

PROSECUTOR'S GUIDE TO STALKING



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Prosecutor's Guide to Stalking

Introduction

Stalking is often misunderstood and only rarely, considering its prevalence, criminally charged by police or prosecutors. In popular culture, the crime of stalking tends to be portrayed as the purview of mentally ill individuals who become obsessed with a celebrity or with a stranger or casual acquaintance—someone with whom the offender has no real relationship. While such stalkers do exist, and the threat that they pose should not be understated, stalking is much more commonly a feature of intimate partner violence or other cases in which the offender's stalking behavior may be overlooked in responding to what is perceived as the "primary" crime.

Because the crime of stalking is commonly defined, statutorily, as a course of conduct directed at a person that causes fear or emotional distress, and because intimate partner violence is rarely a single act but rather represents a pattern of coercive control, there are many cases of domestic violence in which the history of abuse includes conduct that collectively could be charged as stalking. Of course, stalking behavior is not unique to the pathologically obsessed or deluded, nor to batterers. Because the essential feature of stalking is the fear and distress it inspires in its victims, stalking behavior is a malevolent course of conduct that may be used by any person against another. It sometimes serves as a tactic in the commission of some other crime (*e.g.*, by a sexual predator or trafficker as a means of isolating or coercing a potential victim) or as a tool of witness intimidation in virtually any type of criminal case. Although stalking may be most often associated with other criminal activity, there are many cases where stalking is, in fact, the primary crime.

A note on usage:

The term "stalking" may refer to a specific type of malevolent behavior, as well as to a criminal offense by that name. Stalking as a form of behavior can be broadly defined as a course of conduct that causes, or is intended to cause, emotional distress in the person targeted by the stalker. Just as the terms "intimate partner violence" or "abuse" broadly include abusive conduct that may not be subject to criminal prosecution (*e.g.*, emotional/ psychological or economic abuse), there are instances of stalking behavior that may not be chargeable under a specific stalking statute. The primary focus of this Guide is upon stalking that can be criminally charged as such. Conduct that meets the behavioral definition, regardless of whether it meets the criminal statutory definition, will generally be referred to as "stalking behavior."

The crime of stalking is commonly defined, statutorily, as a course of conduct directed at a person that causes fear or emotional distress.

Stalking goes unrecognized, uncharged, and unprosecuted for a number of reasons. Victims, police, and prosecutors often fail to recognize patterns of behavior as "stalking," or associate the term exclusively with following, monitoring, or surveillance—acts that represent only one variety of the many types of behavior that may fit the statutory definition of stalking. Police and prosecutors may focus on a specific incident that resulted in a law enforcement response (*e.g.*, an assault, an isolated threat, an act of vandalism) and fail to explore the context within which the act was

committed—context that may include a course of conduct chargeable as stalking. Prosecutors, failing to understand the strategic value of a stalking charge, may wonder why they should bother “complicating” their case when they have strong evidence of a crime that is perceived to be more serious and easier to prosecute.

When stalking is overlooked and unaddressed, however, victim safety is compromised and prosecutors sacrifice the many strategic benefits of including a stalking charge in their cases where it is a co-occurring crime. Because proof of stalking requires evidence of the acts constituting the course of conduct, the charge permits admission of a wide range of evidence of “other bad acts” that would otherwise require a motion under Evidence Rule 404(b) or its equivalent. Such evidence provides context for the assault or other “primary” crime, shedding light on the defendant’s purpose, motive, and intent and helping to explain the victim’s behavior. It provides the jury with the fullest possible picture of the relationship between the parties and of the offender-victim dynamics that permeate that relationship, allowing jurors to better understand how and why the crime was committed. Prosecution of stalking holds the offender accountable for all of the harm inflicted on the victim and may support important safety conditions for bail or probation, a lengthier prison sentence, and an important predicate for future prosecution if the offender later resumes stalking the same victim—or, as often happens, another one.

In order to effectively hold criminal offenders accountable for all of the harm they have inflicted on their victims, and to deter witness intimidation, prosecutors should be alert for any and all cases—regardless of the type of crime—where stalking might appropriately be charged, request any necessary additional investigation to determine whether the evidence is sufficient, and prosecute stalking charges where appropriate.

This Guide is intended to assist prosecutors in:

- analyzing the elements of their stalking statute(s);
- recognizing stalking in cases where it has been employed by the offender in connection with some other criminal offense;
- appreciating the strategic value of charging stalking in cases where it is related to other criminal offenses;
- determining what evidence is necessary to prove the elements of the crime and ensuring that such evidence is properly documented and preserved; and
- effectively prosecuting a stalking charge.¹

¹ Because there is so much variation in the law from one jurisdiction to another, and because every case presents unique facts and circumstances, it is impossible for a single Guide to anticipate and comprehensively address every issue that may arise in the prosecution of stalking. For technical assistance regarding specific fact patterns or legal issues related to the prosecution of stalking, contact an Attorney Advisor at AEquitas <https://aequitasresource.org/consultations/>.

ABOUT STALKING

The crime of stalking

The first stalking statute was enacted in California in 1990, in response to several high-profile fatal and near-fatal stalking incidents. Within a few short years, stalking statutes had been enacted by Congress and by legislative authorities in all fifty states, U.S. territories, many Indian tribes, as well as in many other countries. This legislative boom can be attributed to official recognition of not only the potential lethality of the conduct, but also the fear and emotional distress it causes to victims. Moreover, in addition to physical and emotional harm, victims of stalking often suffer significant economic losses attributable to property damage, theft, the need for enhanced security measures (e.g., changing locks or installing security cameras), legal expenses, medical or mental health treatment, or lost wages.

According to the National Intimate Partner and Sexual Violence Survey,² approximately 16 percent of U.S. women have been stalked in their lifetimes; 3.7 percent were stalked within the 12 months preceding the 2015 survey. The same study indicated that 5.8 percent of men had been stalked in their lifetimes, with 1.9 percent experiencing stalking within the preceding 12 months. Despite the prevalence, stalking behavior often goes unrecognized and underreported. Victims, as well as law enforcement and prosecutors, may focus on discrete incidents rather than perceiving them as part of a larger pattern of stalking behavior.

Stalking victimization includes a wide range of threatening and disturbing behavior, including following, watching, or surveilling; persistent and unwanted communications; property damage; physical harm, including physical or sexual assault; threats against the victim or the victim's friends, family, or pets; physical intrusion into the home; posting of private information or intimate images of the victim online; and more—the only limitations are the offender's ingenuity, persistence, and resources. Intimate partner stalking is recognized as a significant lethality factor: in one study, 76 percent of female victims of intimate partner homicide had been stalked by their killers, with 89 percent of those homicide victims who had previously been abused by their partners having also been stalked during the year preceding their deaths.³

Stalking differs from most crimes in that it criminalizes a “course of conduct” rather than a discrete criminal act. Moreover, the individual acts making up the course of conduct are often not criminal in and of themselves. Acts that may be innocuous in a different context may become menacing due to their repetitiveness or intrusiveness, or because of the history of violence in the relationship between stalker and victim. When there has been a history of violence and the victim has gone to significant lengths to avoid any encounters with the abuser, even a seemingly friendly note or gift is an alarming signal that those efforts have been unsuccessful— that the abuser has found the victim and once again poses a threat.

² CENTERS FOR DISEASE CONTROL, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, DIVISION OF VIOLENCE PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2015), available at <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

³ Judith McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD. (Sage Publications 1999), available at http://www.margolishealy.com/files/resources/stalking_and_intimate_partner_femicide.pdf.

Stalking as the primary crime

In some cases, stalking is the primary crime alleged. The offender may be a stranger or may be a person known to the victim—a former partner or person the victim once dated, a person seeking a relationship with the victim, someone known from the workplace (supervisor, co-worker, employee, or customer/client), a neighbor, a family member, or a casual acquaintance. The motive for the stalking may be to exact revenge for some perceived wrong, to establish or regain a romantic relationship, or to coerce the victim to respond in some specific way.

When stalking is the primary crime, presenting evidence of a motive may be particularly important. Jurors often have difficulty deciding cases they do not understand. Usually, when stalking is related to another crime, the motive will be more readily apparent. For example, in the context of intimate partner violence, the motive most often is to establish, maintain, or regain control over the victim. When the stalking is related to witness intimidation, the motive is to silence the witness or elicit a recantation. When the stalking appears to have occurred in a vacuum, however, jurors may equate an absence of motive with reasonable doubt. Determine what motivated the stalker—what the end goal was—and build the case around the illegitimacy of that goal and/or the illegitimacy of the stalking behavior as a means to achieve it.

Stalking related to intimate partner violence or other crimes

Stalking frequently occurs between current or former intimate partners. Because intimate partner violence is, itself, most often a course of conduct involving coercive control of the victim, in any case charging a specific crime of intimate partner violence it is worth considering an additional count of stalking for the course of conduct surrounding the discrete criminal offense(s), if the facts and law will permit.

A stalking charge can be of great strategic value. It enables the prosecutor to present evidence of the course of conduct without the need to file a motion to admit evidence of “other bad acts” under Evid. R. 404(b) (or its equivalent), at least as to those acts included in the stalking. Because the course of conduct is, under the stalking statute, an element of the crime, evidence of the acts constituting that course of conduct is automatically admissible at trial. Admitting evidence of the whole course of conduct allows the prosecutor to paint the most complete picture of the abusive relationship, shedding light on the offender’s motive and plan, as well as helping to explain the reasons for the victim’s behavior (including failure to appear at trial, recantation, minimization, or testifying for the defense).

Other crimes that often involve co-occurring stalking behavior include sexual assault or human trafficking crimes, where the stalking may be a tactic to coerce or isolate the victim or to intimidate the victim or witnesses. Stalking as a means of witness intimidation may be employed by perpetrators of other crimes, as well—ranging from drug offenses and gang violence to white-collar crime.

A stalking charge may help to support a request for bail conditions or a criminal protection order that will provide adequate safety to the victim as well as the victim's family (and even friends, or pets, if they are at risk), during the course of the criminal proceedings. The stalking charge will also alert the court that the criminal conduct was not a one-time event, but rather part of a malevolent campaign against the victim that can be expected to continue if it is not prevented. If the defendant is ultimately convicted of stalking, the prosecutor will be better situated to request similar protective provisions to enhance the victim's safety on an ongoing basis.

