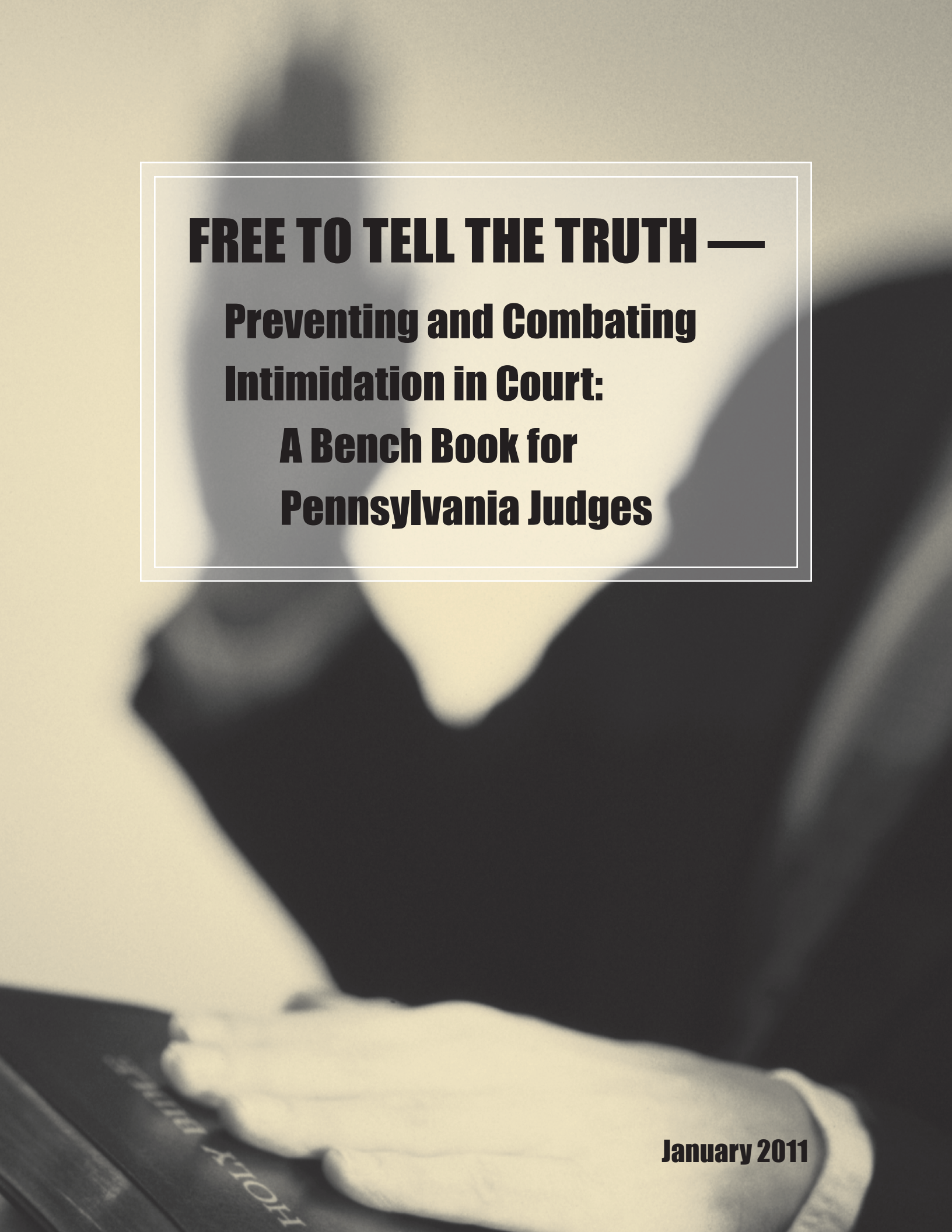

FREE TO TELL THE TRUTH —

Preventing and Combating Intimidation in Court: A Bench Book for Pennsylvania Judges

January 2011

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INTRODUCTION

Justice requires a search for truth in an environment that respects the rights of all parties to the system. Truth cannot be spoken in fear. Witness intimidation strikes at the very heart of our system of criminal justice, crippling our ability to function fairly, decently and with integrity. It cannot be tolerated.

Judges stand as guardians of the courthouse: the place where wrongs will be redressed without fear or recrimination. It is the responsibility of the court to create an environment in which truth can be spoken. To that end, I have collaborated with other members of the justice community to develop this bench book on witness intimidation and jury interference. This bench book is designed to be a practical tool to guide judges in dealing with the many manifestations of witness intimidation or jury interference. Our goal was to identify the body of law in Pennsylvania and other jurisdictions that addresses this assault on justice. We identify the forms of witness intimidation and jury interference and recommend the best practices to protect the integrity of our courts.

This bench book represents the collective wisdom of a dedicated group of lawyers and judges who willingly gave their time, intellect and passion for justice to this project.

This bench book would not have been possible without the extraordinary efforts of Stuart Suss, Esq., a brilliant mind who is totally devoted to the rule of law. Additionally, I am extremely grateful to Walter M. Phillips, Jr., Chairman of the Pennsylvania Commission on Crime and Delinquency (PCCD) and Michael J. Kane, PCCD Executive Director, who provided their wisdom and insight. Finally, with deep appreciation and thanks for the tireless creativity, wisdom and diligence of the Honorable Glenn Bronson, Assistant District Attorney John Delaney, Michael Schwartz, Esq., Benjamin Eichel, Esq. and the Honorable Gwendolyn Bright.

We all trust that you will find this bench book useful in our shared commitment that truth be unimpeded in the halls of justice – the courthouse.

The Honorable Renée Cardwell Hughes

Court of Common Pleas

First Judicial District

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Chapter 1

FORMS OF INTIMIDATION OUTSIDE THE COURTROOM

Chapter 1

FORMS OF INTIMIDATION OUTSIDE THE COURTROOM

Intimidation takes many forms both inside and outside the courtroom. The trial judge must be alert to and responsive to the many forms of intimidation without unnecessarily precluding access to the courtroom and without depriving the defendant of the presumption of innocence. The following is not meant to be an exhaustive list of the forms of intimidation that might be directed against a witness or against the family of a witness. The forms of intimidation are limited only by the deviousness of the persons seeking to intimidate.

The practices recommended herein may not be appropriate for every case. Some recommended practices may be useful in the normal operation of the courtroom to prevent problems. Other recommended practices may be utilized, as necessary, to immediately terminate any inappropriate conduct.

Forms of intimidation may include, but are not limited to:

1. Actual or attempted physical violence or property damage.
2. Explicit threats of physical violence or property damage.
3. Economic threats (as may be utilized in domestic violence cases to induce a victim not to pursue criminal prosecution of an abuser).
4. Indirect or implicit threats.
    - Anonymous phone calls, internet postings, text or other messages.
    - Publicly communicating the fact of the witness's cooperation (orally, in writing, or by postings on the internet or social networks).
    - Defendant and/or his allies appear together, as a show of force, at the residence, place of employment or school of the witness, or other location where the witness is present or is expected to be present.
    - Repeatedly driving past the residence of the witness or other location where the witness is present or is expected to be present.

FORMS OF INTIMIDATION OUTSIDE THE COURTROOM

5. Even in the absence of specific conduct or threats, the prevalence of organized criminal activity and violence in the community creates fear on the part of the witness that may be reflected in the conduct and demeanor of the witness in the courtroom, or in the reluctance or refusal of the witness to appear in court.

6. It is important to note that these actions may be directed at the witness and/or to anyone who may be close to or have influence with the witness, including but not limited to a spouse, parent, sibling or child.

Chapter 2

FORMS OF INTIMIDATION IN AND NEAR THE COURTROOM

FORMS OF INTIMIDATION IN AND NEAR THE COURTROOM

1. Explicitly communicated threats.
2. Photographing or recording the face or voice of the witness.
3. Defendant's allies fill the seats in the courtroom or the hallway, as a show of force, sometimes wearing gang or similar attire.
4. Threatening gestures, including but not limited to:
    a. Pointing a finger as if it were a gun.
    b. Holding hands up to simulate the photographing of the witness.
    c. Smirks or gestures of disgust or disbelief directed toward the witness.
    d. Prolonged staring at a witness.
5. An ally of the defendant may approach a family member of the witness and politely invite the family member to attend the proceedings in the courtroom. The family member does not perceive any sinister motive and accepts the invitation. The witness sees a beloved family member sitting in the courtroom in close proximity to a person known to be an ally of the defendant.

It is the responsibility of the trial judge to be aware of both the explicit and implicit forms of intimidation that occur in and near the courtroom. Intimidation may take place by other means not specified on these lists. Courtroom staff must be trained to recognize all forms of intimidation and to immediately report such conduct to the presiding judge.

Chapter 3

CREATING A SAFE AND SECURE COURTROOM

CREATING A SAFE AND SECURE COURTROOM

Judicial control of the courtroom

It is essential to maintain a safe and secure courtroom to ensure an impartial trial. The following are some of the proactive measures a judge may take.

1. Provide safe waiting areas for witnesses, away from any possible intimidators. Provide secure gathering areas for jurors, with escorted transportation to and from the courthouse and courtroom. Utilize courtrooms with adequate and visible security. Meet with the sheriff to plan courtroom security prior to the trial.

2. Train courtroom staff to be alert to intimidating acts by spectators, including subtle acts of intimidation such as smirking, gestures of disgust or prolonged staring at witnesses or jurors, and to immediately report such conduct to the judge. Position staff in the front and rear of the courtroom so that all conduct and spectators can be observed. Inform courtroom staff that when a factual record needs to be made, staff may be called upon to testify under oath, and be examined by counsel, regarding conduct that has been observed. The judge must ensure that courtroom staff treats all spectators in an evenhanded manner.

3. Warn everyone in the courtroom at the beginning of each day's proceedings that the judge will utilize all available powers, when appropriate, to respond to instances of witness or juror intimidation. These warnings may include:

    a. Criminal conduct will be referred to law enforcement agencies for arrest and prosecution.

    b. Misbehaving spectators will be held in contempt of court with accompanying fines and imprisonment.

    c. Misbehaving spectators will be excluded from the courtroom.

    d. "If you believe that intimidating a witness will stop the proceedings, or otherwise help the defendant, you are wrong."

4. Segregate potential intimidators in the courtroom by keeping the first two rows of seating reserved as a buffer zone to be filled by neutral persons approved by the court (such as members of the news media or students). The purpose is to create distance between the testifying witness, the jury and any potential intimidator. This buffer zone should not be used as a basis for excluding persons from the courtroom except as otherwise permitted by law.

5. Instruct the spectators to leave the courtroom before or after the jurors and the witnesses are permitted to leave the courtroom. The family and friends of the defendant should leave the courtroom separately from the family and friends of the victim.

6. Preclude the use of mobile telephones or other communications devices pursuant to Pa.R.Crim.P. 112 (A). Any telephone or communications device that is improperly used should be seized. The seized device should be stored together with a photocopy of the owner's identification so that the device may be returned at the completion of the day's proceedings.

Rule 112. Publicity, Broadcasting, and Recording of Proceedings.

(A) The court or issuing authority shall:

(1) prohibit the taking of photographs, video, or motion pictures of any judicial proceedings or in the hearing room or courtroom or its environs during the judicial proceedings; and

(2) prohibit the transmission of communications by telephone, radio, television, or advanced communication technology from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session.

The environs of the hearing room or courtroom is defined as the area immediately surrounding the entrances and exits to the hearing room or courtroom.

