



ENHANCING  
**CONVICTION**  
**INTEGRITY**

# Achieving Justice: Countering Witness Intimidation through Forfeiture by Wrongdoing

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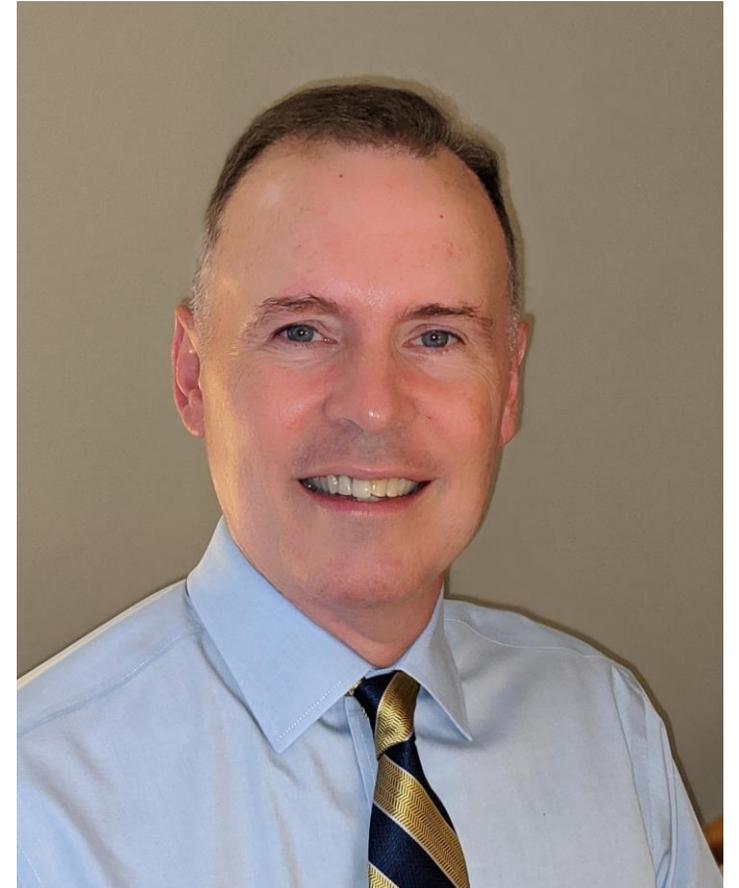
# Patricia D. Powers

Patti Powers joined AEquitas after serving as a Senior Deputy Prosecuting Attorney in Washington State for 27 years, bringing extensive litigation expertise as a well-respected trial attorney. She supervised the Sexual Assault-Domestic Violence Unit and prosecuted and tried a high volume of violent crimes—specializing in adult sexual assault, child sexual assault and abuse, sexual exploitation of minors, domestic violence, and related homicides (including complex litigation of high-profile, as well as cold and current cases). Patti served on the domestic violence and child fatality review committees and was a member of the Washington State Technical Assistance Committee for Child Death Review Guidelines. For five years, she was appointed as a Highly Qualified Expert for the United States Army, Criminal Investigation Division; in this role, she provided training for army criminal investigation agents and prosecutors at Fort Leonard Wood, Missouri, and in Germany. Patti is the lead Attorney Advisor on the SAKI project.

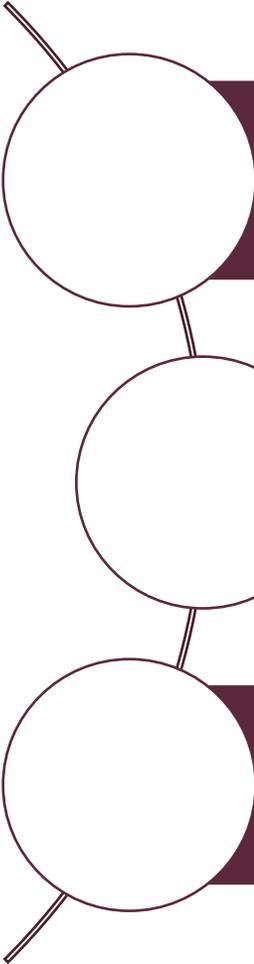


# John F. Wilkinson

John F. Wilkinson, an Attorney Advisor with AEquitas, presents on trial strategy, legal analysis and policy, and ethical issues related to violence against women at the local, state, national and international levels. He conducts research; develops training materials, resources, and publications; and provides case consultation and technical assistance for prosecutors and allied professionals. John served as an Assistant Commonwealth's Attorney in Fredericksburg, VA prosecuting cases involving intimate partner violence and sexual assault, including cases of campus sexual assaults and domestic violence homicide. He also served on the Fredericksburg Area Sexual Assault Response Team and prosecuted child sexual and physical abuse and neglect cases and infant homicides.



