustration when judges, faced with in-court intimidation, appear more focused on remaining neutral and independent rather than stopping the behavior and imposing substantive penalties.<sup>12</sup>

Wary of reversal, judges are often reluctant to take action, specifically to exclude individual spectators or entirely close courtrooms. In an effort to support judges in Philadelphia, the PCCD and collaborating jurists developed a Bench Book containing legal precedents and practical techniques to counteract intimidation.<sup>13</sup> It encourages judges to be attentive to conduct that might intimidate a witness and addresses creating a safe and secure courtroom through:

- Judicial control of the courtroom
- Protective orders restricting conduct outside the courtroom
- Use of anonymous juries
- Bail as a deterrent to witness intimidation
- Excluding spectators
- Testimony from outside the courtroom; and
- Use of the court’s contempt powers.

*It is the prosecutors who need to make judges, court staff, attorneys and security personnel aware of intimidation in a particular case and to observe and report any intimidating behavior.*

Judges have broad power to maintain courtroom securi-

<sup>9</sup> “Forum on Witness Reluctance, Report to the Commission,” The Pennsylvania Commission on Crime and Delinquency (December 2007).

<sup>10</sup> McCoy, C., Phillips, N. and Purcell, D., “Witnesses Fear Reprisals, and Cases Crumble,” *Philadelphia Inquirer*, December 14, 2009.

<sup>11</sup> See, e.g., National Center for State Courts — “Court Security Resource Guide.” (<http://www.ncsc.org>).

<sup>12</sup> “Forum on Witness Reluctance, Report to the Commission.” at 5.

<sup>13</sup> “Free to Tell The Truth - Preventing and Combating Intimidation in Court: A Bench Book for Pennsylvania Judges,” Penn. Comm. on Crime and Delinquency, 2011.

<sup>14</sup> See, e.g., *People v. Hayes* 21 Cal.4th 1211 (1999); Cal. Code Civ. Pro. §128.

<sup>15</sup> “Report of the Advisory Committee,” *supra*. at 11. Periodic training is key to keep current on the meanings of specific clothing, gang colors, posture, gestures, code language and hand signals.

<sup>16</sup> See, e.g., Cal. Code Civ. Proc. §128 and N.C. Code, s. 15A-1034 (Maintenance of Order) (1977).

<sup>17</sup> Finn, P., and Healey, K.M., “Preventing Gang- and Drug-Related Witness Intimidation,” U.S. DOJ, (1996) at 76-77.

<sup>18</sup> *People v. Angel* (Colo. App. 1989) 790 P2d 844; *People v. Ortiz* (1991 App. Div. 1st Dept) 569 NYS2d 81; *Commonwealth v. Penn* 386 Pa. Super. 133 (1989).

<sup>19</sup> *Longus v. State of Maryland* (Court of Special Appeals 2009) 968 A.2d 140; *People v. Mack* (1991, App Div, 2d Dept) 577 NYS2d 892; *Commonwealth v. Conde*, 822 A.2d 45 (Pa. Super. 2003) (upholding exclusion of defendant’s fiancée and friends due to intimidating conduct during testimony).

ty and orderly proceedings<sup>14</sup> but must balance the constitutional requirement of a public trial against interference with the judicial process. It is the prosecutors who need to make judges, court staff, attorneys and security personnel aware of intimidation in a particular case and to observe and report any intimidating behavior.<sup>15</sup>

Some states expressly authorize judges to exclude spectators to ensure the orderliness of proceedings, the safety of persons present or to prevent witness intimidation.<sup>16</sup> Federal and state case law supports limited court closure if an open court would endanger a witness or compromise the court's ability to elicit full and accurate testimony.<sup>17</sup> Exclusions have been upheld where a witness has been threatened or harassed outside the courtroom, becomes upset or refuses to testify in the presence of the individual,<sup>18</sup> feels intimidated by the defendant's family in court<sup>19</sup> or asserts the privilege against self-incrimination due to a fear of retaliation<sup>20</sup> and where defendants or spectators have a history of witness retaliation.<sup>21</sup>

