

**INTIMIDATING A WITNESS, JUROR,
COURT OFFICIAL OR LAW ENFORCEMENT OFFICER**

G.L. c. 268, § 13B

The defendant is charged with intimidation. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* The defendant directly or indirectly:**

- **(threatened)**
- **(attempted to cause physical injury to) (caused physical injury to)**
- **(attempted to cause emotional injury to) (caused emotional injury to)**
- **(attempted to cause economic injury to) (caused economic injury to)**
- **(attempted to cause property damage to) (caused property damage to)**
- **(conveyed a gift, offer, or promise of anything of value to)**
- **(misled)**
- **(intimidated)**
- **(harassed)**

another person;

Second: The other person was:

- a witness or potential witness at any stage of a (criminal investigation) (grand jury proceeding) (trial) (criminal proceeding of any type)
- a person who was aware of information, records, documents, or objects related to (a violation of a criminal statute) (a violation of conditions of probation) (parole) (bail)
- a (judge) (juror) (grand juror) (prosecutor) (police officer) (federal agent) (investigator) (defense attorney) (clerk) (court officer) (probation officer) (parole officer)
- furthering a (civil proceeding of any type) (criminal proceeding of any type) including a (criminal investigation) (grand jury proceeding) (trial) (probate and family proceeding) (juvenile proceeding) (housing proceeding) (land proceeding) (clerk's hearing) (court ordered mediation)
- (attending) (had made known an intention to attend) a (civil proceeding of any type) (criminal proceeding of any type) including a (criminal investigation) (grand jury proceeding) (trial) (probate

**and family proceeding) (juvenile proceeding) (housing proceeding)
(land proceeding) (clerk’s hearing) (court-ordered mediation);**

Third element when wilful conduct is alleged.

**and *Third*: That the defendant did
so willfully with the specific intent to (impede) (obstruct) (delay) or
otherwise interfere with a (criminal investigation) (grand jury) (trial)
(criminal proceeding, namely: _____).**

Third element when reckless conduct is alleged.

**and *Third*: That the defendant
acted in reckless disregard of the impact (his) (her) conduct would have in
(impeding) (obstructing) (delaying) or otherwise interfering with that (civil)
(criminal) proceeding.**

Further instruction on wilful conduct.

**To prove the third element, the
Commonwealth must prove that the defendant specifically intended to
impede, obstruct, delay, or otherwise interfere with a (criminal
investigation) (grand jury) (trial) (criminal proceeding). That is, it must
prove the purpose or objective of any behavior of the defendant.
Obviously, it is impossible to look directly into the defendant’s mind. But**

in our everyday affairs, we often decide from the actions of others what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine what (his) (her) intent was at the time.

Further instruction on reckless conduct.

To prove the third element, it is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to (impede) (obstruct) (delay) or otherwise interfere with the proceeding, but (he) (she) ran that risk and went ahead anyway.

But it is not necessary that (he) (she) intended to interfere with the proceeding or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to interfere with the proceeding and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the result that was inherent in such conduct, it is still

reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were very likely to interfere with the proceeding.

If the Commonwealth has proved each of the three elements of the crime beyond a reasonable doubt, you should return a verdict of guilty. If any element of the crime has not been proved beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. “Investigator.” An “investigator” is defined by our law to mean an individual or group of individuals lawfully authorized by (a department or agency of the federal government, or any political subdivision thereof) (or) (a department or agency of the Commonwealth) (or) (a political subdivision of the Commonwealth, such as a city or town) to conduct or engage in an investigation of, prosecution for, or defense of an alleged violation of law in the course of his or her official duties.

2. "Harass."

To "harass" means to engage in any act directed at a specific person or person, which act seriously alarms or annoys such person or persons and would cause a reasonable person to suffer substantial emotional distress.

Such act shall include, but not be limited to, an act conducted by mail, electronic mail, internet communications, facsimile communications, or other telephonic or telecommunications device.

Devices include, among others, those that transfer signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic, or photo-optical system.

This includes transfers by electronic mail, internet communications, instant messages, or facsimile communications.

G.L. c. 268, § 13B(3).

NOTES:

1. **Effective date.** The model instruction applies to G.L. c. 268, § 13B, as amended by St. 2010, c. 256, § 120, effective November 4, 2010. Use the prior instruction for offenses under the statute which punished willfully endeavoring to interfere with a witness, a juror, or "any person furnishing information to a criminal investigator" or retaliating against a witness or person furnishing such information.