# Objectives



Work with law enforcement and advocates to reduce opportunities for intimidation.

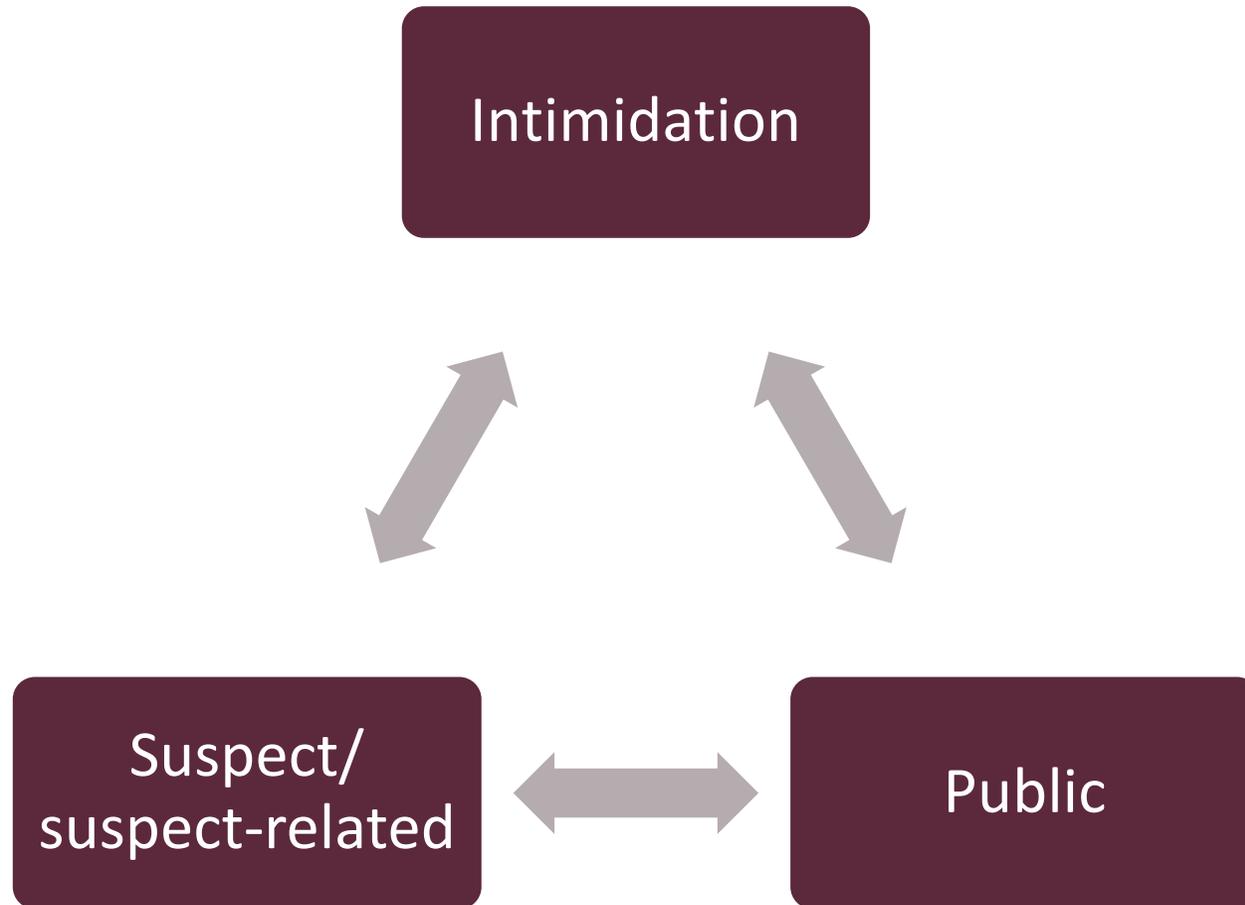
Educate victims about potential intimidation.