**Court Security Programs.** Maintaining the physical security of court facilities requires a multifaceted approach: single entry points with metal detectors, dedicated security personnel, pat-down searches and security cameras. Courts may routinely request identification of spectators,<sup>22</sup> or do so in response to a specific threat or intimidating conduct.<sup>23</sup> Security cameras may discourage entry by those with active warrants or on probation or parole with gang association terms.<sup>24</sup> These measures have been approved against constitutional challenges.<sup>25</sup>

The key is *dedicated* courtroom security tasked with closely observing all parties, as compared to traditional courtroom bailiffs. Some jurisdictions that handle a large number of serious and violent felonies have designated courtrooms for cases requiring a higher level of security

<sup>20</sup> *People v. Bumpus* (1990, App Div, 2d Dept) 558 NYS 587.

<sup>21</sup> *People v. Simpson* (1989, App. Div. 2d Dept) 544 NYS2d 381.

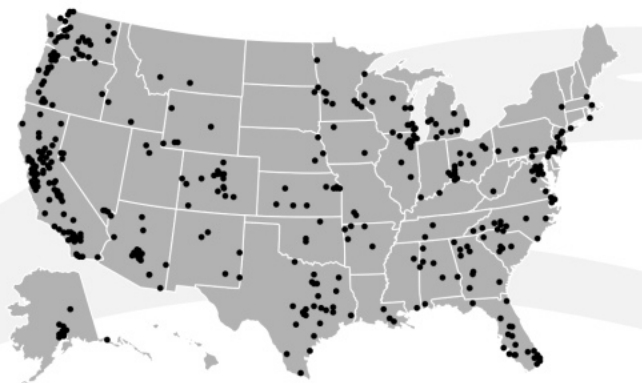
<sup>22</sup> *United States v. Wendell Smith* 426 F.3d 567 (2nd Cir. 2005); *U.S. v. Cruz*, 407 F.Supp.2d 451 (W.D. N.Y., 2006); *Weaver v. Blake*, 454 F.3d 1087 (10th Cir. 2006)

<sup>23</sup> In *United States v. Brazel*, 102 F.3d. 1120 (11th Cir. 1997) the court approved a mid-trial order that all persons who intended to enter the courtroom provide identification. The trial judge observed that individuals were entering and "going into various positions in this courtroom and ... staring at the witnesses that were on the stand." The fixed stares were "making the witnesses uncomfortable, because I observed it." at 1155-56.

<sup>24</sup> "Preventing Gang-and Drug-Related Witness Intimidation," *supra*, at 62.

<sup>25</sup> *United States v. Smith*, 426.F.3d.567 (2nd.Cir. 2005); *United States v. DeLuca*, 137 F.3d 24 (1st. Cir. 1998).

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and expedite cases involving witness intimidation. Security should also be authorized to require spectators produce identification, check warrants or active probation terms, photograph anyone displaying gang clothing, insignia or tattoos and record any posturing, gestures or other threatening actions and, where necessary, to arrest and remove offenders.

Some state victim's rights statutes require measures to minimize contact between victims and defendants in and around court facilities.<sup>26</sup> Victim/witness services in most jurisdictions provide transportation to and from court, secure, private waiting areas<sup>27</sup> and escorts to and from the courtroom — armed when necessary — to provide additional safety and deterrence.<sup>28</sup>

**Intimidating Technology in the Courtroom.** Court security must be particularly alert to the use of electronic devices to intimidate witnesses or jurors.<sup>29</sup> The use of cellphones and smartphones and other mobile devices to photograph or record witnesses, attorneys, spectators, judges and jurors for purposes of intimidation is a serious and growing problem.<sup>30</sup> Courts are struggling to balance convenience of technology with need to preserve the integrity of judicial proceedings.<sup>31</sup>

