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## Witness Intimidation

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# LECTURE

## WITNESS INTIMIDATION

MICHAEL H. GRAHAM\*

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This lecture was delivered at the third annual Mason Ladd Memorial Lecture at the Florida State University College of Law on March 21, 1984. The substance of the lecture will comprise a portion of a book entitled *WITNESS INTIMIDATION: THE LAW'S RESPONSE*, to be published by Greenword Press in 1985. In accordance with the format of the lecture as originally delivered, the reader is respectfully referred to this forthcoming book for footnote references and sources. Subject headings have been inserted into the text of the lecture for the convenience of the reader.

## I. INTRODUCTION

I very much appreciate the great honor bestowed upon me by the invitation to deliver the third annual Mason Ladd Memorial Lecture. While I never had the privilege of meeting Dean Ladd, I am very familiar with his tremendous contributions to both the field of evidence and the College of Law at Florida State University.

This evening I would like to explore for you concerns which arise when a witness is intimidated. Witness intimidation is an extremely serious obstacle in the quest for law and order that is only now receiving the attention which it deserves. Initially I wish to describe the extent of the problem and the response of the law to the plight of the intimidated witness. I will then address the various approaches the law takes to determine whether a prior statement of an intimidated witness will be admitted as substantive evidence at the trial of the accused. As I do so I would like to suggest proposals to expand the substantive admissibility of prior statements of intimidated witnesses to what I believe to be the full breadth warranted by considerations of certainty of making and circumstantial guarantees of trustworthiness.

## II. THE INTIMIDATED WITNESS

### A. *The Magnitude of Witness Intimidation*

Witness intimidation refers to threats made or actions taken by defendants or others to dissuade or prevent victims or eyewitnesses of crimes from reporting those crimes, assisting in the subsequent investigation, or giving testimony at a hearing or trial of the alleged perpetrator. I became interested in the subject of witness intimidation in May of 1982 when I received a telephone call from Robert B. Lawler, Chief of the Appeals Division of the District Attorney's office for Philadelphia, Pennsylvania. Mr. Lawler had read several of my writings in the field of evidence and thought that I might be of some help in connection with an effort in which he was then involved to persuade the Supreme Court of Pennsylvania to sanction the substantive admissibility of prior inconsistent statements.

The conversation quickly focused on a problem with which I was already quite familiar. The prosecution has in its possession a prior statement of a witness in which the witness has implicated the defendant. When the witness is called at trial by the prosecution, the

witness testifies in a manner different than that reflected by the prior statement. The witness may claim lack of personal knowledge ("I didn't see anything"), lack of current recollection ("I don't remember anything"), or instead testify to facts that are either less helpful, neutral, or damaging to the prosecution in comparison with the facts stated in the witness's prior statement. Such witnesses are commonly referred to as "turncoat" or "flipped" witnesses; Mr. Lawler advised me that in Philadelphia they are said to have "gone south."

Mr. Lawler then related the facts from a recent trial which illustrate the injustice that may result when a witness has been successfully intimidated. Police responding to a radio call reporting a shooting found an injured man on the ground outside an apartment building. The man told the officers that he had just jumped from a second floor window. On the window ledge of that apartment the police observed a woman hanging by her fingertips. Inside the apartment the police discovered the body of a man who had been shot to death and evidence which indicated the earlier presence of narcotic drugs. The two witnesses gave statements to the police, one of the statements being tape recorded. Both witnesses identified the killer, accused him of shooting at the two of them as well, and admitted that they were associates with the killer in a drug ring. Of course by the time of trial both witnesses had "turned," and neither witness would testify consistently with his or her prior statement to the police. Under the common law applicable in Pennsylvania, the prior statements of the witnesses were hearsay. Because under the facts of the case no common law hearsay exception was applicable, the prior statements could not be received at trial as substantive evidence. A guilty man went free.

Recent studies have unequivocally confirmed that witness intimidation is a pervasive problem. In 1973 the Institute for Law and Social Research examined witness cooperation in a study based on 1,547 murder, rape, robbery, assault, and burglary cases. The analysis revealed that approximately twenty-three percent of the 1,547 cases were not prosecuted because of what was classified as witness noncooperation. In addition, twenty-eight percent of all witnesses interviewed indicated that fear of reprisal by the defendant accounted for their noncooperation. The response most frequently given by witnesses when asked what changes they thought would make witnesses more cooperative was better protection of witnesses.

In 1976 the Vera Institute of Justice and New York's Victims Services Agency performed an extensive study on witness intimidation. The study reported that thirty-nine percent of the witnesses interviewed in Brooklyn Criminal Court were very much afraid of revenge by defendants and that twenty-six percent had actually been threatened at some time during the criminal process—twenty-one percent of these by the defendant and five percent by the defendant's family or friends. The researchers concluded that as many as 7,500 witnesses are threatened each year in connection with criminal prosecutions in Brooklyn Criminal Court alone. Moreover, the study was limited to cases in which the crime was reported and an arrest was made, thereby excluding the many cases in which—whether because of intimidation or other reasons—the crime was not reported to police or no arrest was made.

There is also abundant anecdotal and impressionistic evidence of the magnitude of the witness intimidation problem. During the 1975 congressional hearings on proposed amendments to the Federal Rules of Criminal Procedure, the Department of Justice furnished the House Judiciary Committee with a list of over seven hundred instances of witness intimidation, including assault and assassination. In 1979 the Rape Prosecution Unit in Philadelphia advised that in fifty percent of reported rape cases the rapist threatened the victim with violence or death if she reported the incident to the police or cooperated with the District Attorney. Because of the increasing use of witness intimidation by criminals as an effective method of keeping victims or witnesses out of courtrooms, that same year a representative of the Chicago Police Department concluded that witness intimidation had even come to be viewed as an "innovative defense"—a certain means of securing an acquittal.

### *B. Organized Crime and Other Contexts*

Witness intimidation occurs in numerous contexts, in several different forms, and in an unlimited number of locations. The context in which witness intimidation is the most widespread, however, is the world of organized crime. In fact, witness intimidation is one aspect of organized crime that characterizes it as a unique form of criminal activity. The Criminal Division of the United States Attorney General's office has indicated that ten percent of the victims of all murders related to organized crime in a four-year period were prosecution witnesses. Very often when a person would agree to testify against an individual connected to organized crime they

would either disappear, become involved in a fatal accident, or be openly murdered. The Department of Justice has also reported that more than twenty-five informants were murdered between 1961 and 1965.

The violence and severity of organized crime's response to government witnesses has been attested to repeatedly. A United States senator reports that scores of criminal cases have been lost because key witnesses turned up in rivers wearing concrete boots, or have been crushed—"James Bond-like"—along with their automobiles by hydraulic machines in syndicate-owned junkyards. United States Attorney General Katzenbach has stated that there are dozens of cases where witnesses have been beaten with baseball bats and tortured with acetylene torches, and there are even more cases of sudden and unexplained silence by witnesses or potential witnesses. Vincent "Big Vinnie" Teresa, a mob hitman, reported that he and another hitman were sent to an island to murder Joe Barboza, a mob killer who had become a federal witness. These "enforcers" used a luxury yacht equipped with high-powered binoculars, telescopic rifles, explosives, wet suits, and oxygen tanks for an underwater attack in order to try to silence Barboza.

While witness intimidation occurs frequently in the organized crime context, it is by no means limited to that situation. A great deal of witness intimidation takes place in the family or domestic setting. In New York, a Domestic Violence Unit serviced approximately 450 victims in a six-month period. Two-thirds of these victims did not press charges, and of those that did twenty-five percent later withdrew the charges. The victim of domestic violence is often told by her abuser that she will be killed if she goes to the police or that her children will be harmed or taken away from her if she does not withdraw her charges.

Another context in which witness intimidation occurs is within the prison system. The Assistant Director of the American Correctional Law Project stated: "If victim/witness intimidation is a 'persistent problem' in the free world, it is an epidemic in prison. It's one of the basic rules of the game for prison inmates. Intimidation is to be expected in virtually every case where an inmate may potentially be testifying against another inmate. . . ."

Intimidation can even occur in the protective environment of a police station. In one case, police officers brought a victim to the police station to identify four men who had assaulted him earlier in the evening. During the identification, the officers left the assailants near the complainant. The four men attacked the victim a

second time and inflicted serious injuries.

### *C. The Forms and Location of Witness Intimidation*

Witness intimidation takes three general forms. The first form is the traditional mode of an overt threat or actual use of force against the witness. The second form is family, community, or cultural intimidation, which occurs most frequently in urban areas. The third form of intimidation is perceived or anticipated intimidation which occurs when the victim or witness either changes his testimony or does not testify out of a fear—however justified or unjustified—of reprisal by the perpetrator.

A 1981 Victims Services Agency study reported that sixty-four percent of intimidated witnesses surveyed were threatened by a direct verbal confrontation. In twenty-three percent of the cases the threat was made by a telephone call to the witness, with half of such calls being anonymous. In some instances no overt threat was made, the mere sound of the defendant's voice being enough to prevent the witness from testifying. Only seven percent of the witnesses interviewed reported that the intimidation was in the form of an actual physical attack, while six percent of the witnesses were threatened with weapons. The witness's property was stolen, damaged, or destroyed in seventeen percent of the cases. The Victims Services Agency study additionally found indirect verbal threats, such as threats conveyed through neighborhood rumors or through the witnesses' friends (eleven percent), threats by looks or gestures (five percent), and threats by writings (two percent). The foregoing percentages total more than one-hundred percent because many witnesses were threatened more than once.