Obtaining a conviction for stalking can also be beneficial for purposes of future prosecution, since many offenders do not stop their behavior after conviction but eventually resume their campaign against the same victim or against a new partner or other victim. In many criminal codes, subsequent stalking convictions carry enhanced penalties, so obtaining that first stalking conviction lays the groundwork for possible enhanced penalties in the future.

Such a conviction will also help to flag the offender's dangerous history, if arrested later for an offense that is less serious on its face, such a misdemeanor crime of domestic violence or property damage.

Any prosecution for stalking related to other charged criminal offenses helps to ensure that the defendant is held appropriately accountable for the full scope of criminal conduct and the ensuing harm to the victim. And since stalking is a continuing crime, it may include incidents that would otherwise be barred by the statute of limitations; the limitations period for a continuing crime does not begin to run until the crime has concluded.

If the stalking is related to the victim's role as victim of (or witness to) some other criminal offense, it should be viewed as a co-occurring crime and be prosecuted, if possible, in the same criminal proceedings as the original criminal offense. If it is not possible to include prosecution of the stalking/witness intimidation in the original case, the prosecutor responsible for that original case should nevertheless address the stalking behavior within the context of that case by seeking and enforcing appropriate bail conditions related to witness safety, introducing evidence of the stalking/intimidation to provide the jury with an accurate picture of the relationship between the parties or as evidence of consciousness of guilt, and arguing the stalking/intimidation as an aggravating factor at sentencing.⁴ The criminal charges for stalking and/or witness intimidation can be prosecuted as a separate case, if necessary, but even then it is important to connect the behavior to the other crime, to provide context for the events as they unfold at both trials. Remember that when stalking or intimidation charges are tried separately from the related crime, evidence to provide the necessary context will require a motion to admit evidence of "other bad acts" under Evid. R. 404(b) (or its equivalent).

“Many offenders do not stop their behavior after conviction but eventually resume their campaign against the same victim or against a new partner or other victim.”

⁴ For more information on responding to witness intimidation, including stalking, see The Prosecutors' Resource on Witness Intimidation, AEQUITAS (March 2014), available at <https://aequitasresource.org/wp-content/uploads/2018/09/The-Prosecutors-Resource-Intimidation.pdf>; and Teresa M. Garvey, Witness Intimidation: Meeting the Challenge, AEQUITAS (2013), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf>

Statute of limitations and territorial jurisdiction

These are threshold questions that must be considered in determining whether and how to charge any crime but may arise with more frequency in stalking cases due to the ongoing nature of the conduct. Because stalking, like conspiracy, involves ongoing criminal activity, the statute of limitations does not begin to run until the criminal activity has concluded. Thus, it may be possible for a stalking charge to include, as part of the course of conduct, acts that were committed beyond the limitations period that would otherwise apply to that act.

Occasionally, some of the elements of stalking may have occurred in other jurisdictions. For example, a defendant in another jurisdiction may be using electronic communication to cause harm to a victim residing in your jurisdiction. Or a course of stalking that commenced in your jurisdiction might have continued after the victim relocated for purposes of avoiding the stalker. Researching your criminal code and case law will help determine whether acts occurring in another jurisdiction can be prosecuted as part of a stalking case in your jurisdiction. In many jurisdictions, as long as some element of crime—whether it be an act or the result of an act (*e.g.*, harm to a person)—occurs within the territorial jurisdiction of the criminal code, the crime may be prosecuted there. It may be worthwhile, in interjurisdictional stalking cases, to consult with prosecutors in the other jurisdiction to learn whether that jurisdiction would be able and willing to prosecute and whether there would be an advantage in doing so—it may be that the other jurisdiction has a less restrictive statute or greater available penalties. Establishing a connection with the prosecuting authority in the other jurisdiction may also be valuable for purposes of more easily securing any evidence located there, including police reports or court records. Interjurisdictional stalking may also violate the federal stalking statute, 18 U.S.C. § 2261A, so it may be advisable in appropriate cases to consult with the U.S. Attorney's Office. In determining which jurisdiction is most suitable for prosecution, it is important to consider the safety and convenience of the victim and witnesses, as well as the relative ease of prosecution and available penalties.

Analyzing and working with your stalking statute

Prosecution of stalking requires careful analysis of your jurisdiction's stalking statute(s), including any caselaw interpreting the statute. While nearly all stalking statutes criminalize a course of conduct⁵ that causes and/or is intended to cause (or is likely to cause) some level of fear or emotional distress on the part of the victim (or, under some statutes, a reasonable person in the victim's position), the specific elements vary significantly from one jurisdiction to another. In addition, some jurisdictions separately codify stalking by use of technology, under a "cyberstalking" statute.

⁵ South Dakota permits "stalking" to be charged based upon a single "credible threat," as well as repeated acts of following or harassing. See S.D.C.L. § 22-19A-1. Such isolated threats, although serious crimes that may pose a grave risk of harm to the victim, do not necessarily present the same challenges or call for the same strategies as the "course of conduct" stalking described in this Guide.

Stalking: a “course of conduct”

Many people—including victims, advocates, police, prosecutors, and jurors—associate the word “stalking” with acts of following the victim, or surveillance to monitor the victim’s whereabouts and activity. In most jurisdictions, that definition is far too limiting. While surveillance and following are generally included in the definition of stalking, most stalking statutes define the crime in terms of a “course of conduct”—multiple acts (which *may include* monitoring the victim) that induce, and/or are intended or likely to induce, fear or emotional distress to the victim. *An offender can be guilty of stalking without ever taking actions involving following or surveilling the victim, simply by engaging in repetitive acts (e.g., assaults, threats, harassment, property damage) that have the requisite cumulative impact on the victim.*

It is critical that this be explained, and emphasized, when training officers, advocates, police, and prosecutors; during *voir dire*; and while presenting opening statements or summations at trial: *the crime of stalking is not what you might think it is.*

Many jurisdictions have complex, multi-layered statutes that classify or grade the crime of stalking based upon various factors, such as whether the conduct was in violation of a protection order, whether the defendant has a prior conviction for stalking, the level of fear or distress experienced by the victim (or intended by the offender), the age of the victim, and/or whether the stalking included a “credible threat” of violence. In determining whether or how to charge stalking in a given case, it is necessary to evaluate the evidence of conduct present in the case, and the effects of that conduct, in terms of the statutory elements of the crime in your jurisdiction. Remember, if there are multiple forms or grades of stalking that could be charged, based on the factors present in your case, it is important to charge any and all stalking crimes that are applicable. Some of these might merge for sentencing purposes if based upon the same conduct, but charging all potentially applicable theories increases the likelihood of a conviction for at least one.

“Course of conduct”

Practice note:

In those cases where the stalking statute or the evidence—after diligent investigation—will not support a criminal charge for stalking, it nevertheless is critical to address the stalking *behavior*. Just because a case cannot be charged criminally as “stalking” does not mean that the conduct involved is not causing serious distress to the victim, nor does it mean the offender does not pose a serious threat.

Stalking behavior that cannot, for one reason or another, be criminally charged as stalking might nevertheless be chargeable under some other statute (*e.g.*, threat, harassment, witness intimidation, identity theft, computer fraud, invasion of privacy). As with stalking, charging such crimes enhances the degree of offender accountability and helps establish a history of the offender’s behavior. And evidence of such acts, even if not criminally charged, may be admissible under Rule 404(b) (“other crimes and bad acts”) to shed light on issues such as the offender’s motive, intent, absence of mistake or accident, or to present the jury with the most comprehensive and accurate picture of the relationship and the offender’s use of power and control tactics.

The foremost concern is always victim safety. A good safety plan, including the use of no-contact provisions in a protection order or bail conditions, may help to eliminate or reduce the danger and distress to the victim.

Some statutes, or their judicial interpretation, specify a minimum number of acts to constitute a “course of conduct” (generally more than one, though at least one statute requires three or more). The statute may state that the acts must be “repeated” or be a “series” or “pattern”—all of which imply at least two acts.

Some statutes specify the timeframe over which the conduct may occur. Some provide that the individual acts may be “close in time,” though it is probably necessary that the acts be distinct enough that they are not component parts of what is essentially a single act (*e.g.*, multiple threatening statements during the same encounter). Many statutes require that the constituent acts evidence a “continuity of purpose,” suggesting that isolated acts that occur many months or years apart, without intervening acts or circumstances (such as the victim’s successfully concealing from the offender, for a time, the location of residence), may be more difficult to criminally charge as stalking.

Most statutes require that the victim be specifically targeted—that the course of conduct be “directed at a person.” This does not necessarily mean that each individual act must have been committed against the same person; acts against a victim’s family, friends, or pets that are intended to elicit a reaction from the victim could be part of a course of conduct directed toward the stalking victim. In such cases, of course, the individual acts against the “proxy” victim should also be separately charged, if criminal in nature.

A defendant can be held criminally responsible for conduct actually carried out by a third party, if there is evidence that the defendant solicited or encouraged the conduct, under traditional

complicity or conspiracy theories. To the extent it is possible to prove that the third party *intended* to assist the defendant in stalking the victim, *i.e.*, that the third party shared the defendant's intent to cause fear or emotional distress in the victim, that person could also be charged with stalking or conspiracy. As with other crimes involving complicity or conspiracy, the accomplice or co-conspirator could potentially be an important source of evidence implicating the primary stalker; it may be worthwhile to consider extending a cooperation agreement for purposes of ensuring the conviction of the primary stalker, who is likely to pose the greater ongoing threat to the victim.

More difficult issues may arise when communications are made *to* third parties (*i.e.*, statements that would distress or cause fear to the victim are made to someone else) or when they are publicly disseminated (*e.g.*, posted on social media) rather than made directly to the victim. In such cases, it will be important to prove that the defendant intended (or knew of the risk) that the victim would learn of and/or be adversely affected by the statements (*e.g.*, suffer employment consequences or experience harassment by others). Communications intended to be strictly private, with no reasonable likelihood of their being passed on to the victim, would probably be insufficient to constitute part of the stalking "course of conduct," although the statements themselves might be admissible in a stalking case to show the defendant's state of mind toward the victim.