Spectators take photos and videos even in the middle of trial, and immediately distribute them through social media to retaliate and intimidate.<sup>32</sup> In 2012, four Orthodox Jewish men were arrested in Brooklyn for photographing a teenage girl while she testified in a high-profile sex abuse case; they were able to post at least one of the photos to Twitter before their arrest.<sup>33</sup> In a Philadelphia murder trial, the court, prosecutor and police worked together to effectively shut down this form of intimidation. Less than two hours after the first witness testified, a Facebook post named the witness, called him a "rat," and stated that people like him should be murdered. The next day, another witness left

a message for the prosecutor: "I'm petrified.... From the bottom of my heart, please, if there's any other way, please don't make me take the stand."<sup>34</sup> The prosecution persuaded the witness to testify and played the recording for the jury. The defendant was convicted and his friend, a court spectator who posted the threat, was charged with witness intimidation, harassment, retaliation and obstructing justice. Bail was set at \$1 million, at the urging of the trial judge. "To think that he had the audacity to come into my courtroom and think he was going to do that and nobody was going to do anything about it? Uh-uh. No," the judge said. "I will not have it."<sup>35</sup>

*"I'm petrified.... From the bottom of my heart, please, if there's any other way, please don't make me take the stand."*

— Message from witness to Philadelphia prosecutor

Spectators also use cellphones to intimidate jurors.<sup>36</sup> In 2009, an Ohio judge had two separate attendees at a murder trial detained after they pointed their cellphones at the jury during trial testimony and recorded the proceedings without the court's permission. The judge declared a mistrial and found the two in contempt for "intimidating and frightening my jury."<sup>37</sup>

A Massachusetts appellate court upheld a witness intimid-

<sup>26</sup> See, e.g., Arizona Rev. Stat. 13-4431. "Before, during and immediately after any court proceeding, the court shall provide appropriate safeguards to minimize the contact that occurs between the victim, the victim's immediate family and the victim's witnesses and the defendant, the defendant's immediate family and defense witnesses."

<sup>27</sup> "Separate and Secure Waiting Area Task Force Implementation Progress Report," Commonwealth of Massachusetts, Office of the Chief Justice of the Trial Court (February 1, 2013).

<sup>28</sup> See, e.g., Alameda County District Attorney, Victim-Witness Assistance Division. ([http://www.alcoda.org/victim\\_witness/available\\_services](http://www.alcoda.org/victim_witness/available_services))

<sup>29</sup> Chuck, E., "Witness Intimidation on social media: Law enforcement's growing challenge," *NBC News*, November 15, 2013. <http://www.nbcnews.com/news/other/witness-intimidation-social-media-law-enforcements-growing-challenge-f2D11599928>.

<sup>30</sup> Patrick, R., "Cellphones increasingly a problem for courts across St. Louis region," *St. Louis Post-Dispatch*, December 27, 2012.

<sup>31</sup> See, e.g., Sydow, N. "Can You Hear Me Now? Issues and Policy

Considerations for Cellphones and Other Electronic Devices in the Courts," *The Court Manager* Vo. 25, Issue 2 (<http://www.nacmnet.org>); "Considerations in Establishing a Court Policy Regarding the Use of Wireless Communications Devices" (2010 Update) National Center for State Courts (<http://www.ncsc.org>).

<sup>32</sup> See also Patrick, R., "Cellphones increasingly a problem for courts across St. Louis region," *St. Louis Post Dispatch*, December 27, 2012.

<sup>33</sup> Otterman, S., "Photos of Accuser on Stand Disrupt Sexual Abuse Trial," *New York Times*, November 29, 2012.

<sup>34</sup> McCoy, C. and Phillips, N., "Forces push protections for witnesses," *Philadelphia Inquirer*, June 13, 2010.

<sup>35</sup> *Id.*, Court of Common Pleas Judge Renee Cardwell Hughes.

<sup>36</sup> Robinson, E., "Trial Judge Imposes Penalties for Social Media in the Courtroom," *Digital Media Law*, March 3, 2010.