Litigate motions to admit evidence under the doctrine of forfeiture by wrongdoing.

What is your experience with victim or other witness  
intimidation?

In cold cases and in current cases?

# Sources of Intimidation



*For many victims, “privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”*

*Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*,  
38 SUFFOLK U. L. REV. 467, 473 (2005).*

# Managing Release of Information

## Prosecution and Law Enforcement

Media coverage:  
press releases,  
requests for  
comment

Public Record Act  
requests

Discovery

# Releasing Information

01

Media may request copies of public records: filing documents, police reports, witness statements

02

Review law to determine exemptions and redactions

03

Determine which, if any, records may be sealed and applicable case law for sealing criteria

# Victim's Records



# Responses to Motions to Compel

The item is not within your care, custody, or control

Rule 16, Federal Rules of Criminal Procedure



Victim has a right to privacy

*See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 484 (1965)

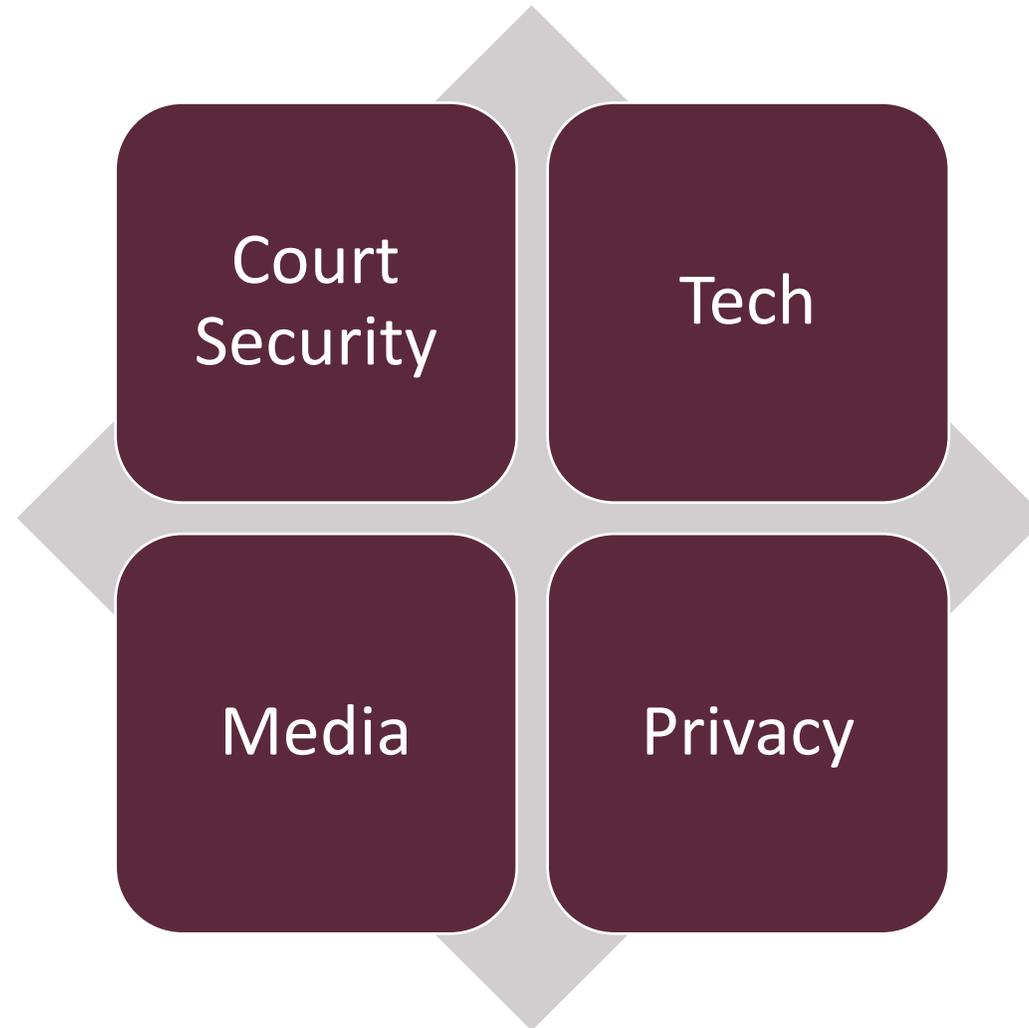


Defendant cannot go on a "fishing expedition"; they must articulate a specific reason why they believe the evidence is necessary or exculpatory

