



<http://www.baltimoresun.com/news/local/politics/bal-md.witness28feb28,1,5206360.story?coll=bal-local-headlines>

Hearsay rules complicate bills on intimidation

Defendants' rights weighed against protection of witnesses

By Julie Bykowicz
Sun Staff

February 28, 2005

The efforts of some state lawmakers to curb witness intimidation are being threatened by seemingly technical legal jargon that cuts to the heart of one of the criminal justice system's most sacred principles: a person's right to confront his or her accuser.

Gov. Robert L. Ehrlich Jr. and prosecutors are pushing for legislation that would allow some out-of-court statements by intimidated witnesses to be used as evidence, even if the witnesses don't come to court to testify. Such statements are usually inadmissible and rejected as hearsay.

Ehrlich's bill also would increase the possible prison term for witness intimidation from five to 20 years, an idea that legislators said has broad support.

On Friday, a Senate committee approved two versions of witness-intimidation legislation: Ehrlich's measure, which contains the controversial hearsay exception for intimidated witnesses, and a similar bill without it. The House committee - which killed a similar hearsay exception proposal last year - has yet to vote.

"Dividing it into two bills is really an insurance policy," said Sen. Brian E. Frosh, a Montgomery County Democrat and chairman of the Senate Judicial Proceedings Committee, which approved the bills.

Frosh said most legislators recognize witness intimidation as a problem - aware that it's plaguing prosecutors in Baltimore, as highlighted in the locally produced DVD Stop Snitching - but some can't bring themselves to approve a hearsay exception.

Courts, including in Maryland, have long accepted the idea that defendants who harm witnesses forfeit their right to confront them at trial.

Maryland's Court of Special Appeals upheld in September 2000 a murder conviction from Prince George's County in which the identification of a defendant by a woman who had since died was allowed. Slain witness Angela Sipe's identification was admitted as evidence against Keith Leon Carroll even though she had been killed days after the original murder. He was convicted of both murders.

But only in recent years have some states begun to note the exception in their laws, as Ehrlich is trying to do. The federal court system made it part of its rules of evidence in 1997.

At least seven states, including Pennsylvania, Ohio and Tennessee, have made similar hearsay exceptions part of their rules of evidence.

"There's a real trend toward writing these things down," said Leonard Birdsong, a Florida law professor who wrote a law review article about the federal hearsay exception for intimidated witnesses. "Prosecutors don't want to have to jump through hoops every time a witness is killed. Putting something into an evidence code makes it readily available."

Baltimore State's Attorney Patricia C. Jessamy, who has been to [Annapolis](#) about a dozen times this session to lobby for Ehrlich's bill, said she wants her prosecutors to have the same tools as federal prosecutors.

But Timothy S. Mitchell, president of the Maryland Criminal Defense Attorneys Association, said that what's good for the federal courts isn't always good for the states.

Potential for abuse

Because Maryland law allows any resident to bring a criminal charge against someone - which is not the case under federal law - Mitchell said he sees a far greater potential for abuse of the hearsay exception at the state level.

He said there could be a scenario in which someone files a false charge, is confronted by the wrongly accused person and then claims to be intimidated. Then, using the hearsay exception for intimidated witnesses, Mitchell said, prosecutors might be able to use the accuser's statement in court.

"There is an extreme danger that someone could be excused from ever having to appear in court to be cross-examined about false charges they brought," he said.

Jessamy said that is not an issue because prosecutors review all charges, including those filed by residents rather than by police. She said prosecutors do not pursue charges that are based on only one person's statement, with no corroborating evidence.

The city's top prosecutor also said statements would not be admitted haphazardly under Ehrlich's bill. "We will have to prove to a judge that it was the defendant's actions which caused the witness' unavailability."

Members of the House committee did not seem reassured during a Feb. 17 hearing on witness intimidation. Del. Luiz R.S. Simmons, a Montgomery County Democrat, said he has a "real problem" with the idea of a hearsay exception.

Questions about value

Even if the hearsay exception were to be approved this year, it's not clear how well it works in states that already have it.

The top prosecutors in Philadelphia and Cincinnati - cities in states with the exception - have made public calls this year to toughen penalties for witness intimidation.

Cathie Abookire, a spokeswoman for the Philadelphia district attorney, said she could not say how many times, if ever, prosecutors had made use of the state's hearsay exception for intimidated witnesses, noting that the office does not keep such statistics.

And prosecutors for Hamilton County, Ohio, which includes Cincinnati, and Nashville, Tenn., have not used the provision, said spokeswoman for their offices.

It appears that no national studies on the relatively new evidence rule have been done, and in more than eight hours of testimony before the legislative committees, none of the supporters of the hearsay exception referred to its effect on other cities.

Lynn McLain, a [University of Baltimore](#) law professor and evidence expert, said she is not aware of complaints from defense attorneys in other states about the hearsay exception being misused.

Mitchell, the Maryland defense attorney, said the hearsay exception does nothing to protect witnesses. "In essence, this would only deal with the aftereffects of witness intimidation," he said.

Jessamy disagreed.

"The core of witness intimidation is silencing the witness," she said. "The hearsay exception thwarts that aspect of intimidation."

She said that after just a few successful prosecutions using the hearsay exception, "word will get out on the street that statements can come in and the witness was not silenced."

Sun staff researcher Shelia Jackson contributed to this article.

Copyright © 2005, [The Baltimore Sun](#)