



## PSN VICTIM AND WITNESS INTIMIDATION AND RETALIATION TOOLKIT

# PROSECUTOR CONSIDERATIONS FOR VICTIM AND WITNESS INTIMIDATION AND RETALIATION

In any crime, victims and witnesses are at risk of intimidation or retaliation. Perpetrators use these tactics to discourage victims and witnesses from cooperating with the criminal justice system. This guide will assist prosecutors in identifying intimidation and retaliation through examining common perpetrator methods and their effects on victims and witnesses. It also provides best practices for prosecutors when responding to victim and witness intimidation and retaliation.

*For more information on victim and witness intimidation and retaliation, see the other guides in this toolkit.*

### COMMON METHODS OF INTIMIDATION AND RETALIATION

Any individual who participates in or is seen as helpful to a criminal investigation or prosecution may be subject to intimidation or retaliation.<sup>1</sup> Perpetrators may directly pressure victims and witnesses not to cooperate or may use others to do so.<sup>2</sup> Intimidation strategies may include control, isolation, threats, violence, and emotional pleas and promises to change. Rapidly evolving technologies, especially social media networks, have increased opportunities for perpetrators to intimidate victims and witnesses. Offenders may discourage victims or witnesses from participating through guilt, manipulation, or inducements.<sup>3</sup> The courts themselves may be misused by perpetrators to identify and locate victims and witnesses; for example, perpetrators may use witness lists or file motions for discovery to find out a witness's new address or locate a safe house where a victim is staying. Once located, perpetrators may stalk, intimidate, or convince victims and witnesses not to participate. One tactic is to use the potential of a lengthy trial to guilt a victim or witness into not proceeding. Moreover, intimidation often occurs in the courthouse where a victim may arrive without support, while the intimidator may have family members, friends, and numerous other community members packing the courtroom.

### COMMON RESPONSES TO INTIMIDATION AND RETALIATION

Intimidation and threats of retaliation reduce meaningful participation by victims and witnesses in the criminal justice system. Victims and witnesses may fail to appear even when summoned to court. If they do appear, victims may give testimony that minimizes the perpetrator's criminal behavior, change material portions of their account of the crime, feign memory loss, or completely recant.<sup>4</sup> Even if victims or witnesses initially come

1 Wilkinson, J., Mallios, C., & Martinson, R. (2013, March). *Evading justice: The pervasive nature of witness intimidation*. AEquitas. Retrieved July 19, 2022, from [https://aequitasresource.org/wp-content/uploads/2018/09/Strategies\\_in\\_Brief\\_Issue\\_16.pdf](https://aequitasresource.org/wp-content/uploads/2018/09/Strategies_in_Brief_Issue_16.pdf)

2 Ibid.

3 Ibid.

4 Ibid.



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forward, they may appear to become uncooperative or hostile over time.<sup>5</sup> Other feared consequences may include losing custody of children, losing financial support, and losing family and friends. When the victim or witness are undocumented, they may also fear deportation and the associated collateral consequences, such as being separated from their children.

Victims and witnesses may fear the consequences of “snitching,” including violence by the perpetrator, by their community, or by the friends, family, and associates of the perpetrator. Often victims and witnesses of community violence live, attend school, or work within a close distance of the intimidator, and they likely know their social circle (e.g., friends, relatives, neighbors, co-workers). If the broader community sees intimidation and retaliation occurring against victims and witnesses, community members may in turn become afraid to cooperate. In some instances, no witnesses will be willing to come forward, resulting in decreased perpetrator accountability, access to justice, and public safety.

#### **BEST PRACTICES FOR PROSECUTORS REGARDING VICTIM AND WITNESS INTIMIDATION AND RETALIATION**

Intimidation limits access to justice for victims, increases delays and costs to the criminal justice system, lessens community confidence in the system, and inhibits the system’s ability to protect the community. Victims and witnesses deserve to be protected by the criminal justice system.<sup>6</sup> Prosecutors can identify, document, and minimize intimidation and retaliation through a variety of strategies.

#### **Identify Intimidation and Retaliation**

Prosecutors must be properly trained to identify and respond to intimidation and retaliation and should assume that intimidation and retaliation will occur in all of their cases.

Prosecutors should proactively seek to identify whether victims and witnesses have previously experienced intimidation. They should review prior dropped criminal and civil cases and ask victims and witnesses about any prior history of intimidation (e.g., prior criminal or civil cases, other times the victim left or tried to leave an abuser in the case of interpersonal violence, and other known victims). Prosecutors can also collaborate with victim service providers to identify any lapses in contact that may be attributable to intimidation or retaliation. Prosecutors should collaborate with law enforcement to monitor suspects (as permitted by law), including

#### **Strategies to Address Witness Intimidation (Webinar) by the Violence Reduction Network**

During this webinar, participants hear from subject matter experts regarding innovative ways to address witness intimidation. Ms. Kristine Hamann, Bureau of Justice Assistance visiting fellow, provides opening remarks and facilitates the discussion among nationally recognized subject matter experts regarding their expertise in implementing effective strategies to protect witnesses.