<sup>37</sup> Miller, D., "Mistrial: 2 men are accused of videotaping the jury hearing an aggravated murder case," <http://www.cleveland.com>, February 24, 2010.

<sup>38</sup> *Commonwealth v. Casiano*, 876 N.E.2d 475 (Mass. Ct. App. 2007).

idation conviction where a defendant pointed a cellphone at an undercover officer in a court hallway. "It is irrelevant whether any photographs were taken, as the police officer was made to believe that the defendant was taking pictures of him and could disseminate his likeness, an act intended to intimidate."<sup>38</sup>

Efforts to control the unauthorized use of wireless devices vary widely. Some courts prohibit the possession of all cellphones and personal electronic devices in all court facilities.<sup>39</sup> Cook County Circuit Court was one of the first state courts to ban cellphones after repeated complaints from judges about street gangs using them to photograph witnesses. "They're bold and they're brash.... They think they can do it in court just like the way they do it every day out of court."<sup>40</sup> Although cumbersome and time-consuming, it is effective.

Nearly all courts explicitly prohibit the taking of photographs or making video or audio recordings in the weapons screening areas or in courtrooms without court consent.<sup>41</sup> Many simply require that all devices be turned off at all times. The difficulty in detecting use of these devices often renders such policies entirely ineffective. Most violations are met with a warning, although court rules allow for confiscation,<sup>42</sup> contempt and/or monetary sanctions.<sup>43</sup>

## THE BAIL DILEMMA

In addition to low-conviction rates and pervasive witness intimidation, the Inquirer series highlighted Philadelphia's dysfunctional bail system and resulting fugitive problem.<sup>44</sup> The city's deposit bail system, which required defendants post only 10 percent of bail in cash, resulted in a failure-to-appear rate in excess of 30 percent in 2010,<sup>45</sup> with 61,000 outstanding bench warrants and \$1 billion owed by fugitive

defendants.<sup>46</sup> Ducking out on court is a tactic to avoid prosecution: "You think you're going to jail, you just run... They catch you a year or two later, the case falls apart. Any witness they have, they don't have time for it... They just don't want the hassle. That's a known fact."<sup>47</sup> As a result, small-time criminals, emboldened by evading the courts, graduate to more serious and violent crimes, further eroding citizens' faith in the ability of the police and the courts to protect them.

In most states, a motion for a "no bail" hold or high bail is the first step to prevent or deter witness intimidation. In 2010, less than 1 percent of Philadelphia's criminal defendants were held without bail pending preliminary hearing or trial, a number which is particularly alarming in light of the number of violent crimes in the city.<sup>48</sup> Some states grant the right to bail unless an individual is charged with an offense punishable by death;<sup>49</sup> others authorize presumptive preventative detention under a broad range of circumstances.<sup>50</sup>

Of particular concern are bail statutes that permit the court to consider only an accused's likelihood to appear in court and the ability to post financial bond. Others, which recognize risks to the public, and particularly to victims and witnesses, authorize courts to consider the degree of dangerousness that a defendant poses to the community.<sup>51</sup> Prompted in part by a proliferation of violence against witnesses, in 2014 New Jersey approved a state constitutional amendment that permits courts to consider the criminal history and threat a defendant poses in making bail determinations.<sup>52</sup>

Bail schedules, set by state or local authorities,<sup>53</sup> often do not reflect the seriousness of intimidation crimes. Low bail or an "own recognizance" release is often granted where a defendant is not already charged with a serious offense or the alleged intimidation does not involve physical violence

<sup>39</sup> See, e.g., "Cellphones, tape recorders and cameras are prohibited inside the Federal Courthouse in Manhattan." [http://www.nysd.uscourts.gov/site\\_manhattan.php](http://www.nysd.uscourts.gov/site_manhattan.php).