# Practice Tips

- Redact references to victim's personal identification information in case reports, preserving original documents.
- Request that court order defendant not to disseminate discovery.
  - In custody and out of custody considerations

# Proactively Provide Information to Victim and All Witnesses



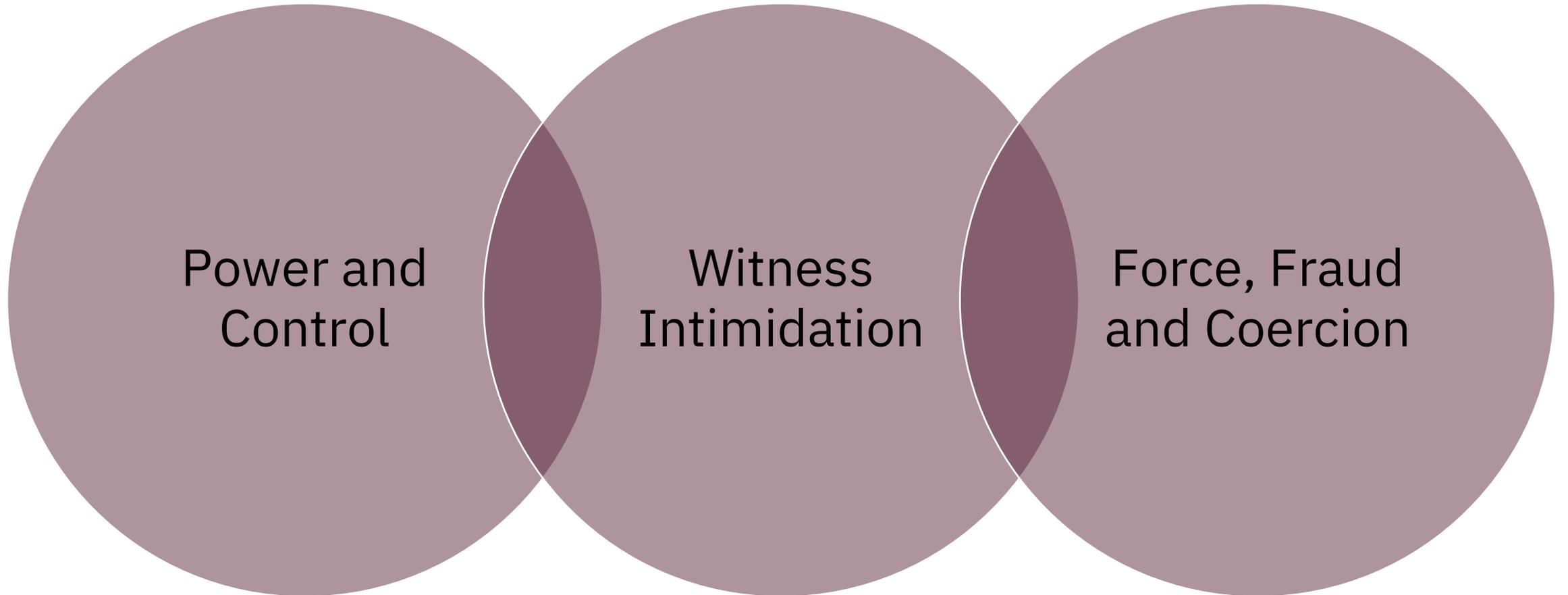
## Prior Victims: 404(b) Witnesses

- Regardless of when these crimes occurred, these witnesses are victims who remain traumatized.
- Approach preparation and direct exam in a trauma-informed way.
- Offer support throughout the process.
- Provide information proactively: status of offender, safety, and security considerations.