7. Respond promptly to misconduct. When a spectator smirks, laughs, or tosses a hand or otherwise indicates disapproval of a witness's testimony, or similar disrespect for the proceedings, the judge should immediately announce (out of the presence of the jury, if possible) that such behavior will not be tolerated. The misconduct usually stops.

8. Prohibit clothing such as gang attire or clothing that contains an intimidating message.

Judicial control of the courtroom

9. Although there appears to be no Pennsylvania authority on the issue, there is persuasive authority elsewhere holding that it may be permissible, in an appropriate case, to require that anyone who enters the courtroom provide identification, including some form of an identification card, along with name, address and date of birth. Before implementing these requirements, the judge should make findings on the record that justify the measures taken, including the fact that intimidation is enabled by anonymity. The task of collecting the information should be performed by the sheriff or a court officer, as part of neutral courtroom security. The policy should be applied to all spectators not known to the sheriff or court officer.

   The reasons for this procedure should be explained by the judge. Identifying information is taken from all spectators to insure the integrity of the proceedings. Courtrooms are open to the public and spectators should not be discouraged from attending judicial proceedings. However, in some cases, it may be necessary for the court to document the identity of spectators in the courtroom. Intimidators feel emboldened by their perceived anonymity. This procedure prevents the intimidator from hiding behind anonymity.

   Requesting identification at the courthouse door is a permissible courtroom security procedure. It should be used with caution and accompanied by a clear factual record setting forth the court's reasons.

10. Prohibit clothing that conceals the identity of a witness or spectator. For example, a person may seek to attend court proceedings with a face shielded from view by religious attire. There is no Pennsylvania authority forbidding the court from requiring the person to permit the face to be viewed for identification or as a condition for attending court or testifying. Any unveiling should be done, with sensitivity, in the presence of a court officer or other official of the same gender.

CREATING A SAFE AND SECURE COURTROOM

Judicial control of the courtroom

Legal discussion:

The courts have been charged with a responsibility to participate in and monitor the development of courthouse security arrangements and generalized courtroom and courthouse security measures such as the use of metal detectors and examining an individual's identification at the courthouse entrance have been approved against constitutional challenges in *United States v. Smith*, 426 F.3d 567 (2nd Cir. 2005), *cert. denied*, 546 U.S. 1204, 126 S.Ct. 1410, 164 L.Ed.2d 109 (2006); and in *United States v. DeLuca*, 137 F.3d 24 (1st Cir. 1998).

In *United States v. Brazel*, 102 F.3d 1120 (11th Cir.), *cert. denied*, 522 U.S. 822, 118 S.Ct. 79, 139 L.Ed.2d 37 (1997), the court approved the requirement, three weeks into the trial, that all persons who intended to enter the courtroom identify themselves (by identification card, name, address, and birth date). The trial judge noted that she had observed that individuals were entering and "going into various positions in this courtroom and . . . staring at the witnesses that were on the stand." *Id*. at 1155. The fixed stares were "making the witnesses uncomfortable, because I observed it." *Id*. at 1156.

The court of appeals found no violation of the Constitution. "The trial judge implemented the identification procedure based on her own observations for more than a week, confirmed by the prosecution, that individuals had been coming into the courtroom and fixing stares on the witnesses and possibly government counsel. The court considered the alternative proposed by defendants, but reasonably found it infeasible. She did not believe that, while presiding over the trial, she could assume the responsibility to pick out individuals who might be trying to influence the witnesses or might otherwise pose a threat to trial participants. Given the specific problem that had arisen and the limited nature of the remedy adopted, we see no abuse of discretion in what was done."

In *Williams v. State*, 690 N.E.2d 162, 168, 169 (Ind. 1997), the Supreme Court of Indiana affirmed the trial court's requirement that spectators present identification and sign in before entering the courtroom.

Five men fired at least sixty-five rounds of ammunition from assault rifles at the door and walls of an apartment in a complex in Indianapolis. A 16-year-old girl passing by the apartment was killed by a bullet to the head and inside a 7-year-old boy was permanently injured. The five shooters were members of the "Ghetto Boys," a group organized to sell crack cocaine. According to trial testimony, the shooting was intended as retaliation against Stacey Reed who, the day before the shooting, had broken into the home of a Ghetto Boy and stolen from the gang's stash of cocaine.

CREATING A SAFE AND SECURE COURTROOM

Judicial control of the courtroom

During the trial members of the public who sought access to the courtroom were required to pass through a metal detector and "wand." In addition, spectators who were unknown to the court were required to present identification to the officer at the door and sign in.

The Supreme Court of Indiana rejected defendant's argument that the security procedures violated his constitutional right to a public trial. "The security procedures required that each person who was unknown to the officer at the door show identification and sign in. Neither requirement actively excludes anyone." The Supreme Court imposed a prospective requirement, pursuant to its supervisory powers over the Indiana trial courts, "that the [trial] court make a finding that specifically supports any measures taken beyond what is customarily permitted that are likely to affect unfettered access by the press and public to the courtroom. The finding need not be extensive, but must provide the reasons for the action taken, and show that both the burdens and benefits of the action have been considered."

CREATING A SAFE AND SECURE COURTROOM

Protective orders during the discovery stage

INTRODUCTION: This bench book describes two forms of judicial action, both of which carry the label: "protective orders." Pa.R.Crim.P. 573(F) provides for protective orders during the discovery process, permitting the trial judge to delay the discovery or to restrict the dissemination of discovery material. 18 Pa.C.S. § 4954, as discussed *infra* at 28, provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim at locations outside the courtroom.

Rule 573(F), and the cases applying it, recognize that a trial judge is empowered to restrict otherwise permissible discovery in order to prevent disclosure of the name, address or other identifying information about a witness so as to protect the safety of that witness.

Pa.R.Crim.P. 573(F), formerly Rule 305(F), provides as follows:

> **(F) Protective orders**
> Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.

Recommended practices under this rule:

1. Proceedings on a motion for protective order under Rule 573 (F) may be held *in camera*.
2. The judge should review the discovery material being withheld, make a factual record, and make a determination as to how soon in advance of the testimony of the witness the disclosure of the discovery material should be made to the defendant.

Protective orders during the discovery stage

3. In making this determination, the judge should consider less restrictive options than the withholding of discovery entirely, such as (1) redacting the statement of the witness so as to remove the name, address, age and any other identifying information; (2) making available to defense counsel an interview with a willing witness prior to the trial; (3) denying discovery for the minimal amount of time necessary to insure the safety of the witness.
4. The discovery material that has been withheld should be placed in the record, under seal, so it may be available for appellate review.

Legal discussion:

In *Commonwealth v. Brown*, 544 Pa. 406, 676 A.2d 1178, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996), a capital case, the Commonwealth did not provide the name of an eyewitness until the trial began because the trial court had issued a protective order, at the request of the Commonwealth, pursuant to former Pa.R.Crim.P. 305(F). When the name of the eyewitness was disclosed, defense counsel objected because the Commonwealth had not given notice to the defendant of the filing of the protective order. A request for a mistrial was denied. The judge granted a 24-hour continuance to enable defense counsel to prepare for the testimony of the witness and the judge stated that he would entertain a request for additional time if necessary. No additional time was requested.

The Supreme Court affirmed the ruling of the trial judge since (1) the Commonwealth had sought trial court approval before withholding the identity of the witness; (2) there was no challenge to the adequacy of the Commonwealth's reasons for seeking a protective order; and (3) defense counsel was given a continuance in order to prepare for the testimony of the witness.

In *Commonwealth v. Hood*, 872 A.2d 175 (Pa. Super.), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), the Superior Court held there was no error in the use of an *ex parte* hearing for the request and issuance of a protective order.

During the investigation of a drug-related shooting, the Commonwealth developed information to support a protective order to keep the identities of the witnesses, as well as their statements, from being disclosed prior to trial because the witnesses were fearful of retaliation. The trial court granted the Commonwealth's motion for a protective order after an *ex parte* hearing.

Protective orders during the discovery stage

The Superior Court held that there was no error in the use of an *ex parte* hearing since the presence of defendant and defense counsel at the protective order hearing would have defeated the purpose of providing protection for these witnesses. The appellate court further noted that the defendant lost no legal rights by not having the names of the witnesses disclosed to him during the discovery stage as he was afforded full confrontation with these witnesses at trial as the witnesses were subjected to a full and vigorous cross-examination. Additionally, defendant was given all the time he requested to prepare for these witnesses. In the absence of any showing of prejudice, Superior Court held that the trial judge had not abused her discretion in granting the *ex parte* protective order.

The Supreme Judicial Court of Massachusetts addressed a rule nearly identical in language to Pa.R.Crim. P. 573(F) in *Commonwealth v. Holliday*, 450 Mass. 794, 803, 804, 800, 882 N.E.2d 309, 318, 319, 316 *cert. denied sub nom. Mooltrey v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 399, 172 L.Ed.2d 292 (2008) (citations and internal quotations omitted).

> Although the Commonwealth bears the burden of demonstrating that the safety of a witness would be put at risk if information, otherwise required to be disclosed, was made available to the defendant in the absence of a protective order, we have previously held that it need not demonstrate a specific or actual threat to the safety of a witness when the danger to witness safety is inherent in the situation.
>
> In granting the order at issue here, it was permissible for the [trial] judge to determine that the Commonwealth's representations that the crimes were the result of a murderous feud between gangs still operating in the neighborhood where the witnesses lived were reliable, that for years witnesses had been reluctant to come forward out of fear for their safety, and that those witnesses who were then incarcerated were particularly fearful of the defendants obtaining copies of statements made against them, and distributing those statements in the prisons, making them the potential targets of violence. It was not error for the [trial] judge to have concluded that there is great risk that retaliation could take place, endangering the witnesses for the Commonwealth. In other words, even absent evidence of a specific threat, the threat to witnesses was inherent in the situation. There was no abuse of discretion in issuing a protective order in these circumstances.

CREATING A SAFE AND SECURE COURTROOM

Protective orders during the discovery stage

Text of trial court order: “I order that the addresses and locations of witnesses in the above-captioned matter not be disclosed to Defense Counsel or the Defendants. I further order Defense Counsel not to give written copies of transcribed witness statements, reports containing witness statements, or witness statements in any form to the defendants or any other persons. I order Counsel for the Commonwealth to make available witnesses for Defense Counsel, in order that Defense Counsel may request interviews with the witnesses, and interview the witnesses if they are willing to be interviewed. I make these orders in order to protect the safety of the witnesses.” The order was later modified to permit defense counsel (and their investigators) access to the addresses of the witnesses who made statements.

CREATING A SAFE AND SECURE COURTROOM

May the Judge empanel an anonymous jury?

Convening an anonymous jury is an option only when all parties agree or after a motion is filed and complete and particularized factual findings are made, on the record, setting forth the need and justification for such a procedure.

Legal discussion:

In *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892 (2007), the Supreme Court of Pennsylvania held that the news organizations have a qualified First Amendment right to the names, but not the addresses, of jurors in a criminal case. However, the ruling recognized that the trial court may find that disclosing the jurors' names in a particular circumstance may raise "concerns for juror safety, jury tampering, or juror harassment." *Id*. at 64, 922 A.2d at 905. "[T]he trial court can deny the right of access when it offers on the record findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id*. The Supreme Court suggested that names of jurors could be withheld if the trial court makes "particularized findings of fact [that] the jurors have been or are likely to be harassed by the public, press, or defendant's family or friends." *Id*.

