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policing with perspective

MPTC IN-SERVICE: UPDATE³

Intimidation of witness

Police departments can make great use of the Commonwealth's witness intimidation statute, G.L. c. 268, § 13B, to protect community complainants and even confidential informants.² I know you recognize that this law applies to witnesses who testify, but did you know that its protective umbrella covers anyone who provides *or could provide* information during a police investigation? This applies to *any* criminal investigation – from a neighborhood dispute, to bullying in school, to narcotics trafficking.

Specifically, G.L. c. 268, § 13B punishes anyone who “threatens . . . intimidates or harasses . . . a witness *or potential witness at any stage of a criminal investigation, [or] . . . a person who is or was aware of information that relate[s] to a violation of a criminal statute.*” [emphasis added]

As an example, if a dealer you arrest intimidates or harasses your informant, you may re-arrest him for witness intimidation. Even if this particular dealer harasses area drug users who he suspects might be the informant, he violates the witness intimidation statute because those individuals, as buyers of his product, are *potential* witnesses against him concerning the violation of a criminal law! For your arrested dealer, the threat of invoking this tough law may deter him from trying to discover the identity of your informant.

As another example, departments must often release police reports as public records, even though doing so has the potential to disclose information that could fan the flames of an ongoing dispute. Or, in the school context, a bully may think about retaliation when he or she finds out the police are investigating.

In these situations, or any others you may encounter, consider using our form to put people on notice that they are not to harass people who have talked to officers, or who *may* talk to officers.

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² Attorney Scheft gratefully acknowledges Deputy Chief William Brooks of the Wellesley Police Department. Chief Brooks developed the original witness intimidation form and collaborated on this article.

Sworn and non-sworn police officials (some departments teach their records clerk about the form) may impress upon individuals the legal jeopardy they will face. Our form contains the actual language of G.L. c. 268, § 13B (so there is no later claim that the meaning of the law was distorted) and a space for the warned individual's signature. The record is clear for later presentation in court!

When talking to a person, emphasize in a calm but firm manner:

- You understand the emotional nature of the current dispute, case, etc.;
- So you want to be sure that they understand that any direct or indirect, effective or ineffective, intimidation or influence authorizes immediate arrest and constitutes a crime;
- With severe potential punishment;
- Which is why you want to be fair and make sure they understand this law.

The maximum penalty for witness intimidation is ten years in state prison (although there is a house of correction alternative, so you may bring your case in the district court).

The fact that the underlying criminal conduct is less severe than the penalty for intimidation is irrelevant. Consequently, the offender who harasses a trespass or simple assault complainant commits a felony. The reason for the severe sanction: Witness intimidation (or influence) always disrupts and damages our justice system, regardless of the issue at stake and regardless of the outcome of the case. *Comm. v. Wiencis*, 48 Mass. App. Ct. 688 (2000).

This past year, the witness intimidation law was amended to cover civil proceedings (including probate court, CHINS and clerk's hearings). The definition of "harassment" now includes the use of any electronic device (e.g., email, internet, texting, instant messaging).

The Witness Intimidation Warning form has already been put to good use in the field because, in large measure, it affirms the old adage: "An ounce of prevention is worth a pound of cure!"

Underage alcohol

Whipped cream with alcohol. G.L. c. 138, § 1 defines both alcohol and an alcoholic beverage. "Alcohol" refers to all alcohol intended for human consumption (which excludes such items as wood or methyl alcohol). An "alcoholic beverage" is "any liquid intended for human consumption containing a ½ of 1% or more of alcohol by volume at 60 degrees Fahrenheit."

While the latest craze, whipped cream with alcohol, does not constitute an alcoholic beverage, it is alcohol. As a result, this product is regulated by G.L. Chapter 138 and may not be sold or given to individuals under the age of 21. Likewise, a minor who possesses whipped cream with alcohol is violating G.L. c. 138, § 34C. Section 34C specifically states: "Whoever . . . knowingly possesses, transports or carries on his person, *any alcohol* or alcoholic beverages, shall be punished . . ." [emphasis added]

Notification of the Crime of Witness Intimidation or Influence, G.L. c. 268, § 13B

- (1) Whoever, directly or indirectly, willfully
- (a) threatens, or attempts or causes physical injury, emotional injury, economic injury or property damage to;
 - (b) conveys a gift, offer or promise of anything of value to; or
 - (c) misleads, intimidates or harasses another person who is:
 - (i) a witness or potential witness at any stage of a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type;
 - (ii) a person who is or was aware of information, records, documents or objects that relate to a violation of a criminal statute, or a violation of conditions of probation, parole or bail;
 - (iii) a judge, juror, grand juror, prosecutor, police officer, federal agent, investigator, defense attorney, clerk, court officer, probation officer or parole officer;
 - (iv) a person who is furthering a civil or criminal proceeding, including criminal investigation, grand jury proceeding, trial, other criminal proceeding of any type, probate and family proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court ordered mediation, any other civil proceeding of any type; or
 - (v) a person who is or was attending or had made known his intention to attend a civil or criminal proceeding, including criminal investigation, grand jury proceeding, trial, other criminal proceeding of any type, probate and family proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation, any other civil proceeding of any type with the intent to impede, obstruct, delay, harm, punish or otherwise

interfere thereby, or do so with reckless disregard, with such a proceeding shall be punished by imprisonment in a jail or house of correction for not more than 2 and one-half years or by imprisonment in a state prison for not more than 10 years, or by a fine of not less than \$1,000 nor more than \$5,000, or by both such fine and imprisonment.

(2) As used in this section, "investigator" shall mean an individual or group of individuals lawfully authorized by a department or agency of the federal government, or any political subdivision thereof, or a department or agency of the commonwealth, or any political subdivision thereof, to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of his official duties.

(3) As used in this section, "harass" shall mean to engage in any act directed at a specific person or persons, which act seriously alarms or annoys such person or persons and would cause a reasonable person to suffer substantial emotional distress. Such act shall include, but not be limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including but not limited to any device that transfers signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.

(4) A prosecution under this section may be brought in the county in which the criminal investigation, grand jury proceeding, trial or other criminal proceeding is being conducted or took place, or in the county in which the alleged conduct constituting an offense occurred.

My signature indicates that I have read and that I understand the law above.

(signature)

(date)

(witness)

(date)