The intimidation of a witness often involves persons other than the defendant. For instance, when a woman charged a member of a family from whom she rented a trailer with rape, the defendant's family confiscated all her belongings and told her that they would not be returned until she dropped the charges. Another witness, a trainee in a job program, was assaulted by one of her instructors; when she reported the assault she was dismissed from her training program for being a "troublemaker." One witness was sexually assaulted by her class professor who told her that if she reported the crime she would fail his class, other professors would fail her, this would prevent her from transferring schools, and he would use his influence to prevent her from being admitted to her chosen occupation.

There are examples of subtle and outwardly innocuous acts used

to intimidate witnesses of crimes. In one instance, gang members stood on the sidewalk in front of the witness's home and did nothing more than glare at the house. Another witness, after being raped by a motorcycle gang, reported that several gang members drove their motorcycles by her house.

As indicated by the Victims Services Agency study, intimidation can and does occur anywhere and everywhere a witness can be found. Most threats, forty-two percent, occurred in the witness's home or neighborhood. Another twenty percent of the witnesses reported that they were threatened at the scene of the crime, while eleven percent indicated they were threatened at the scene of the arrest. Fifteen percent of the witnesses reported threats occurring in the courthouse, while still another fifteen percent stated they were threatened at school or the workplace. One witness even reported that he was threatened as he was riding to the precinct in a police car with the defendant.

#### *D. Responding to the Plight of the Intimidated Witness*

Witness intimidation is a crime that has two unique aspects—only unsuccessful attempts are ever reported or discovered, and successful attempts thwart the criminal justice system from securing the convictions of the perpetrators of separate and distinct crimes. Further, witness intimidation has the devastating effect of undermining public confidence in the legal process. A criminal justice system that does not receive cooperation from witnesses will cease to function. Yet in Los Angeles, for example, as recently as 1978 the district attorney's office had filed only five witness intimidation cases over a six-month period. Of these, there were three convictions and two dismissals. Two of those convicted were placed on probation and the third was jailed on a misdemeanor count. Of the twenty-thousand inmates in California's adult correctional system in 1979, only eleven were serving time for violation of the state's felony witness intimidation law.

Until recent time little attention was given to the plight of the victims of witness intimidation. The traditional approach of the criminal justice system was to focus solely upon the identification, apprehension, prosecution, punishment, and rehabilitation of offenders. Victims and witnesses to crimes were considered only to the extent that they actually played a direct role in the identification and prosecution of offenders. When it came to assisting victims and witnesses in overcoming the frustrations and economic sacrifices caused by reporting criminal activity and involvement in



criminal proceedings, the criminal justice system was virtually absent.

Ironically, while the plight of the intimidated witness was generally being ignored, the importance of the assistance and cooperation of victims was clearly recognized. Studies over the years have indicated two major reasons for victim noninvolvement or non-cooperation. First, victims and witnesses are often presented with major inconveniences and problems due to their involvement in the operation of the criminal justice system. As a result, all too frequently even civic-minded and initially cooperative persons regret having ever stepped forward, and vow never to do so again. Second, noninvolvement is often an initial predisposition that prevails over any thought of volunteering help. This type of predisposition includes prejudices and negative attitudes toward the personnel and agencies of the criminal justice system and, of course, fear of reprisal. While the fear of reprisal may originate internally with an individual, more often it is brought about by physical threats or family, community, or cultural intimidation.

During the late 1960's and early 1970's problems associated with being a victim or witness of crime began to receive more attention. For example, in a 1973 report on courts the National Advisory Commission on Criminal Justice Standards and Goals referred to deficient "methods and procedures by which witnesses are used." The Commission observed that "[c]itizens—as victims, witnesses, defendants, or jurors—experience delay, inconvenience, and confusion." Several prosecutor's offices and police agencies began to initiate programs designed to improve the handling of witnesses. The National District Attorneys Association established a commission on victim and witness assistance. The Association's objective was "to develop a special capability on the part of the district attorneys to better serve the needs of victims of crime and witnesses to crime, and to thereby enhance the effectiveness of their prosecutive [sic] activities." In addition, national and local groups sprang up to assist victims and witnesses.

In response to the increased awareness of the overall plight of victims and witnesses to crimes and the renewed appreciation of the importance of voluntary cooperation by such persons in the successful prosecution of offenders, a group of recommendations emerged which resulted in some concrete action. Victim compensation programs were established in nearly three-fourths of the states, and statutes providing for the availability of a court order requiring the criminal defendant to make restitution as part of his

sentence were enacted in several jurisdictions. However, procedures designed to ensure fair treatment of witnesses and thereby encourage full witness cooperation were acted upon only in isolated instances throughout the country. Much remained to be done.

In the mid-1970's the American Bar Association (ABA) turned its attention to the special needs and problems faced by crime victims. In 1976, the ABA Criminal Justice Section created the Committee on Victims. A major motivation for its creation was the recognition that the organized bar, in concentrating its efforts for years on the rights of the accused, had neglected the plight of crime victims and witnesses. The Committee initially focused on improved treatment for victims by the criminal justice system, suggesting amendments to the ABA Criminal Justice Standards to reflect a concern for the fair treatment of victims and urging implementation of an ABA policy supporting crime victim compensation legislation. The Committee then turned its attention in 1977 to the problem of victim and witness intimidation—theretofore largely unexamined. These efforts eventually led to recommendations in 1980 for action by six segments of society: the legislature, law enforcement, prosecution, courts, community groups/private sector, and the organized bar. Spurred on by the recommendations of the Committee on Victims, Congress passed the Victim and Witness Protection Act of 1982. The President's Task Force on Victims of Crime rendered its report during December of the same year. Finally, exactly one year later the National Conference of the Judiciary on the Rights of Victims of Crime issued a similar call to action. Included within the flurry of activity were recommendations to encourage the voluntary cooperation of victims and witnesses through adoption of practices and procedures designed in part to reduce the threat of intimidation. The Victim and Witness Protection Act of 1982 contains provisions which made witness intimidation a separate criminal offense as well as providing for the availability of injunctive relief against any person who intimidates a witness.

While the basic thrust of several of the recommendations put forth by the ABA, the President's Task Force, the National Conference on the Judiciary, and many of the provisions of the Victim and Witness Protection Act of 1982 directly addressed the problem of witness intimidation, many others, such as those providing for the prompt return of a victim's property, notification to creditors, and federal funding of victim compensation programs, dealt solely with concerns for the plight of *victims* of crime. The following

guidelines suggested by the President's Task Force on Victims of Crime to mitigate the problems that citizens encounter by participating in the criminal justice system typify current recommendations:

- (1) The provision of services to victims of crime, including information on compensation for out-of-pocket losses, medical and psychological treatment programs, case status information, and protection from intimidation;
- (2) Prompt notification to victims and witnesses of scheduling changes in court proceedings;
- (3) Prompt notification to victims of violent crime concerning their cases, including the arrest and bond status of the defendant and the eventual outcome of the case;
- (4) Consultation with the victim during the various stages of the prosecution;
- (5) Separate waiting areas for defense and prosecution witnesses awaiting court proceedings;
- (6) Prompt return of property seized as evidence or recovered during an investigation;
- (7) Contacting a victim's employer and creditors to seek their cooperation, by explaining the situation of the victim after the crime, the necessity of court appearances and his temporary inability to meet outstanding debts. . . ;
- (8) Training law enforcement personnel in victim assistance; and
- (9) The provision of general victim assistance in a variety of areas, such as transportation, parking, and translators.

With respect to the problem of witness intimidation, the recommendations for action of the ABA, the President's Task Force, and the National Conference on the Judiciary, as well as the statutory provisions of the Victim and Witness Protection Act of 1982, seek to prevent and discourage intimidation in the first instance, and thereafter to react appropriately to attempts at intimidation when they do occur. The problem, however, is that a response to an attempt at intimidation by means of police protection, issuance of an injunction, or criminal prosecution is available only if the intimidation is unsuccessful. A witness who has been successfully intimidated will not come forward to seek protection of any kind, nor otherwise bring the action of the defendant to the attention of the authorities. A witness who has been successfully intimidated may be dead, may refuse to appear voluntarily in court, may go into hiding to avoid the service of a subpoena, or may simply disregard

the subpoena served upon him. A successfully intimidated witness who testifies in court may feign a lack of recollection as to the events relating to the crime for which the accused is on trial, or may even "turn" or "flip" and tell a story completely different than the one which he related to prosecution authorities when first interviewed.

When a witness is successfully intimidated, the statements of fact which he initially gave to prosecution authorities will not be forthcoming at trial. The question then becomes whether the government can introduce the prior out-of-court statement of the witness at trial as substantive evidence. Resolving questions of substantive admissibility of prior witness statements has been greatly affected by the enactment of the Federal Rules of Evidence in 1975 and the subsequent enactment by twenty-seven states of rules of evidence modeled on the Federal Rules.

### III. SUBSTANTIVE ADMISSIBILITY OF PRIOR STATEMENTS

#### A. *Prior Inconsistent Statements*

##### 1. *Current Federal Rule of Evidence 801(d)(1)(A)*

At common law the prior inconsistent statement of a witness who is in court and who is subject to cross-examination is hearsay when offered to prove the truth or falsity of the matter asserted. The Advisory Committee to the Federal Rules of Evidence, recognizing that the absence of contemporaneous cross-examination at the time the prior statement was made is not significant when the declarant is present in court subject to cross-examination, proposed that all prior inconsistent statements be given substantive effect. Congress, however, refused to adopt the proposed rule and limited substantive admissibility of prior inconsistent statements in Rule 801(d)(1)(A) to statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Congress expressed concern that under the proposed rule a criminal defendant could be convicted on the strength of evidence as to a prior statement of a witness which was in fact never made. The risk of fabrication addressed by Congress can be appreciated by considering the following illustration.