In *United States v. Scarfo*, 850 F.2d 1015 (3rd Cir. 1988), *cert. denied*, 488 U.S. 910, 109 S. Ct. 263, 102 L. Ed. 2d 251 (1988), the Third Circuit held: "Because the prosecution's evidence describing the defendant's organized crime group might have caused anxiety among the jurors, the trial judge withheld their identities before and after *voir dire* in this extortion case. In these circumstances, we find no abuse of discretion either in adopting that procedure or in explaining it to the jury." *Id*. at 1016. "Pretrial proceedings revealed that plea agreements, which included transactional immunity and post-trial witness relocation, had been arranged with [two men] in return for their testimony as government witnesses. Both had been implicated in several murders allegedly committed at Scarfo's behest. Their testimony would show that one prospective witness had been killed in the past, one judge had been murdered, and attempts had been made to bribe other judges. [Both witnesses'] lives had been threatened, and they would remain under heavy guard during their appearances in court." *Id*. at 1017.

In *United States v. Wecht*, 537 F.3d 222 (3rd Cir. 2008), the Third Circuit reversed the district court ordering an anonymous jury and held that there is a presumptive First Amendment right of public access to the names of trial jurors and prospective jurors prior to the empanelment of the jury. The court found that the presumption was not overcome by the district court's articulated reasons: the media may publish stories about the jurors, friends or enemies of the defendant may try to influence the jurors,

May the Judge empanel an anonymous jury?

and defendant had filed a pleading alleging that he had many potential enemies from his extensive career as a witness in criminal and civil cases.

A federal statute specifically authorizes a trial judge to keep the names of jurors confidential "in any case where the interests of justice so require." 28 U.S.C. § 1863(b)(7). In a capital case a trial judge may withhold the list of venirepersons from the defendant if "the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." 18 U.S.C. § 3432. There are no comparable statutes in Pennsylvania.

Two rules of Pennsylvania criminal procedure specifically address information about venirepersons and jurors:

Pa.R.Crim.P. 630, pertaining to juror qualification forms, requires that the form containing the "names of persons to serve as jurors" be "prepare[d]" "publish[ed]" and "post[ed]." The form itself "shall not constitute a public record." The information provided on the form "shall be confidential."

Pa.R.Crim.P. 632 pertains to the juror information questionnaire. The required form discloses the juror's name and city/township of residence, but not the street address. The information on the questionnaires "shall be confidential" and the questionnaires "shall not constitute a public record." On the other hand, the attorneys "shall receive copies of the completed questionnaires." *In Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892 (2007), the Court held that the confidentiality provisions of Rule 632 do not "overcome" the constitutionally based right of access of the news organizations. The *Long* court read the confidentiality provisions of Rule 632 to apply to the answers to questions provided by the jurors on the questionnaire, not to "identifying information contained therein." *Id*. at 63 n.15, 922 A.2d at 905 n.15.

CREATING A SAFE AND SECURE COURTROOM

Protective orders restricting conduct outside the courtroom

INTRODUCTION: 18 Pa.C.S. § 4954 provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim that may occur at locations outside the courtroom. As previously discussed, *supra* at 22, Pa.R.Crim.P. 573(F) also uses the term "protective orders." That rule applies during the discovery process, permitting the trial judge to delay the discovery or to restrict the dissemination of discovery material.

§ 4954. Protective orders

Any court with jurisdiction over any criminal matter may, after a hearing and in its discretion, upon substantial evidence, which may include hearsay or the declaration of the prosecutor that a witness or victim has been intimidated or is reasonably likely to be intimidated, issue protective orders, including, but not limited to, the following:

(1) An order that a defendant not violate any provision of this subchapter or section 2709 (relating to harassment) or 2709.1 (relating to stalking).

(2) An order that a person other than the defendant, including, but not limited to, a subpoenaed witness, not violate any provision of this subchapter.

(3) An order that any person described in paragraph (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.

(4) An order that any person described in paragraph (1) or (2) have no communication whatsoever with any specified witness or victim, except through an attorney under such reasonable restrictions as the court may impose.

18 Pa.C.S. § 4954.1 provides that a protective order shall contain at its top a notice containing the telephone number of the police department that the victim or witness should contact if the order is violated. 18 Pa.C.S. § 4955 sets forth the consequences of a violation of a protective order. A person violating the order may be punished for any substantive crime that has been committed or for contempt of court. The court is empowered to revoke the offender's bail after a hearing or issue a bench warrant for the offender's arrest. The text of these statutes may be found in the Appendix.

Protective orders restricting conduct outside the courtroom

The reference in these statutes to "any provision of this subchapter" encompasses certain criminal offenses, designed for the protection of witnesses, victims and court officers.

18 Pa.C.S. § 4952. Intimidation of witnesses or victims

18 Pa.C.S. § 4953. Retaliation against witness, victim or party

18 Pa.C.S. § 4953.1. Retaliation against prosecutor or judicial official

These statutes are set forth in full in the Appendix.

1. This statutory scheme authorizes any criminal court, including a magisterial district judge, following a hearing, to issue a protective order that a defendant or other person not violate the statute, that he or she maintain a certain distance from a specified witness or victim, and that he or she have no communication with any specified witness or victim. The court has authority to issue a protective order prohibiting the misconduct of the defendant and any other person.
2. While both a hearing and substantial evidence are required, there is no requirement of a formal motion. A judge may invoke this statute *sua sponte*.
3. Hearsay and declarations by the prosecutor both constitute admissible evidence at the hearing. 18 Pa.C.S. § 4954.
4. The order of the court should be specific as to the person(s) prohibited, the person(s) protected, prohibited actions, and the duration of the order. The order should also provide for its service upon the police department that would have primary responsibility for the protection of the witness or victim.
5. A standard protective order is available within the Common Pleas Court Case Management System (CPCMS) as document #3521.
6. For the purposes of § 4954, a juvenile delinquency proceeding may not be a criminal matter or proceeding. As such, the presiding judge in a juvenile delinquency proceeding may be without authority under § 4954 to issue a protective order. *Interest of R. A.*, 761 A.2d 1220 (Pa. Super. 2000). However, the court does have the inherent authority to regulate its

proceedings and to control the courtroom and its environs, and to protect its witnesses. See generally, *Interest of Crawford*, 360 Pa. Super. 36, 519 A.2d 978 (1987) (court has inherent power to hold alleged juvenile delinquent in contempt for failure to appear at adjudicatory hearing to which juvenile had been subpoenaed; court is not stripped of this power by absence from the Juvenile Act of any reference thereto).

CREATING A SAFE AND SECURE COURTROOM

Conditions of bail

The Pennsylvania Constitution recognizes that dangerousness can preclude bail. Article 1, § 14 provides:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

A defendant threatening, intimidating, harassing or injuring a witness or juror, or causing any of the foregoing, should be considered dangerous by the court in setting, amending, or revoking bail. Similarly, when the court sets or reviews bail for anyone charged with intimidating or threatening a witness or juror, the court should consider the danger posed to the community, particularly when that danger strikes at the very core of the justice system.

18 Pa.C.S. § 4956, set forth below, mandates that a defendant's bail, or any other form of recognizance, be conditioned on the defendant neither doing, nor causing to be done, nor permitting to be done, any act of intimidation or retaliation. The statute further requires that the defendant be given notice of this condition.

> **18 Pa.C.S. § 4956. Pretrial release.** (emphasis added)
>
> (a) Conditions for pretrial release. -- Any pretrial release of any defendant whether on bail or under any other form of recognizance **shall be deemed**, as a matter of law, **to include a condition that the defendant neither do, nor cause to be done, nor permit to be done on his behalf,** any act proscribed by section 4952 (relating to intimidation of witnesses or victims) or 4953 (relating to retaliation against witness or victim) and any willful violation of said condition is subject to punishment as prescribed in section 4955(3) (relating to violation of orders) **whether or not** the defendant was the subject of an order under section 4954 (relating to protective orders).
>
> (b) Notice of condition. -- From and after the effective date [February 2, 1981] of this subchapter, any receipt for any bail or bond given by the clerk of any court, by any court, by any surety or bondsman and any written promise to appear on one's own recognizance shall contain, in a conspicuous location, notice of this condition.

CREATING A SAFE AND SECURE COURTROOM

Conditions of bail

See also, Pa.R.Crim.P. 526(A), which requires that a condition of bail be that the defendant "refrain from criminal activity."

In addition, the bail authority may impose any condition necessary to "ensure the defendant's appearance and compliance." Pa.R.Crim.P. 526(B), 527(A)(3).

These conditions apply to any defendant released on recognizance, nonmonetary conditions, unsecured bail bond, nominal bail and monetary condition. Pa.R.Crim.P. 524(B).

The court may modify or revoke the defendant's bail if the defendant fails to comply with any of the conditions of bail. Pa.R.Crim.P. 529, 536.

Section 2711 of the Crimes Code, 18 Pa.C.S. § 2711, also requires that, in domestic violence cases, if the bail authority determines that the defendant poses a threat of danger to the victim, the bail authority must impose the additional conditions of bail that the defendant "refrain from entering the residence or household of the victim or the victim's place of employment," and that the defendant "refrain from committing any further criminal conduct against the victim."

1. 18 Pa.C.S. § 2711 applies to arrests for violations of section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2706 (relating to terroristic threats) or 2709.1 (relating to stalking) against a family or household member, defined as "spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood." 18 Pa.C.S. § 2711(a); 23 Pa.C.S. § 6102.

2. Any conditions of bail imposed pursuant to 18 Pa.C.S. § 2711(c)(2) "shall expire at the time of the preliminary hearing or upon the entry or the denial of the protection of abuse order by the court, whichever occurs first."

The text of these statutes and rules may be found in the Appendix.

CREATING A SAFE AND SECURE COURTROOM

Exclusion of spectators

An order excluding spectators from the courtroom must be in compliance with two constitutional provisions: the defendant's right to a public trial under the Sixth Amendment and the right of the news media to attend and report on the trial pursuant to the First Amendment. On the other hand, it is well established that a trial judge may maintain a safe and secure courtroom.

Anyone may be excluded who is observed in the courtroom acting in a manner that disrupts the proceedings, intimidates a witness or juror, or violates the rules of decorum of the court. For example, a spectator who makes faces or inappropriate gestures during the proceedings, glares at witnesses or jurors or visibly reacts to testimony may be summarily removed from the courtroom.

1. If the misbehavior occurs in the judge's presence, the judge should make a full record stating explicitly that factual findings, describing in detail the offending conduct, are based on the judge's personal observations.
2. If the misbehavior was brought to the judge's attention by someone in the courtroom, but the judge did not personally observe the misbehavior, the judge should hold a hearing outside the presence of the jury to make a factual record of the misbehavior. For example, if a courtroom staff member saw the conduct, that person should testify on the record, subject to examination by counsel. The judge should explicitly state findings of fact based on the record made at the hearing.
3. The judge should exclude only the offending person or persons.

A witness may express a reluctance to testify based upon fear, but there may not have been visible misconduct in the courtroom. The threat to the witness may not have been made in open court, but the person who made the threat is in attendance as a spectator at the trial. Threats or other acts of intimidation may have been committed by unknown persons. Under these circumstances:

1. The judge should convene a hearing outside the presence of the jury.
2. The intimidated witness should testify at the hearing. It is better not to rely exclusively upon the representations by the prosecutor regarding the witness.
3. The hearing may be held *in camera* if necessary to develop the information.
4. The witness must offer more than a generalized assertion of fear. A record must be made of words or acts, inside or outside the courtroom, that would justify the fear.

Exclusion of spectators

5. Specific factual findings should be made regarding the credibility of the evidence and whether a threat of injury or intimidation exists. The judge should state reasons why exclusion of the person or persons is essential to protect the witness from fear or emotional disturbance that would prevent or impede the witness from testifying truthfully.