Several statutes explicitly require that the offender's conduct have "no legitimate purpose"—and even if without such statutory requirement, a legitimate purpose may nevertheless amount to a defense in jurisdictions requiring intent to cause fear or emotional distress. There also may be a specific statutory exception for constitutionally protected conduct (most often, conduct protected by the First Amendment). A statutory exception for constitutionally protected conduct does not protect stalking behavior to any greater extent than the federal or state constitution already does, but the statutory exception may serve the purpose of saving the statute from constitutional challenge for overbreadth.

Effect of the conduct (the "fear" element)

Does the statute require proof that the victim actually experienced some quantum of fear or emotional distress, or is it sufficient that the offender's conduct would cause a reasonable person to experience fear or emotional distress? Some statutes require both—proof of the victim's subjective fear/distress and that the conduct be such that a reasonable person would have that reaction. The objective "reasonable person" standard generally refers to a reasonable person situated similarly to the victim (*i.e.*, one who knows what the victim knows and has experienced what the victim has experienced). Note that putting the victim's reaction into historical context may require a motion to admit evidence of "other bad acts" under Rule 404(b), to the extent that the prior acts are not included within the "course of conduct" charged in the present case. Such evidence should be admissible on the grounds that it is relevant to prove an element of the offense: the basis for the victim's actual fear/distress and the reasonableness of that reaction in view of the history between the parties.

Under some statutes, the fear must be fear of bodily injury or death of the victim and/or a member of the victim's family or household; in others, fear for the "safety" of the victim or member of the

family or household. Whether “safety” includes emotional safety may be an open question, or it may be answered by researching the law in your jurisdiction. Other statutes refer to “emotional distress” (usually “serious” or “substantial” distress) instead of, or as an alternative to, fear.

Some victims will present themselves as angry or annoyed rather than fearful. This does not necessarily preclude a finding that the victim experienced fear within the meaning of the statute. A victim’s actions to avoid contact with the offender, such as changing phone numbers, email addresses, residence, online accounts, or routine, may represent significant cost or inconvenience and be sufficient to demonstrate that the victim felt endangered by the offender’s conduct.

It is important to note, however, that a victim’s ongoing contact with the offender does *not* necessarily mean the victim lacked fear. It is not unusual for victims of stalking to maintain contact with the offender, despite their fears, for a number of reasons. A victim may legitimately be concerned that breaking contact will cause the offender to escalate the behavior—to become even more intrusive, alarming, or stealthy. Victims may fear that if they cease interacting, the offender will resort to engagement with their friends, family, or others to find them or to carry threats or messages. They may feel that the best way to gauge the level of danger is to maintain contact and watch what the offender is saying and doing. A victim may be able to explain this reasoning to the jury or an expert could be called to explain this common victim behavior. *See, infra* at 23-24.

The mental elements (purpose/intent or other culpability states)

Since the crime of stalking involves both a “course of conduct” and a result of that conduct (fear or emotional distress on the part of the victim), it is important to determine what mental state (or *mens rea*) is applicable both with respect to the conduct and to the result of that conduct, since those, too, are elements of the crime that must be proved.

The criminal codes in many jurisdictions follow the Model Penal Code’s (MPC) culpability scheme, which specifies the levels of culpability that must be proved with respect to acts or conduct that are elements of a crime, as well as those pertaining to the effect or result of those acts. That scheme classifies the mental elements of crimes as “purposeful,” “knowing,” “reckless,” or “negligent.” *See*, Model Penal Code § 2.02. In MPC jurisdictions, the applicable statutory provisions, together with the principles of statutory construction, will determine which mental state must be proved with respect to acts or results of the acts. The stalking statute may require, for example, that the prosecution prove the defendant acted purposely with regard to the acts constituting the course of conduct, but that the defendant merely knew (or recklessly disregarded the risk) that the victim would be placed in fear or would experience emotional distress. Or it may require that the defendant specifically intended for the victim to experience fear or emotional distress.

Determining what must be proved with regard to the offender's state of mind requires careful reading of the stalking statute as well as any generally applicable provisions in the criminal code related to culpability states or intent/*mens rea* and any relevant caselaw.

In jurisdictions that have not adopted the MPC culpability standards, the stalking statute may use elements with a specific meaning (e.g., "willfully" or "maliciously") that are defined by the jurisdiction's criminal code or in its caselaw. It may be important to determine whether the statute is one of "general intent," in which the defendant must intend only to commit the acts constituting the course of conduct, or whether it is one of "specific intent," in which case the defendant must also intend the result of the conduct—the victim's fear or emotional distress.

In cases where the course of conduct consists of threatening communications made in a public forum, such as social media, First Amendment issues may affect whether a defendant can be found guilty of stalking for statements made with less than *knowledge* that the statements would be perceived as threatening by the victim (or by a reasonable person). The U.S. Supreme Court's First Amendment jurisprudence suggests that it would likely overturn a conviction based upon a finding that the defendant "reasonably should know" the communications would be perceived as a threat (which represents a negligence standard). It is unclear, however, whether a statute specifying a *recklessness* standard as to the threatening nature of the statements would survive First Amendment scrutiny. A defendant's *knowledge* that a statement would be perceived as threatening would certainly be sufficient to sustain a conviction against a First Amendment challenge. "Knowledge" is usually defined as "practical certainty"—a higher standard than recklessness or negligence—but such knowledge may not be particularly difficult to prove. Evidence that the defendant was aware the victim would see/hear the communication, together with evidence of the context in which the statement was made (including the history of violence or more explicit threats, as well as any notice the defendant may have had about the effect on the victim of similar statements), may demonstrate that the defendant could be "practically certain" of the statement's impact.

The United States Supreme Court avoided squarely addressing the First Amendment issue in *Elonis v. United States*, 135 S.Ct. 2001 (2015), a case involving Facebook posts for which the defendant was prosecuted under the federal threats statute; nevertheless, the opinions in that case highlight some of the potential problems that may arise in prosecuting stalking cases involving publicly disseminated communications perceived as threats.⁶

First Amendment issues are much less likely to present a serious concern where the stalking course of conduct includes a variety of other acts, aside from communications, or where the communications are made directly to the victim.

⁶ For a discussion of the *Elonis* case, and its implications for the prosecution of similar conduct, see Teresa Garvey, Keep Calm and Understand *Elonis v. United States*, STRATEGIES IN BRIEF (Aug. 2015), available at <https://aequitasresource.org/wp-content/uploads/2018/09/Keep-Calm-And-Understand-Elonis-v-US-SIB25.pdf>.

Recognizing the role of stalking in co-occurring crimes

To uncover stalking when it is related to some other crime, the prosecutor must be willing to look beyond the four corners of the “primary” criminal offense. Victims and witnesses should be screened, during interviews, for indications of possible stalking, as well as other forms of witness intimidation. Ask whether the offender has engaged in unwanted contact with them and whether they have been subjected to threats or other disturbing behavior. Ask whether strange or suspicious events have occurred that suggest the offender may be monitoring their whereabouts or activities.

Asking victims whether they have been “stalked” is unlikely to reveal the presence of stalking. Rather, victim interviews should be conducted in a manner designed to elicit the facts that may support a charge of stalking. Interviews should draw out incidents that form a fear- or distress-inducing pattern, including a discussion of history and surrounding circumstances that contribute to the victim’s sense of fear or emotional distress. Have there been prior police reports or protection orders? Ask, “What *else* has the offender done to make you feel scared or upset?” To uncover use of technology to stalk, ask whether the offender has seemed to have more information about the victim’s life and activities than the victim has disclosed to the offender or posted on public forums. Does the offender “coincidentally” show up wherever the victim goes?

In cases involving intimate partner violence, ask what ELSE the offender has done to make the victim feel scared or upset—in the majority of cases, there will be a pattern of conduct that potentially could be charged as stalking. A complete, detailed history of the abusive relationship should always be obtained in intimate partner violence cases; such history is essential to put the criminal conduct in context. Ask whether the offender has seemed to have more information about the victim’s life and activities than the victim has disclosed to the offender or posted on public forums. Does the offender “coincidentally” show up wherever the victim goes? Unexplained knowledge of the victim’s personal information, location, and activities might be an indication of stalking, including the use of technology to stalk. Ask about prior reports to law enforcement—including incidents that may have been reported in another jurisdiction. Is there a history of protection orders, including those that were ultimately dismissed? Applications for such orders may document much of the relevant history.

History is similarly important in cases of human trafficking or any other crime in which the offender and victim had a relationship of any duration, providing the offender with the opportunity and motive to engage in repetitive acts in the course of targeting or maintaining control over the victim.

Witnesses in cases involving gang violence are also frequently vulnerable to witness intimidation; offenders or their allies may repeatedly drive by the witness’s home, park on the witness’s street, or make threats against the witness or the witness’s family. Offenders may use social media to threaten witnesses or expose their cooperation on social media or other websites. Repetitive acts of this type may be sufficient to support a stalking charge.

Safety measures

Whenever stalking behavior is uncovered, regardless of whether the facts and law will support a criminal charge for stalking, measures should be taken to enhance the victim's safety. The victim should be offered the services of an advocate who can help create a safety plan, including recommendations to protect the victim's digital privacy. Resources to enhance victim safety online include the Safety Net Project developed by the National Network to End Domestic Violence (NNEDV) at <https://nnedv.org/content/safety-net/>.

A risk assessment is useful for several purposes: to assist the victim in understanding the potential risk of lethality, to support requests for pretrial detention and appropriate bail conditions, to determine which cases may demand greater prosecutorial attention and resources, and to support sentencing and post-sentencing (e.g., probation or parole) recommendations.

A variety of risk assessments are available. One that is specific to stalking victimization is the Stalking and Harassment Assessment and Risk Profile (SHARP) assessment, available at <http://www.cdar.uky.edu/CoerciveControl/sharp.html>. Several other risk/threat-assessment instruments have been developed for use in domestic violence cases, including:

- the Maryland Network Against Domestic Violence Lethality Assessment Program (LAP); see <https://lethalityassessmentprogram.org>;
- the Mosaic Threat Assessment instrument; see <https://www.mosaicmethod.com>;
- the Danger Assessment; see <https://www.dangerassessment.org>;
- the Ontario Domestic Assault Risk Assessment (ODARA); see http://www.waypointcentre.ca/UserFiles/Servers/Server_9960/File/ODARA%20Fact%20sheet%20v0116.pdf.