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

KERRY HEALEY, NATIONAL INSTITUTE OF JUSTICE, *RESEARCH IN ACTION,*  
*VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS*  
*AND EMERGING RESPONSES 2* (Oct. 1995)

# Techniques to Prevent Testimony

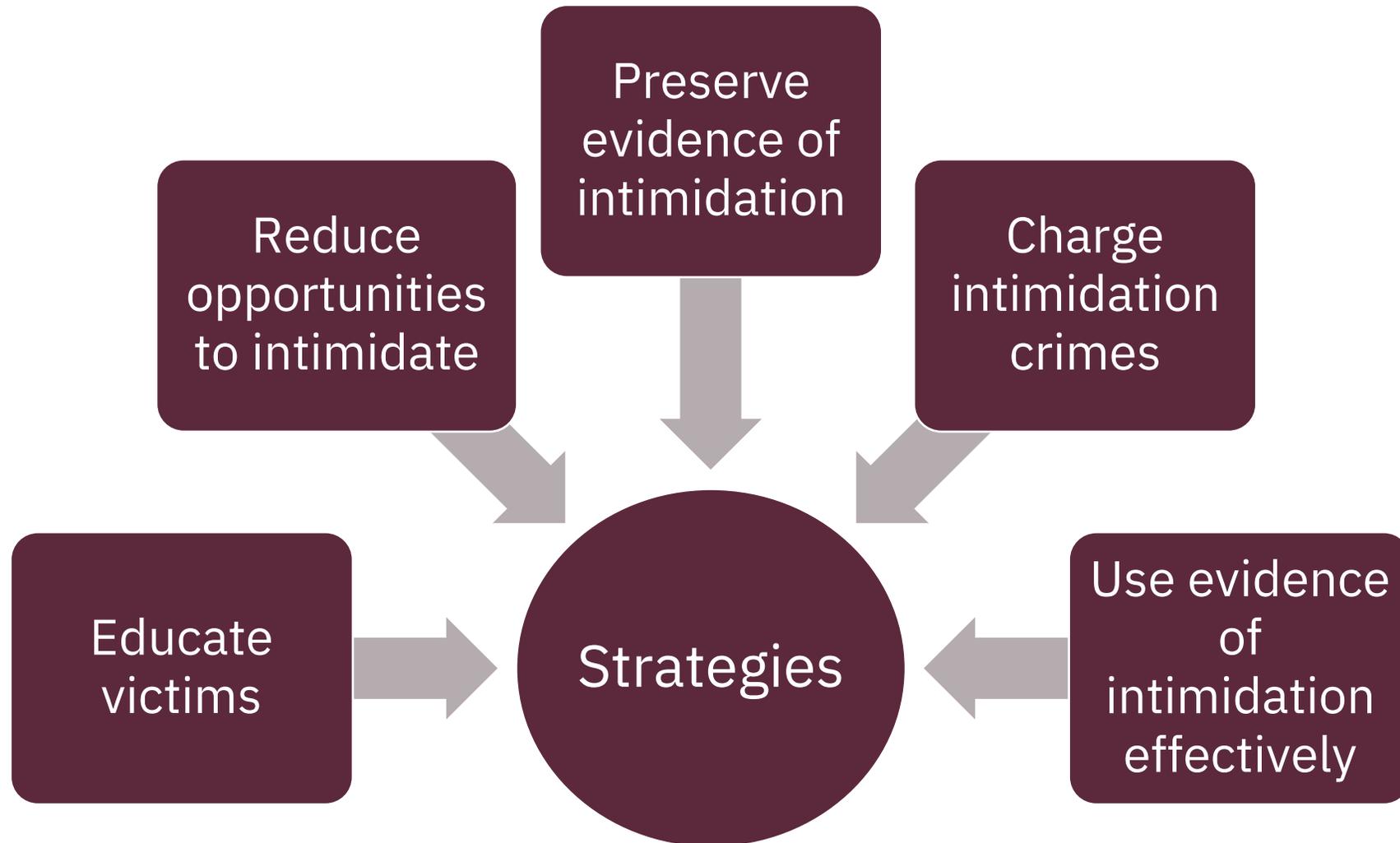


“Perpetrators are not threatening the victim, but are using more sophisticated emotional appeals designed to minimize their actions and gain the sympathy of the victim.”

Bonomi, R. Gangamma, C. Locke, H. Katafiasz & D. Martin, *Meet Me at the Hill Where We Used to Park*, 73 SOCIAL SCIENCE & MEDICINE, 1054-61 (2011)

How should we proactively address potential intimidation with victims/ witnesses?

# Countering Witness Intimidation



# Collaboration and Safety Planning



# Communication with Victims

- Discuss witness intimidation during every conversation.
- Advise victim or witness on what to expect.
- Provide instructions on how to preserve evidence.
- Determine a point of contact victim or witness can report to when not in immediate danger.
- Do not minimize contact by offender.