Assume that the prosecution calls a witness to the stand to testify concerning certain events which took place in a bar on the night of a bank robbery. A policeman has advised the prosecution that when he went into the bar, a witness told him that he was a

friend of the defendant and that the defendant had been in the bar earlier that evening. The policeman is prepared to testify that the witness told him that the accused arrived at the bar in a very agitated state, that he was out of breath and carrying a brown paper bag, and furthermore that the defendant admitted to the witness that he had just robbed a bank. At trial the witness admits talking to the police officer but adamantly maintains that what he told the police officer was that when he saw the defendant in the bar that evening the defendant did not say anything to him, that the defendant was in normal physical condition, and that the defendant was not carrying anything.

Consider the position of the defense attorney who is attempting to cross-examine the police officer as to whether an inconsistent oral statement was made by the witness. Because the police officer in fact spoke to the witness, cross-examination as to time, location, etc., will be unavailing. The situation resolves ultimately into a "Yes he did" versus "No I didn't" situation, where the police officer will swear that his version of the statement was made and the alleged declarant of the statement will swear that it was not. Congress believed that given such a situation the jury would too often just uncritically accept the testimony of the police officer as to the existence of the highly incriminating oral inconsistent statement. Congress further believed that given the oral nature of the alleged prior inconsistent statement, there was an unacceptable potential that the police officer fabricated his testimony and hence the defendant would be unjustly convicted. Congress accordingly amended Rule 801(d)(1)(A) to limit substantive admissibility of prior inconsistent statements to those made at a formal proceeding where there can be almost absolute assurance that the prior statement was made.

Acknowledging the legitimacy of congressional concern regarding Rule 801(d)(1)(A), it nevertheless appears that the rule's safeguards designed to ensure that a prior inconsistent statement was actually made and accurately recorded are overly strict. Why should the rule exclude a signed or handwritten statement that is acknowledged by the witness or proven to be his by other evidence? Why should it exclude an oral statement not made under oath when the witness during his testimony admits that he made it? Why should the rule exclude on any ground substantive admission of prior inconsistent statements in an affidavit that was executed under oath and submitted to the court in the same or another proceeding by the witness's attorney?

2. *Proposed Amendment to Federal Rule of Evidence 801(d)(1)(A)*

Alternative proposals have been advanced that would authorize substantive admission of prior inconsistent statements where it is sufficiently established that they were actually made. These proposals assert that substantive admissibility should extend to all prior inconsistent statements for which there are substantial guarantees of certainty of making and accuracy of reporting and for which an effective opportunity exists at trial to examine witnesses to expose and counteract any impropriety that may have occurred in the taking of the statement such as coercion, deception, or subtle influence. Professor McCormick, for example, in an article entitled *The Turncoat Witness: Previous Statements as Substantive Evidence* [25 TEX. L. REV. 573, 588 (1947)], has suggested the following rule:

A statement made on a former occasion by a declarant having *an opportunity to observe the facts stated*, will be received as evidence of such facts, notwithstanding the rule against hearsay if

(1) the statement is proved to have been written or signed by the declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding, and

(2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant. [Emphasis added].

Professor McCormick's proposal contains one important qualification: it requires that the declarant have personal knowledge of the facts stated. Section 1 of the English Evidence Act of 1938 contained a similar personal knowledge requirement:

In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(i) if the maker of the statement either—

(a) had personal knowledge of the matters dealt with by the statement; or

(b) [made the statement as part of a business record]; and

(ii) if the maker of the statement is called as a witness in

the proceedings. . . .

Although the effect of the personal knowledge requirement has not been elaborated upon by the authors of the proposals that adopt it, the requirement has at least two very important consequences. First, only a witness with personal knowledge of the subject matter of a prior inconsistent statement can be examined about whether the statement is truthful. Second, the requirement excludes from evidence all prior statements of a witness that merely narrate a third person's declaration, unless the witness also had personal knowledge of the subject matter constituting the event or condition related by the third person's statement. Thus, a witness's prior statement that he heard a criminal defendant make an incriminating admission would be inadmissible as substantive evidence unless the witness had personal knowledge of the incriminating conduct itself. The personal knowledge requirement excludes from evidence those statements most open to fabrication by the declarant while concurrently assuring the opportunity for effective cross-examination.

The illustration previously employed demonstrates the importance of the requirement of personal knowledge. Recall that in the bank robbery prosecution the government calls a friend of the accused to the stand. The witness testifies that he saw the defendant at a local bar on the night of the offense, that the defendant did not say anything to him at that time, that he appeared to be in normal physical condition, and that he was not carrying anything. Further assume that the prosecution possesses a written statement made by the witness that concerns the night in question. While on the stand, the witness admits having written and signed the statement, though he denies its factual accuracy. Under the proposals imposing a requirement of personal knowledge, a prior inconsistent statement contained in the written declaration to the effect that the defendant had admitted robbing the bank would not be admissible as substantive evidence, because the witness had no personal knowledge of the underlying subject matter of his prior inconsistent statement, i.e., that the defendant in fact robbed the bank. Conversely, a prior inconsistent statement in the witness's out-of-court declaration to the effect that when the defendant entered the bar he was very agitated and out of breath, was wearing a torn shirt, and was carrying a brown paper bag would be substantively admissible "first-hand hearsay" because the witness's prior inconsistent statement sufficiently demonstrates his personal knowledge

of the matters stated.

Both the McCormick recommendation and the English statute would exclude the prior inconsistent statement that the defendant admitted robbing the bank from the jury. This type of statement—the “double level hearsay” statement, typified by the admission-confession of the criminal defendant—is the kind of evidence that has caused the most concern for the judicial system. Such statements create the greatest risk of total fabrication by the witness and consequently the greatest danger of misapplication by the jury. Under either of the foregoing proposals, only “first-hand hearsay” would be admissible.

Subject to the requirement of personal knowledge, the suggested modification of the common law would give substantive admissibility to prior inconsistent statements of a witness available at trial for cross-examination which the witness acknowledges at trial as having made. In addition, statements proven to have been written or signed by such a witness would be given substantive effect. The proposals also implicitly recognize that recorded statements of such witnesses provide sufficient protection against fabrication so as to warrant substantive effect. The foregoing proposals would, however, exclude from substantive evidence an unacknowledged oral statement, the prior statement most likely not to have been made and most likely, if made, to have been unfairly obtained or inaccurately reported.

With respect to written, recorded, and acknowledged statements which would be substantively admissible under both of the proposals when made by a witness possessing personal knowledge of the underlying subject matter, it is undeniable that coercion, deception, or subtle influence may have affected the process of taking and preserving the statement. However, the circumstances surrounding the actual making of the statement may be explained by the witness to the trier of fact, and the declarant may provide the trier of fact with a complete explanation of why the statement is misleading, inaccurate, or otherwise incorrect. Others who were present when the statement was made, including persons called to lay a foundation for the admission of the prior inconsistent statement, may be examined and cross-examined on such matters as well. Moreover, and critically important, the witness possessing personal knowledge of the event related is in a position to advise the trier of fact of that which he now contends actually occurred. The jury may observe the demeanor of the witness throughout. Effective cross-examination by counsel opposing the truth of the



prior inconsistent statement can be expected to do no more; it rarely accomplishes as much.

In short, the difficulty with Rule 801(d)(1)(A) is not that it fails to permit substantive admission of all prior inconsistent statements, but rather that it fails to admit many statements that almost certainly were made and for which an effective opportunity exists at trial to expose and counteract any impropriety that may have occurred in the taking of the statement. The McCormick and English proposals broaden admissibility beyond Rule 801(d)(1)(A)'s limitation to statements made at formal proceedings. Yet each, assisted by the requirement of personal knowledge, ensures to a sufficient degree of certainty that the statements were made and that they may be explored for trustworthiness at trial; at the same time, both exclude the most untrustworthy declaration, the unacknowledged oral statement. Accordingly, it is suggested that Federal Rule of Evidence 801(d)(1)(A) be amended to state:

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) *Prior Statement of Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and

(A) The statement is inconsistent with his testimony, and

(i) is proved to have been made under oath subject to penalty of perjury at a trial, hearing, or other proceeding or in a deposition, or

(ii) is made by a declarant having personal knowledge of the underlying event or condition the statement narrates, describes, or explains and

(1) the statement is proven to have been written or signed by the declarant, or

(2) the making of the prior statement by the declarant is acknowledged either

(a) by the declarant in his testimony in the present proceeding or

(b) by the declarant under oath subject to the penalty of perjury or in a deposition, or

(3) the statement is proven to have been accurately recorded by a tape recorder, videotape recorder, or any other similar electronic means of sound recording.

Certain provisions of the proposed rule deserve specific mention. Current Rule 801(d)(1)(A) does not permit substantive admissibil-

ity when a witness at trial acknowledges the making but denies the truth of the inconsistent statement; in contrast Proposed Rule 801(d)(1)(A)(ii)(2)(a) would give substantive admissibility to this inconsistent statement. In addition, Proposed Rule 801(d)(1)(A)(ii)(2)(b) provides for the substantive admissibility of a prior oral or written statement, the making of which the witness had acknowledged while testifying at a prior trial, hearing, other formal proceeding, or deposition, even if the witness had denied its truth at that proceeding. Thus, subject to the requirement of personal knowledge, if a witness at the current trial had earlier appeared at one of these formal proceedings and had stated that he had made a particular oral statement, the statement would be admissible substantively in the present trial if it is inconsistent with his present trial testimony, even if he now states that he never made the prior oral statement or that it was untrue.

