Countering Witness Intimidation:
Forfeiture by Wrongdoing

INNOVATIVE
Sustaining effective practices and promoting systemic change

INFORMED
Training, resources, and assistance supported by research and experience

PRACTICAL
Customized strategies that are accessible, responsive, and easy to apply

What We Do

Resources
Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices

Consultations
Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions

Training Events
Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals

Partnerships & Initiatives
Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training
Support

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Objectives

- Reduce opportunities for intimidation
- Educate victims about intimidation
- Use evidence of intimidation to help convict abuser, regardless of whether (or how) the victim testifies
- Litigate motions to admit evidence under the doctrine of forfeiture by wrongdoing

Witness Intimidation

What do you picture when you think of witness intimidation?

Witness intimidation is anything done with the intention or purpose of preventing or altering a witness’s testimony or report to law enforcement, or to retaliate against a witness for such testimony or report.

Urban criminal justice system professionals said more victims were intimidated in domestic violence cases each year than in gang or drug crime.


Domestic violence (DV) victims appear at elevated risk for retaliation, especially when living with or economically dependent on the offender, or in contact with the offender because of shared parenting.

*DO ARRESTS AND RESTRAINING ORDERS WORK?* (Buzawa & Buzawa eds., 1996)

“Only unsuccessful intimidation ever came to the attention of police or prosecutors.”


“*These gaps in our communities’ responses are places that victims fall through and offenders crawl through.*”

Excerpt from a role play on the realities of the justice system, created by Graham Barnes for the National Training Project of Domestic Abuse Intervention Programs, Duluth, MN
Subtle Tactics in IPV/DV Cases

- Non-verbal cues
  - “The look”
  - Taking off jewelry, shirt
  - Making a fist
- “Code” words
  - “Now you did it!”
- Culture
Emotional Appeals

After listening to 3 hours of jail calls each for 17 men in custody on DV charges who called their victims, researchers observed:

“Perpetrators are not threatening the victim, but are using more sophisticated emotional appeals designed to minimize their actions and gain the sympathy of the victim.”

A. Bonomi et al., Meet Me at the Hill Where We Used to Park, 73 J. Soc. Sci. & Med. 1054-1061 (2011)

Continuation & Escalation

Power & control dynamics

Post-arrest, pre-filing

Leading up to Trial

KERRY HEALEY, NAT’S INST. OF JUST., RESEARCH IN ACTION, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES (1995)

Countering Witness Intimidation

- Reduce opportunities to intimidate
- Preserve evidence of intimidation
- Charge intimidation crimes
- Educate victims
- Use evidence of intimidation effectively

Strategies
How do you educate victims about witness intimidation?

Educate Victims

• What is considered intimidation?
• What should I do if I’m being intimidated?
• What should I save?
• How should I save it?
• Victims are not investigators—consider risk to them and to case

Educate Victims Cont’d

• Discuss witness intimidation during every conversation
• Advise victim on what to expect
• Provide instructions on how to preserve evidence
Educate Victims
Cont’d

• Determine point of contact for reports

• Connect victim with services that can assist in continual safety planning

• Do not minimize contact by offender

Example

WHAT MAY HAPPEN WHILE YOUR CASE IS PENDING

THE DEFENDANT MAY ATTEMPT TO “DESERTE OR DISTRACT” YOU TO CONFUSE YOU ABOUT WHAT HAPPENED DURING THE INCIDENT. He/She may say:

• “He/She can’t tell the truth.”
• “I don’t know what he/she is talking about.”

THE DEFENDANT MAY MAKE DECISIONS FOR WHAT HAPPENED, APOLOGIZE, SEND YOU GIFT, AND PROMISE TO CHANGE.

• “I never would have happened if you had (had not)…”
• “You started it! You’re always nagging me.”
• “You never should have called the police. Now look at the mess we’re in!”
• “Why are you doing this? You’re tearing our family apart.”
• “This could cost me my job.”
• “What did you tell them? How am I supposed to defend myself?”

THE DEFENDANT MAY TRY TO TALK YOU OUT OF APPEARING IN COURT.

• “If you don’t show up in court, this will all go away.”
• “You can get them to drop the charges.”

THE DEFENDANT MAY THREATEN YOU.

• “If you show up in court, you’ll pay for it.”
• “You have to drop the protection order. If you don’t, I’ll be homeless.”
• “You don’t drop the charges, I’ll report you to Child Protective Services.”
• “If you show up in court, I’ll fight you for custody of the kids.”
• “You identify against me, I’ll have to teach you a lesson.”

Example Cont’d

Victim Resource Program
Denver City Attorney’s Office
Prosecution and Code Enforcement

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What strategies do you employ to limit opportunities for intimidation?

Limit Opportunities

- Engage with allied partners to assist
  - Transportation
  - Accompany victims in the courthouse
- Train court personnel about overt and subtle witness intimidation

Limit Opportunities (Cont'd)

- Utilize formal and informal witness rooms
- Ensure safety planning
  - Includes technology safety
- Listen to victims' safety concerns
Charging Intimidation Crimes

Are you proactively investigating witness intimidation?

Investigation Strategies

• Assume there will be witness intimidation
• Ask victims about prior incidents of DV
• Monitor jail phone calls and visits

Investigation Strategies
Cont’d

• Review DV history – criminal cases and civil protection orders
  o Were any dropped?
  o What were the circumstances?
• Collaborate with victim service providers
Charge Intimidation Crimes

Coercion
M.S. § 609.27

Tampering with witness
M.S. § 609.498

Stalking
M.S. § 609.749(5)(a)

Bribery
M.S. § 609.42(3)

Try with original crime, if possible

What do you do with witness intimidation evidence?