# Educating Victims

- Prosecutors and law enforcement should be part of the conversation about safety planning and their roles.
- Connect victim with system-based and community-based advocates to enhance education and engage in continual safety planning.
- Determine need and willingness to participate in formal and informal relocation.
- Support the victim with changes in activities they may want to make to be safer.



## VICTIM RESOURCE PROGRAM

Denver City Attorney's Office | Prosecution and Code Enforcement

### **NO MATTER WHAT S/HE SAYS**

- The abuse is not your fault.
- You do not deserve to be abused.
- Any consequences the defendant receives are not your fault.
- You cannot drop the charges. The City of Denver is bringing the charges.

▼  
▼  
This case results from a City charge. The maximum penalty for a City charge is up to one year in jail and/or a fine of up

### **WHAT MAY HAPPEN WHILE YOUR CASE IS PENDING**

#### **THE DEFENDANT MAY ATTEMPT TO "REWRITE HISTORY" OR TRY TO CONFUSE YOU ABOUT WHAT HAPPENED DURING THE INCIDENT.**

- "I never said those things - I would never threaten you or hurt you."
- "It's my property - I can do what I want to it."
- "This is all a misunderstanding."
- "You're not really hurt."

#### **HE/SHE MAY MINIMIZE WHAT HAPPENED.**

- "We were just arguing! I shouldn't go to jail for this."
- "The police blew this way out of proportion. I barely touched you."

#### **THE DEFENDANT MAY MAKE EXCUSES FOR WHAT HAPPENED, APOLOGIZE, SEND YOU GIFTS, AND PROMISE TO CHANGE.**

- "You know how much stress I'm under."
- "I was drunk. I promise I'll get sober."
- "It was an accident. You know I would never intentionally hurt you."
- "I'm sorry - I just snapped. You know how much I really love you."
- "It will never happen again, I promise."

in jail and/or a fine of up to \$999. In most cases defendants will be given the opportunity for probation and counseling.

## **VICTIM OUTREACH OFFICE**

**490 W. COLFAX,  
FIRST FLOOR  
DENVER, CO 80202**

**720.913.8020**

**Please call for  
information on your  
case and community  
referrals or come in  
to meet with a victim  
specialist or city  
attorney.**

### **THE DEFENDANT MAY BLAME YOU FOR THE ARREST, ATTEMPT TO MAKE YOU FEEL GUILTY, AND CLAIM TO BE THE VICTIM.**

“This 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.”

“If 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.”

“If you testify against me, I’ll have to teach you a lesson.”

## RESOURCES

This handout may be downloaded, printed, and distributed at your local office. Please input the resources and services available in your jurisdiction. You may use Adobe Acrobat to directly edit the PDF or create a sticker listing your resources to mark the handout. If you have any questions, contact AEquitas at 202-558-0040

# WHAT DO I NEED TO KNOW ABOUT WITNESS INTIMIDATION?



# WITNESS INTIMIDATION

## WHAT IS WITNESS INTIMIDATION?

Anything done to stop you from reporting a crime or from coming to court

## CAN IT HAPPEN TO ME?

Intimidation can happen to anyone, but it's more likely to happen if the crime involves:

- Domestic, sexual, or dating violence; stalking; or child abuse
- Someone you know, an acquaintance, or a former intimate partner
- A gang, a gun, or drugs

## EXAMPLES OF INTIMIDATION:

- Threatening to hurt you or your loved ones
- Threatening to share embarrassing secrets

## WHAT SHOULD I DO IF I AM INTIMIDATED?

- Call 911
- Call your detective
- Call Victim/Witness Services at the prosecutor's office
- Call your prosecutor

### IMPORTANT TIP:

**Be sure to save any emails, text messages, voicemail messages, or other evidence of intimidation.**

**Remember, we can't stop it if we don't know about it.**

## EXAMPLES OF INTIMIDATION:

- Threatening to hurt you or your loved ones
- Threatening to share embarrassing secrets
- Spreading rumors
- Threatening to take away money or promises to give money, gifts, or favors
- Threatening deportation
- Filing false charges against you or a loved one
- Defendant's supporters showing up in large numbers to court
- Bullying you or posting images of you on social media
- Following you or a loved one around
- Vandalizing property
- Apologizing and promising to change
- Threatening phone calls or hang ups
- Retaliating for reporting a crime or going to court