When stalking is related to intimate partner violence, the victim should be eligible for a domestic violence protection order. In some jurisdictions, any victim of stalking can apply for a stalking protection order. Although such civil protection orders usually must be obtained by the victim, rather than by the prosecutor acting on the victim's behalf, some jurisdictions also provide for criminal protection orders, which can be obtained by the prosecutor. In addition, prosecutors should seek appropriate bail conditions, including no-contact provisions (which should carefully specify prohibitions on indirect as well as direct contact, including contact through the use of technology and social media) and any other conditions (e.g., GPS monitoring or restrictions on usage of digital devices) that will help to ensure the victim's safety. Protection orders may be more readily enforceable than bail conditions because the law typically requires an immediate arrest for violation of a protection order. Enforcement of bail conditions, in contrast, may require a motion to revoke bail. The associated delay in enforcement can potentially endanger the victim, since the offender may remain at liberty while the motion is pending. There is also a difference in the duration of protection: protection orders usually remain in place until they expire or are dismissed, while bail conditions remain in place only during the pendency of the criminal proceedings. It is not necessary to choose among the available legal protections; there is no reason why a stalking victim cannot have multiple legal protections in place at the same time.

Conditions in a protection or bail order should specify that “no contact” includes indirect contact and contact through third parties, as well as social media posts about, or directed toward, the victim. They should prohibit contact with members of the victim’s family or household and, in appropriate cases, the victim’s employer and named friends of the victim. In addition, the defendant should be prohibited from monitoring, tracking, or surveilling the victim, by use of technology or otherwise. Any locations frequented by the victim should be addressed; if the offender and victim regularly frequent the same places (e.g., a church or a gym), the victim should be consulted about what times the offender must be barred from those locations. The order should also specify that if the offender arrives at a public location and the victim is present, the offender must promptly depart.

In addition to no-contact conditions, the defendant should be prohibited from possessing firearms, ammunition, and any firearms permits; orders should require the verifiable surrender of any the defendant currently possesses. Some jurisdictions have protocols in place for firearms surrender; if your jurisdiction lacks such a protocol, resources and technical assistance for establishing such procedures can be found at the National Domestic Violence and Firearms Resource Center, at <https://www.preventdvgunviolence.org>. Additional conditions may include electronic monitoring of the defendant (e.g., ankle bracelet), regular in-person reporting to probation, and prohibition on the use of alcohol or recreational drugs.

Any violations should result in prompt action to enforce the conditions; when the violation is one that poses a risk to the victim or to anyone else, move to revoke bail.

About digital evidence

Given the ubiquity of technology in modern society, it is inevitable that the majority of stalkers will use technology—at least to some extent—as a means of tracking, spying on, or harassing/threatening their victims. Hacking into the victim’s online accounts or devices, installing spyware on the victim’s devices (or devices belonging to the children), or using built-in tracking software (e.g., phone tracking or location settings in apps) allows the offender to intercept the victim’s communication with others and to learn where the victim is going and what the victim is doing. Software/apps that facilitate such spying are readily available for purchase, typically marketed as a legitimate means of monitoring the online activity of children or of employees using business-owned devices. Even more common is stalker use of electronic communications—phone calls, emails, text messages, instant messages, and, increasingly, communications via social media (e.g., Facebook, Twitter, Snapchat, Instagram). These may be used to harass or threaten the victim directly, or indirectly by posting messages with the intent that the victim will learn of them and be harmed by them or by encouraging others to engage in conduct intended to harm the victim.

Obtaining evidence in such cases depends on the platform or app used. Victims can provide consent for access to their own online accounts. Information obtained from the victim’s account can often be used as a starting point to establish a basis for obtaining subscriber information about the account that is the source of the content and, ultimately, search warrants for that source account and/or for the offender’s electronic devices. Federal law controls what types of stored information a service provider may release to law enforcement, as well as the type of process required for its release. Under the Stored Communications Act (S.C.A.), 18 U.S.C. §§ 2701-2712, various categories of information may be obtained by subpoena, court order, or search warrant. Each type of process

has its own criteria for issuance and permits the release of different categories of information, from basic subscriber information (which can often be obtained by subpoena) to full content of the stored communications (which requires a search warrant). Often, stored communications are available for only a limited period of time; it may therefore be necessary to promptly issue a preservation request to the provider, pending issuance of more formal legal process, to ensure that the communications data are not deleted or altered in the meantime.

Details about securing and admitting digital evidence is beyond the scope of this Guide, but there are numerous resources available to assist. State bureaus of criminal investigations and many large local law enforcement departments have cybercrimes divisions with experts who can assist in obtaining evidence.

Other sources of advice and assistance include:

- The National Institute of Justice (NIJ) has produced a handbook, *Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors*, which provides detailed information about obtaining and working with digital evidence, including tips for working with the experts who can explain the evidence at trial; the resource is available at <https://www.ncjrs.gov/pdffiles1/nij/211314.pdf>.
- International Association of Chiefs of Police (IACP) operates a CyberCenter, which provides a wealth of information helpful to law enforcement and prosecutors handling crimes with digital evidence, including a compilation of Litigation Guides at <http://www.iacpcenter.org/prosecutors/litigation-resources/> and a brief guide to search warrants for seizure/examination of electronic devices at <http://www.iacpcenter.org/prosecutors/digital-search-warrants/>.
- The U.S. Department of Justice (DOJ) has a Computer Crimes and Intellectual Property Section that can provide general or case-specific assistance in obtaining digital evidence. Resources can be found at <https://www.justice.gov/criminal-ccips/ccips-documents-and-reports>. To contact the Section for assistance, call the Duty Attorney at (202) 514-1026 (regular hours) or (202) 514-5000 (after hours).
- The National Network to End Domestic Violence (NNEDV) has a toolkit for prosecutors handling cases involving tech evidence. See <https://www.techsafety.org/legal-toolkit>.
- Virtually all social media platforms, email or cellular providers, and Internet Service Providers (ISPs) have a legal compliance department and many maintain a web page specifically to provide guidance to law enforcement. Facebook's law enforcement guidance, for example, can be accessed at <https://www.facebook.com/safety/groups/law/guidelines/>. These departments are typically able to provide guidance about what information is obtained/retained by the service and how long it is retained, as well as sample language for preservation requests, subpoenas, and search warrants.

PROSECUTING THE STALKING CASE

Pretrial

Working with the stalking victim

You should meet with the victim at the earliest possible stage in the proceedings. At the first meeting, establish a rapport with the victim. Express an understanding of the distress and frustration the victim has experienced as a result of the stalking and any negative experiences in navigating the criminal justice system. Assure the victim that although the process may seem slow, you will work to expedite the case and will keep them informed throughout. Ongoing communication is especially important in these cases, so plan to check in with the victim on a regular basis to address any new developments in the case or in the victim's safety.

Role of Advocates

Working collaboratively with system-based victim/witness coordinators and/or community-based advocates is essential in stalking cases. Victim service providers can assist prosecutors in communicating with victims to ensure that victims are not only kept informed about the case but also provided with support and advocacy throughout the course of prosecution, including sentencing and beyond. The services of community-based advocates are not limited to victims involved in ongoing criminal prosecutions. Unlike systems-based advocates, their communications with victims are often protected by confidentiality and privilege. Both types of advocates can play an important role in providing victims of stalking with safety and guidance.

Provide the victim with a "stalking log" and explain the importance of documenting any new contact from the offender (or the offender's family, friends, or other allies). A sample stalking log is available from SPARC at https://www.stalkingawareness.org/wp-content/uploads/2018/07/SPARC_StalkingLogInstructions_2018_FINAL.pdf. While the victim should call 911 if in immediate danger, ensure that the victim also has the number of an investigator or law enforcement officer they can contact if safety concerns arise between check-ins with you. If the victim contacts law enforcement regarding new criminal activity or suspicious events, advise the victim to inform any responding officer that this appears to be related to the ongoing stalking case and request that the case information (and your name) be documented in the report. The victim should also note the officer's name, badge number and report number in the stalking log to ensure proper follow-up. This will help to ensure that any new incidents are not inadvertently adjudicated separately and that any related police reports are forwarded to you for inclusion in your case.

Provide the victim with information about what evidence to preserve and turn over to law enforcement. A helpful list of documentation tips for digital evidence can be found at the Safety Net site of the National Network to End Domestic Violence (NNEDV): <https://www.techsafety.org/documentationtips>. In addition, NNEDV and the National Council of Juvenile and Family Court Judges has produced a guide for self-represented litigants seeking to present evidence related to the misuse of technology: http://www.ncjfcj.org/sites/default/files/NCJFCJ_SRL_HowToGatherTechEvidence_Final.pdf.

The recommendations in that guide can assist victims in properly preserving such evidence. With digital content such as social media posts, which can be readily deleted or changed, it is best to have law enforcement view the content “live” on the victim’s device, in addition to taking a screenshot or printing out the content. This will help counter any defense claim that the printout or screenshot was faked. Note that it will be important to send a “preservation letter” to the service provider to maximize the availability of evidence pending issuance of process such as a search warrant.

While victims can and should be advised about how to preserve evidence, they should be cautioned about conducting their own investigation. The jurisdiction’s wiretap statute may prohibit the recording of phone calls, for example, unless both parties to the call consent. In such jurisdictions, surreptitious recording by the victim may constitute a crime—and the last thing victims need is to provide offenders with grounds for filing a criminal charge against them. Even when the victim lives in a one-party-consent jurisdiction (which permits recording as long as one party to the conversation—in this case, the victim—consents to such recording), engaging the offender in conversation can be problematic, particularly once the right to counsel has attached. There is a risk that the victim may be viewed as an agent of the prosecution, and that the defendant’s statements will therefore be suppressed. It is safer, from a legal standpoint, for the victim to allow any calls from the defendant to go to voicemail, which can then be preserved. If the victim receives a call from an unknown number and it turns out to be the defendant, the victim should be advised to simply end the call. If it is safe to do so, the victim can tell the defendant to stop contacting them, without waiting for a response before ending the call and documenting the contact and the request to refrain from contact. If victims feel they *must* take the call or speak with the offender for their own safety, advise them to keep the conversation as neutral as possible—not to question the offender or seek admissions related to the case (and provide appropriate cautions about recording).