The proposal also requires that the statement be "proven" to have been made whenever the witness refuses to acknowledge that he made it. It envisions that the resolution of that issue would be within the province of the court. Thus, this determination of substantive admissibility is not intended to be controlled by the standard of Federal Rule of Evidence 104(b), under which the court would only need to find that sufficient evidence had been introduced to support a jury finding that the out-of-court statement was made by the witness. Rather, the litigant seeking to use as substantive evidence a prior inconsistent statement that the witness had not admitted making must initially satisfy the court that it is more probably true than not true that the statement was in fact made, as provided in Rule 104(a). Given the nature of the prior inconsistent statements that fall within the proposed rule, it is probable that the witness will seldom deny making the statement, absent allegations of forged signatures on, or alterations in, prior signed or recorded statements. Ultimately, the decision as to whether the statement was made rests with the jury.

While the proposed amendment to Federal Rule of Evidence 801(d)(1)(A) requires that for the prior inconsistent statement to be admissible, the proponent must prove that it is more probably true than not that the statement alleged to be that of the declarant was the exact statement that the declarant recorded, wrote, or signed, the proponent of the prior statement should not be required to bear this burden of proof regarding other contested matters relating to the statement. The special problems of distortion through subtle wording variations, complete omissions, fabricated

additions followed by uncritical signing, subtle influence, or appeal to the declarant's desire to please another person, etc., can adequately be resolved by the jury after it has heard such allegations presented by the in-court declarant and explored during the cross-examination of the person who obtained the prior statement. The jury, consistent with its traditional function, is assigned the task of judging the credibility of each witness and of deciding what in fact occurred when the prior statement was allegedly made. Thus, once the court is persuaded that the prior statement was in fact recorded, written, or signed by the witness, it need not determine such contested matters relating to the circumstances surrounding the making of the statement. However, if the declarant in either a civil or criminal case asserts that a prior statement was made involuntarily, under the proposed rule the proponent of the statement should be required to convince the judge that it is more probably true than not true that the statement had not been the product of coercion. In this regard, it is noteworthy that the more probably true than not standard has already been applied in criminal cases to determine the voluntariness of a prior inconsistent statement.

To summarize, the proposed amendment to Federal Rule of Evidence 801(d)(1)(A) increases to the extent justified by the concern for certainty of making and circumstantial guarantees of trustworthiness the breadth of prior inconsistent statements which would be substantively admissible when the declarant is available for cross-examination. The proposed rule also provides the opportunity to easily and promptly preserve a prior statement by video or tape recording the oral statement or by reducing the statement to writing. Unfortunately, the proposed rule does not address the problem of determining whether a prior statement of a witness may be offered as substantive evidence when the declarant of the statement has been intimidated, resulting in the total loss of his testimony at trial.

### *B. Former Testimony*

A hearing of the same or a different proceeding provides an opportunity to perpetuate the witness's testimony for admission into evidence as former testimony under Federal Rule of Evidence 804(b)(1) should the witness's testimony prove unavailable at trial because of witness intimidation or otherwise. Various practical considerations, however, make it less than likely that substantial increased use of available hearings for the purpose of perpetuating

testimony will occur. The prosecutor, whether it be a suppression hearing or preliminary hearing, is primarily concerned with accomplishing the limited objectives at hand such as establishing voluntariness, consent to search, or probable cause, while at the same time exposing his case to scrutiny by the accused to the least extent possible. Accordingly, hearsay testimony is often employed with only the police officer testifying. Summary and conclusory questions are often presented to the police officer, or the witness if he testifies, by means of leading questions to the extent permitted by the court over objection. Moreover, even in instances where the witness is called and nonleading questions are asked, only the minimum information needed to accomplish the objective at hand will be asked of the witness. Obviously testimony elicited in this fashion will be less persuasive if later admitted at trial than testimony taken with the express purpose of perpetuation in mind. Moreover, if the witness proves unavailable, objection can be interposed at trial to the introduction of prior hearing testimony as former testimony under Rule 804(b)(1) on the basis that a similar motive did not exist and an adequate opportunity was not provided for cross-examination at the prior hearing, given the limited nature of the determination to be made. While it certainly would be beneficial for prosecutors to keep in mind that testimony elicited from a witness prior to trial may be offered later at trial, it is doubtful that considerations of perpetuation will significantly affect present practice. Too many other competing considerations make it entirely unlikely that the interest in perpetuation against the contingency of unavailability will be the dog that wags the tail of strategy at pretrial hearings.

### *C. Depositions to Perpetuate Testimony*

The availability of the deposition to perpetuate testimony in the federal court pursuant to Federal Rule of Criminal Procedure 15 and in many state courts pursuant to statute or court rule offers another opportunity to protect against the loss of a witness's testimony at trial by reason of witness intimidation. Increased resort to perpetuation depositions under appropriate circumstances is undoubtedly both a good idea and a likely result of the current wave of concern over the problem of witness intimidation. However, various impediments stand in the way of the perpetuation deposition becoming a truly meaningful tool in the fight against witness intimidation.

Federal Rule of Criminal Procedure 15(a) provides that a per-

petuation deposition may be taken by the prosecution “[w]henver due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial.” “Exceptional circumstances” exist whenever it appears that a prospective witness may be unable to attend or may be prevented from attending the hearing, that the potential testimony of the witness is material, and that the interests of justice require that his deposition be taken. Florida Rule of Criminal Procedure 3.190(j)(1) is almost identical:

After an indictment or information upon which a defendant is to be tried is filed, the defendant or the State may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the application is made within ten days before the trial date, the court may deny the application.

Similarly, Uniform Rule of Criminal Procedure 431(a) states:

**When taken.** At any time after the defendant has appeared, any party may take the testimony of any person by deposition, except:

(1) The defendant may not be deposed unless he consents and his lawyer, if he has one, is present or his presence is waived;

(2) A discovery deposition may be taken after the time set by the court only with leave of court;

(3) A deposition to perpetuate testimony may be taken only with leave of court, which shall be granted upon motion of any party if it appears that the deponent may be able to give material testimony but may be unable to attend a trial or hearing; and

(4) Upon motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress the deponent or a party, the court in which the prosecution is pending or the court of the [district] where the deposition is being taken may order that the deposition not be taken or continued or may limit the scope and manner of its taking. Upon demand of the objecting party or de-

ponent, the taking of the deposition shall be suspended for the time necessary to make the motion.

Attendance of witnesses and production of documentary evidence and objects may be compelled by subpoena under Rule 731.

Generally speaking, two major obstacles inhibit the effectiveness of perpetuation depositions as currently authorized. First, a deposition perpetuation proceeding may not be conducted until after the defendant has appeared. Having appeared, the presence of the defendant at the deposition is required unless he waives the right or the judge orders that the deposition proceed with the accused removed because of his disruptive conduct. Even in the event of either of these circumstances, defendant's counsel must be present. If the defendant is not present at the deposition and his absence is not excused, the deposition of the unavailable deponent may not be received at trial as substantive evidence when offered by the government. The requirement that the defendant has appeared, that he receive notice of the perpetuation deposition, that the defendant be present at the deposition, and that he be represented by counsel all result in the passage of time during which the witness may be the victim of intimidation. If the defendant did not already know the identity or address of the victim, he will receive such information in the notice of the perpetuation deposition. Moreover, the perpetuation deposition itself provides the accused an opportunity to exert pressure on the witness by virtue of his mere presence coupled with the right of cross-examination.

Second, the perpetuation deposition may be taken only if the prosecution on a verified application or by affidavit establishes either that the witness may be unable to attend the trial, usually for reasons of health or presence outside of the country, or may be prevented from attending the trial. With respect to witness intimidation, the prosecution will most often never learn about attempts at intimidation until the trial has already begun. Moreover, if the prosecution has merely heard rumors about or only somehow senses the probability of an attempt at intimidation, the prosecution would lack sufficient basis to make an adequate showing by verified application or affidavit that the witness may be prevented from testifying at trial. The problems inherent in satisfying the standards for obtaining a perpetuation deposition were enumerated in the context of a debate on Federal Rule of Criminal Procedure 16 and its then-proposed requirement of the disclosure of potential witness lists:

Rule 16 as it would be amended by the Supreme Court or House Judiciary Committee versions may seem to offer solutions to our problems, but the solutions are chimerical. There is the provision, first, for the protection order in subdivision (d)(1), under which a court may deny or order any part of the normal discovery "upon a sufficient showing." There are theoretical difficulties in making a showing why the normal rule should not be followed on the basis of the nature of the charges, or an arrest record or even a reputation. Demonstrating that there has been a high incidence of violence and threats of violence in a range of federal criminal cases may seem a little beside the point in determining whether one defendant should be denied what others are accorded. An appreciation of the general problem is a sound argument for keeping the rule as it is, but change the rule and allow an exception for valid reason, and a judge may want a reason peculiar to the case in front of him. The government cannot always be that specific. Our problem is with risks and probabilities, not near certainties. If we had particular reasons to expect violence, we could guard the witness or take other measures. And pretrial discovery can occur well before the trial; there is no utility in a protective order after giving away the witness's identity.

Assuming *arguendo* that in a few cases there may be available evidence of witness intimidation sufficient to warrant a court ordered perpetuation deposition, instigation of the procedure may itself serve to aggravate rather than eliminate the threat. A defendant may initiate or intensify wrongful efforts to ensure that he will ultimately be successful in suppressing the witness's testimony.

In summary, proceedings currently available for later substantive admissibility should the witness's testimony prove unavailable at trial are inadequate. Deficiencies caused by the limited purpose of and by delay associated with the preliminary hearing and the suppression hearing are severe. Difficulties surrounding establishing "exceptional circumstances" and delay with respect to the perpetuation deposition may be hard to overcome.