6. When making factual findings, the judge should remember that intimidation genuinely may arise from indirect and implicit threats or from the prevalence of organized criminal activity and violence in the community.

7. Counsel for the defendant may be of the opinion that the presence in the courtroom of menacing-looking spectators may be creating a bad impression of the defendant in the eyes of the jury. Counsel for defendant, in some cases, may agree on the record to an order of exclusion.

8. The judge must explicitly consider alternatives to exclusion, such as additional security, and, if appropriate, state reasons why such alternatives to exclusion are not adequate.

9. An order excluding spectators should not be excessive in its scope. There is rarely a basis for excluding the news media. An order excluding all spectators is rarely justified as compared to an order excluding those designated persons whose presence is connected to fear by the witness. Closer scrutiny is given to orders excluding members of defendant's family absent evidence of misconduct attributable to the excluded family member.

10. An order excluding spectators should not be excessive in length. The exclusion should apply only during the testimony of the fearful witness and exclusion should terminate at the completion of that testimony.

11 There is no requirement set forth in court decisions that the acts of intimidation be committed by the defendant or be committed at the solicitation of the defendant. The defendant is not being excluded from the courtroom. Exclusion of spectators is not a sanction against the defendant; instead, it is a sanction against the spectators who are frightening the witness. Misconduct by the defendant or misconduct attributable to the defendant is not required. *State v. Bobo,* 770 N.W.2d 129 (Minn. 2009), summarized *infra* at 38.

CREATING A SAFE AND SECURE COURTROOM

Exclusion of spectators

Legal discussion:

United States Supreme Court:

Courts rely upon the legal standard set forth in *Waller, v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). In *Waller,* all persons except for court personnel were excluded for the entirety of a suppression hearing. Closure of a judicial proceeding must advance an overriding interest, the closure must be no broader than necessary to protect that interest, the trial judge must consider reasonable alternatives to closing the proceeding, and the judge must make findings adequate to support the closure.

In a typical case of witness intimidation, the courtroom may not be closed in its entirety to all persons. Instead, there may be a partial closure of the courtroom. Only specified individuals may be excluded. The exclusion will be temporary, just during the testimony of the intimidated witness. There may not be a permanent exclusion of the individuals from the courtroom.

When there is a partial closure of the courtroom, some state and federal courts modify the *Waller* standard. These courts have adopted the position that where a closure is partial, it is necessary to show a "substantial reason" rather than an "overriding interest" to justify the closing. Other courts continue to apply the *Waller* standard both for partial and for total closures. Pennsylvania courts have not specifically decided whether the "overriding interest" or the "substantial reason" standard applies to partial closures of the courtroom.

In *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), the Court held that a congested courtroom, without more, is not a justification for limiting public access during jury selection. Similarly, the presence in the courtroom of a court reporter and members of the news media does not necessarily preclude a defendant from successfully asserting a violation of his right to a public trial.

Pennsylvania decisions:

In *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985), the Pennsylvania Supreme Court upheld convictions against defendants' assertions that their right to a public trial was violated by exclusion of spectators during several days of *voir dire*. The trial of eight high-profile defendants was conducted amid tumult, inside and outside the courtroom. Although some of the bases of the Court's ruling have been abrogated by *Presley, supra*, the Court's opinion contains a strong statement as to the right of the judge to enforce standards of conduct within his or her courtroom. "[T]rial judges are vested with broad discretion in setting and enforcing the standards of proper conduct

for all those who seek to attend judicial proceedings before them. We should not be hasty to reverse a trial judge's actions in establishing order in his courtroom, unless his actions are not designed to maintain dignity, order, and decorum, and instead deny or abridge unwarrantedly the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Berrigan,* 509 Pa. at 133, 501 A.2d at 234.

In *Commonwealth v. Howard*, 324 Pa. Super. 443, 471 A.2d 1239 (1983), the Superior Court upheld the rulings of the trial court that (1) ordered the removal of the defendant from the courtroom based upon his disruptive behavior, and (2) ordered the removal of members of the group MOVE from the courtroom for the final one hour of one afternoon's proceedings based upon the trial judge's factual findings, stated on the record, that there was a causal connection between the presence of the group in the courtroom and the instances of disruptive behavior by the defendant.

Commonwealth v. Conde, 822 A.2d 45 (Pa. Super. 2003), upheld the exclusion of defendant's fiancée and friends for the duration of a trial after they had been observed by the judge and by a court officer making intimidating gestures and faces at witnesses.

In *Commonwealth v. Penn*, 386 Pa. Super. 133, 562 A.2d 833 (1989), *appeal denied*, 527 Pa. 616, 590 A.2d 756, *cert. denied,* 502 U.S. 816, 112 S.Ct. 69, 116 L.Ed.2d 43 (1991), all spectators were excluded from the courtroom based upon a representation to the trial judge by the prosecutor that a Commonwealth witness was fearful of testifying in a full courtroom following the breaking of several windows at his home and the receipt of several anonymous calls on the previous evening threatening injury to him and his four children if he testified at trial, as well as the witness having been accosted outside the courtroom that morning by persons he could not or would not identify, who also requested that he change his testimony.

The Superior Court found the closure of the courtroom to have been unjustified based upon two errors by the trial judge. First, the trial judge accepted the representation by the prosecutor without personally interviewing the witness, either in court or *in camera*, and without making an independent assessment of the credibility of the witness with respect to the allegations of intimidation. Second, the trial judge failed to explain on the record why closure of the courtroom was necessary as compared to other alternatives such as criminal prosecution of the intimidators or augmented courtroom security.

CREATING A SAFE AND SECURE COURTROOM

Exclusion of spectators

Other jurisdictions:

INTRODUCTION: As previously stated, before persons may be excluded from the courtroom, specific factual findings are warranted setting forth the basis for the court's conclusions that a witness has been intimidated and that exclusion of one or more spectators is an appropriate response to the intimidation. While there is not extensive case law in Pennsylvania on this issue, appellate courts from around the country have upheld orders excluding spectators when a legally sufficient justification has been presented. We offer four examples of such rulings that may be found to be persuasive authority.

People v. Frost, 100 N.Y.2d 129, 790 N.E.2d 1182, 760 N.Y.S.2d 753 (2003)

Before trial in a New York murder case, the prosecution, pursuant to a state statute similar to Pa.R.Crim.P. 573(F), moved for a protective order. In support of its motion seeking to protect the identities of witnesses prior to trial, the prosecution noted defendant's criminal history, the criminal history of defendant's father and step-brother, the defendant's family's attempt to discourage potential witnesses to the instant crime, and the lack of cooperation by the community into prior investigations of crimes believed to have been committed by defendant. The prosecution requested that the hearing be held *in camera* outside the presence of defendant or his attorney. After the hearing the trial court granted the prosecution's motion and directed that the identities of certain witnesses not be revealed during *voir dire*, and that disclosure of relevant discovery material be delayed and redacted to protect witnesses' identities.

At trial, the prosecution moved on four separate occasions for closure of the courtroom during the testimony of certain witnesses. The trial court conducted an *ex parte* hearing on each occasion to determine whether the courtroom should be closed. The defendant and his counsel were excluded from these hearings. At the first such hearing, the trial court ordered the closure of the courtroom during the witness's testimony and, to protect the witness's identity, allowed him to testify under the fictitious name Steven Knight. The court also issued a protective order as to his address and occupation. At subsequent *ex parte* hearings, the trial court determined that the courtroom would be closed for the testimony of two additional witnesses.

The highest court in New York, the Court of Appeals, unanimously upheld defendant's conviction. The Court of Appeals ruled that the evidence elicited at the hearings pertaining to the potential witnesses' extreme fear of testifying in open court was legally sufficient. The court also specifically affirmed the trial court rulings excluding defendant

and his counsel from the *ex parte* hearings, permitting the testimony of the prosecution witness under a fictitious name, and closing the courtroom during the testimony of three witnesses.

State v. Bobo, 770 N.W.2d 129 (Minn. 2009)

The State presented evidence, in a hearing outside the presence of the jury, that both James [witness] and Bobo [defendant] were members of the Rolling 30's Bloods gang and that, on the date James was scheduled to testify, gang members were present at the trial. The State also presented evidence regarding letters arguably intended to influence James not to testify, as well as double hearsay regarding alleged conversations in which Bobo's friends or relatives encouraged James not to testify. According to the police investigator, who spoke to James after James refused to testify, James decided not to testify after facing Bobo directly and seeing all of the other people in the courtroom. The officer specifically testified that James claimed the reason he did not testify was because he was afraid after seeing Bobo and all the other people in the courtroom.

The trial court barred the entire public during the testimony by James. The trial court considered excluding specific individuals but rejected the option as not feasible. The trial court rejected having someone standing at the door to the courtroom, attempting to identify those who were Rolling 30's Bloods gang members or who might otherwise intimidate James, as ineffective and potentially an invasion of privacy.

The Supreme Court of Minnesota ruled that the trial court appropriately considered alternatives and found the temporary closing of the courtroom to the public during James' testimony to be the only reasonable alternative. "[W]e conclude that there was sufficient evidence to support the [trial] court's finding that keeping the courtroom open was substantially likely to jeopardize the overriding interest that James testify truthfully at trial."

State v. Drummond, 111 Ohio St.3d 14, 854 N.E.2d 1038 (2006)

The trial court excluded all spectators from the courtroom after an incident where there had been an altercation between a spectator and courtroom deputies and after a second incident had occurred in chambers involving the trial court and a spectator. The trial court excluded members of the public and the defendant's family, but did so only for the length of a single cross-examination and two other witnesses' testimony. The trial court permitted media representatives to remain in the courtroom throughout the testimony of these witnesses.

CREATING A SAFE AND SECURE COURTROOM

Exclusion of spectators

The Supreme Court of Ohio held that the trial court's interest in maintaining courtroom security and protecting witness safety supported the trial court's limited closure of the courtroom. There had been a physical altercation between a spectator and courtroom deputies, and a second incident occurred in the judge's chambers. The trial court also stated that "the fear of retaliation expressed by various witnesses" was a basis for its action. The Supreme Court acknowledged the dangerous nature of gang violence and the genuine need to protect witnesses testifying against gang members from the deadly threat of retaliation. The closure was no broader than necessary.

Commonwealth v. Young, 899 N.E.2d 838 (Mass. App. Ct.), *review denied*, 453 Mass. 1105, 902 N.E.2d 947 (2009)

A witness, Greene, was hesitant to testify. The prosecution identified the defendant's brother as a "specific concern" for Greene. The judge also inquired of Greene, outside the presence of the jury, if there was anything that she particularly was concerned about, and Greene replied, "I know some of his family." Greene then acknowledged that "his family" referred to the defendant's family, including the defendant's brothers. Before Greene testified, the judge allowed the defendant's brother to be excluded from the courtroom during Greene's testimony.

The Massachusetts appellate court noted that no person other than defendant's brother was excluded from the courtroom, and that the record revealed that the brother's presence caused apparent fearfulness on the part of Greene. The appellate court held that the trial judge had not abused her discretion in ordering this limited exclusion.

CREATING A SAFE AND SECURE COURTROOM

Protection of identity of undercover police officers

A specialized body of case law exists where spectators have been excluded from a courtroom in order to conceal the identity of an undercover police officer. Courts have recognized two distinct interests that have been found deserving of protection. The first interest is the protection of the life and safety of the undercover officer. Second, the state has an interest in maintaining the continued effectiveness of an undercover officer who would soon be returning in an undercover capacity to the same neighborhood where the defendant had been arrested. Courts have described these interests as "extremely substantial," *Ayala v. Speckard*, 131 F.3d 62, 72 (2nd Cir. 1997) (*en banc*), *cert. denied*, 524 U.S. 958, 118 S.Ct. 2380, 141 L.Ed.2d 747 (1998), and as "overriding," *Brown v. Kuhlmann,* 142 F.3d 529, 537 (2nd Cir. 1998).