Generally speaking, stalking cases should be expedited to the extent possible. The longer it takes to resolve the case, the more likely it is that the offender will find ways to continue to stalk and intimidate the victim—even from behind bars. Once the criminal justice process has begun, the stakes have gone up for the offender—and, consequently, for the victim, who may be subjected to increased intimidation intended to pressure the victim into dropping the charges or abandoning participation in the criminal proceedings. In some cases still at the investigative stage, however, where the evidence to support a stalking charge is weak, the victim is willing, and the risk of physical or emotional harm appears to be low, a delay in charging to permit additional investigative efforts (e.g., consensual law enforcement monitoring of the victim’s phone or online accounts) may be appropriate to shore up the case before formal charges are filed (and before the defendant’s right to counsel has attached).

Supplemental investigation

Only rarely will prosecutors have all the evidence they need in order to prosecute a stalking charge at the time the initial charge is filed. Because stalking occurs over the course of time, the quantity of potential evidence may be substantial and located in a variety of places. It may be necessary to conduct multiple interviews with the victim and other witnesses (particularly those familiar with the relationship and the effect the stalking has had on the victim) to establish a good timeline of the events and to determine where additional evidence may exist. Ask the victim about the defendant’s friends and family and consider whether they might be worth interviewing. Such interviews might

shed light on the defendant's feelings about the victim or reveal defenses that might be asserted. If there have been prior reports to the police, including those made in other jurisdictions, request the reports from the responding agency. Investigation should continue throughout the pretrial period, with discovery updated accordingly.

Charging

As noted previously, any and all applicable statutory provisions—stalking and other applicable offenses, including any witness intimidation—should generally be charged, if at all possible, in the same charging instrument. To the extent that some of the other criminal acts are within the scope of the stalking charge, some of the charges might merge at sentencing, but charging all applicable offenses maximizes the admissible evidence and the ability to hold the offender accountable for the full range of criminal conduct.

To determine the scope of the stalking charge(s), consult your statute and caselaw to determine how the law defines the course of conduct that may be charged. For example, it may be important that incidents included in the stalking charge occur within a specific time period. Some statutes may permit inclusion of more remote incidents as long as they evidence a continuity of purpose. The indictment or information should charge dates consistent with the law in your jurisdiction. The date of each incident included in the stalking need not be specified in the charging instrument but should be determined and supported by testimony and other evidence to the extent possible. A typical charge in an indictment might, for example, state (incorporating the language of the statute):

On or about dates between February 1, 2018 and October 10, 2018, the defendant did purposely or knowingly engage in a course of conduct directed at Jane Doe that would cause a reasonable person to fear bodily injury to herself or a member of her immediate family, or to fear the death of herself or a member of her immediate family, and did so in violation of an existing court order prohibiting the behavior, to wit, a Final Restraining Order issued December 15, 2017, by the Honorable John Jones, J.S.C., in the matter of Jane Doe v. John Doe, Dkt. No. FV-XXX, in violation of §XXX, a crime of the third degree.

The specifics of the acts, and approximate dates, should be described in the victim's statement and/or testimony at grand jury or the preliminary hearing. It is preferable not to specifically describe, in the charging instrument itself, the incidents included in the course of conduct underlying the stalking charge. This is because the charging instrument will be read to the jury, and the verdict sheet and jury instructions may incorporate the language of the indictment or information. Including too much specificity in the charging instrument may suggest to the jury that it must find each of the predicate acts beyond a reasonable doubt in order to find the defendant guilty of stalking. In fact, since the stalking statute generally requires only a finding of a course of conduct, unanimity as to each predicate act is generally not required. *See, infra at 26-27.* Rather, upon the defendant's request, the prosecution can provide a bill of particulars to specify the incidents to be relied upon as predicate acts for the course of conduct. This should satisfy the notice requirement without unduly restricting the jury in its deliberations.

For cases in which the stalking consists of public communications on social media, consider alleging that the statements were made with *knowledge*, or in *reckless disregard of the risk*, that the victim would be placed in fear, even if your statute requires mere negligence (e.g., that the defendant “reasonably should have known” that the victim would be placed in fear. Doing so *may* help to protect a conviction from appellate challenge on First Amendment grounds. See, *supra* at 13.

Discovery

Police reports, statements, and documents obtained in the course of investigation should be reviewed for sensitive personal information that may compromise victim safety if it is disclosed during discovery. When such information exists, move to obtain an order to delay or restrict disclosure of the information to the defendant. Some information may have to be disclosed to defense counsel, with an order restricting disclosure to the defendant. When the information is not material to the charge or to defense of the charge, however, it should be possible to seek an order protecting the information from discovery altogether.

An increasingly popular defense tactic is to make demands for discovery of private information about the victim—often, information that is not in the possession or control of the prosecution. These demands for discovery, or subpoenas *duces tecum*, may seek information about the victim’s medical or mental health records, interactions with advocates or shelters, or contents of the victim’s computer or other devices. Most often, the defendant cannot articulate a specific reason to believe information exists that would be material to the defense; rather, these demands amount to a fishing expedition in the hopes of learning something that can be used to undermine the victim’s credibility. Such unwarranted demands for private victim information serve to discourage victims from reporting crimes and from continuing to participate in the criminal justice process; accordingly, they should be vigorously opposed.

The opposition to demands for the victim’s private information will depend upon the form of the demand (i.e., discovery or subpoena) and governed by your jurisdiction’s constitution, statutes, evidence rules, and court rules, as interpreted in your caselaw. Depending on the type of information sought, there may be privileges (e.g., therapist-patient or advocate-client) that either prohibit or stringently limit disclosure of the information. All jurisdictions have some form of victims’ rights statute and/or constitutional provision, which may provide some protection for the victim’s private information, as well as affording victims generally a right to be treated with fairness and dignity within the criminal justice system. Even *in camera* review of such information should be opposed, at least until the court has made a finding that the information sought is likely to exist and to be material and helpful to the defendant. The mere speculation that the victim might have made an inconsistent statement to another is not sufficient to support a request for *in camera* review, particularly when the information is protected by law. For assistance in opposing defense demands for private or confidential victim information, contact an Attorney Advisor at AEquitas.

Anticipating defenses

Potential defenses, or defense strategies, may be suggested by analyzing the evidence in the case, by interviewing the victim and other witnesses, and by considering defense arguments, including those made in the course of plea negotiations and in motion briefs. The defendant may repeatedly offer the same explanations or excuses to the victim or others, including the police. Remember that

stalking represents a pattern of behavior; it is generally unnecessary to exclude all possible defenses as to each individual act. To the extent that the defendant's responsibility for some of the acts can be firmly established, it may be reasonable to infer that the defendant is responsible for the others, as well, and that they evidence the same continuity of purpose. Among the defenses common in stalking cases are:

- "It wasn't me." This defense may be asserted in instances where the means of contact cannot be definitively linked to the defendant, such as receipt of email from a fake account or phone calls or text messages from an unknown or spoofed phone number. In the absence of digital evidence to prove the source of the communications, often you can meet this defense circumstantially: who had the motive and opportunity to commit the crime? Others may have had the opportunity to send threatening emails to the victim, but not the motive, while the acts are consistent with other conduct for which the defendant is clearly responsible. Context may also provide a necessary link if the communication references matters that pertain to the offender, to the relationship, or to prior events.
- "It was a coincidence." This common defense may be raised in cases in which the defendant repeatedly shows up in the same places as the victim, particularly in smaller communities. One instance might be coincidence, but multiple occurrences at multiple locations signal intentional following. Additionally, consider the circumstances of the encounter, as well as the defendant's actions in response to the encounter. Was the defendant already there, immediately leaving when the victim arrived on the scene, suggesting an accidental encounter? Or did the defendant attempt to engage with the victim? Was the defendant positioned so as to furtively observe the victim?
- "I'm the one being stalked." Stalkers are creative and resourceful. They may engage in behaviors—particularly after being charged with stalking—to make it appear that the victim is stalking or threatening them. For instance, stalkers might spoof calls or text messages to themselves to make it appear that the victim is sending them threatening messages, or falsely report crimes they claim were perpetrated by the victim. Investigate whether there is evidence to show the defendant created the calls or messages or, at least, to disprove the victim's responsibility for them—which, circumstantially, suggests the defendant's responsibility. Defendants who can be proved responsible for falsely implicating the victim in a crime should be criminally charged for such acts. In addition, such acts are good evidence of consciousness of guilt.
- "I'm being framed or set up." The defendant may suggest that others—the victim, the victim's friends or family, or unknown enemies—are responsible for certain acts, which they have committed for the purpose of "framing" the defendant. Again, to the extent the defendant can be proved responsible for one or more acts, and the context established, this defense becomes implausible.
- "The victim is overreacting." A common tactic used by stalkers and abusers is to make their victims appear mentally or emotionally unstable—*e.g.*, paranoid or overly sensitive. Such claims

are best countered by carefully marshaling the evidence to demonstrate that, given the history and context of the defendant's actions, the victim's fear or distress was a reasonable response and a condition that the defendant was responsible for creating.

- "I was just concerned for my kids." When the parties have children in common, defendants may claim that their conduct was motivated by a concern for the well-being of the children. For example, the defendant may claim that he spied on the victim out of concern about the victim's substance abuse or fear that the children are being neglected or abused. Or the defendant may profess concern about the behavior of the victim's new partner around the children. Such claims may have surface appeal, so it is important to place the behavior in the context of any history of abuse or other behavior clearly unrelated to the well-being of the children and to show that if the defendant had such legitimate concerns, there were legitimate alternatives available that did not involve invading the victim's privacy and causing fear or emotional distress.

Motion practice

Depending on the facts of the case and the law in your jurisdiction, it may be necessary or advisable to file certain motions during the pretrial phase. The timing will depend on the type of motion and the court rules. The most common motions in stalking cases are motions to admit evidence of "other bad acts" under Rule 404(b) (or its equivalent) for any relevant acts outside the scope of the stalking charge itself and motions to admit expert testimony, which may include use of a technical expert to explain any digital evidence or an expert qualified to explain victim behavior that jurors might otherwise misunderstand.

- **"Other bad acts"**

To admit evidence under Evidence Rule 404(b) (or its equivalent), it will be necessary to show that the evidence relates to some purpose other than the offender's propensity to engage in criminal conduct—typically, identity, motive, intent, common scheme or plan, or absence of mistake or accident. The permissible purposes listed in the Rule are not exclusive; they merely represent examples of purposes for which the evidence may be offered. In stalking cases, for example, evidence of violence in the history of the relationship should be admissible to explain why an offender's seemingly unthreatening conduct would have caused fear in the victim or in a reasonable person in the victim's position. Likewise, evidence of witness intimidation should be admissible as evidence of consciousness of guilt—the innocent need not resort to intimidation tactics.