**Remember, we can't stop it if we don't know about it.**

## WHAT CAN VICTIM/WITNESS SERVICES DO TO HELP ME?

The following services are available:

- Accompanying you to court
- Assisting older individuals, persons with disabilities, and out-of-state victims and witnesses with transportation
- Assistance with parking at a designated parking garage
- Safety planning
- Reporting intimidation
- Temporary and permanent relocation for victims and witnesses who meet certain criteria
- Referral to other services, including: family grief counseling, shelters, job counseling, alcohol/drug rehabilitation, domestic violence programs, and immigration services

# Continuum of Intimidation

Sexual and intimate partner violence dynamics



Post-arrest, pre-filing



Leading up to trial



During trial



Post-conviction



# Limit Opportunities for Intimidation

- Identify victims' safety concerns and potential for suspect and/or public harassment.
- Engage with law enforcement and allied partners to assist with:
  - Transportation
  - Accompany victims to and in the courthouse
- Train court personnel about overt and subtle witness intimidation.
- Utilize formal and informal witness rooms.

# Limit Opportunities

Cont'd

- Ensure safety planning includes tech safety.
- Be present during defense interviews if requested by the victim.
- Ask for additional security measures when there is a history of witness intimidation or tampering.
  - Make a record.

## Alternative Residence

- Partner with housing authority in your jurisdiction and around the state.
- Tap into victim compensation funds: argue witness is a victim of witness intimidation, if appropriate.
  - State victim's compensation
  - Federal Victims of Crimes Act (VOCA) funding,  
<http://www.navaa.org/statedirectory.html>
- Develop a formal witness relocation program within your jurisdiction.

*“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

# Prepare for Coerced Recantation

*Meet Me at the Hill Where We Used to Park*

Victim is strong and resolved



Offender minimizes abuse and casts themselves as the victim



“They don’t understand us”



"Lie for me, it's us against the world"



Developing the Plan

How do we proactively investigate witness intimidation?

# Protective Orders

## Protect identity of victim

Use initials

Redact any  
“identifying  
information”

## Guard against disclosure of privileged information

Counseling records

SANE photographs

## Privacy concerns of victims and witnesses

Social Media

Cell phones

# Investigation Strategies

- Assume the likelihood of witness intimidation.
- Ask victims about prior history of intimidation:
  - Other criminal or civil cases
  - Other times they left or tried to leave
  - Other victims
- Monitor jail phone calls and visits.
  - Search by inmate PIN and known destination phone numbers.

# Investigation Strategies

Cont'd

- Cross train jail personnel to identify and report communication within the jail.
- Review prior criminal and civil cases:
  - Were any dropped?
  - What were the circumstances?
- Collaborate with victim service providers:
  - Pay attention to lapses in contact

# Responding to Witness Intimidation

Revoke Bail or Bond

Hold in Contempt

Use as Evidence of Guilt

Litigate Admission of “Other Bad Acts”

Charge Crimes

# Protection Orders

## Criminal

- Condition of pretrial release
- Revocation of release
- May be a crime
- Contempt

## Civil

- Relationship between offender and victim
- Type of violence or threats
- Violation is a crime
- Contempt

# Contempt

File a Petition for an Order to Show Cause

Order to Show Cause initiates civil or criminal contempt proceeding

Judges have inherent right to uphold their orders

# Criminal Charges

Witness  
Intimidation

Witness  
Tampering

Extortion

Bribery

Obstruction  
of Justice

Perjury

Stalking

ID Theft

Anything  
else?

# Charging Strategies

- Charge and join witness intimidation-related crimes.
  - Fed. R. Crim. P. 8
- File motion to admit “other bad acts” of intimidation.
  - Fed. R. Evid. 404(b)
  - United States v. Hayden, 85 F.3d 153, 159 (4th Cir. 1996)
- Argue witness intimidation is evidence of consciousness of guilt.
  - United States v. Harmon, 721 F.3d 877, 884 (7th Cir. 2013)

# Forfeiture by Wrongdoing

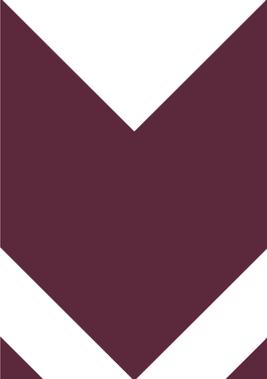
Have you litigated a Forfeiture by Wrongdoing motion?