<sup>40</sup> Kass, J., "Judge did Right Thing by Banning Cellphones in Courtrooms," *Chicago Tribune* April 25, 2013; Cook County General Administrative Order No 2013-05 "Cellphones and other electronic devices."

<sup>41</sup> Conn. Supreme and App. Cts. — "Guidelines for the Possession and Use of Electronic Devices." [http://www.jud.ct.gov/external/supapp/electronicdevices\\_supapp.pdf](http://www.jud.ct.gov/external/supapp/electronicdevices_supapp.pdf).

<sup>42</sup> Kent City, Courthouse, Delaware (February 19, 2010); Vt. Sup. Ct., Admin. Dir. No. 28 (October 2008).

<sup>43</sup> See, e.g., Ca. R. Ct., 1.150 and local court rules. Superior Court of Ca., San Bernardino City., Cellphone Policy <http://www.sb-court.org/GeneralInfo/CellPhonePolicy.aspx>

<sup>44</sup> Purcell, D., McCoy, C. and Phillips, N., "Violent Criminals Flout Broken Bail System," *Philadelphia Inquirer*, December 15, 2009.

<sup>45</sup> Shubik-Richards, C., "Philadelphia's Crowded and Costly Jails: The Search

for Safe Solutions," The Pew Charitable Trusts, May 2010.

<sup>46</sup> "The Reform Initiative, Interim Report," p. 30

<sup>47</sup> "Violent Criminals Flout Broken Bail System," *supra*.

<sup>48</sup> See, <http://citydata.com>; <http://www.city-data.com/crime/crime-Philadelphia-Pennsylvania.html>

<sup>49</sup> See, e.g., Cal. Pen. C. §1270.5.

<sup>50</sup> See, Va. Crim. P. 19.2-120.

<sup>51</sup> The standard articulated in the Bail Reform Act of 1984 (18 U.S.C. § 3141).

<sup>52</sup> "Election Day 2014: Voters approve bail reform measure," <http://www.nj.com>, November 4, 2014. The amendment takes effect in 2017.

<sup>53</sup> Cal. Pen. Code §1269b(c), (d), and (e). Superior Court judges set county-wide bail schedules.

<sup>54</sup> "Violent Criminals Flout Broken Bail System," *supra*.

or firearms.<sup>54</sup> Where intimidation is likely, but has not yet occurred, judges are even less inclined to deny bail. Occasionally, defendants unwittingly show their true colors. Take the case of Hutchison Ivey. While being held on \$5 million bail in Philadelphia for armed robbery, Ivey yelled at visiting relatives for not getting a witness to change her statements to police. When the recorded interlude was played during a bail hearing, rather than the sought-after reduction, bail was revoked.<sup>55</sup>

To support a motion for bail, prosecutors depend on accurate and detailed records of all warrants, arrests and case dispositions, not only for local cases, but nationally. Equally important is information regarding a defendant's family, criminal associations and any involvement in cases that have stalled, been dismissed or lost at trial as a result of witness interference. Assigning all related cases to a single prosecutor can help to identify, fast track and monitor intimidation and underlying criminal cases.

A few states require that, as condition of pretrial release, defendants refrain from any contact with victims or witnesses and specifically prohibit conduct that can be construed as witness intimidation or dissuasion.<sup>56</sup> Due to the difficulty of proving subtle forms of intimidation, prosecutors are often unable to pursue substantive charges. Motions for increase or revocation of bail for violation of such conditions may be the only available remedy. Where a defendant is on probation or parole, any violation of law may result in automatic detention without bail.<sup>57</sup> Civil or criminal protective orders, where available, may offer additional protection — but the penalties for violation rarely exceed misdemeanor or general contempt.<sup>58</sup>

Unfortunately, detaining a defendant does not prevent direct or indirect intimidation. Cases involving threats or retaliation against victims and witnesses while defendants are in custody are common.<sup>59</sup> Monitoring telephone calls, correspondence and visitors often helps to detect intimidation. However, widespread smuggling of cellphones and

smartphones into correctional facilities provides ready, and often untraceable, means to deliver or to order threats or retaliation against witnesses.