- **Expert testimony (technology experts; victim behavior experts)**

When the defendant has used technology to stalk the victim, it may be necessary to call an expert to explain the evidence obtained and its significance. The State Police or large municipal police departments are likely to have analysts who are qualified to explain the evidence; local academic institutions may also have experts among their faculty. Prepare carefully with the expert to ensure that the evidence is explained in a manner that will be comprehensible to jurors with limited technical knowledge.

Expert testimony is admissible in most jurisdictions to explain victim behavior such as delayed reporting, remaining with or returning to an abusive partner, maintaining contact with the stalker, recantation, or minimization. Qualified experts may include victim advocates; mental health experts experienced in working with victims of domestic violence, sexual violence, or human trafficking; law enforcement officers with training and experience on the subject; social workers; and academic experts. This type of expert testimony is offered solely to educate the jury about possible explanations for victim behavior that the jury might not otherwise understand; it should never be used to prove that someone is a victim of stalking or abuse, nor to prove that a victim's testimony is truthful. The expert should not be anyone who has worked with the victim, nor should the expert be provided with discovery or asked to interview or examine the victim; rather, the testimony should explain in a general way the dynamics and factors that explain the variety of victim responses, emphasizing that there is no single "typical" response.⁷

Expert testimony to explain victim behavior is not *always* necessary or desirable. Consider whether the victim can adequately explain the reasons for acting (or declining to act) in a certain way. Many victims are quite capable of explaining their reasoning: "I figured if I changed my email or phone number, he'd start doing something worse to get attention. Besides, this way I knew where he was and what he was up to. If I cut contact, I know he would have done something worse and I wouldn't know what he was thinking." In such cases, calling an expert to testify might well be unnecessary or even counterproductive if it causes the jury to wonder why such testimony was deemed necessary. The victim's ability to explain behaviors and emotional reactions should be assessed during case preparation to determine whether an expert would be helpful. It is always possible, too, to file a motion to present expert testimony and wait until the victim has testified to decide whether it is necessary to actually put the expert on the stand.

- **Motions *in limine***

Motions *in limine* should be filed with respect to any evidence for which there is likely to be a dispute as to admissibility—whether it is evidence the prosecution wants to admit or to exclude. Motion practice provides the opportunity to carefully think through the legal theories under which the evidence should be admitted (or excluded), research the law, and provide the court with well-supported reasons for the desired ruling. Arguing the issues in advance of trial will minimize interruptions during the trial and help to ensure that neither side alludes to inadmissible evidence during *voir dire* or opening statements. It also provides the court with an opportunity to read the caselaw and carefully consider the arguments, helping to avoid errors that can result from hasty rulings made in the heat of trial. Finally, an adverse ruling that excludes or admits important evidence can more readily be challenged by interlocutory appeal, if appropriate, when the ruling is made well in advance of trial.

- **Forfeiture by wrongdoing**

If the victim is unavailable to testify at trial due to some action on the part of the defendant (with the intent of causing the victim's unavailability as a witness)—usually by engaging in some

⁷ For more details about presenting expert testimony to explain victim behavior, see Jennifer Gentile Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, NAT'L DISTRICT ATT'Y ASS'N (2007), https://www.forensichealth.com/wp-content/uploads/2016/10/pub_introducing_expert_testimony.pdf

form of witness intimidation or manipulation—the prosecutor can file a motion to admit the victim’s out-of-court statements under the doctrine of forfeiture by wrongdoing. The forfeiture rule is codified in many jurisdictions and in many others it is recognized as a matter of common law. Forfeiture may be argued even in states that lack a codified rule or caselaw recognizing the doctrine—no jurisdiction has rejected it.⁸

- **Defense motions**

Aside from filing prosecution motions, it may be necessary to respond to defense motions, including those that challenge the stalking prosecution on constitutional grounds—most often on the grounds that the statute, or its application to the defendant, infringes on the right to free speech. Defendants have raised this issue in the context of social media postings, particularly where the postings amount to subtle or veiled threats or when they are posted under the guise of artistic expression (e.g., poetry or lyrics). As previously explained,⁹ First Amendment concerns are most likely to arise in the context of stalking cases where the entire course of conduct consists of threatening communications in a public forum. Countering such claims will require showing that the postings or public statements at issue constitute a “true threat” not protected under the First Amendment, as well as ensuring that the charging language, as well as the related jury instructions and verdict sheet, reflect the appropriate level of culpability. As previously explained, requiring a finding that the defendant had *knowledge* of the threatening nature of the statements, or acted with *reckless disregard* with respect thereto, is more likely to survive First Amendment scrutiny than a finding that the defendant was merely *negligent* about the impact of the statements.

Another potential constitutional challenge would be that the stalking statute is unconstitutionally vague—that the statute does not give fair notice as to what conduct is prohibited. Many such challenges were mounted in the wake of newly-enacted stalking statutes. In many jurisdictions the vagueness issue has already been resolved in the courts; however, newly enacted or amended statutes may elicit new challenges on vagueness grounds.

AEquitas can provide assistance in filing or responding to motions—contact an Attorney Advisor for help with research or formulating your argument.

Plea negotiations

It is a reality of our criminal justice system that a majority of criminal cases are resolved by plea or other non-trial disposition, such as diversion. In considering whether to offer a plea or alternative disposition, bear in mind the seriousness—and potential lethality—of stalking, in addition to the reality that many stalkers are persistent and obsessive, as well as dangerous. Pleading a stalking case to a different or lesser offense, or admitting a stalker to a diversionary program, will usually cause the

⁸ For more details about forfeiture motions, see The Prosecutors’ Resource on Forfeiture by Wrongdoing (AEquitas, 2012), available at https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf; Teresa Garvey, Legal Jiu-Jitsu for Prosecutors in Intimate Partner Violence Cases: Forfeiture by Wrongdoing, STRATEGIES (AEquitas, 2018), available at <https://aequitasresource.org/wp-content/uploads/2018/12/Legal-Jiu-Jitsu-for-Prosecutors-in-IPV-Cases-Forfeiture-by-Wrongdoing-2.pdf>.

⁹ See *supra* at 13.

offender to again be treated as a first offender if the conduct is repeated with the same or a different victim. Even if the defendant is willing to plead to a more serious offense, it is usually worth insisting on a plea to the stalking charge as well, even for a concurrent disposition that does not increase the overall sentence. The conviction may be important as a predicate first conviction in the event of a future stalking charge, to alert law enforcement and other prosecutors about the defendant's stalking history, and to support conditions to protect victim safety.

Plea offers to lesser or different offenses should be considered only if it appears, after thorough investigation, that the stalking offense is unlikely to be provable at trial. Diversionary treatment should be considered in only the rarest of cases, and never solely because of difficulty in proving the case; where there are proof problems, a criminal conviction to an alternative charge, with appropriate conditions, is generally more appropriate. Any plea that includes probationary supervision should include conditions that protect the victim and address any factors that may have contributed to the stalking (*e.g.*, batterers' intervention; mental health and/or substance abuse evaluation and treatment if appropriate; prohibition on possession of firearms; and no-contact provisions, including prohibitions on contact with the victim's family and any friends who may be targeted). Ongoing safety planning after sentencing is critical. *See infra* at 34-35 (*Sentencing and Beyond*).

Jury instructions/charges

In preparing the case for trial, review any applicable model or pattern jury instructions that may be specified in your jurisdiction. Such instructions may not have been updated in response to court decisions or recent statutory amendments; they may represent an inaccurate statement of the law; they may not address issues that are important in your case. If there is no model instruction, if the model instruction does not accurately state the law, or if additional jury instructions are appropriate, draft and submit proposed jury instructions well in advance of trial. Doing so will help you present a case in which the evidence fits into the instructions the jury will receive at the conclusion of the trial, as well as help to eliminate one common cause for reversal on appeal. The court's ruling on the proposed instructions can also help to set the stage for evidentiary rulings that will need to be made in the course of trial. Do not limit your review to the stalking instruction itself; ensure that appropriate instructions are given for any other words, concepts, or legal principles the jury will be called upon to apply when they are deliberating. For example, when there is witness intimidation involved, it may be appropriate to request a jury instruction on "consciousness of guilt"—that the jury may consider the defendant's acts of intimidation as evidence of consciousness of guilt, in the same way it might consider flight from the scene of a crime. Provide the court with any caselaw or other authority that will support your requested instructions.

One issue worth considering with regard to the adequacy of jury instructions is the issue of jury unanimity. Unlike multiple-incident cases of child abuse charged in a single count, for which the jury is required to unanimously agree as to the same incident, the defining element for stalking is a finding that there was a "course of conduct." While the jury must be unanimous in its finding that there was a "course of conduct" as defined in the statute, along with the other elements of the offense, the jury need not unanimously agree which predicate acts constituted the course of conduct.¹⁰ It may be worthwhile to provide a proposed jury instruction to that effect, which

¹⁰ *See, e.g.*, *State v. Elliott*, 987 A.2d 513, 520-21 (Me. 2010) and cases cited therein; *United States v. Ackell*, 907 F.3d 67, 78-80 (1st Cir. 2018).

might appropriately be given at the same time the jury is instructed on the general requirement of unanimity in its verdict. An AEquitas Attorney Advisor can provide further assistance on issues related to jury instructions.

Begin to think about which, if any, lesser-included offenses should or might be charged to the jury. In stalking cases, for example, there may be a lower-graded stalking offense with fewer elements; in some jurisdictions, harassment may be a lesser-included offense, differing from stalking only by the number of acts or the level of fear required for conviction. Such charges should generally be given, even over defense objection, when the evidence could rationally allow the jury to find the defendant not guilty of the greater offense but guilty of the lesser offense. In some jurisdictions, the defendant (but not the prosecution) may request a jury charge on a “lesser related” offense, *i.e.*, one in which the elements are not subsumed within the greater offense, but similar in kind. For example, a defendant charged with stalking might request a jury instruction on a lower-graded “cyberharassment” offense having additional elements involving the use of technology. In some cases, the sufficiency of evidence supporting a jury finding on the elements of any lesser offenses may not be apparent until the end of the trial. It may be helpful to raise these issues during the final pretrial conference, however; if the court rules that specific lesser (included or related) offenses will be charged, you may want to address them in your opening or summation, emphasizing the evidence supporting conviction of the greater stalking offense.