#### IV. THE PRESERVATION PROCEEDING

In federal court and in a minority of state courts, oral statements, written or recorded statements, and grand jury testimony of an unavailable witness may be offered as substantive evidence under the "other hearsay" exception of Federal Rule of Evidence 804(b)(5). However, with respect to oral, written, or recorded statements, the prosecution is rarely able to convince the court that

such statements possess the magnitude of circumstantial guarantees of trustworthiness required for admissibility. While the situation with respect to grand jury testimony is more promising, the manner in which such testimony is preserved leaves substantial doubt in any given case as to whether equivalent circumstantial guarantees of trustworthiness can be shown.

The following proposal for the creation of a preservation proceeding is designed to increase the odds of the prior statement of the unavailable witness being found sufficiently trustworthy to be admitted under Rule 804(b)(5). The components of the preservation proceeding being proposed are (1) the taking of testimony at a hearing before a noninvestigative presiding officer, (2) the taking of testimony with the express purpose of facilitating the later determination of equivalent circumstantial guarantees of trustworthiness required by Rule 804(b)(5) for admissibility, (3) cross-examination by designated counsel provided with full discovery, but in the absence of the defendant, thus permitting the preservation proceeding to be held without delay, and (4) finally, the incorporation of procedural rules relating to the taking of testimony at the preservation proceeding and its subsequent use at trial designed to accomplish the specific objective at hand.

### A. *The Components*

#### 1. *Noninvestigative Presiding Officer*

The Ninth Circuit has offered some guidance as to the meaning of "other proceeding" as employed by Rule 801(d)(1)(A) and in the process has shed some light upon the type of proceeding which assures certainty of making and facilitates the ascertainment of guarantees of trustworthiness. In *United States v. Castro-Ayon* [537 F.2d 1055 (9th Cir.), cert. denied, 429 U.S. 983 (1976)], the court had to decide whether an immigration proceeding qualified as an "other proceeding." An unarmed border patrol agent stopped a van carrying eleven illegal aliens. The van's registration was in the name of Castro-Ayon, a United States citizen. At a border patrol station, Agent Pierce, a special inquiry officer, informed the aliens of their rights, placed them under oath, and conducted an interrogation. Each interrogation was recorded on tape. As a result of these events, Castro-Ayon was indicted for inducing illegal immigration, transporting illegal immigrants, and conspiracy.

At Castro-Ayon's trial, the government called three of the aliens and inquired about Castro-Ayon. The testimony of each tended to



exculpate the defendant, although the aliens admitted making statements to Agent Pierce after their arrest. The government then called Agent Pierce who testified to the prior statements which were inconsistent with those given at trial. Over the defendant's objection, the trial court permitted the introduction of the statements as substantive evidence under Rule 801(d)(1)(A).

On appeal, the Ninth Circuit upheld the admission of the statements. First, the court reasoned that if Congress had intended to limit the reach of "other proceeding" to grand jury testimony, it would have used the term "grand jury." Second, the court found that the immigration proceeding bore similarities to a grand jury proceeding. The court stated:

[B]oth are investigatory, ex parte, inquisitive, sworn, basically prosecutorial, held before an officer other than the arresting officer, recorded, and held in circumstances of some legal formality. Indeed, this immigration proceeding provides more legal rights for the witnesses than does a grand jury: the right to remain totally silent, the right to counsel, and the right to have the interrogator inform the witness of these rights.

The opinion was careful to expressly deny that the court's holding made admissible every sworn statement given during a police station interrogation. Recognizing that the border patrol station interrogation bore similarities to a police station interrogation, the court nevertheless concluded that the border patrol interrogation would qualify as an "other proceeding."

While the court did not specifically state its reasoning as to the differences qualifying the immigration proceeding and not the ordinary witness interrogation conducted at the police station, the critical difference is with respect to an aspect of the immigration proceeding noted above. A police station interrogation, as well as a grand jury proceeding, can be investigatory, ex parte, inquisitive, and can involve sworn statements. Furthermore, if the witness is also being detained, he will have been informed of his rights. What remains is the presence of a noninvestigative officer. A police station interrogation does not involve the presence of an officer "other than the arresting officer." The immigration proceeding involved in *Castro-Ayon* requires a special inquiry officer to conduct the proceeding. The officer, an immigration official deemed qualified to conduct such a proceeding by the Attorney General, may not preside over a proceeding in which he has any investigative or prosecutorial functions. The special inquiry officer is empowered to

receive and adduce relevant evidence, rule upon any objections, and regulate the course of the hearing. Additionally, the hearing must be recorded verbatim, except for statements which the special inquiry officer permits to be made off the record.

In summary the immigration proceeding, in comparison to a police station interrogation, is more similar to the usual grand jury proceeding by virtue of the fact that it is a proceeding conducted by or before a person having no investigative function. The presence of a noninvestigative presiding officer appointed by the Attorney General or the presence of the members of the grand jury provides assurance that the statement was made under conditions not involving coercion, deception, or subtle influence. Verbatim recordings assure certainty of making of the prior statement. *Castro-Ayon* thus strongly suggests that the federal government and the states can experiment in the creation of formal proceedings providing adequate assurance of certainty of making while facilitating the ascertainment of circumstantial guarantees of trustworthiness. Such a proceeding designed to preserve testimony should include provision for the presence of a qualified noninvestigative officer, that is, a judge, magistrate, or attorney appointed specially to preside, recording of the proceeding to assure certainty of making, and formal regulation of the taking of evidence.

## 2. *Facilitating the Determination of Trustworthiness*

Inaugurating proper procedures for the taking of evidence is the linchpin to the critical function of facilitating the ascertainment of equivalent circumstantial guarantees of trustworthiness required for the admissibility of preservation proceeding testimony should the witness's live testimony be unavailable at trial for any reason, including witness intimidation. A determination of the trustworthiness of a statement involves an assessment of the credibility of the declarant together with an assessment of corroborative and contradictory evidence bearing on the truth of the matter asserted in the statement, considered in light of the totality of the surrounding circumstances. Credibility of the witness is dependent upon his willingness to tell the truth and his ability to accurately describe the event of which he purports to have personal knowledge. A witness's ability to accurately describe an event of which he purports to possess personal knowledge is the product in turn of the nature and extent of the witness's actual physical and mental capacity to perceive, record, recollect, and narrate the matter described. Determining the trustworthiness of a statement thus in part involves

an assessment of each component of credibility, i.e., the declarant's perception, recordation and recollection, narration, and sincerity with respect to the matter asserted in the statement.

In assessing the credibility of a witness the trier of fact looks to the demeanor of the witness, the content of the witness's testimony on direct examination, and his answer to questions asked on cross-examination. Leading questions are not permissible on direct examination except as may be necessary to develop the witness's testimony. A leading question suggests the answer desired by the examiner. The vice of such a question lies in substituting the suggestions of counsel for the actual testimony of the witness. On the other hand leading questions are ordinarily permitted on cross-examination. The reason for prohibiting leading questions, i.e., the witness will be responsive to the suggestions of counsel, generally does not apply to the witness under cross-examination. Because examination of the witness at the preservation proceeding should proceed as if at trial, leading questions on direct examination would be prohibited except as may be necessary to develop the witness's testimony.

Discrediting a witness on cross-examination concerning his perception, recordation and recollection, or narration may sometimes be accomplished by the simple means of a leading question. Because a leading question will tend to be argumentative when the attack is upon sincerity, resort to a specific mode of impeachment is generally required. Depending upon the circumstances, the potentially available modes of impeachment of a witness's sincerity are (1) reputation for truth and veracity, (2) prior act of misconduct, (3) prior conviction, (4) partiality because of interest, bias, corruption, or coercion, (5) contradiction by other evidence, including the conduct of the witness himself, and (6) self-contradiction with one's own prior inconsistent statement. Leading questions may be employed in the process of attacking the witness's sincerity in any of the foregoing modes. Of course, with respect to certain modes of impeachment, particularly contradiction and prior inconsistent statement, the attack also extends to personal knowledge. To illustrate, if the witness denies being four hundred feet away from the event which he allegedly observed, asserting instead that he was only twenty feet from the event, a prior inconsistent statement that he was four hundred feet away constitutes an attack not only upon sincerity, but also upon perception, recordation, and recollection.

The procedure for taking of testimony of the witness must be

structured to facilitate to the extent possible an accurate assessment of the credibility of a witness and the trustworthiness of his preserved testimony in case the witness should prove unavailable at trial. To accomplish this objective, it is essential that an opportunity be provided for counsel to cross-examine the witness. To enhance the potential for destructive cross-examination, full discovery of then available material is also necessary. Finally, the preservation proceedings should be conducted promptly to enhance the likelihood of accurate recollection and reduce the passage of time during which the witness can be subjected to coercion, deception, or subtle influence by the prosecution, as well as reduce the opportunity for the witness to fabricate a credible story. Of course, a prompt preservation proceeding also serves to reduce the risk of the witness being intimidated by the accused.

### 3. *Designated Counsel*

In *Ohio v. Roberts* [448 U.S. 56 (1979)], the United States Supreme Court discussed the role of cross-examination in ensuring trustworthiness within the context of the sixth amendment confrontation clause and the hearsay rule. The Court found that an opportunity for a detailed exploration of the events was crucial to finding the evidence sufficiently reliable for purposes of satisfying the confrontation clause in connection with the admission of preliminary hearing testimony of an unavailable witness. The opportunity for detailed exploration of events would, of course, require the presence of a trained attorney representing the defendant. The Court, however, rejected the contention that the cross-examination must be conducted by the same attorney who later represents the defendant at trial. In *Roberts*, the Supreme Court found no substance in the defendant's argument that statements given in a preliminary hearing where he was not represented by his trial attorney required "a particularized search for 'indicia of reliability.'" The attorney at the preliminary hearing, however, was the defendant's counsel at that time and bore a responsibility to his client. In addition, of course, the accused was available at the preliminary hearing to assist his counsel in conducting the cross-examination.