In addressing the safety of the police officer, courts look to whether associates of the defendant or current targets of investigation were present in the courtroom, whether specific threats had been received by the officer, and whether the officer's claims of safety concerns had been corroborated by efforts made by the officer to conceal his identity and visibility in and around the courthouse, such as by using side entrances, not walking through public hallways and remaining secluded. If the officer is planning to return to the specific neighborhood where the defendant had been arrested, that fact is relevant both as to safety and as to the continued effectiveness of the undercover officer. However a safety concern may be found even if the officer is not returning to the same neighborhood after the trial.

Most of these cases have been decided on direct review in the courts of New York and on *habeas corpus* review in the federal district and appellate courts covering New York. Some cases also permit the undercover officer to testify under an assumed name.

See generally, People v. Ramos, 90 N.Y.2d 490, 497, 662 N.Y.S.2d 739, 685 N.E.2d 492 (1997), *cert. denied sub nom., Ayala v. New York*, 522 U.S. 1002, 118 S.Ct. 574, 139 L.Ed.2d 413 (1997) (exclusion of spectators); *People v. Alvarez,* 51 A.D.3d 167, 854 N.Y.S.2d 70 (App. Div. 1st Dept. 2008), *leave to appeal denied*, 11 N.Y.3d 785, 896 N.E.2d 97, 866 N.Y.S.2d 6 (2008) (exclusion of defendant's girl friend; testimony under assumed name); *Ayala v. Speckard*, 131 F.3d 62 (2nd Cir. 1997) (*en banc*), *cert. denied*, 524 U.S. 958, 118 S.Ct. 2380, 141 L.Ed.2d 747 (1998) (exclusion of spectators); *Vidal v. Williams*, 31 F.3d 67, 69 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1102, 115 S.Ct. 778, 130 L.Ed.2d 672 (1995) (insufficient justification for exclusion of spectators); *Brown v. Kuhlmann*, 142 F.3d 529 (2nd Cir. 1998) (exclusion of spectators); *Brown v. Andrews*, 180 F.3d 403 (2nd Cir. 1999) (insufficient justification for exclusion of spectators); *Nieblas v. Smith*, 204 F.3d 29 (2nd Cir. 1999) (exclusion of spectators); *Brown v. Artuz*,

Protection of identity of undercover police officers

283 F.3d 492 (2nd Cir. 2002) (exclusion of spectators); *Sevencan v. Herbert*, 342 F.3d 69 (2nd Cir. 2003), *cert. denied,* 540 U.S. 1197, 124 S.Ct. 1453, 158 L.Ed.2d 111 (2004) (exclusion of spectators including defendant's wife); *Rodriguez v. Miller*, 537 F.3d 102 (2nd Cir. 2008) (exclusion of spectators including members of defendant's family); *Martinez v. Brown*, 2009 WL 1585546 (S.D. N.Y. 2009) (Gorenstein, U.S.M.J.), *Report of United States Magistrate Judge adopted in its entirety*, 2009 WL 2223533 (S.D. N.Y. 7/27/09) (Berman, J.) (officer permitted to withhold his name and to identify himself only by his badge number).

CREATING A SAFE AND SECURE COURTROOM

Testimony from outside the courtroom

Testimony by a child witness

Statutory authority in Pennsylvania permitting child witnesses to testify from locations outside the courtroom can be found at 42 Pa.C.S. § 5984.1 (use of recorded testimony "in any prosecution or adjudication involving a child victim or child material witness"), and at 42 Pa.C.S. § 5985 (testimony may be taken "in any prosecution or adjudication involving a child victim or child material witness" in a room other than the courtroom "transmitted by a contemporaneous alternative method").

These statutes, which are set forth in full in the Appendix, prescribe detailed conditions for the admissibility of such testimony, including but not limited to the following:

1. These statutes are not limited to testimony from a child who is the "victim" of a crime. The statutes apply both to a "child victim" and to a "child material witness."
2. Although these statutes are most often used for testimony by victims of sexual assaults, nothing in the statutes limits their applicability to the prosecution of sexual offenses. These statutes may be invoked in any proceeding "involving a child victim or child material witness." 42 Pa.C.S. §§ 5984.1(a), 5985(a).
3. These statutes contain requirements as to who may be present, direct the court to "ensure that the child victim or material witness cannot hear or see the defendant," and require that there be adequate opportunity for the defendant and defense counsel to communicate.
4. Before permitting such a form of testimony, "the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate." Procedures by which the court makes that determination are set forth in the statutes.

Legal Discussion

In *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the United States Supreme Court upheld the procedure by which child witnesses were permitted to testify by one-way, closed-circuit television. The Court held that where necessary to

protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there was no dispute that the child witnesses testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, the Court concluded that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

See also *Commonwealth v. Geiger,* 944 A.2d 85, 96 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009) (Section 5984.1 does not violate defendant's right to confrontation or due process. The trial court properly allowed child victims to testify via videotape, after hearing testimony from psychiatric therapist and finding that a face-to-face confrontation with their alleged abusers would cause "severe emotional distress.").

CREATING A SAFE AND SECURE COURTROOM

Testimony from outside the courtroom

Unavailable adult witness

The statutes found at 42 Pa.C.S. § 5984.1 and at 42 Pa.C.S. § 5985 apply only to child witnesses. May a court utilize similar procedures with respect to an adult witness? Courts considering the use of remote location testimony from unavailable adult witnesses must address two issues:

1. Does the court have the authority to permit an adult to testify from a remote location?
2. How does the court ensure the defendant's right to confront the witness?

As a threshold matter, the court must decide whether the absence of specific statutory authority addressing adult witnesses reflects a legislative intent to limit the court's use of remote location testimony to child witnesses. Or, does a court have inherent authority to formulate procedures for taking the testimony of an adult witness who is unable to be present in the courtroom?

While no Pennsylvania appellate decision explicitly addresses whether a court has the inherent authority to receive testimony from a remote location by an unavailable adult witness, persuasive authority may be found in rulings from two other jurisdictions.

The trial court's opinion in *United States v. Gigante*, 917 F. Supp. 755 (E.D.N.Y. 1997), addressed whether the court had the inherent authority to utilize closed circuit television for the testimony of a witness in the absence of specific authority in the Federal Rules of Criminal Procedure. The trial judge ruled that he had such authority. The Court of Appeals for the Second Circuit, in affirming the conviction, did not address that issue. *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999).

The highest court of New York, the Court of Appeals, in a divided ruling, upheld the authority of the trial court to permit testimony by two way video conferencing where the 83-year-old victim was too ill to travel from California to New York. The only issue addressed was the power of the court to utilize such a procedure in the absence of an explicit grant of authority. *People v. Wrotten*, 14 N.Y.3d 33, 923 N.E.2d 1099, 896 N.Y.S.2d 711 (2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 2520, 177 L.Ed.2d 316 (2010).

Although the Superior Court in *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009), *appeal denied*, ___ Pa. ___, ___ A.2d ___ (2010), did not specifically address whether the court has inherent power to establish procedures to receive the testimony of an unavailable adult witness, the *Atkinson* court did address the procedures for

protecting the defendant's right to confront the witnesses against him. The Superior Court held that Atkinson's right to confront the witness against him had been violated (but the error was harmless) when an incarcerated prisoner was permitted to testify at the suppression hearing by use of a two-way videoconferencing system. The Superior Court held that there was an insufficient record to establish a "compelling state interest" justifying the absence of live testimony.

The court distinguished cases in which there had been a showing of emotional damage to a child witness and noted that other jurisdictions had permitted substitutes for live testimony where a witness was seriously ill and unable to travel or located out of the country. See *e.g., United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (witness in Saudi Arabia); *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007) (terminally ill witness); *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001) (witness in Argentina); *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999) (witness was in the federal witness protection program at a secret location and was also in the final stages of fatal cancer). Compare *Bush v. State*, 193 P.3d 203 (Wyo. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 1985, 173 L.Ed.2d 1090 (2009) (husband was seriously ill and located in another state, but wife should not have been permitted to testify by video teleconference); *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (witness in Australia, but justification for video testimony not established).

In adjudicating these issues, the court needs to consider the effect of state constitutional amendments to Article I, § 9 (removing the former requirement that the confrontation of witnesses be "face to face") and to Article V, § 10(c) (authorizing the General Assembly to enact legislation providing for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or closed-circuit television).

The Pennsylvania Constitution now affords the same protection as its federal counterpart with regard to the Confrontation Clause. See *Commonwealth v. Geiger,* 944 A.2d 85, 97 n.6 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009); *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008). There is no longer any greater protection under the Pennsylvania Constitution.

CREATING A SAFE AND SECURE COURTROOM

Testimony from outside the courtroom

Unavailable adult witness

Pa.R.Crim.P. 119 does not authorize the use of two-way simultaneous audio-visual communication at a trial, absent the defendant's consent. However, neither Rule 119 nor the Comment to the Rule addresses either the statutes permitting child victims and child material witnesses to testify from remote locations and the cases upholding those statutes. The authority to enact such statutes was provided to the General Assembly by the previously cited state constitutional amendment to Article V, § 10(c).

The full text of the constitutional provisions and Rule 119 may be found in the Appendix.

CREATING A SAFE AND SECURE COURTROOM

Testimony from outside the courtroom

Preservation of testimony

An intimidated witness may communicate his or her intent to leave the jurisdiction. It may be necessary to preserve the testimony of that witness prior to the commencement of the trial.

Pa.R.Crim.P. 500 and 501 authorize the preservation of the testimony "of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved." The phrase "may be unavailable" is defined in the Comment to Rule 500 as "situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or may become incompetent to testify for any legally sufficient reason."

Rule 500(a)(4) contemplates that the preserved testimony should be taken in the presence of the defendant and defense counsel. With defendant and counsel present, there is no issue regarding the right to confront the witness. This is similar to Fed R.Crim.P. 15, which affords the defendant a right to be present.

The full text of the rules may be found in the Appendix.

Commonwealth v. Selenski, 996 A.2d 494 (Pa. Super. 2010), the Superior Court held that there is no right of public access to proceedings under Pa.R.Crim.P. 500 to preserve the testimony of a witness. Any transcript and tape recording are not documents attendant to a judicial proceeding until such time as it becomes necessary to offer and present the preserved testimony during the trial or other related proceedings.

Chapter 4:

RESPONSES TO WITNESS INTIMIDATION

RESPONSES TO WITNESS INTIMIDATION

Contempt of court

Direct criminal contempt

The relevant portions of the statutory scheme for contempt of court are found at 42 Pa.C.S. §§ 4132-4136 and are set forth in the Appendix. A comprehensive analysis of the law of contempt is beyond the scope of this bench book. The following principles may be of assistance to the judge in a case of witness or juror intimidation.

Direct criminal contempt is addressed at 42 Pa.C.S. § 4132 and includes "[t]he misbehavior of any person in the presence of the court, thereby obstructing the administration of justice." 42 Pa.C.S. § 4132(3).

"A conviction pursuant to section 4132(3) requires proof beyond a reasonable doubt: (1) of misconduct, (2) in the presence of the court, (3) committed with the intent to obstruct the proceedings, (4) which obstructs the administration of justice." *Commonwealth v. Falana*, 548 Pa. 156, 161, 696 A.2d 126, 128 (1997).