Preparing the victim to testify

Witness preparation will be easier if you have maintained contact with the victim throughout the pretrial period, so you are not surprised by new developments and can focus on discussing the victim’s trial testimony. Apart from normal nervousness about the prospect of testifying in court, stalking victims may be particularly concerned about remembering dates and other important details of numerous events spanning a lengthy period of time. Strategize about how best to refresh the victim’s recollection when needed. One possibility would be to prepare an outline based on the statements, reports, and other evidence already provided in discovery. Such an outline would have to be provided to the defense prior to trial and marked for identification but could provide a convenient way to quickly refresh the victim’s recollection. Be sure to prepare the victim to explain how the outline was created—that the two of you reviewed the evidence in the case together and that the outline represents, to the best of the victim’s ability, an accurate summary of the sequence of events. Of course, the victim can still expect to be cross-examined with the actual statements and other evidence in the case, and the outline itself would not be admitted into evidence. However, preparation of the outline might make the testimony on direct go more smoothly and relieve some of the victim’s anxiety about recalling the events. In addition, merely preparing the outline may sufficiently refresh the victim’s recollection such that the need to refer to the outline in court will be minimized.

Explain to the victim what your questions are intended to elicit. Understanding why certain questions are asked on direct will enhance the victim’s ability to provide a helpful response. For example, in answering questions about how a particular act or event made the victim feel, you want the victim to explain the emotional reaction in detail, not merely respond, “scared” or “angry.” Emphasize that you are not trying to suggest what the answer should be, but it is important that the victim describe the feelings in as much detail as possible. If there was fear of physical harm, the victim should be

prepared to explain why that was—the history of violence, the bizarre and disturbing nature of the defendant’s conduct, or the sheer relentlessness of the behavior, for example.

If the victim remained in contact with the defendant, or resumed a relationship with the defendant, explain that while you clearly understand why that seemed to be the reasonable thing to do, the jury may not. With careful preparation, the victim will not feel defensive about such questions on direct, but rather understand that the answers will help the jury comprehend what the victim was going through and why the victim took, or refrained from taking, certain actions.

In preparing the victim for cross-examination, share your thoughts about the probable defense strategy. If the defense has been claiming, for example, that the victim is “crazy” or “paranoid,” the goal on cross may be to goad the victim into anger or tears, which will make it particularly important for the victim to keep cool during cross-examination. If the strategy is to portray the victim as a bad parent who must be monitored for the protection of the children, discuss ways to respond to those questions, including areas of questioning you might want to pursue on re-direct to defuse such claims. Emphasize the need for the victim to be completely truthful rather than defend against implied accusations and assure the victim that you will make any necessary clarifications on re-direct.

Trying the Stalking Case

Theme and theory of the case

As in every criminal case that goes to trial, it is important to develop a compelling theme and a coherent theory of the case.

The theory of the case explains what happened, as well as how and why it happened. Supported by the evidence, a good theory of the case provides a framework for the jury to take with them to the deliberation room. A sound theory should account for almost all of the evidence presented and minimize loose ends that do not seem to fit. The theory represents the explanation for what happened that you will argue in summation. It should permit the jury to connect the dots represented by discrete pieces of evidence, which should fit together in a way that satisfies the human urge to understand facts and behavior. In a stalking case, the jury should understand what the defendant was trying to accomplish, the extremes to which the defendant was willing to go to obtain it, and the defendant’s willingness to inflict harm on the victim—and, perhaps, on others—in order to get it. Motive is important—was the defendant out for revenge? Why? Was the defendant trying to coerce the victim into a relationship? From leaving a relationship? Moreover, the jury must understand what the defendant did—how the defendant was able to figure out where the victim would be, or to send spoofed emails, or to cause strangers to approach the victim for sex. The theory should also explain the victim’s reaction to the stalking—the history that caused the victim to be afraid or the unnerving sense of being constantly under surveillance by someone who wishes you harm. Finally, the theory of the case should explain how the defendant intended, or knew, that the stalking behavior would have that impact on the victim.

The theme of the case, on the other hand, is more of a rhetorical device—a touchstone that can be used during *voir dire*, opening statement, trial testimony, and summation to remind the jury what the case is “about.” If there are words that a defendant used in the course of stalking the victim (“If I can’t have you, nobody will;” “I’m going to make you regret the day you walked away”), those words can

make a compelling theme when repeated throughout the trial. If the victim used a poignant phrase to describe how she felt during the stalking (“No matter what I did, he was always there;” “All I wanted was to have my life back”), that could be the theme. Or you can create your own: “Her life became a prison;” “He made it his mission to destroy her.” The theme should convey why the jury should care about the case—what happened to the victim and the defendant’s malevolence in perpetrating the harm. Once you have chosen a theme, return to it throughout the trial, particularly during the opening and summation.

Jury selection/voir dire

The first goal of *voir dire* is to identify jurors with attitudes or experience that indicate they are likely to be biased or unwilling to follow the law. Secondly, *voir dire* offers the opportunity to educate the jury about your case and for the members of the panel to educate each other. Remember to ensure that any potentially embarrassing or traumatizing questions can be answered at sidebar.

Begin by defining what you mean by “stalking” as you ask the questions. For purposes of exploring juror attitudes and experience, you can briefly summarize your statutory definition. For example, you might preface the questions by stating something like this: “This case is about stalking, which has a specific legal definition in our state. The judge will explain the law to you in detail at the conclusion of the trial, just before you begin your deliberations. But for purposes of our discussion here, when I use the term ‘stalking,’ I am referring to situations where someone engages in a course of conduct or repeated acts, directed toward another person, that makes that other person feel fearful for the safety of themselves or a family member or that causes that other person serious emotional distress. When we talk about stalking in this case, we are not talking about following someone’s public or willingly-shared social media presence or about behavior that is merely annoying. The word ‘stalking’ gets used a lot in casual ways, but here we are talking about behavior that constitutes a crime because of the serious impact it has on the victim.”

Ask questions probing juror attitudes about the specific types of conduct at issue in your case. For example, if the case involves intrusion into the victim’s devices or online accounts, you can ask whether there are circumstances in which it would be acceptable for one partner or former partner to secretly monitor the other’s online activity, emails, or phone calls. Some jurors may feel such conduct is acceptable if a partner is suspected of infidelity or drug use, or if there is concern about the safety of children in common. Ask whether such circumstances would justify the conduct. If the “justification” is likely to be at issue in your case—particularly if the juror’s responses suggests an unwillingness to follow the law as given to them at the conclusion of the case—the juror should be stricken for cause or by peremptory challenge.

If technology is involved in your case, explore the jurors’ familiarity with technology—they need not be avid technology users, but ideally, they should have at least a passing familiarity with computers, mobile devices, email, text messaging, and social media, to the extent those kinds of technology will be at issue in the case.

Jurors should also be closely questioned about the existence of any firmly held beliefs based upon myths surrounding the criminal context in which the stalking took place: domestic violence, sexual violence, human trafficking, and the perpetrators or victims of such offenses. If you plan

to present expert testimony to explain victim behavior, jurors should indicate a willingness to set aside any previously held beliefs if the evidence shows that those beliefs are based upon incorrect assumptions.

A set of suggested *voir dire* questions specifically for stalking can be found in the Appendix; for questions related to co-occurring crimes or other special circumstances present in your case, contact an Attorney Advisor at AEquitas for further assistance.

Opening statement

The opening statement should tell the story of the events that you intend to prove at trial. Describe history of the relationship (if any) or how the victim and the defendant knew each other (if they did), the progression of the stalking behavior, the victim's reaction and response (including any efforts to thwart the stalking or discourage the stalker), and any investigative efforts to reveal the pattern of conduct and the defendant's responsibility for it. Emphasize the circumstances demonstrating the defendant's intent and awareness of the harm inflicted on the victim.

Address any apparent "weaknesses" in a straightforward and unapologetic way. Seemingly problematic facts can, in fact, present opportunities to re-create the reality of the crime for the jury by inviting jurors to more fully understand the events from the victim's perspective. For example, if the victim maintained contact with the defendant—not blocking social media posts, for instance, or continuing to pick up the phone despite knowing who was calling—because it felt safer to do so, explain that in your opening (provided, of course, that there will be evidence to support it). Prepare the jury to view the victim's actions and reactions as a product of the stalking behavior, rather than an indication that the stalking behavior was less than alarming. If you are certain you will be calling an expert to explain victim behavior, you can mention in your opening that you will be calling a witness who can help the jury understand why the victim behaved in a way that might seem to go against the jury's idea of common sense.

Introduce the theme of the case early in your opening and refer to it as often as you reasonably can. You will be repeating the refrain in your summation.

Trial testimony

How the evidence is presented at trial will depend, in part, on whether the stalking is the "primary" crime or whether it is related to a more serious co-occurring crime—a serious physical or sexual assault, homicide, or human trafficking.

When the stalking is a co-occurring crime, the evidence of stalking may be best presented as part of the context of the related criminal offense. That related offense may be more "dramatic" than the numerous instances of conduct that makes up the stalking, and the evidence more immediately compelling. The evidence of the related crime may thus conveniently set the stage for the stalking evidence by first focusing the jury's attention on the horrific outcome for the victim. This enables the jury to immediately see the stalking as a serious offense in its own right. Consider calling a first responder—a police officer or EMT—as your first witness, to describe the scene and the response,

before calling the victim to testify. The victim or other witnesses can then describe the stalking conduct in the context of the related crime.

When stalking is the primary criminal offense, it is generally best to call the victim as the first witness. Direct testimony should begin with a history of the relationship (if there is one), emphasizing any history of control, threats, and assault. Ask the victim to detail the stalking over time. Was there an event, such as a breakup or accusation of infidelity, that seemed to trigger it, or did it simply grow out of the abusive history of the relationship? Pose questions that will elicit the victim's emotional responses to the stalking, as well as any steps taken to stop it or to mitigate its effects. If the victim was forced to alter account information, daily routine, employment, place of residence, church membership, or other aspects of daily life, have the victim describe the burden of making such changes. If the defendant's actions were particularly frightening or upsetting because of past history or information that the defendant possesses about the victim—for example, making threats that play on a particular fear—have the victim explain those details, which will help to prove the defendant's knowledge and intent. Structure the direct examination in a manner that will allow the jury to understand the reality of the crime through the lens of the victim's experience. The goal is to make the jury understand the seriousness of the crime and its impact on the victim before delving into more technical details, such as tracing the source of emails or social media postings.