<sup>5</sup> Knight, N. (2018, February 15). “I want to drop this case”: *Dealing with uncooperative victims in domestic violence cases*. County of Monterey. Retrieved July 19, 2022, from <https://www.co.monterey.ca.us/Home/ShowDocument?id=97342>.

<sup>6</sup> Wilkinson, Mallios, & Martinson, *supra* n. 1.



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tracking inmate phone calls, tracking the destination of phone numbers, and reviewing inmate visit logs.

Prosecutors must also be mindful of factors that drive community intimidation and retaliation. For example, the risks of intimidation and retaliation are greater in certain communities. The following are risk factors for intimidation and retaliation:

- **Poverty:** lack of access to economic resources often exacerbates crime and leads to greater risk of community intimidation, particularly when victims and witnesses cannot afford legal representation or critical resources needed to mitigate the harm caused by intimidation and retaliation.
- **Communities of color:** as a result of the disproportionate incarceration rate and systematic disparities affecting people of color in the United States, communities of color are historically mistrustful of and less likely to engage with law enforcement and the criminal justice system as a whole. This reality creates the conditions for intimidation and retaliation because victims and witnesses of color might be more fearful of reporting crime and mistrustful of law enforcement and prosecutorial efforts.
- **Gender:** the perpetrators of violent crimes tend to be adult men, and women may feel less capable of defending themselves against adult men. They may also have an intimate relationship with the person intimidating them, including financial dependence or a child in common, which makes them more accessible and vulnerable.
- **Immigration status:** unnaturalized immigrants may be at increased risk for intimidation due to their fear of deportation.

In addition, children, individuals with a criminal history, and victims of domestic violence face a greater risk of intimidation and retaliation.

### Engage and Educate Victims and Witnesses

Prosecutors should always utilize a trauma-informed approach to their work. This approach includes recognizing the signs and symptoms of trauma, creating a relationship with the victim that accounts for the effects of trauma,

### Providing Effective Services to Young Men and Boys of Color

This 90-minute training module discusses how to apply a client-centered approach with young men and boys of color who are victims of crime; identify historical events, racial discrimination, implicit bias, and other socio-ecological factors that influence help-seeking; assess various types of risks, including psychological, physical, and social safety; and develop effective safety plans with each victim.

### Serving LGBTQ Survivors of Violence

This training will provide victim advocates and allied professionals with knowledge and skills needed to effectively support and work with LGBTQ-identified people, communities, and survivors, and to translate the knowledge and skills into a defined action plan for themselves and their agencies. The training will help participants strengthen their knowledge of the obstacles LGBTQ people experience in seeking victim services and explore how best to overcome or alleviate these obstacles. At the conclusion of the training, victim service providers and allied professionals will be better able to serve LGBTQ victims of crime.



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avoiding exposing the victim to further trauma, and protecting themselves from vicarious trauma.<sup>7</sup>

Understanding trauma is important not only to prevent the re-traumatization of victims and witnesses but also to ensure prosecutors use approaches that better access critical details related to intimidation and retaliation. Prosecutors should utilize trauma-informed interviewing techniques, which include asking direct questions, actively listening, using language intentionally, and showing genuine empathy, patience, and understanding. Prosecutors should also consider meeting with victims and witnesses in neutral locations and utilizing victim advocates as a source of support for victims throughout the entire process. **For a more detailed description of a trauma-informed approach, please see the “Trauma-Informed Engagement with Victims and Witnesses of Intimidation and Retaliation” guide of this series.**

Prosecutors should educate victims and witnesses about intimidation, such as creating a checklist of tactics and behaviors commonly used to intimidate. This checklist should include less obvious or overt tactics, such as emotional appeals and promises to change. Prosecutors can also explain to victims, witnesses, and their families how to document intimidation, including when it occurs over cell phones and social media. Through collaboration with victim services, prosecutors can provide victims and witnesses with access to individualized safety planning. By engaging with victims and witnesses early and regularly, prosecutors can earn the trust of victims and witnesses and encourage continued cooperation.<sup>8</sup> Opportunities for offenders to intimidate and retaliate can be alleviated by listening to victims’ safety concerns and engaging with allied partners, such as law enforcement and victim advocates, to create a safety plan.

#### Preserving Evidence of Intimidation and Retaliation

Prosecutors should work with victims and witnesses to preserve any evidence of intimidation and retaliation, including phone records, forensic examinations, letters, screenshots or recordings, photographs, and Facebook

#### Witness Intimidation: Meeting the Challenge

This publication is the result of AEquitas’ Improving the Justice System Response to Witness Intimidation initiative. It explores the different forms that intimidation can take, recommendations for training and collaboration among allied professionals, and strategies for uncovering intimidation, responding to it, and handling trials when intimidation is a factor.