2. **Related statutes.** See G.L. c. 268, §§ 13 (bribing or attempting to bribe juror), 13A (picketing court to obstruct or influence), 13C (disrupting court proceedings), 14 (juror accepting bribe).

3. **Attempt to intimidate need not succeed.** In a prosecution for attempted intimidation it is immaterial that the witness had already recanted her testimony against the defendant before receiving his threatening telephone calls. *Commonwealth v. Pagels*, 69 Mass. App. Ct. 607, 614-615 (2007). See also *Commonwealth v. Robinson*, 444 Mass. 102, 109 (2005).

4. **“Criminal proceeding.”** The trial does not end when the verdict is announced. *Commonwealth v. Cathy C.*, 64 Mass. App. Ct. 471, 474 (2005). When a show cause hearing was held and the application was either allowed or no decision had yet been announced, the proceeding was still ongoing. *Robinson*, 444 Mass. at 109-110.

5. **“Intimidation”** in G.L. c. 268, § 13B does not require that the victim be placed in fear or apprehension of actual harm. *Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 235 (1998). It is not necessary that the defendant’s statement or conduct refer directly to a pending court case in order to constitute intimidation. *Commonwealth v. Drumgoole*, 49 Mass. App. Ct. 87, 91 (2000). The jury may infer that the act of pointing a cellular telephone camera at a witness waiting to testify in a criminal proceeding, and making a physical gesture consistent with taking a photograph of the witness, while not overtly threatening, falls within the meaning of intimidation. *Commonwealth v. Casiano*, 70 Mass. App. Ct. 705, 708-709 (2007). Photographing the victim’s family near the victim’s home on the day of a court hearing is sufficient for the jury to infer intent to intimidate. *Commonwealth v. Robinson*, 444 Mass. 102, 110 (2005). Intent to intimidate is inferable from the defendant’s bizarre telephone call during stalking trial, though its content was similar to earlier calls. *Commonwealth v. Potter*, 39 Mass. App. Ct. 924, 926 (1995). It is not required that the defendant specifically articulated a warning against speaking to the police or other criminal investigator. The fact finder may evaluate the circumstances in which a statement was made, including its timing, to determine whether the defendant in fact intended to intimidate the victim. *Commonwealth v. King*, 69 Mass. App. Ct. 113, 120 (2007) (inferable that defendant’s statement that “[i]f he saw [the victim] on [TV] News he was going to come back and kill [him]” was a shorthand warning against reporting a robbery to the police).

6. **“Witness.”** The statute is applicable to any potential witness, whether or not actually called to testify, who has any relevant and material information, whether or not it bears directly on an essential element of the crime. *Commonwealth v. Burt*, 40 Mass. App. Ct. 275, 277-278 (1996). A court interpreter is not a “witness” within the meaning of § 13B. *Commonwealth v. Belete*, 37 Mass. App. Ct. 424, 426 (1994).

7. **“Harm” and “Punish.”** The terms “harm” and “punish” are ambiguous and may not support a conviction for intimidation. *Commonwealth v. Hamilton*, 459 Mass. 422, 436-437 (2011).

8. **Evidence of acquittal in underlying proceeding.** It is in the judge’s discretion whether to admit evidence that the underlying criminal proceeding ended in acquittal. *Commonwealth v. Orton*, 4 Mass. App. Ct. 593, 595 (1976).

9. **Future cooperation with police.** There is no requirement that the victim must be furnishing information on the day that the intimidating action is taken or statement made. *King*, 69 Mass. App. Ct. at 121. “It is enough that the jury reasonably conclude from the surrounding circumstances that it was likely that the victim would furnish to an official investigating authority information pertaining to the crime and that the defendant intended to discourage such communication.” *Id.*

10. **Consciousness of guilt.** A threat made against a witness *after* the witness has already testified should not be admitted as consciousness of guilt. When a threat is too late to have any effect on the course of the trial, its probative value is outweighed by its inflammatory potential. *United States v. Pina*, 844 F.2d 1, 9 (1st Cir. 1988).

11. **Separate threats or inducements in same communication.** Separate and distinct threats or inducements may be charged as separate offenses even if they are contained within a single telephone call, letter or personal confrontation. *Commonwealth v. Lester*, 70 Mass. App. Ct. 55, 68 (2007) (a “person seeking to influence

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a witness may, in one telephone call, threaten physical harm to the witness, threaten to kill a family member, or offer varying inducements”).