Current statutes authorizing the taking of depositions to perpetuate testimony demonstrate that cross-examination *by counsel for the accused* at a special proceeding is sufficient to ensure trustworthiness of the evidence and admissibility as former testimony at trial should the witness's testimony prove unavailable. As stated before, however, the utility of such depositions in combating wit-

ness intimidation is problematic. The deposition occurs too late; it cannot be held prior to formal appearance of the accused. The deposition also requires that the defendant be advised in advance of the name of the witness. These aspects of perpetuation deposition procedure inform a defendant exactly who to intimidate while providing the time for the intimidation to take place. Finally, the presence of the accused at the perpetuation deposition may itself have an intimidating effect.

The preservation proceeding, to be effective in combating witness intimidation, therefore must be held forthwith, sometimes even before the defendant is identified, and without prior disclosure to the defendant of the identity of the witness. Obviously it follows that for the preservation proceeding to be effective must be held in the absence of the defendant. On the other hand, to facilitate a subsequent determination of equivalent circumstantial guarantees of trustworthiness should the preservation proceeding testimony be offered when the witness's testimony at trial proves unavailable, the witness should be cross-examined at the preservation proceeding. The preservation proceeding must therefore include the presence of an attorney to represent the interest of the person or persons who the witness will incriminate. Accordingly, a court or magistrate must be able to appoint a public defender or other attorney as designated counsel for the express and sole purpose of representing the interests of the person who may be incriminated by the testimony of the witness at the preservation proceeding in such person's absence.

On the occasions where the accused is available to be present and neither the identity of the witness, the content of his testimony, nor delay is of critical concern, a deposition to perpetuate testimony is clearly a preferable alternative. Because the deposition to perpetuate testimony, unlike the preservation proceeding, assures admissibility of the witness's testimony as substantive evidence if the witness's testimony proves unavailable, the prosecution has substantial incentive to make use of the deposition procedure when circumstances permit.

The attorney designated to cross-examine on behalf of the potential defendant at the preservation proceeding should be provided with all of the then available discoverable material. Discovery in advance of the preservation proceeding is essential to the later determination of whether sufficient circumstantial guarantees of trustworthiness are present with respect to the witness's testimony when offered at trial should the declarant prove unavailable.

Rule 412(a) of the Illinois Supreme Court Rules is illustrative of the type of material to be provided:

Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or by a co-defendant, and a list of witnesses to the making and acknowledgement of such statements;

(iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert;

(v) any books, papers, document, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial. . . .

In addition, unless the discovered material adequately provides, the prosecution should be required to place the witness's testimony to be preserved in context by providing designated counsel with a copy of the police report or other document sufficient for the purpose. If no such document exists, it is suggested that it would be appropriate to have a police officer or other person testify on personal knowledge (or hearsay if necessary) to accomplish the same

goal. Complete discovery should be provided to designated counsel in advance of or at the preservation proceeding even where under the jurisdiction's own discovery rules disclosure would only occur after the conclusion of the witness's direct testimony at trial.

Encouraging detailed exploration on cross-examination of the witness's testimony given on direct examination at the preservation proceeding creates a tactical concern for the designated counsel. Above all an attorney on cross-examination does not want to elicit further damaging responses from a witness. To avoid such a possibility, an attorney, subject to certain limited exceptions, generally will not ask a potentially damaging question to which he does not already know the answer. Thus for tactical reasons an attorney is most often unwilling to undertake a "fishing expedition" which may or may not elicit responses discrediting the witness if the risk of eliciting further incriminating evidence instead is substantial. In short, if the witness becomes unavailable at trial, defense counsel does not want to find that he has perpetuated testimony more damaging than that which would have existed without the cross-examination.

Concern on the part of designated counsel with perpetuating damaging responses on cross-examination would clearly be warranted given the structure of the preservation proceeding. The promptness of a proceeding will undoubtedly prevent designated counsel from having adequate time to investigate the facts. Moreover, designated counsel will not have the benefit of having consulted with the defendant or his witnesses. Thus he will often be unaware of facts known to the defendant and his witnesses, including the defendant's version of what occurred during the incident forming the crux of the criminal charge itself.

To encourage thorough exploration on cross-examination, it is necessary to provide that testimony elicited on cross-examination of the witness at the preservation proceeding may not be employed at trial as substantive evidence by the government if the witness's testimony proves unavailable. The fishing expedition thus sanctioned permits thorough exploration on cross-examination of all aspects of the trustworthiness of the witness's direct testimony. This is essential to a determination of equivalent circumstantial guarantees of trustworthiness if the testimony given on direct examination is offered into evidence at trial. In order to effectively implement the suggestion, the prohibition against the admissibility of evidence elicited on cross-examination when offered by the government must also extend to testimony elicited by the government

on redirect examination, unless the defendant opens the door to admissibility at trial by offering testimony given on cross-examination to which the redirect relates.

Thus the presence of an experienced attorney as designated counsel, the encouragement given to designated counsel to conduct an explorative cross-examination, full discovery of available material, and the eliciting of testimony from the witness on direct examination by means of nonleading questions except as may be necessary to develop the testimony, all serve to ensure that all matters bearing upon the trustworthiness of the witness's testimony will be explored at the preservation proceeding. Implementing the foregoing together with other elements constituting a formal proceeding, the preservation proceeding would require the presence of a noninvestigative presiding officer, the prosecutor, an experienced attorney designated to represent the accused's interest, the witness, and one or more adequate methods of recording the statement. Use of videotape would not only adequately ensure certainty of making but would preserve the witness's demeanor at the preservation proceeding for subsequent consideration.

#### 4. *Procedure at Proceeding*

At any time before trial, including the period prior to the arrest or even identification of the accused, the prosecution must be able to bring any witness, either voluntarily or by subpoena, before a judge, magistrate, or attorney specifically appointed to conduct the proceedings, for the express purpose of preserving the witness's testimony. In order to initiate a preservation proceeding, the prosecution *should not* have to make any showing whatsoever as to the likelihood of the witness being unable to attend or of being prevented from attending the trial. The presiding officer should immediately designate a public defender or a member of the private bar to represent the interest of the person to be accused or implicated by the witness at the proceeding, with the cost of designated counsel being borne by the state. Designated counsel for the accused must be provided with available discovery. The scope and manner of direct examination and cross-examination should be as would be allowed at trial itself. During the proceeding, designated counsel representing the accused's interest should object during direct examination to matters of form in obtaining the witness's testimony, including the use of leading questions by the prosecution and other such matters that can usually be obviated if raised, such as lack of a sufficient foundation. Other objections, such as relevancy, would



automatically be reserved for trial. Designated counsel would be expected to ask questions on cross-examination designed to explore matters affecting credibility such as lack of personal knowledge, untrustworthy partiality, inconsistent conduct or statements, and character for untruthfulness. It is anticipated that the designated attorney will thoroughly probe all avenues of impeachment indicated by discoverable material made available prior to or at the preservation proceeding. Designated counsel, of course, should also cross-examine the witness to the extent success may be reasonably anticipated to discover and then develop any other matters bearing upon the trustworthiness of the witness's testimony. Lack of admissibility of answers of the witness to inquiries during cross-examination, when offered by the government, is designed to encourage broad exploration; indeed, a fishing expedition is intended.

Because the purpose of the proceeding is to ensure certainty of making and develop evidence bearing upon the trustworthiness of the testimony, thorough exploration is essential even though to some extent designated counsel will in the process be educating and thus preparing the witness to respond to the same line of cross-examination when repeated at trial. The witness at trial may rehabilitate himself and state that at the hearing he was confused, but that "everything is now clear in his mind." Similarly, if the particular prosecution witness is one who otherwise might "soften" his view of the facts as time passes and his emotional involvement lessens, extensive cross-examination at the preservation proceeding may only serve to harden his position and make him less able to retreat to a more friendly position at trial. On the other hand, many witnesses are more likely to make damaging admissions or contradictory statements at the preservation proceeding because they will have been less thoroughly briefed for that proceeding than they would be for a trial. Also, with respect to most witnesses, the more they say before trial, the more likely that there will be some inconsistency between their trial testimony and their previous statements. Of course, the witness's response to questions asked at the preservation proceeding would be available to impeach any different response by the witness at trial. An inconsistent statement made at a preservation proceeding, being a formal proceeding with the witness under oath, may have a more damaging impact upon the witness's credibility in comparison to prior statements given to the police. Thus, in short, if a tactical disadvantage occurs by virtue of the procedures suggested, it is certainly

minor and does not have any effect on the overall fairness of the accused's trial.

The presiding officer must assume an active role in facilitating the subsequent determination as to whether the witness's testimony is sufficiently trustworthy to be admitted at trial if the witness proves unavailable. The presiding officer should exercise reasonable control over the mode, order, and form of examination of the witness, with an eye toward the ultimate determination of admissibility. He should have the right, both during and at the conclusion of the witness's testimony, to interrogate the witness in order to fully develop the foundation for the witness's testimony, to bring out needed facts not elicited by the parties, and to clarify those facts to which the witness has already testified which bear on the trustworthiness of the witness's testimony. In addition, the presiding officer may elect to give the witness an additional opportunity to support, confirm, qualify, change, or otherwise modify or alter his prior testimony. The posing of questions to the witness at any time by the presiding officer may very well evoke a different response from the witness than near identical or even identical questions by either counsel. It is suggested that the authority vested in the presiding officer will sometimes strike a more honest cord. Following the taking of the witness's testimony, the presiding officer should ask a series of questions such as:

1. "Did anyone threaten you or force you in any way to give your testimony?" If the answer is yes, the presiding officer should ascertain the facts.

2. "Did anyone suggest, request, or imply in any manner that you testify to any fact which you testified to today?" If the answer is yes, the presiding officer should ascertain the facts.