Effective Use of Intimidation Evidence

• Forfeiture by wrongdoing
• Explain witness recantation / minimization
• Consciousness of guilt
• Aggravating factor at sentencing
Intimidation Worked - The Victim Cannot Participate

How do we get in the victim’s statements?

Forfeiture by Wrongdoing (FBW)

Concept

• Defendant has the right to confront witnesses against him/her

• Right can be forfeited if the witness cannot be confronted due to the defendant’s wrongdoing
Forfeiture by Wrongdoing

- Common law from 1666
  - Lord Morley's Case (6 State Trials, 770)
- Law in the U.S. since 1878
  - Reynolds v. United States, 98 U.S. 145 (1879)
- Rule of Equity

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Reynolds v. U.S.

98 U.S. 145 (1878)

“The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.”

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Public Policy

U.S. v. Thevis, 665 F.2d 616 (5th Cir. 1982)

“...to permit such a subversion of a criminal prosecution would be contrary to public policy, common sense, and the underlying purpose of the Confrontation Clause... and make a mockery of the system of justice that the right was designed to protect.”

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Giles v. California
554 U.S. 353 (2008)
• Defendant shot ex-girlfriend
  o Claimed self-defense
• Remanded – not enough evidence the victim’s unavailability was due to defendant’s intentional act
  o Defendant must have specific intent to make victim unavailable as a witness when committing wrongdoing

“Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.”

Giles, 554 U.S. at 376

Former Testimony
Minn. R. Evid. 804(b)(6)
Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

6) Forfeiture by wrongdoing. A statement offered against a party who wrongfully caused or acquiesced in wrongfully causing the declarant’s unavailability as a witness and did so intending that result.
Hearsay Exception
Minn. R. Evid. 804(b)(5)

Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant:

5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means.”

Efforts to Produce Witness

• State must show efforts to produce witness were both reasonable and made in good faith
  o State v. Cox, 779 N.W.2d 844, 851 (Minn. 2010) (citing Barber v. Page, 390 U.S. 719 (1968)).

• “The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.”
  o Cox, 779 N.W.2d at 852 (citing Ohio v. Roberts, 448 U.S. 56, 74 (1980)).

Reasonable Efforts

• Subpoena, writ, interstate witness subpoena, offer of travel/lodging expenses
  o Barber, 390 U.S. at 723-724 & n.4 (1968).
  o U.S. v. Yida, 498 F.3d 945, 960 (9th Cir. 2008).

• Extensive efforts to locate witness may be insufficient if not commenced until eve of trial
  o U.S. v. Tirado-Tirado, 563 F.3d 117 (5th Cir. 2009).
Prepare to show reasonable efforts to produce witness

- Obtain multiple ways to contact/locate witness
- Document all contacts with witness and efforts to locate
- Document any statements of intention by witness not to appear or to refuse to testify
- Don’t wait till eve of trial!

Bench warrant?

“[W]e believe that whether the State is required to secure the presence of a witness by means of a material witness warrant depends in part on the resulting hardship to the witness and the importance of the witness's testimony.”


FBW requires State to show by preponderance of the evidence that:

1) Declarant-witness is unavailable;
2) Defendant engaged in wrongful conduct;
3) The wrongful conduct caused the unavailability; and
4) Defendant intended to cause unavailability

Cox, 779 N.W.2d at 851-72
FBW Hearing
Preliminary Determinations
• Evidentiary Hearing must be held outside jury’s presence

• State must show by preponderance of evidence that:
  o Defendant was involved or responsible for causing witness unavailability; and
  o Defendant acted with intent to cause unavailability

FBW Hearing
Preliminary Determinations (Cont’d)
• Evidentiary Hearing is governed by Minn. R. E. 104(a)
  o Court not bound by evidentiary rules, including hearsay
  o Don’t need to call intimidated victim to prove FBW
Defendant’s Wrongdoing

- “Knowledge, complicity, planning or in any other way…”
  - People v. Pappalardo, 152 Misc.2d 364 (N.Y. 1991)

- Evidence of wrongdoing
  - Jail phone calls
  - History of relationship
  - Prior criminal and civil cases
  - Witnesses to intimidation
  - Testimony at prior hearings

Evidence

- History of abuse
- Prior charges filed and withdrawn
- Testimony from bond hearing or prior cases
- Evidence of victim’s fear of defendant and prior cases
- Anything to show what defendant did to prevent/discourage victim from testifying

Additional Resources

https://aequitasresource.org/resources/

- “Combatting Witness Intimidation, Experiences in Creating Systems-Based Change”
- “Legal Jiu-Jitsu for Prosecutors in Intimate Partner Violence Cases: Forfeiture by Wrongdoing”
- “Evidence of Other ‘Bad Acts’…”
- Webinar: “Safeguarding Victim Privacy in a Digital World”
- Webinar: “#GUILTY: Identifying, Preserving, and Admitting Digital Evidence”
Going Forward

- Identify overt and subtle forms of intimidation
- Educate victims about what to expect and how to preserve evidence
- Proactively investigate intimidation
- Identify and preserve admissible out-of-court statements
- Litigate admission of statements pretrial

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Office Hours

3rd Thursday of Every Month, from 2-4pm Eastern

- Discuss the most pressing issues facing prosecutors and allied professionals today
- Serve as a resource, and provide you with relevant resources
- Connect you with other practitioners in the field to help foster peer relationships

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