#### A Prosecutor’s Checklist to Address Victim or Witness Intimidation and Retaliation

This checklist contains some common intimidation tactics and behaviors that prosecutors should be aware of, as well as suggested strategies to prevent intimidation and retaliation in criminal cases.

7 Wener, E. (2021). *Avoiding the second assault: A guidebook for trauma-informed prosecutors*. Lewis & Clark Law Review, 25.2, 573.

8 AEquitas. (2014, March). *The prosecutors’ resource witness intimidation*. AEquitas. Retrieved July 19, 2022, from <https://aequitasresource.org/wp-content/uploads/2018/09/The-Prosecutors-Resource-Intimidation.pdf>.



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and other social media records. Victims may have access to digital evidence, which prosecutors can help secure in a manner to ensure admissibility in court. Prosecutors may need to utilize subpoenas, court orders, and search warrants to access a variety of evidence from third parties, including phone companies, banks, and technology companies. When accessing and preserving evidence contained on victims and witnesses' electronic devices, prosecutors should seize only content that is relevant, material, or exculpatory, and as permitted by law. Prosecutors should strive to ethically protect victim and witness privacy by using redactions, asking for in-camera reviews and protective orders, and otherwise limiting access to victim and witness information that is not discoverable under the rules of evidence and does not fall within the defendant's due process rights.

By preserving this evidence, a prosecutor may be able to proceed with an evidence-based case that focuses on preserving and admitting physical evidence and admissible statements to substantiate the charge without victim testimony. When prosecutors can proceed with an evidence-based case, the prosecutors and victim will experience less pressure, and the case may ultimately be strengthened at trial.<sup>9</sup>

#### Respond to Victim and Witness Intimidation and Retaliation

If there is evidence of intimidation or retaliation in a case, prosecutors have a variety of tools to hold the offender accountable.

A spectrum of responses follow:

- Ask that the terms of the release be modified to include stricter conditions that would better protect victims and witnesses.
- File a motion to revoke the offenders' release.
- Seek to have the perpetrator held in contempt of a civil or criminal order of protection.
- Litigate the admission of evidence of intimidation under the evidence rule related to "other bad acts."
- File (and join) additional charges that could include criminal violations of protective orders, stalking or harassing, or witness tampering or intimidation.

#### Combating Witness Intimidation: Experiences in Creating Systems-Based Change

This publication from AEquitas and the Justice Management Institute discusses the Combating Witness Intimidation Initiative. It discusses challenges related to witness intimidation, strategies to address these challenges, and methods to evaluate the outcomes of these approaches.

<sup>9</sup> Wright, D., & Weinberg, H. (2019, May 8). *How to handle a recanting witness*. Justice Clearinghouse. Retrieved July 19, 2022, from <https://www.justiceclearinghouse.com/resource/how-to-handle-a-recanting-witness/>.



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#### Other measures to ensure victim safety are as follows

- Brief court personnel about the possibility of intimidation both inside and outside the courtroom during the victim or witness's testimony.
- Request additional staff inside and outside the courtroom, including undercover security.
- File a motion to preclude cell phones and electronic recording devices inside the courtroom.
- Have an advocate accompany a witness coming and going to the courtroom, in the courtroom, and in areas immediately outside the courtroom.
- Use appropriate witness rooms or another secure space to keep witnesses separate from those waiting outside the courtroom.<sup>10</sup>

Child victims of crime require additional prosecutor considerations. See the following guides on supporting child victims throughout the criminal justice process:

#### [Child Victims and Witnesses Support Materials | OVC](#)

These materials were created based on the input of national experts and lived experience experts. The goal of these materials is to support children and youth during their involvement with the justice system as a victim or witness to a crime. The materials provide effective, trauma-informed, and developmentally appropriate information and support to children in an easy-to-understand format, helping them feel informed, supported, and empowered.

#### [Child Victims with Disabilities: A Guide for Prosecutors](#)

This guide instructs prosecutors on issues that must be addressed in their interactions with and accommodations for children with disabilities in various phases of the prosecution of cases of alleged child abuse. This issue is significant because children with disabilities are at least three times more likely to be abused or neglected than their peers without disabilities, and they are more likely to be seriously injured or harmed by maltreatment. This circumstance requires that the prosecutors managing these important cases be prepared to serve and advocate for child victims with distinctive physical, cognitive, and emotional needs throughout case processing.



#### WANT TO LEARN MORE?

For an in-depth analysis of victim and witness intimidation and retaliation from the perspective of prosecutors, see NCVC's "Trauma-Informed Prosecutorial Strategies to Address Victim and Witness Intimidation and Retaliation" video.



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<sup>10</sup>Prosecutors Center for Excellence. (2016). *Witness intimidation: What you can do to protect your witness*. Retrieved October 11, 2022, from <https://pceinc.org/wp-content/uploads/2016/07/20160610-Witness-Intimidation-What-You-Can-Do-To-Protect-Your-Witnesses-PCE.pdf>.