"In the presence of the court" does not necessarily require that the court witness the intimidating conduct. In *Falana, supra*, after Falana was sentenced, and as he was leaving the courtroom, Falana walked by the row where the victim was seated. He stated to her, "I'll be out one day." The trial court held a hearing, and after a determination of the facts, found Falana in direct contempt of court and imposed sentence.

The Supreme Court of Pennsylvania, upheld the contempt sanction, holding that "acts such as jury tampering and witness intimidation that occur outside the physical presence of the court, but that interfere with its immediate business, are punishable as contempt." *Id*. at 162, 696 A.2d at 129.

Falana argued that he did not engage in misconduct "in the presence of the court" because the trial judge did not hear Falana's remarks. The Supreme Court disagreed. "[M]isconduct occurs in the presence of the court if the court itself witnesses the conduct or if the conduct occurs outside the courtroom but so near thereto that it obstructs the administration of justice. Because an individual can be cited for contempt based on statements made outside the courtroom, it follows that when an individual makes a remark in the courtroom while the judge is physically present, he cannot avoid a conviction for contempt simply because the judge did not hear him speak the words in question." *Id*. at 162, 696 A.2d at 129 (citations omitted).

Commonwealth v. Falana also addresses the element of contempt that requires that the conduct "obstruct[ed] the administration of justice." Falana had argued that he did not obstruct the administration of justice in this case because he made the remark after the

court completed the sentencing hearing and his words did not disrupt the proceedings. A 4-2 majority of the Supreme Court disagreed:

> An obstruction of the administration of justice requires a showing of actual, imminent prejudice to a fair proceeding or the preservation of the court's authority. By uttering a threat in the courtroom and in the presence of the judge, [Falana] indicated that his conviction and sentencing would not deter him from harming the victim. Through his words, he belittled the trial court's attempt to administer justice and protect the person he had violently attacked. Furthermore, the fact that [Falana] threatened a witness who had just testified against him made it especially important that the court vindicate its authority by holding him in contempt. To have permitted [Falana] to use the courtroom to intimidate his victim, and thereby possibly deter others from testifying in the future, would clearly obstruct the efficient administration of justice and demean the court's authority. Accordingly, we hold that threats made in a courtroom in the presence of a judge may constitute a sufficient basis for a finding of criminal contempt, even if the judicial proceeding has concluded.

Id. at 163, 696 A.2d at 129 (citations omitted).

The Supreme Court did not address whether intimidating conduct that occurs when the judge is not in the courtroom constitutes direct criminal contempt. "We granted allocatur on the limited issue of whether the facts of this case provide a sufficient basis for a finding of contempt. Therefore, we do not reach the issue of whether similar conduct in the courtroom, in the presence of court officers, but not in the presence of the judge, may constitute contempt." *Id*. at 163 n.5, 696 A.2d at 129 n.5.

RESPONSES TO WITNESS INTIMIDATION

Contempt of court

Direct criminal contempt - procedural issues

Direct criminal contempt may be punished immediately and summarily. Proceedings should take place outside the presence of the jury. The alleged contemnor has a right to counsel and must be afforded an opportunity to be heard in his or her own defense. The court should make factual findings upon the record describing the contumacious conduct before making a finding of guilt. Guilt must be proven beyond a reasonable doubt. The contemnor should be granted an opportunity to speak prior to the imposition of any punishment. When imposing sentence, the court should address the factors set forth in the Sentencing Code as would be the case in any other sentencing proceeding.

Because these are summary proceedings, without the right to a trial by jury, the sentence may not exceed six months imprisonment. When there has been no jury trial for the contemnor, may separate instances of contempt of court result in consecutive sentences which, in the aggregate, exceed six months? In the case of direct criminal contempt if there are (1) multiple acts of contumacious conduct, and (2) if the court adjudicates the contemnor and imposes sentence promptly after the occurrence of the misconduct, then separate sentences of six months or less may be imposed without a jury trial, and each successive individual sentence may be directed to be served consecutively. *Commonwealth v. Owens*, 496 Pa. 16, 436 A.2d 129 (1981). If the judge does not adjudicate the alleged contempts immediately, but defers the hearing, ruling and sentencing until after the trial, then, in the absence of a jury trial, the aggregate sentence may not exceed six months imprisonment. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512, 41 L.Ed.2d 912, 94 S.Ct. 2687 (1974). See also *Lewis v. United States*, 518 U.S. 322, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996).

For a direct criminal contempt, the Superior Court has required the imposition of both a minimum and maximum sentence. *Commonwealth v. Cain*, 432 Pa. Super. 47, 637 A.2d 656 (1994) (direct criminal contempt for refusal to testify at trial); Commonwealth v. Williams, 753 A.2d 856 (Pa. Super.), *appeal denied*, 567 Pa. 713, 785 A.2d 89 (2000) (direct criminal contempt for cursing at judge).

RESPONSES TO WITNESS INTIMIDATION

Contempt of court

Indirect criminal contempt

Indirect criminal contempt is a violation of a court order that occurred outside the court's presence. As previously discussed, 18 Pa.C.S. § 4954 provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim at locations outside the courtroom. 18 Pa.C.S. § 4955 states that a person violating such an order may be punished for any substantive crime that has been committed and/or for contempt of court. A violation of a protective order outside the presence of the court would be an indirect contempt.

42 Pa.C.S. § 4136 provides certain procedural rights to persons charged with indirect criminal contempt. However, in *Commonwealth v. McMullen*, 599 Pa. 435, 961 A.2d 842 (2008), the Supreme Court of Pennsylvania held that portions of section 4136 that granted certain defendants a right to a jury trial or that limited the amount of the fine or the length of imprisonment were unconstitutional. The Court concluded that the legislature had no authority to restrict the inherent power of a court to punish for contempt of court. The Court noted that the legislature had sought to regulate criminal contempt in other statutory provisions, citing 42 Pa.C.S. §§ 4132-4139. The Court did not address the constitutionality of the remaining statutes.

In light of the uncertainty of the state of the statutory law regarding indirect criminal contempt, further discussion is outside the scope of this bench book.

RESPONSES TO WITNESS INTIMIDATION

Admission of hearsay by unavailable witness

Introduction

A witness may be rendered unavailable by means of intimidation.

When a witness is unavailable, the court may permit the introduction of prior testimony of the unavailable witness pursuant to the conditions set forth in Pa.R.E. 804(b)(1) (Former Testimony), and the court may permit the introduction of the prior out-of-court statements by the unavailable witness pursuant to the conditions set forth in Pa.R.E. 804(b)(6) (Forfeiture by Wrongdoing).

Rule 804. Hearsay Exceptions; Declarant Unavailable.

(a) Definition of Unavailability. ‘‘Unavailability as a witness’’ includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

RESPONSES TO WITNESS INTIMIDATION

Admission of hearsay by unavailable witness

Introduction

(b) *Hearsay Exceptions*. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony.

(2) Statement Under Belief of Impending Death.

(3) Statement Against Interest.

(4) Statement of Personal or Family History.

(5) Other Exceptions [Not Adopted].

(6) Forfeiture by Wrongdoing.

1. A factual record should be made in support of the court's ruling **admitting hearsay testimony.**

2. Where the Commonwealth seeks to admit a missing witness's prior recorded testimony, a "good faith" effort to locate the witness must be established. That which constitutes a "good faith" effort is a matter left to the discretion of the court. *Commonwealth v. Wayne*, 533 Pa. 614, 720 A.2d 456 (1998), cert. denied, 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999) (good faith effort shown: detective spoke with witness's attorney on another case and was informed that witness failed to appear for a scheduled court appearance; search of witness's last known address was made to no avail; address listed on witness's driver's license and car registrations were also checked to no avail; detective contacted family members who said witness returned to his native Jamaica; cousin of witness told the detective that she had recently seen witness in Jamaica); *Commonwealth v. Douglas,* 558 Pa. 412, 737 A.2d 1188 (1999) (plurality opinion), *cert. denied*, 530 U.S. 1216, 120 S.Ct. 2220, 147 L.Ed.2d 252 (2000) (no requirement that police set up surveillance of home of witness); *Commonwealth v. Lebo*, 785 A.2d 987 (Pa. Super. 2002) (witness in boot camp in South Carolina improperly found to be unavailable absent any evidence of efforts to procure her presence); *Consolidated Rail Corp. v. Delaware River Port Authority, 880 A.2d* 628 (Pa. Super. 2005), *appeal denied*, 587 Pa. 714, 898 A.2d 1071 (2006) (witness in witness protection program improperly found to be unavailable absent any evidence of efforts to procure his presence); *McCandless v. Vaughn,* 172 F.3d 255, 268 (3rd Cir. 1999) (efforts to locate sole eyewitness to a murder described as "casual").

Admission of hearsay by unavailable witness

Introduction

3. It is not necessary for a witness to be dead or missing to be unavailable. A witness is unavailable under F.R.E. 804(b)(6), identical to Pa.R.E. 804(b)(6), or under the federal rule's common law predecessor if the witness is unwilling to testify by reason of a threat. *United States v. Aguiar*, 975 F.2d 45 (2nd Cir. 1992) (admitting statements of witness to police and prosecutor); *United States v. Scott*, 284 F.3d 758 (7th Cir.), *cert. denied*, 537 U.S. 1031, 123 S.Ct. 582, 154 L.Ed.2d 448 (2002) (admitting prior grand jury testimony of witness); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977) (admitting prior grand jury testimony of witness); *United States v. Zlatogur,* 271 F.3d 1025 (11th Cir. 2001), *cert. denied,* 535 U.S. 946, 122 S.Ct. 1338, 152 L.Ed.2d 242 (2002) (admitting statements of witness to INS agent).

RESPONSES TO WITNESS INTIMIDATION

Admission of hearsay by unavailable witness

Former Testimony

Rule 804(b) Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

1. For purposes of criminal proceedings, this rule is based upon 42 Pa.C.S. § 5917.

2. In determining whether the party had an "adequate opportunity" for cross examination at the prior proceeding, please review *Commonwealth v. Bazemore*, 531 Pa. 532, 614 A.2d 684 (1992) (prior testimony not admissible; defense counsel not informed of witness's prior inconsistent statement, prior criminal record and potential pending charges); *Commonwealth v. Thompson*, 538 Pa. 297, 648 A.2d 315 (1994) (prior testimony admissible); *Commonwealth v. Wayne*, 533 Pa. 614, 720 A.2d 456 (1998), *cert. denied*, 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999) (prior testimony admissible; prior inconsistent statement and prior criminal record disclosed at preliminary hearing); *Commonwealth v. Douglas*, 558 Pa. 412, 737 A.2d 1188 (1999) (plurality opinion), *cert. denied*, 530 U.S. 1216, 120 S.Ct. 2220, 147 L.Ed.2d 252 (2000) (prior testimony admissible); *Commonwealth v. Paddy*, 569 Pa. 47, 800 A.2d 294 (2002) (prior testimony admissible; prior criminal record disclosed at preliminary hearing); *Commonwealth v. Wholaver,* ___ Pa. ___, 989 A.2d 883 (2010), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 178 L.Ed.2d 216 (2010) (prior testimony admissible; adequate cross-examination at preliminary hearing regarding bias, motive to lie, and other areas of impeachment); *Commonwealth v. Fink,* 791 A.2d 1235 (Pa. Super. 2002) (prior testimony admissible).