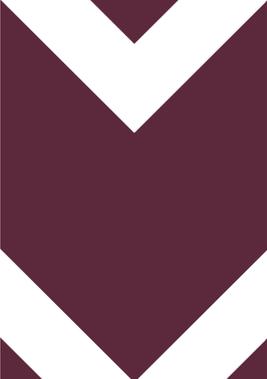
## FRE 804 (b): Hearsay Exception: Forfeiture by Wrongdoing

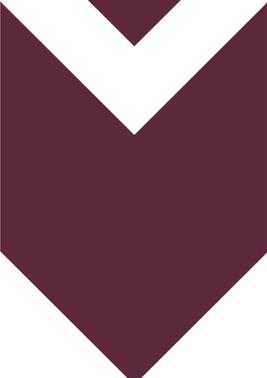
(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

# 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
  - Codified in most states, rejected by none

# 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.”

Victim  
unavailable

+

Due to  
defendant's  
wrongdoing

+

Intending that  
result



Admission of  
victim/ witness  
statements

# Unavailability

- Cannot be located
- Real or feigned memory loss
  - *People v. Pappalardo*, 152 Misc. 2d 364, 576 N.Y.S.2d 1001 (Sup. Ct. 1991)
- Deceased
- Defendant marries victim (privilege)
- Refusal to testify
- Defendant had victim deported

## Efforts to Produce Witness

State must show efforts to produce witness were both reasonable and made in good faith.

- 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.”

- Ohio v. Roberts, 448 U.S. 56, 74 (1980)

## Emerging Issue

People v. Nelson, 67 N.Y.S.3d 719 (N.Y. App. Div. 2017)

“Unavailability’ in this context is not limited to a witness's outright refusal to testify or physical absence from the proceedings; a witness is practically or effectively unavailable where the witness recants his or her initial statements or otherwise changes his or her version of the events as a result of misconduct on the part of the defendant.”

# Argument for Expansion

People v. White, 772 N.Y. S.2d 309 (1st Dept. 2004)

“To deem a testifying, but recanting witness ‘available’ for Confrontation Clause purposes, as defendant suggests, would provide witness tamperers with an incentive to induce witnesses to recant rather than to refrain from testifying at all.”

# Wrongdoing

State v. Hallum, 606 N.W.2d 351, 356 (Iowa 2000)

- Not limited to wrongful conduct or misconduct.
- Does not require threats, force, intimidation.
- Includes persuasion and control by defendant.
- May be established if defendant directs witness to exercise the Fifth Amendment privilege.

To introduce unavailable victims' statements at trial under the exception to the hearsay rule for forfeiture by wrongdoing, there is no requirement that the defendant must engage in violence or employ threats of physical violence to cause fear in the victim in order to procure the victim's unavailability.

State v. Aguilar, 181 So.3d 649 (2015)

# Evidence of Wrongdoing

- Includes but isn't limited to:
  - Jail phone calls
  - History of relationship
  - Prior criminal and civil cases
  - Witnesses to intimidation
  - Testimony at prior hearings
- May be proven by circumstantial evidence
  - *See, e.g.,* State v. Shaka, 927 N.W.2d 762 (Minn. Ct. App. 2019); Anderson v. State, 447 P.3d 1072, 1078 (Nev. 2019); United States v. Ledbetter, 141 F. Supp. 3d 786 (S.D. Ohio 2015)

“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 v. California*, 554 U.S. at 353, 376 (2008)

# Forfeiture Hearing

## Judicial Determination

- Requires pre-trial or hearing outside of the presence of the jury
- Standard = “preponderance of the evidence”
  - WA & NY require “clear and convincing evidence”
- Hearsay evidence admissible, including affidavits
- Statements you wish to introduce are admissible
- Consider using expert witness to educate through testimony or offer of proof
- Court may reserve ruling based on unavailability until trial

## Going Forward

Identify overt and subtle forms of intimidation.

Educate victims about what to expect and how to preserve evidence.

Proactively investigate intimidation.

Litigate motion to admit evidence under forfeiture by wrongdoing.

## 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”
- “No Victim? Don't Give Up: Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques”
- “The Prosecutors' Resource on Forfeiture by Wrongdoing”

# Contact Information



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