## PRELIMINARY HEARING OR GRAND JURY?

Between 1974 and 2012, Pennsylvania did not have an indicting grand jury; witnesses were required to testify at public preliminary hearings. In Philadelphia, hearings were

*Cases involving threats or retaliation against victims and witnesses while defendants are in custody are common. . . . However, widespread smuggling of cellphones and smartphones into correctional facilities provides ready, and often untraceable, means to deliver or to order threats or retaliation against witnesses.*

fraught with procedural anomalies and, in particular, difficulty getting law enforcement and incarcerated witnesses to court. Civilian witnesses, whose identities became known to defendants, their friends and family, were repeatedly subject to intimidation. Many witnesses appeared the first, and even the second time they were subpoenaed, but after repeated delays, resulting in lost work days and inconvenience, eventually failed to appear. Preliminary hearings became a battleground where defense attorneys took full advantage of inefficient practices and a municipal court rule that allowed a judge to dismiss a case when the

<sup>55</sup> See, Dean, M., "Judge revokes bail for man caught trying to intimidate a witness," *Philadelphia Inquirer*, January 10, 2014.

<sup>56</sup> See, e.g., Del. Code § 3537(a)

<sup>57</sup> Cal. Pen. C. §1275.1 provides a peace officer, judge, or prosecutor may place a no-bail hold on an arrestee, upon filing of a declaration of probable cause to detain the arrestee without bail.

<sup>58</sup> See, e.g., NY Pen. L. §§ 215.50; 215.51 Criminal Contempt.

<sup>59</sup> See, "Inmates Use Facebook to harass their victims, intimidate witnesses from behind bars," *New York Daily News*, November 21, 2011.

<sup>60</sup> Philadelphia County, Municipal Court Rule 555 A.

<sup>61</sup> "The Reform Initiative, Interim Report," *supra*.

<sup>62</sup> DiFilippo, D., "City's grand-jury policy has positives, downfalls," *Philadelphia Inquirer*, January 7, 2014; Dean, M., "Judge Revokes bail for man caught trying to intimidate witness," *Philadelphia Inquirer*, January 10, 2014.

Commonwealth was unable to proceed three times.<sup>60</sup>

In 2010, the Grand Jury Subcommittee<sup>61</sup> recommended that Pennsylvania reinstate the indicting grand jury and permit the admission of hearsay testimony to protect victims and witnesses, reduce the number of appearances and reduce opportunities for contact between witnesses and defendants.<sup>62</sup> The option to indict by grand jury was restored in 2012 for cases in which “witness intimidation has occurred, is occurring or is likely to occur.”<sup>63</sup> By the close of 2013, Philadelphia prosecutors reported that of 625 cases<sup>64</sup> brought before the indicting grand jury, indictments were returned in 87 percent of cases and an additional 3 percent resulted in guilty pleas.

Whether to proceed by preliminary hearing or to seek a grand jury indictment depends on state statutes, local practice and the nature of the case. Other than Connecticut, every state and the District of Columbia use an indicting grand jury in some capacity. Twenty-three states and the District of Columbia require an indictment to prosecute certain offenses (capital offenses and/or felonies). Twenty-five provide the option to indict or proceed by information and preliminary hearing, but are regularly used in only about half of the states where not required.<sup>65</sup>

Proceeding by grand jury is generally effective in delaying, if not deterring, intimidation because the identity of victims and witnesses are protected.<sup>66</sup> Testifying before a grand jury is also inherently less stressful because defendants, defense counsel and spectators are excluded and there is no cross-examination. In states that permit the use of grand jury testimony at trial, it also enables the prosecutor to lock in the witness’ testimony<sup>67</sup> should a witness disappear, recant or refuse to testify at trial. It may also reduce the number of appearances for witnesses since, unlike preliminary hearings, grand jury proceedings are rarely postponed.<sup>68</sup>

