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# Countering attempts to silence the truth

## Confronting witness intimidation in California civil litigation

By GELAREH SARA GOLRIZ

Witness testimony plays a crucial role in the discovery process, facilitating the pursuit of collecting vital evidence. Witness intimidation, although less common in the civil arena, casts a shadow over the pursuit of justice, threatening to silence voices and distort the course of legal proceedings. While the notion of witness intimidation often evokes images of mafia bosses resorting to threats of bodily harm to silence those willing to testify, the reality within civil litigation reveals a more nuanced and equally concerning form of coercion. Consider the scenario where a pivotal witness, essential for resolving a civil case, opts for silence or claims lack of knowledge not out of fear of physical harm, but rather under the looming threat of legal repercussions.

In a similar scenario, imagine an employer silencing an employee witness by dangling the specter of termination or demotion as retribution for speaking truthfully.

How does one navigate this precarious terrain where the sworn guardians of law may wield intimidation tactics akin to underworld bosses and employers use intimidation tactics reminiscent of those depicted in dramatic films?

In this article, we delve into the perplexing world of witness intimidation in California civil litigation, exploring its legal complexities, the ethical ramifications of engaging in such tactics and, how to effectively confront such tactics.

### A good offense is the best defense

Upon identifying a potential witness relevant to your case, it is imperative to promptly initiate contact and apprise them of their potential involvement. Inform them of the possibility of being approached by opposing counsel or other external parties with intimidating tactics. Provide your contact information to the witness and advise them to reach out to you directly should any concerns arise. In cases where the witness's employment may be implicated, articulate the prohibition against retaliatory actions by their employer should they elect to testify.

### Forms of witness intimidation

Witness intimidation can take various forms, which can include both subtle and overt actions aimed at influencing a witness's testimony or cooperation. Common types of witness intimidation include: verbal threats, violence, threatening a witness's job in order to coerce them into remaining silent, engaging in aggressive legal tactics, such as filing frivolous lawsuits or motions, or using the legal process to harass or intimidate the witness.



### Witness intimidation in a civil case may constitute a criminal offense

Penal Code sections 132-140 establish a detailed and comprehensive statutory scheme for penalizing the falsification of evidence and efforts to bribe, influence, intimidate or threaten witnesses. It is a criminal offense to dissuade the witness from giving testimony, or worse, to threaten a witness to dissuade them from testifying. Penal Code section 136.1 states in pertinent part:

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

- (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.
- (2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

"Maliciously" is defined as "an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice." (Pen. Code, § 136.) Further, under Penal Code section 137, "Every person who knowingly induces another person to give false testimony or withhold true testimony not privileged by law . . . is guilty of a misdemeanor." (Pen. Code, § 137, subd. (c).)



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## Threats of violence as a tactic to silence witnesses

A simple and oft-seen example of witness intimidation is through threats of violence. For example, in *People v. Galvez*, the plaintiff witnessed a gang member committing an assault and contacted 911. Defendant gang members asked him if he was calling the police. When he answered in the affirmative, defendants assaulted him. Defendants were convicted of violating section 136.1, subdivision (b)(1): attempting to prevent or dissuade a witness to a crime from reporting the crime to law enforcement. (*People v. Galvez*, (2011) 195 Cal.App.4th 1253, 126.)

## Witness intimidation in an employment setting

In a workplace setting, silencing employees is seen in a myriad of ways including retaliation, wrongful termination, negative performance evaluations, harassment, and social ostracizing. This scenario often unfolds when an employee lodges a complaint and subsequently faces termination or retaliation, creating a chilling effect among other employees who fear similar reprisals. In *Cabesuella v. Browning-Ferris Industries of California, Inc.*, plaintiff alleged that the “true reasons” the employer terminated him included the fact that he had complained of the long hours the drivers were required to work, which plaintiff believed to be a health and safety hazard. The court held that “an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe.” (*Cabesuella v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th at p. 108.)

## The impact of Penal Code section 136.1 in civil cases

Penal Code section 136.1, subdivision (a)(2) neither restricts the means a defendant selects to commit the offense, nor does it require that defendant personally deliver the message to the witness. “A threat need not actually

deter or reach the witness because the offense is committed when the defendant makes the attempt to dissuade the witness from testifying.” (*People v. Foster* (2007), 155 Cal.App.4th 331.) By criminalizing attempts to dissuade witnesses from testifying truthfully, this statute upholds the integrity of civil proceedings and reinforces the fundamental principle of fair and impartial justice.

## Intimidation does not consist solely of unequivocal threats of harm

Early on in my career, I represented a client who was injured during the course of her employment. A colleague and witness to the incident was unwilling to testify because his employer had told him it would not be beneficial for his future with the company to speak about what had occurred. Although this is not a direct threat, it is sufficient to constitute a violation of Penal Code section 136.1. “If the defendant’s actions or statements are ambiguous, but reasonably may be interpreted as intending to achieve the future consequence of dissuading the witness from testifying, the offense has been committed.” (*People v. Wahidi* (2013) 222 Cal.App.4th 802, 807.)

## Ramifications for attorneys who engage in intimidation

Intimidating or dissuading a witness from testifying constitutes attorney misconduct under California Rules of Professional Conduct, rule 8.4, which provides that it is professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice. Further, California Rules of Professional Conduct, rule 5-310 provides: “A member shall not: (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.”

## Addressing witness intimidation

If you believe a potential witness has

been subjected to intimidation, submit a motion containing a detailed factual statement. The factual statement should provide the exact language used or actions taken that you assert constitute intimidation. Request that the court instruct defendant and/or defense counsel to refrain from any further witness intimidation and ask for sanctions. The motion demonstrates your firm resolve and readiness to address the defense’s questionable tactics and may also entice defense to initiate settlement discussions in an effort to avoid legal and/or professional sanctions.

## Conclusion

Although witness intimidation may be less prevalent in civil litigation, its significance cannot be understated. As an advocate, it is imperative to recognize and proactively address this issue. While prevention is ideal, it is acknowledged that despite best efforts, instances of witness intimidation may still occur. However, there are effective strategies to mitigate its impact and uphold the integrity of the legal process. By acknowledging and confronting instances of witness intimidation, advocates demonstrate a commitment to ethical practice and the fair administration of justice. Thus, in navigating the complexities of civil litigation, prioritizing the prevention and management of witness intimidation emerges as a foundational aspect of effective advocacy.

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