3. "Has there been any plea agreement entered into between you (or your counsel) and the government?"

4. "Has there been any grant of immunity entered into between you or your counsel and counsel for the government?"

5. (If the answer to 3 or 4 is yes) "What is the substance of that plea agreement or grant of immunity? Do all parties agree that the substance of the plea agreement or grant of immunity has been correctly stated?" (If a written plea agreement exists, have the government submit a copy to designated counsel and have one filed for the record.)

6. "Have you been under the care of a psychologist or psychiatrist?"

7. "Are you addicted to narcotics? Were you using narcotics at the time of the event you related?"

8. "Are you addicted to alcohol? Were you drinking during the event?"

9. Ask the witness to state the extent of his participation in the alleged crime, if any, and advise that if falsely made he will be subject to prosecution for perjury.

10. "Is there anything not covered in your testimony or by these questions which is relevant to a determination of the trustworthiness of your testimony?"

At the conclusion of the preservation proceeding, the presiding officer may be requested or required to place a statement on the record setting forth his or her assessment of the trustworthiness of the witness's statement. The statement should be evaluated in light of the witness's testimony and corroborating and contradictory facts as considered together with surrounding circumstances represented in affidavits, reports, or otherwise. This assessment, if made, should also set forth particular significant factual matters along with an evaluation of the witness's credibility, any extrinsic evidence otherwise available bearing on credibility, and the witness's demeanor. This initial determination of trustworthiness by the presiding officer could prove of great assistance to the judge asked to determine the admissibility of the testimony if the witness proves unavailable at trial. In addition, such an initial determination may assist the prosecution in determining additional steps to be taken to corroborate or otherwise bolster the witness's testimony. If the assessment of the presiding officer at the preservation proceeding raises substantial doubt as to admissibility at trial, the prosecution may choose to take protective measures (or additional protective measures if some had already been taken) to ensure the presence and the testimony of the witness at trial, or proceed to perpetuate the witness's testimony as former testimony as promptly as possible by means of either a preliminary hearing or deposition.

The transcript and, if made, a videotape recording of the preservation proceedings should be sealed. Designated counsel should be under order not to discuss the preservation proceeding with outsiders, including the accused or his trial attorney. In addition, the press should be barred from the proceeding itself. All of these measures are necessary to ensure the safety of the witness where the identity of the witness, as distinguished from the content of his testimony, is not known to the actual or potential accused. Disclosure of the name and address of the witness and the testimony that was preserved should be governed in accordance with the discovery

rules of the particular jurisdiction. Thus, for example, in Illinois this information would be made available prior to the preliminary hearing, while in the federal court the transcript would be made available only after the witness has completed his direct examination at trial. Obviously the transcript must be disclosed to defense counsel in advance of any determination of admissibility should the witness prove unavailable at trial.

Where the identity of the witness is already known to the defendant, it is in the interest of the witness that the defendant be advised, through his counsel, that the witness's testimony has been preserved. A defendant, once advised that intimidation of the witness is unlikely to keep the witness's testimony from the jury, is less likely to undertake the intimidation in the first place. Obviously the deterrent effect of the preservation deposition on the conduct of the defendant will not occur unless the defendant is advised that the witness's testimony has already been preserved.

### *B. Determining Admissibility*

If the witness whose testimony was preserved testifies at trial in a manner inconsistent with his preservation proceeding testimony, the preservation testimony would be admissible on behalf of either the prosecution or defense both to impeach and as substantive evidence. The language of Rule 801(d)(1)(A) referring to "other proceeding" is obviously broad enough to include testimony at a preservation proceeding; the preservation proceeding permits adequate assurances of certainty of making and is more conducive to trustworthiness than testimony before a grand jury.

If the witness whose testimony was preserved proves "unavailable at trial," the admissibility of his testimony at the preservation proceeding must be governed by the criteria for the "other [hearsay] exception" set forth in Rule 804(b)(5) and not the criteria for former testimony set forth in Rule 804(b)(1).

#### *1. Former Testimony*

Use of Rule 804(b)(1) as a standard of admissibility is inappropriate for a variety of reasons. The hearsay exception for former testimony not only envisions an attorney conducting cross-examination, at a minimum it envisions an attorney assisted by his client conducting cross-examination. While it is true that designated counsel will have had an adequate opportunity and the same basic motive to develop the witness's testimony at the preservation hear-

ing as would the accused's counsel at trial, important differences remain. First, designated counsel was neither selected nor approved by the accused, and the style and quality of attorneys do vary. Of greater importance, designated counsel will be in the dark as to the accused's defense and will be unaware of facts about the event in question and the witness whose testimony was preserved which are known to the accused. Tactical decisions, while in the reduced risk form contemplated, will nevertheless be made without input from the defendant himself. As the Report of the House Committee on the Judiciary indicated in amending Rule 804(b)(1) to include, among other notions, the requirement that the defendant against whom the testimony is being offered be the defendant in the prior proceeding, it is "generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." Even putting informational and tactical concerns aside, it is hard to argue that a person who has not been charged, maybe not even arrested, and possibly not even identified, can be considered a party to the preservation proceeding as required by Rule 804(b)(1), when he is not present, has no contact with anyone who is present, and does not even know of the proceeding.

In short, employment of Rule 804(b)(1) as the basis of admissibility would require an evaluation of the adequacy of the opportunity to cross-examine arising in the context of a preservation hearing being held immediately after the event, prior to any charge being levied against the defendant, conducted by designated counsel in a proceeding unknown to the defendant, with designated counsel obviously unaided by the accused and armed with less discovery than would normally be made available at trial. Thus while Rule 804(b)(1) has the distinct advantage that statements meeting its requirements are automatically admissible without an ad hoc search for circumstantial guarantees of trustworthiness, the cross-examination which takes place at the preservation hearing is clearly too divergent from the cross-examination contemplated to bring the preservation proceeding within the hearsay exception for former testimony.

## 2. *Federal Rule of Evidence 804(b)(5)*

Admissibility of the testimony of the witness "unavailable at trial" given at the preservation proceeding should be governed by the criteria set forth in Rule 804(b)(5). Thus the testimony would

be admissible as substantive evidence only if the court at trial finds that the statement possesses circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions contained in Rule 804(b).

*a. Unavailability Requirement*

At common law the requirement of unavailability evolved separately in connection with particular hearsay exceptions rather than along general lines. However, as the Advisory Committee's Note to Rule 804(a) points out, "no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions." Accordingly, Rule 804(a) alters this pattern by treating unavailability as a single concept applicable to each exception. An exception to this unified approach exists only with respect to the imposition of a requirement regarding procuring testimony of a witness absent from the hearing which is applicable solely to Rules 804(b)(2), (3) and (4) where the proponent of the hearsay statement is unable to compel the witness's attendance by process or other reasonable means under Rule 804(a)(5). Because the admissibility of preserved testimony of an unavailable witness is being offered under Rule 804(b)(5), the exception in Rule 804 is inapplicable to the situation at hand. Rule 804(a) provides as follows:

**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 his statement; or

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

(3) testifies to a lack of memory of the subject matter of his 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 his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

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

The definition of unavailability contained in Rule 804(a) provides five alternatives, each alone sufficient to meet the requirement. The thrust of the alternative definitions of unavailability concerns the unavailability of the testimony of the witness, which includes, but is not limited to, situations in which the witness is not physically present in court. Physical presence on the witness stand does not make a witness available within the meaning of the rule if the witness exercises a privilege, simply refuses to answer, or testifies to a lack of memory as to the subject matter of his prior statement.

Rule 804(a)(1) provides that a witness exempt from testifying concerning the subject matter of his statement on the grounds of privilege is unavailable. An actual claim of privilege must be made by a witness, other than a criminal defendant, and allowed by the court before the witness will be considered unavailable on the basis of a privilege. Rule 804(a)(2) provides that one who persists in refusing to testify concerning the subject matter of his statement, despite an order of the court that he do so, is unavailable. Silence resulting from misplaced reliance upon a privilege without making a claim, or in spite of a court denial of an asserted claim of privilege, constitutes unavailability under this subsection.

Rule 804(a)(3) provides that a witness who testifies to a lack of memory of the subject matter of his statement is unavailable. A witness may either truly lack recollection or, for a variety of reasons, including, as we know all too well, intimidation by the accused, feign lack of recollection. In either event, the witness is unavailable to the extent that he asserts a lack of recollection of the subject matter of the prior statement even if the witness recalls other events. Rule 804(a)(4) provides that a witness unable to be present or to testify at the hearing, because of death or then existing physical or mental illness or infirmity, is unavailable. If the reason for the prosecution's witness's unavailability is only temporary, considerations underlying the confrontation clause may require resort to a continuance.

Rule 804(a)(5) provides that a declarant is unavailable if his presence cannot be secured by process or other reasonable means.

In federal criminal cases, a subpoena may be served at any place within the United States. In all criminal cases, the confrontation clause itself requires that before former testimony pursuant to Rule 804(b)(1) may be introduced against the accused as a substitute for in-court testimony the prosecution must make a good faith effort to obtain the presence of the witness at trial. Witnesses who are in state or federal prison can be required to appear in state or federal court pursuant to a subpoena to the individual, and a writ of habeas corpus ad testificandum issued to the appropriate prison authority. Under Rule 804(a)(5) and the confrontation clause, whether the government has shown good faith in attempting to locate the witness and procure the witness's attendance must be determined on a case-by-case basis after careful review of the particular facts and circumstances.

Determination of unavailability is a matter decided by the court; the party offering the statement has the burden of showing unavailability. A witness is not "unavailable" under any of the subdivisions of Rule 804(a) if the circumstances which would otherwise constitute unavailability are due to the procurement or other wrongdoing of the proponent of the statement.

