

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

G.L. c. 268, § 13B

Note: Instruction 7.365 is a stand-alone instruction on intentionally misleading an investigator in a criminal investigation.

**The defendant is charged with intimidation of a insert statutory class of person alleged to have been intimidated. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:**

***First:* the defendant willfully, either 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)<sup>1</sup>**
- **(intimidated)**
- **(harassed)**

**Another person;**

***Second:* the other person was:**

- **A witness or potential witness**
- **A person who was aware of information, records, documents, or objects related to a violation of (a criminal statute) (conditions of (probation) (parole) (bail))**
- **A (judge) (juror) (grand juror) (attorney) (police officer) (federal agent) (investigator) (clerk) (court officer) (probation officer) (parole officer)**
- **A person (who is or was attending) (who made known an intention to attend) a ((criminal proceeding of any type) (civil proceeding of any type), namely \_\_\_\_\_)<sup>2</sup>, (grand jury proceeding) (juvenile proceeding)**

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<sup>1</sup> For a definition of what constitutes “misleading” conduct, see Instruction 7.365 – Intentionally misleading an investigator in a criminal investigation.

<sup>2</sup> G.L. c. 268, § 13B, as amended by st. 2018, c. 69, § 155, specifically references the following proceedings in addition to identifying criminal proceedings of any type and civil proceedings of any type: grand jury proceeding, dangerousness hearing, motion hearing, trial, any type of a parole hearing, parole violation proceeding, probation violation proceeding, administrative hearing, probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk’s hearing, and court-ordered mediation.

**[or]**

*If the alleged act was committed on or after April 13, 2018:*

- **(victim witness advocate) (correction officer) (court reporter) (court interpreter);**
- **A person who is or was aware of information, records, documents or objects that relate to a violation of a court order;**
- **A family member of a person described in his section, namely \_\_\_\_\_;**

*If the alleged act was committed before April 13, 2018:*

- **A person who was furthering a ((criminal proceeding of any type) (civil proceeding of any type, namely \_\_\_\_\_) (grand jury proceeding) (juvenile proceeding.**

Third element when intentional conduct is alleged.

**and *Third*: That the defendant did so with the specific intent to: (impede, obstruct, delay, prevent or otherwise interfere with a (criminal investigation at any stage) ((criminal proceeding of any type)**

**(civil proceeding of any type), namely \_\_\_\_\_)<sup>3</sup>, (grand jury proceeding) (juvenile proceeding);**

*If the alleged act was committed on or after April 13, 2018:*

**[or]**

**punish, harm or otherwise retaliate against any such persons which I previously defined or such person's family member for participating in a (criminal investigation at any stage) ((criminal proceeding of any type) (civil proceeding of any type), namely \_\_\_\_\_)<sup>4</sup>, (grand jury proceeding) (juvenile proceeding).**

*Further instruction on specific intent.*

**To prove the third element, the Commonwealth must prove that the defendant specifically intended to: impede, obstruct, delay, prevent, or otherwise interfere with a (criminal investigation at any stage) ((criminal proceeding of any type) (civil proceeding of any type, namely \_\_\_\_\_)<sup>5</sup> (grand jury proceeding) (juvenile proceeding).**

*If the alleged act was committed on or after April 13, 2018:*

**[or]**

<sup>3</sup> See fn. 1, *supra*.

<sup>4</sup> See fn. 1, *supra*.

<sup>5</sup> See fn. 1, *supra*.

(punish, harm or otherwise retaliate against any such person which I previously defined or such person's family member for participating in a (criminal investigation at any stage) (criminal proceeding of any type) (civil proceeding of any type), namely \_\_\_\_\_)<sup>6</sup>, (grand jury proceeding) (juvenile 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 other 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.

*Third element when reckless conduct is alleged.* **And Third: [or] That the defendant acted in reckless disregard that (his) (her) conduct may impede, obstruct, delay, prevent, or otherwise interfere with a (criminal investigation at any stage) ((criminal proceeding of any type) (civil**

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<sup>6</sup> See fn. 1, *supra*.

proceeding of any type), namely \_\_\_\_\_)<sup>7</sup>, (grand jury proceeding), (juvenile proceeding).

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, prevent, or otherwise interfere with a (criminal investigation at any stage) ((criminal proceeding of any type) (civil proceeding of any type, namely \_\_\_\_\_) (grand jury proceeding)<sup>8</sup> (juvenile 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. 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

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<sup>7</sup> See fn. 1, *supra*.

<sup>8</sup> See fn. 1, *supra*.

**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) (a department or agency of the Commonwealth) (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.**

G.L. c. 268, § 13B(2).

**2. “Criminal investigation.”** Where a person is charged with intimidation in connection with a criminal investigation, the Commonwealth does not have to prove that a crime had actually occurred or that a criminal investigation was in progress when the alleged intimidation occurred. Rather it must prove beyond a reasonable doubt that a possible criminal violation occurred that would lead to a criminal investigation or proceeding.

*Commonwealth v. Fragata*, 480 Mass. 121, 127 (2018).

**3. “Harass.”** To “harass” means to engage in any act directed at a specific person or group of persons, which act seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress.

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

Devices include, amount 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 transfer by electronic mail, internet communications, instant messages, or facsimile communications.**

G.L. c. 268, § 13B(3).

NOTES:

1. **Effective date.** On April 13, 2018, G.L. c. 268, § 13B was amended by St. 2018, c. 69, § 155, so that an act committed in retaliation for past participation in a criminal investigation or court proceeding can now be charged as a crime under § 13B. As a result, the holding in *Commonwealth v. Hamilton*, 459 Mass. 422, 435-37 (2011), that § 13B did not cover retaliation for past participation in a criminal investigation or court proceeding, has been superseded. In addition, the amendment eliminated the category of persons protected by the statute who “further[ed] a civil or criminal proceeding . . . of any type,” and added the following additional categories of persons protected by the statute: a person who is or was aware of information, records, documents, or objects that relate to a violation of a court order; victim witness advocate; correction officer; court reporter; court interpreter; and family member of a person described in the section.

This model instruction applies to acts committed both prior to, and after, the April 13, 2018, amendment to § 13B.

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, 614-15 (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, 708-09 (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. *Robinson*, 444 Mass. at 110. Intent to intimidate is inferable from the defendant’s bizarre telephone call during stalking trial, though its content was similar to earlier

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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. **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.*

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