The protection afforded witness identity is, even with use of the grand jury, limited. In most jurisdictions, pretrial

discovery of grand jury material is limited to the recorded grand jury testimony of the defendant and of witnesses who will be called by the prosecution at trial. Roughly a dozen states mandate discovery of the transcript of the grand jury proceedings<sup>69</sup> and several provide for pretrial disclosure of the entire grand jury transcript at the discretion of the court.<sup>70</sup>

Proceeding by preliminary hearing can be either a blessing or a curse, depending on state statutes and local rules of court. Although a preliminary hearing is not constitutionally mandated, nearly every state provides for their use in certain categories of offenses.<sup>71</sup> Because there are no constitutionally required procedures governing the admissibility of hearsay<sup>72</sup> or right to confront witnesses,<sup>73</sup> preliminary hearings may help to insulate victims and witnesses from intimidation. A number of states have adopted measures similar to California’s Proposition 115 (Prop 115),<sup>74</sup> which permits a finding of probable cause to be based entirely on hearsay testimony by a qualified peace officer<sup>75</sup> and an exception to the requirement that hearsay declarants be available for cross-examination.<sup>76</sup> One of the stated objectives of Prop 115 was “to restore balance to our criminal justice system, [and] to create a system in which justice is swift and fair, and... in which crime victims and witnesses are treated with care and respect.”<sup>77</sup> Prop 115 does not, however, entirely protect witness identities, as a testifying officer is most likely required to use names while laying foundation for hearsay testimony, nor does it preserve testimony for future use.

What is clear from Philadelphia’s experience and in many jurisdictions is that there is no single legal strategy or tactic to effectively protect victims and witnesses through the pretrial phase. Staying on top of any case involving intimidation or obstruction proves the adage: the devil is in the details.

<sup>63</sup> Press Release: “Pennsylvania Supreme Court Strengthens Witness Protection,” June 22, 2012.

<sup>64</sup> Williams, S., “Letters: D.A. indicts our grand-jury story,” *Philadelphia Inquirer*, January 14, 2014.

<sup>65</sup> Fairfax, R., “Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty,” 19 *William & Mary Bill Rts. J.* 339 (2010).

<sup>66</sup> See, e.g., Fed. R. Crim. P. 6(e); NY Code Crim. P. §§190.05 et. seq.; Cal. Civ. Code § 891.

<sup>67</sup> Several states permit depositions in criminal cases. e.g., Wisconsin, (WSA § 971.23(6)). Vermont (Vt. R. Cr. P. 15(h-j) (1991)).

<sup>68</sup> “Grand Jury Subcommittee Report,” *supra*.

<sup>69</sup> See Alaska R. Crim. P. 6(m); Ky. R. Crim. P. 5.16(3); Mass. R. Crim. P. 14(b); N.J. Crim. R. 3:6-6, 3:13-3.

<sup>70</sup> See Colo. R. Crim. P. 16(a)(1)(ii) (“with consent of judge supervising the grand jury”); N.D. Cent. C. § 29-10.1-38; Utah C. Ann. § 77-11-9; Wash. Rev. C. Ann. § 10.27.090(5).

<sup>71</sup> See *Whitman v. Superior Court*, 820 P.2d 262, 271 (Cal. 1991); see also, *Ramirez v. Arizona*, 437 F.2d 119 (9th Cir. 1971).

<sup>72</sup> *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010).

<sup>73</sup> See *United States v. Andrus*, 775 F.2d 825, 836 (7th Cir. 1985).

<sup>74</sup> Cal. Prop. 115 (1990) amended Cal. Pen. C. § 872(b)).

<sup>75</sup> See, e.g., Cal. Pen. Code § 872(b)) and *Whitman v. Superior Court*, *supra*.

<sup>76</sup> Cal. Evid. Code §1203.1.

<sup>77</sup> 1990 Cal. Stat. A-243, §1(c). One of the stated objectives of Prop 115 was “to restore balance to our criminal justice system ...”