*b. Specified Criteria*

Admissibility of statements of an unavailable witness made at a preservation proceeding is to be governed by Rule 804(b)(5):

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

.....

**(5) Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and



address of the declarant.

Rule 804(b)(5) contains five express requirements, all of which must be determined by the court to have been satisfied before the statement may be admitted. Four of these requirements—materiality, necessity, satisfaction of the rules, and notice—may be disposed of in passing. The final criteria, equivalent circumstantial guarantees of trustworthiness, deserves careful exploration in light of procedures established for the preservation proceeding.

The requirement that the statement be offered as evidence of a material fact means that not only must the fact that the statement is offered to prove be relevant, but that the fact be of substantial importance in determining the outcome of the litigation. Introduction of the hearsay statement must be necessary by virtue of being more probative on the point for which it is offered than any other evidence which the proponent may reasonably procure. Whether a particular effort to procure alternative proof of a matter may reasonably be demanded must, of course, depend upon the fact at issue considered in the context of the litigation. The requirement that the general purposes of the rules of evidence and the interest of justice be best served by admission of the statement into evidence is of little practical importance in determining admissibility. Finally, a hearsay statement may not be admitted under the “other [hearsay] exception” of Rule 804(b)(5) unless the proponent of it gives proper notice to the adverse party pursuant to subsection (C).

The requirement of “equivalent circumstantial guarantees of trustworthiness” requires that the court undertake a search for trustworthiness—trustworthiness equivalent to that possessed by statements falling within an enumerated hearsay exception. In evaluating trustworthiness, courts have looked to four criteria: certainty that the statement was made; assurance of personal knowledge of the declarant of the underlying event; practical availability of the declarant at trial for meaningful cross-examination concerning the underlying event; and finally, an ad hoc ascertainment of trustworthiness based upon the totality of the surrounding circumstances including corroborating facts and an assessment of credibility of the declarant, considered in light of the class-type exceptions to the hearsay rule supposed to demonstrate such characteristics. Relevant factors bearing upon the ascertainment of trustworthiness include (1) the declarant’s partiality, i.e., interest,

bias, corruption, or coercion, (2) the presence or absence of time to fabricate, and (3) suggestiveness brought on by the use of leading questions.

Procedures established for the preservation proceeding will facilitate application of these criteria. Obviously the declarant is unavailable and the statement of the declarant was in fact made. The eliciting of testimony of the witness at the preservation proceeding by the prosecution by means of nonleading questions coupled with exploration on cross-examination by designated counsel should be helpful in judging the personal knowledge of the declarant. In addition, the witness's response to questions on cross-examination recorded on videotape to permit evaluation of demeanor should greatly assist in the determination. Of course, matters bearing on the credibility of the witness which were not raised at the preservation proceeding may also be brought before the court. Similarly, evidence establishing facts corroborating or contradicting the statement of the declarant may properly be brought before the court and evaluated in determining whether the government has established the presence of equivalent circumstantial guarantees of trustworthiness.

It is suggested that evidence of intimidation causing physical unavailability or feigned lack of recollection should *not* be considered by the court in determining whether the statement is sufficiently trustworthy to be received in evidence. The defendant, his agent, or others have almost as much, if not just as much, reason to silence a witness who is falsely incriminating the defendant as one who is testifying truthfully. Such evidence, if considered, possesses a substantial tendency to be overvalued.

Statements of unavailable witnesses satisfying the requirements of Rule 804(b)(5) would not run afoul of the confrontation clause. As stated in *Ohio v. Roberts* [448 U.S. 56, 66 (1979)]:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

"Equivalent circumstantial guarantees of trustworthiness" and "particularized guarantees of trustworthiness" are surely intended

to be synonymous.

## V. CONCLUSION

In conclusion, the criminal justice system in this country has traditionally been offender oriented, focusing on the apprehension, prosecution, punishment, and rehabilitation of offenders. While the criminal justice system clearly understood it could not function without the assistance and cooperation of victims and witnesses, little, if any, effort was expended on their behalf. Victims of crime remained uncompensated for their losses by either the convicted defendant or the state. Only sporadic efforts were made to reduce the frustrations and economic sacrifices that involvement in criminal proceedings causes for witnesses. Of more immediate concern, almost nothing was done to address the specific plight of the intimidated witness.

This attitude began to change a little more than a decade ago. During the last few years a strong national victim and witness assistance movement has had noticeable success in increasing the public's overall awareness of the problems and concerns of victims and witnesses. Today hundreds of local assistance programs to respond to the needs of victims and witnesses exist throughout the country and special effort has been made to reduce the chance of a victim or witness being intimidated. Community organizations, church groups, bar associations, and service groups have been instrumental in bringing about this change in attitude and with it the beginnings of meaningful remedial action.

At the national level, the ABA issued recommendations on victim and witness intimidation in 1980. Congress enacted the Victims and Witness Protection Act of 1982. Later that same year the President's Task Force on Victims of Crime's final report was issued. December 1983 saw the National Conference of the Judiciary on the Rights of Victims of Crime issue a similar call for action by all segments of our society involved in the criminal justice system. State legislatures have been active in responding to victim and witness needs as well. Legislatures in thirty-eight states have now enacted measures to provide compensation to victims of crime. Some states have enacted legislation permitting courts to order criminal offenders to make restitution to their victims. States have also enacted legislation to assist victims and witnesses in understanding and participating in the criminal justice process. A few states have gone further and enacted comprehensive legislation recognizing a "bill of rights" for crime victims and witnesses.

The ABA recommendations, the Victims and Witnesses Protection Act of 1982, the Report of the President's Task Force on Victims of Crime, and the call to action by the National Conference of the Judiciary are all definitely steps in the right direction for reducing witness intimidation. Because the Victims and Witness Protection Act of 1982 and the attempts to implement the recommendations set forth in the various reports are so recent, there has been very little review of such efforts by those concerned. The United States Department of Justice, Bureau of Statistics has, however, issued a preliminary general assessment. The Bureau's view is that the current state of affairs is merely a beginning and that "further efforts are necessary . . . to ensure that the broad scope of victim/witness concerns are met in a comprehensive and effective manner in all jurisdictions." The Bureau indicates that new practices and procedures suggested in the various reports will impose substantial operating and financial demands on the criminal justice system and that technical, administrative, and policy changes are critical to ensure that the objectives are met. Thus it remains to be seen to what extent the current movement to address the plight of crime victims will make a truly substantial contribution in the effort to obtain fair treatment for victims and witnesses and to reduce the incidence of witness intimidation.

At present, most out-of-court statements made by a witness to a crime are not admissible as substantive evidence at trial by virtue of the operation of the hearsay rule if the witness changes his testimony or proves unavailable at trial. Accordingly, there is substantial incentive on the part of criminal defendants to intimidate victims and witnesses and thus prevent the introduction of damaging testimony at trial. On the other hand, only trustworthy out-of-court statements should be admitted as substantive evidence against the accused. Thus the challenge is to develop procedures to preserve sufficiently trustworthy out-of-court statements and admit them as substantive evidence at trial if the witness's testimony is lost by reason of intimidation.

Three specific recommendations are made. First, the substantive admissibility of prior inconsistent statements should be expanded beyond the scope now provided for in Federal Rule of Evidence 801(d)(1)(A) to include all statements possessing adequate assurance of certainty of making. In addition, a requirement of personal knowledge by the declarant as to the subject matter of the statement should be imposed to eliminate those statements most subject to fabrication by the witness and most likely to be misapplied

by the jury. Second, greater consideration should be given to taking advantage of those procedures that now provide for the perpetuation of testimony of witnesses following formal charges, including production of the witness at a preliminary hearing or the taking of a deposition to perpetuate testimony. Unfortunately, practical considerations associated with the preliminary hearing make it less than likely that such increased consideration will result in significantly increased usage. With respect to the perpetuation deposition, the showing of the "likelihood of unavailability" which is generally required by statute or court rule is difficult to establish in many cases because concern with potential intimidation is often based on experience coupled with hunch rather than hard evidence. The delay associated with all currently available procedures detracts from their usefulness in combating witness intimidation, as does the presence of the accused at the preliminary hearing or perpetuation deposition. Third, and finally, a new proceeding is suggested, denominated a "preservation proceeding," designed specifically to preserve the testimony of the witness. Statements taken at the preservation proceeding would be admissible as substantive evidence if the witness's testimony proves unavailable at trial only if the court finds that equivalent circumstantial guarantees of trustworthiness have been established as required by Federal Rule of Evidence 804(b)(5). Procedures applicable at the preservation proceeding are designed to drastically increase the likelihood that the preserved testimony of the witness given at such a proceeding will be found sufficiently trustworthy in comparison to oral, recorded, or written statements, and even grand jury testimony that must now be offered under Rule 804(b)(5) when a witness's testimony is lost to the trier of fact by reason of intimidation.

Implementation of the foregoing proposals with respect to criminal trials in federal court would require specific statutory authorization to conduct a preservation proceeding and amendment to Federal Rule of Evidence 801(d)(1)(A). Implementation requirements for the proposals in state courts will obviously vary depending upon the particular position now adopted with respect to substantive admissibility of prior inconsistent statements, the availability of depositions to perpetuate testimony, and admissibility of hearsay statements under an exception for "other" trustworthy hearsay. In all instances in state court, of course, specific statutory authorization to conduct a preservation proceeding will be necessary.

Trustworthy testimony preserved and admitted as substantive evidence in accordance with one of the three methods previously discussed will often prevent a guilty defendant who successfully intimidates a witness from going free. In addition, it is hoped that a defendant will be less likely to intimidate a witness if he is aware that the witness's perpetuated testimony will be admissible at trial even if the witness has been successfully intimidated to change his testimony, or not testify at all.