RESPONSES TO WITNESS INTIMIDATION

Admission of hearsay by unavailable witness

Forfeiture by Wrongdoing

Rule 804(b) Hearsay Exceptions. The following statements, as hereinafter defined, 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 that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

1. To determine the admissibility of evidence under the analogous, and identical, federal rule, also numbered 804(b)(6), federal courts have **required that an evidentiary hearing be held** outside the jury's presence prior to the admission of the evidence in question. At the hearing, the prosecution must establish by a preponderance of the evidence that: (1) the defendant (or party against whom the out-of-court statement is offered) was involved in, or responsible for, procuring the unavailability of the declarant . . . and (2) the defendant . . . acted with the intent of procuring the declarant's unavailability as an actual or potential witness. See *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008) (discussing with approval trial court's use of preponderance standard while affirming admission of hearsay statement).

2. The rule applies both to one who "engaged" in wrongdoing and also to one who "acquiesced" in wrongdoing. For that reason, courts have held that the wrongdoing of a conspirator may be imputed to the defendant if the wrongdoing was the result of a conspiracy involving the defendant, if the wrongdoing was within the scope of the conspiracy, was in furtherance of the conspiracy and the result of the wrongdoing was reasonably foreseeable to the defendant. *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002), *cert. denied,* 537 U.S. 1134, 154 L.Ed.2d 824, 123 S.Ct. 918 (2003); *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000). See also *Commonwealth v. Bey,* No. CP-1100021-2002 (C.P. Philadelphia 2010) (Hughes, J.) (application of Rule 804(b)(6) where a defendant, from within the prison, solicited the murder of a witness).

3. In a case where defendant is charged with murder, hearsay statements by the victim-declarant are admissible if it is established that the murder was committed with the **intent** of making the victim unavailable to testify. It is not

sufficient merely to establish that the murder had the **effect** of making the victim unavailable. *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)

4. "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system . . . the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."
Davis v. Washington, 547 U.S. 813, 833, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224, 244 (2006) (internal quotations and citations omitted).

APPENDIX

Constitutional provisions, criminal statutes and rules of criminal procedure that may be used for the protection of victims, witnesses and court officers:

Pa. Const. Art. I, § 9

§ 9. Rights of accused in criminal prosecutions.

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

Pa. Const. Art. V, § 10(c)

§ 10. Judicial administration.

…

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television.

APPENDIX

18 Pa.C.S. § 2711

§ 2711. Probable cause arrests in domestic violence cases.

…

(c) Bail. - -

…

(2) In determining whether to admit the defendant to bail, the issuing authority shall consider whether the defendant poses a threat of danger to the victim. If the issuing authority makes such a determination, it shall require as a condition of bail that the defendant shall refrain from entering the residence or household of the victim and the victim's place of employment and shall refrain from committing any further criminal conduct against the victim and shall so notify the defendant thereof at the time the defendant is admitted to bail. Such condition shall expire at the time of the preliminary hearing or upon the entry or the denial of the protection of abuse order by the court, whichever occurs first. A violation of this condition may be punishable by the revocation of any form of pretrial release or the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding him to custody or a modification of the terms of the bail. The defendant shall be provided a hearing on the matter.

18 Pa.C.S. § 4952

§ 4952. Intimidation of witnesses or victims

(a) OFFENSE DEFINED.-- A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:

(1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime.

(2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge.

(3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge.

(4) Give any false or misleading information or testimony or refrain from giving any testimony, information, document or thing, relating to the commission of a crime, to an attorney representing a criminal defendant.

(5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence.

(6) Absent himself from any proceeding or investigation to which he has been legally summoned.

(b) GRADING.--

(1) The offense is a felony of the degree indicated in paragraphs (2) through (4) if:

(i) The actor employs force, violence or deception, or threatens to employ force or violence, upon the witness or victim or, with the requisite intent or knowledge upon any other person.

(ii) The actor offers any pecuniary or other benefit to the witness or victim or, with the requisite intent or knowledge, to any other person.

(iii) The actor's conduct is in furtherance of a conspiracy to intimidate a witness or victim.

(iv) The actor accepts, agrees or solicits another to accept any pecuniary or other benefit to intimidate a witness or victim.

(v) The actor has suffered any prior conviction for any violation of this section or any predecessor law hereto, or has been convicted, under any Federal statute or statute of any other state, of an act which would be a violation of this section if committed in this State.

(2) The offense is a felony of the first degree if a felony of the first degree or murder in the first or second degree was charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.

(3) The offense is a felony of the second degree if a felony of the second degree is the most serious offense charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.

(4) The offense is a felony of the third degree in any other case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.

Otherwise, the offense is a misdemeanor of the second degree.

APPENDIX

18 Pa.C.S. § 4953

§ 4953. Retaliation against witness, victim or party

(a) OFFENSE DEFINED.-- A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or a party in a civil matter.

(b) GRADING.-- The offense is a felony of the third degree if the retaliation is accomplished by any of the means specified in section 4952(b)(1) through (5) (relating to intimidation of witnesses or victims). Otherwise, the offense is a misdemeanor of the second degree.

18 Pa.C.S. § 4953.1

§ 4953.1. Retaliation against prosecutor or judicial official

(a) OFFENSE DEFINED.-- A person commits an offense if he harms or attempts to harm another or the tangible property of another by any unlawful act in retaliation for anything lawfully done in the official capacity of a prosecutor or judicial official.

(b) GRADING.-- The offense is a felony of the second degree if:

(1) The actor employs force, violence or deception or attempts or threatens to employ force, violence or deception upon the prosecutor or judicial official or, with the requisite intent or knowledge, upon any other person.

(2) The actor's conduct is in furtherance of a conspiracy to retaliate against a prosecutor or judicial official.

(3) The actor solicits another to or accepts or agrees to accept any pecuniary or other benefit to retaliate against a prosecutor or judicial official.

(4) The actor has suffered any prior conviction for any violation of this title or any predecessor law hereto, or has been convicted under any Federal statute or statute of any other state of an act which would be a violation of this title if committed in this Commonwealth.

(5) The actor causes property damage or loss in excess of $1,000.

Otherwise, the offense is a misdemeanor of the first degree.

(c) DEFINITIONS.-- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Judicial official." Any person who is a:

(1) judge of the court of common pleas;

(2) judge of the Commonwealth Court;

(3) judge of the Superior Court;

(4) justice of the Supreme Court;

(5) magisterial district judge;

(6) judge of the Pittsburgh Magistrate's Court;

(7) judge of the Philadelphia Municipal Court;

(8) judge of the Traffic Court of Philadelphia; or

(9) master appointed by a judge of a court of common pleas.

"Prosecutor." Any person who is:

(1) an Attorney General;

(2) a deputy attorney general;

(3) a district attorney; or

(4) an assistant district attorney.

18 Pa.C.S. § 4954

§ 4954. Protective orders

Any court with jurisdiction over any criminal matter may, after a hearing and in its discretion, upon substantial evidence, which may include hearsay or the declaration of the prosecutor that a witness or victim has been intimidated or is reasonably likely to be intimidated, issue protective orders, including, but not limited to, the following:

(1) An order that a defendant not violate any provision of this subchapter or section 2709 (relating to harassment) or 2709.1 (relating to stalking).

(2) An order that a person other than the defendant, including, but not limited to, a subpoenaed witness, not violate any provision of this subchapter.

(3) An order that any person described in paragraph (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.

(4) An order that any person described in paragraph (1) or (2) have no communication whatsoever with any specified witness or victim, except through an attorney under such reasonable restrictions as the court may impose.

18 Pa.C.S. § 4954.1

§ 4954.1. Notice on protective order

All protective orders issued under section 4954 (relating to protective orders) shall contain in large print at the top of the order a notice that the witness or victim should immediately call the police if the defendant violates the protective order. The notice shall contain the telephone number of the police department where the victim or witness resides and where the victim or witness is employed.

18 Pa.C.S. § 4955

§ 4955. Violation of orders

(a) PUNISHMENT.-- Any person violating any order made pursuant to section 4954 (relating to protective orders) may be punished in any of the following ways:

(1) For any substantive offense described in this subchapter, where such violation of an order is a violation of any provision of this subchapter.

(2) As a contempt of the court making such order. No finding of contempt shall be a bar to prosecution for a substantive offense under section 2709 (relating to harassment), 2709.1 (relating to stalking), 4952 (relating to intimidation of witnesses or victims) or 4953 (relating to retaliation against witness or victim), but:

(i) any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed on conviction of said substantiv offense; and

(ii) any conviction or acquittal for any substantive offense under this title shall be a bar to subsequent punishment for contempt arising out of the same act.

(3) By revocation of any form of pretrial release, or the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding him to custody. Revocation may, after hearing and on substantial evidence, in the sound discretion of the court, be made whether the violation of order complained of has been committed by the defendant personally or was caused or encouraged to have been committed by the defendant.

(b) ARREST.-- An arrest for a violation of an order issued under section 4954 may be without warrant upon probable cause whether or not the violation is committed in the presence of a law enforcement officer. The law enforcement officer may verify, if necessary, the existence of a protective order by telephone or radio communication with the appropriate police department.

(c) ARRAIGNMENT.-- Subsequent to an arrest, the defendant shall be taken without unnecessary delay before the court that issued the order. When that court is unavailable, the defendant shall be arraigned before a magisterial district judge or, in cities of the first class, a Philadelphia Municipal Court Judge, in accordance with the Pennsylvania Rules of Criminal Procedure.

18 Pa.C.S. § 4956

§ 4956. Pretrial release.

(a) Conditions for pretrial release. --Any pretrial release of any defendant whether on bail or under any other form of recognizance shall be deemed, as a matter of law, to include a condition that the defendant neither do, nor cause to be done, nor permit to be done on his behalf, any act proscribed by section 4952 (relating to intimidation of witnesses or victims) or 4953 (relating to retaliation against witness or victim) and any willful violation of said condition is subject to punishment as prescribed in section 4955(3) (relating to violation of orders) whether or not the defendant was the subject of an order under section 4954 (relating to protective orders).

(b) Notice of condition. --From and after the effective date of this subchapter, any receipt for any bail or bond given by the clerk of any court, by any court, by any surety or bondsman and any written promise to appear on one's own recognizance shall contain, in a conspicuous location, notice of this condition.

42 Pa.C.S. § 4132

§ 4132. Attachment and summary punishment for contempts.

The power of the several courts of this Commonwealth to issue attachments and to impose summary punishments for contempts of court shall be restricted to the following cases:

(1) The official misconduct of the officers of such courts respectively.

(2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.

(3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

APPENDIX

42 Pa.C.S. § 4133

§ 4133. Commitment or fine for contempt.

Except as otherwise provided by statute, the punishment of commitment for contempt provided in section 4132 (relating to attachment and summary punishment for contempts) shall extend only to contempts committed in open court. All other contempts shall be punished by fine only.

42 Pa.C.S. § 4134

§ 4134. Commitment for failure to pay fine.

The court may order the sheriff or other proper officer of any county to take into custody and commit to jail any person fined for a contempt until such fine shall be paid or discharged. If unable to pay such fine, such person may be committed to jail by the court for not exceeding three months.

42 Pa.C.S. § 4135

§ 4135. Publication out of court.

(a) General rule.--Publication out of court respecting the conduct of judges, magisterial district judges, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal shall not be construed as a contempt of court on the part of the author, publisher or other person connected with such publication.

(b) Civil and criminal liability not affected.--If any publication specified in subsection (a) shall improperly tend to bias the minds of the public, or of the tribunal, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal, any person aggrieved thereby may proceed against the persons responsible for the publication by appropriate civil action or criminal proceeding.

42 Pa.C.S. § 4136

§ 4136. Rights of persons charged with certain indirect criminal contempts.

(a) General rule.--A person charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court shall enjoy:

(1) The rights to bail that are accorded to persons accused of crime.

(2) The right to be notified of the accusation and a reasonable time to make a defense, if the alleged contempt is not committed in the immediate view or presence of the court.

(3) (i) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial districtwherein the contempt is alleged to have been committed.

(ii) The requirement of subparagraph (i) shall not be construed to apply to contempts:

(A) Committed in the presence of the court or so near thereto as to interfere directly with the administration of justice, or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

(B) Subject to 23 Pa.C.S. § 6114 (relating to contempt for violation of order or agreement).

(C) Subject to 75 Pa.C.S. § 4108(c) (relating to nonjury criminal contempt proceedings).

(4) The right to file with the court a demand for the withdrawal of the judge sitting in the proceeding, if the alleged contempt arises from an attack upon the character or conduct of such judge, and if the attack occurred otherwise than in open court. Upon the filing of any such demand, the judge shall there upon proceed no further but another judge shall be designated by the court. The demand shall be filed prior to the hearing in the contempt proceeding.

(b) Punishment.--Except as otherwise provided in this title or by statute hereafter enacted, punishment for a contempt specified in subsection (a) may be by fine not exceeding $100 or by imprisonment not exceeding 15 days in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail for the nonpayment of such a fine, he shall be discharged at the expiration of 15 days, but where he is also committed for a definite time, the 15 days shall be computed from the expiration of the definite time.

42 Pa.C.S. § 5984.1

§ 5984.1. Recorded testimony.

(a) Recording. --Subject to subsection (b), in any prosecution or adjudication involving a child victim or child material witness, the court may order that the child victim's or child material witness's testimony be recorded for presentation in court by any method that accurately captures and preserves the visual images, oral communications and other information presented during such testimony. The testimony shall be taken under oath or affirmation before the court in chambers or in a special facility designed for taking the recorded testimony of children. Only the attorneys for the defendant and for the Commonwealth, persons necessary to operate the equipment, a qualified shorthand reporter and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during testimony.

The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness but shall ensure that the child victim or material witness cannot hear or see the defendant. Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purpose of providing an effective defense.

(b) Determination. --Before the court orders the child victim or the child material witness to testify by recorded testimony, the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate. In making this determination, the court may do any of the following:

(1) Observe and question the child victim or child material witness, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(c) Counsel and confrontation. --

(1) If the court observes or questions the child victim or child material witness under subsection (b)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.

(2) If the court hears testimony under subsection (b)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

42 Pa.C.S. § 5985

§ 5985. Testimony by contemporaneous alternative method.

(a) Contemporaneous alternative method. --Subject to subsection (a.1), in any prosecution or adjudication involving a child victim or a child material witness, the court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method. Only the attorneys for the defendant and for the Commonwealth, the court reporter, the judge, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during his testimony. The court shall permit the defendant to observe and hear the testimony of the child

victim or child material witness but shall ensure that the child cannot hear or see the defendant. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purposes of providing an effective defense. Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted.

(a.1) Determination. --Before the court orders the child victim or the child material witness to testify by a contemporaneous alternative method, the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child victim or child material witness, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(a.2) Counsel and confrontation. --

(1) If the court observes or questions the child victim or child material witness under subsection (a.1)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.

(2) If the court hears testimony under subsection (a.1)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

Pa.R.Crim.P. 119

Rule 119. Use of Two-Way Simultaneous Audio-Visual Communication in Criminal Proceedings.

(A) The court or issuing authority may use two-way simultaneous audio-visual communication at any criminal proceeding except:

(1) preliminary hearings;

(2) proceedings pursuant to Rule 569(A)(2)(b);

(3) trials;

(4) sentencing hearings;

(5) parole, probation, and intermediate punishment revocation hearings; and

(6) any proceeding in which the defendant has a constitutional or statutory right to be physically present.

(B) The defendant may consent to any proceeding being conducted using two-way simultaneous audio-visual communication.

(C) When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the proceeding.

Pa.R.Crim.P. 500

Rule 500. Preservation of Testimony After Institution of Criminal Proceedings.

(A) BY COURT ORDER.

(1) At any time after the institution of a criminal proceedings, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved.

(2) The court shall state on the record the grounds on which the order is based.

(3) The court's order shall specify the time and place for the taking of the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.

(4) The testimony shall be taken in the presence of the court, the attorney for the Commonwealth, the defendant(s), and defense counsel, unless otherwise ordered.

(5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

(B) BY AGREEMENT OF THE PARTIES.

(1) At any time after the institution of a criminal proceeding, the testimony of any witness may be taken and preserved upon the express written agreement of the attorney for the Commonwealth, the defendant(s), and defense counsel.

(2) The agreement shall specify the time and place for taking the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.

(3) The testimony shall be taken in the presence of the attorney for the Commonwealth, the defendant(s), and defense counsel, unless they otherwise agree.

(4) The agreement shall be filed of record.

(5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

Pa.R.Crim.P. 501

Rule 501. Preservation of Testimony by Videotape Recording.

(A) When the testimony of a witness is taken and preserved pursuant to Rule 500 by means of videotape recording, the testimony shall be recorded simultaneously by a stenographer.

(B) The following technical requirements shall be made part of the court order required by Rule 500(A) or the written agreement provided in Rule 500(B):

(1) The videotape recording shall begin with a statement on camera that includes:

(a) the operator's name and business address;

(b) the name and address of the operator's employer;

(c) the date, time, and place of the videotape recording;

(d) the caption of the case;

(e) the name of the witness;

(f) the party on whose behalf the witness is testifying; and

(g) the nature of the judicial proceedings for which the testimony is intended.

(2) The court and all parties shall identify themselves on camera.

(3) The witness shall be sworn on camera.

(4) If the length of the testimony requires the use of more than one videotape, the end of each videotape and the beginning of each succeeding videotape shall be announced on camera.

(5) At the conclusion of the witness' testimony, a statement shall be made on camera that the testimony is concluded. A statement shall also be made concerning the custody of the videotape(s).

(6) Statements concerning stipulations, exhibits, or other pertinent matters may be made at any time on camera.

(7) The videotape recording shall be timed by a digital clock on camera that continually shows the hour, minute, and second of the testimony.

(8) All objections and the reasons for them shall be made on the record. When a judge presides over the videotaping of testimony, the judge's rulings on objections shall also be made on the record.

(9) When a judge does not preside over the videotaping of testimony, the videotape operator shall keep a log of each objection, referenced to the time each objection is made. All rulings on objections shall be made before the videotape is shown at any judicial proceeding.

(10) The original videotape recording shall not be altered.

Pa.R.Crim.P. 524

Rule 524. Types of Release on Bail.

…

(B) All of the types of release in paragraph (C) shall be conditioned upon the defendant's written agreement to appear and to comply with the conditions of the bail bond set forth in Rule 526(A).

Pa.R.Crim.P. 526

Rule 526. Conditions of Bail Bond.

(A) In every case in which a defendant is released on bail, the conditions of the bail bond shall be that the defendant will:

(1) appear at all times required until full and final disposition of the case;

(2) obey all further orders of the bail authority;

(3) give written notice to the bail authority, the clerk of courts, the district attorney, and the court bail agency or other designated court bail officer, of any change of address within 48 hours of the date of the change;

(4) neither do, nor cause to be done, nor permit to be done on his or her behalf, any act proscribed by Section 4952 of the Crimes Code (relating to intimidation of witnesses or victims) or by Section 4953 (relating to retaliation against witnesses or victims), 18 Pa.C.S. §§ 4952, 4953; and

(5) refrain from criminal activity.

(B) If the bail authority determines that it is necessary to impose conditions of release in addition to the conditions required in paragraph (A) to ensure the defendant's appearance and compliance, the bail authority may impose such conditions as provided in Rules 524, 527, and 528.

Pa.R.Crim.P. 527

Rule 527. Nonmonetary Conditions of Release on Bail.

(A) When the bail authority determines that, in addition to the conditions of the bail bond required in every case pursuant to Rule 526(A), nonmonetary conditions of release on bail are necessary, the categories of nonmonetary conditions that the bail authority may impose are:

(1) reporting requirements;

(2) restrictions on the defendant's travel; and/or

(3) any other appropriate conditions designed to ensure the defendant's appearance and compliance with the conditions of the bail bond.

(B) The bail authority shall state with specificity on the bail bond any nonmonetary conditions imposed pursuant to this rule.

Pa.R.Crim.P. 529

Rule 529. Modification of Bail Order Prior to Verdict.

(A) The issuing authority who is the magisterial district judge who was elected or assigned to preside over the jurisdiction where the crime occurred, upon request of the defendant or the attorney for the Commonwealth, or by the issuing authority sua sponte, and after notice to the defendant and the attorney for the Commonwealth and an opportunity to be heard, may modify a bail order at anytime before the preliminary hearing.

(B) A bail order may be modified by an issuing authority at the preliminary hearing.

(C) The existing bail order may be modified by a judge of the court of common pleas:

(1) at any time prior to verdict upon motion of counsel for either party with notice to opposing counsel and after a hearing on the motion; or

(2) at trial or at a pretrial hearing in open court on the record when all parties are present.

(D) Once bail has been set or modified by a judge of the court of common pleas, it shall not be modified except

(1) by a judge of a court of superior jurisdiction, or

(2) by the same judge or by another judge of the court of common pleas either at trial or after notice to the parties and a hearing.

(E) When bail is modified pursuant to this rule, the modification shall be explained to the defendant and stated in writing or on the record by the issuing authority or the judge.

Pa.R.Crim.P. 536

Rule 536. Procedures Upon Violation of Conditions: Revocation of Release and Forfeiture; Bail Pieces; Exoneration of Surety.

(A) SANCTIONS

(1) Revocation of Release

(a) A person who violates a condition of the bail bond is subject to a revocation of release and/or a change in the conditions of the bail bond by the bail authority.

(b) When a violation of a condition occurs, the bail authority may issue a bench warrant for the defendant's arrest. When the bench warrant is executed, the bench warrant proceedings shall be conducted pursuant to Rule 150.

(c) The bail authority also may order the defendant or the defendant's surety to explain why the defendant's release should not be revoked or why the conditions of release should not be changed. A copy of the order shall be served on the defendant and the defendant's surety, if any.

(d) When the bail authority changes the conditions of the bail bond and/or revokes the defendant's release, the bail authority shall state in writing or on the record the reasons for so doing.

(2) Forfeiture

(a) When a monetary condition of release has been imposed and the defendant has violated a condition of the bail bond, the bail authority may order the cash or other security forfeited and shall state in writing or on the record the reasons for so doing.

(b) Written notice of the forfeiture shall be given to the defendant and any surety, either personally or by both first class and certified mail at the defendant's and the surety's last known addresses.

(c) The forfeiture shall not be executed until 20 days after notice of the forfeiture order.

(d) The bail authority may direct that a forfeiture be set aside or remitted if justice does not require the full enforcement of the forfeiture order.

(e) When a magisterial district judge orders bail forfeited pursuant to this rule, the magisterial district judge shall generate a check in the amount of the bail monies he or she has on deposit in the case, and shall send the check and a copy of the docket transcript to the clerk of courts for processing and disbursement as provided by law.

(B) BAIL PIECES

(1) A surety or bail agency may apply to the court for a bail piece.

(2) If the court is satisfied that a bail piece is required, it may issue a bail piece authorizing the surety or bail agency to apprehend and detain the defendant, and to bring the defendant before the bail authority without unnecessary delay.

(C) EXONERATION

(1) A bail authority, in his or her discretion, may exonerate a surety who deposits cash in the amount of any forfeiture ordered or who surrenders the defendant in a timely manner.

(2) When the conditions of the bail bond have been satisfied, or the forfeiture has been set aside or remitted, the bail authority shall exonerate the obligors and release any bail.