Expert testimony to explain victim behavior may be presented before or after the victim testifies, depending on the difficulty of the issue and the extent to which the victim is able to personally explain. Having the expert testify before the victim takes the stand might be advantageous in cases where the behavior may be especially difficult for the jury to understand, regardless of the victim's own testimony. In other cases, it may be more impactful for the victim to testify first and then have the expert explain that there are good reasons for the victim to have behaved in such a manner.

It may be desirable to present technical evidence in the middle of your case, since such evidence, important as it may be for purposes of proving the defendant's responsibility for the conduct, may not seem as compelling as the evidence emphasizing the interpersonal dynamics at work in the stalking case. It may also be important to elicit from your technical expert that, even where evidence definitively connecting the defendant to the email or post does not exist, the defendant's responsibility for the conduct cannot be excluded. The expert can explain what attempts were made to identify the source of the email or post and the reasons that would make it impossible to link the email to a specific individual (*e.g.*, use of spoofing techniques or a VPN [virtual private network] that does not maintain data sufficient to establish the source of the communication). Even when the use of such techniques or technologies cannot be established, it may be important to explain their existence and their utility in concealing the source of a communication. The defendant's responsibility for the communication can often be proved circumstantially, but presenting evidence of forensic efforts and available technology will help to satisfy jurors that a thorough investigation was conducted. In addition, explanations pointing to efforts to conceal the source of communications can be powerful evidence of consciousness of guilt—if there were nothing wrong with the communications, why would there be a need to conceal their source? And who, aside from the defendant, would be so determined to do so?

The remainder of the case may consist of evidence corroborating the testimony of the victim and any other witnesses, as well as evidence that closes any gaps. If possible, identify a witness whose

testimony can end your case on a strong note. This might be a person who can testify to the ongoing impact of the stalking on the victim. For example, a roommate might testify about the victim's continued vigilance about personal safety issues—installing extra locks, worrying about calls from unknown numbers, or isolating at home for fear of going out.

These are only suggestions; the facts of your case and the available evidence, as well as your personal style and the composition of the jury, may suggest another approach would be more effective. The goal is to ensure not only that sufficient evidence is presented to prove all the elements of the offense(s), but also that the jury understands the impact of the defendant's conduct on the victim's life.

Summation

Summation is where the sometimes-sprawling stalking case is pulled together. The jury has most likely heard evidence of numerous incidents and myriad details about those incidents. It is possible for a jury to come to the conclusion of the trial testimony feeling a bit overwhelmed by the range and scope of the evidence. A large part of your job in summation is to simplify this mass of evidence by explaining how it all fits together to demonstrate, finally, that the prosecution has proved beyond a reasonable doubt all of the elements of the crime.

Remind the jury that the evidence is to be considered as a whole—that each individual act and other facts alleged need not be proved beyond a reasonable doubt, so long as the jury is satisfied that all of the essential elements of the crime have been proved. You should also point out the ways in which evidence related to one act or incident might support, through corroboration or illumination, the facts and circumstances related to other acts. For example, if one or more acts clearly illustrate the defendant's intention to frighten or coerce the victim, it is reasonable to infer that other acts were committed for the same purpose. Likewise, proof of the defendant's responsibility for one or more acts of communication can support an inference that similar communications were also the work of the defendant.

Encourage the jury to view the pattern of behavior revealed by the evidence—a pattern that represents the defendant's relentless efforts to intrude on the victim's life, personal freedom, and peace of mind. Offenders often view their stalking as a kind of game—one that is intended to achieve a goal of some kind. It may be to exact revenge on the victim for a perceived wrong, to compel or coerce the victim to respond in a certain way, or simply to assert power and control over the victim. Point out the strategies and reveal the tactics the defendant used in furtherance of the motive, whatever it may be, and demonstrate how those strategies and tactics were intended to further the defendant's illicit goal.

Explain how the evidence proves the effect of the conduct on the victim. It is generally inappropriate to ask jurors to put themselves in the victim's shoes—such argument might be construed as an improper appeal to juror sympathy. You can, however, ask the jury to view the defendant's behavior through the lens of the victim's experience in light of the history of the relationship, the victim's personal knowledge and circumstances, and the unique dynamics at play in the course of the stalking. Emphasize the reasonableness of the victim's reaction and highlight the fact that that the reaction was a direct result of the defendant's behavior. Explain how efforts on the part of the victim to counter or to cope with the stalking (*e.g.*, changing routine or account information, obtaining a protection order, installing safety equipment) reveals the victim's fear and distress. Ask the jury to

recall the victim's emotional reactions when efforts to stop the defendant's behavior failed to have that effect.

If victim behavior is an issue (*e.g.*, maintaining contact with the defendant), point out the reasons for the behavior (whether explained by the victim or by an expert) and explain why the response was a reasonable one under the circumstances. Remember that everything argued in summation must be based on the evidence presented at trial or reasonable inferences that can be drawn from the evidence. Be careful not to inject into the argument your own knowledge about domestic violence or other areas of expertise—for example, that is not unusual for victims to recant or minimize or to return to the abuser; such statements are permissible in summation only if an expert has testified about those facts.

Remember to weave into your argument, at any appropriate points, the theme that you introduced in your opening statement. References to the theme can help tie the case together, enabling the jury to view the case as a cohesive whole—with all evidence pointing to the defendant's guilt.

Jury instructions and verdict sheet

Before the court issues the final charge to the jury, consider whether any of the evidence presented at trial suggests the need for any changes or additions to the previously-submitted proposed jury charges. These might include limiting instructions related to "other bad acts" evidence or a charge related to an unanticipated defense strategy. Be sure to review the entire charge the court intends to give. If your stalking statute is complex, be sure the charge omits instructions related to subsections that are not applicable to your case. Confusing jury instructions make the jury's job unnecessarily difficult and pose a risk not only to the correct verdict, but also to the conviction on appeal.

Consider whether to request jury instructions for lesser-included (or to oppose requests for lesser-related) offenses. If the evidence at trial would potentially permit a jury to find the defendant not guilty of a greater offense but guilty of a lesser-included offense, the charge should usually be given. Many jurisdictions require that such charges be given even over the objection of the defense (which might oppose the charge for strategic reasons, preferring an all-or-none verdict). Be sure you are familiar with what your law requires with respect to lesser-included offenses.

Carefully review the verdict sheet to ensure that the language accurately reflects the charges the jury must decide, and that the instructions on the form with regard to lesser-included offenses properly direct the jury to consider those offenses only in the appropriate circumstances (*i.e.*, only if the jury decides the defendant is not guilty of the greater offense).

Verdict

If the jury returns a guilty verdict, move to revoke bail if a sentence of imprisonment is likely to be imposed. If the defendant is acquitted, or if bail is continued pending sentence, request that the court order the defendant to remain in the courtroom until the victim has an opportunity to safely leave the courthouse. If there is risk of third-party intimidation or retaliation, ask the judge to order those in the gallery to remain in the courtroom briefly, as well. If the defendant remains free on bail, or if the defendant is likely to post bail, ask the court to remind the defendant that all bail conditions

remain in effect, including any no-contact conditions. An advocate or investigator should be available to escort the victim from the courthouse.

Regardless of the verdict, plan to spend some time with the victim after the trial to discuss the verdict. Explain what the verdict means, particularly if it is not obvious, as when the jury returns a guilty verdict on lesser-included offenses. It is important to reassure the victim that a verdict of “not guilty” does not mean that the jury disbelieved the testimony. Since a not-guilty verdict will most likely result in the automatic expiration of any criminal protection order, it is particularly important that a civil protection order, with appropriate conditions, remain in place. If the victim was relying on the criminal order, provide information and assistance in obtaining a civil order with appropriate conditions.

If the defendant was found guilty, explain to the victim what to expect at sentencing. The victim usually has the option of addressing the court in person at the time of sentencing, submitting a victim impact statement (including a request for restitution), or both. An advocate can help the victim prepare such a statement and assist in pulling together any necessary documentation to support a request for restitution. Restitution may include expenses the victim had to incur as a result of the stalking, such as installation of security equipment; cost of repair or replacement of property damaged or compromised by the defendant; medical/mental healthcare expenses; and any lost wages or childcare expenses related to attending meetings or court proceedings related to the prosecution. Remind the victim of the opportunity to request that the court impose any special conditions of post-conviction supervision, such as drug or alcohol evaluation (and treatment, if necessary), mental health evaluation/treatment, conditions of no contact with the victim or any specific members of the victim’s family or friends that may need protection, batterers’ intervention treatment, or other appropriate conditions. Explain what range of sentences is available to the court, in view of the defendant’s criminal history and the seriousness of the crime, so that the victim will have a realistic idea of what to expect at sentencing.

“Regardless of the verdict, plan to spend some time with the victim after the trial to discuss the verdict.”

Sentencing—And Beyond

Submit to the court a detailed sentencing memorandum in support of whatever sentence you want the court to impose. Be sure that the court has received any victim impact information that may have been submitted. If there is a dispute as to the appropriate amount of restitution, a hearing on that issue may be necessary. The victim generally has the right to address the court personally at the time of sentencing, if desired, even if a victim impact statement has been submitted.

If a probationary sentence is imposed, urge the court to impose appropriate conditions that will maximize the continued safety of the victim. Such conditions should include those barring direct or indirect contact with the victim and specific friends or family members; barring the defendant from certain locations frequented by the victim; maintaining a specific distance from the victim’s home, workplace, or school (enforced with electronic monitoring, if available); and prohibitions on the possession of firearms, ammunition, and firearms permits. In addition, conditions such as batterers’

treatment and substance abuse or mental health treatment may address factors contributing to the crime. In cases where the defendant used technology to stalk, restrictions on computer usage or online activity may be appropriate. Such restrictions should not be so broad as to restrict all ability of the defendant to conduct personal business online (*e.g.*, personal banking or employment-related activity), but should be tailored to the activity involved in the offense (*e.g.*, restrictions on social media activity or use of a virtual private network [VPN] when online).

Encourage the victim to maintain contact with an advocate for purposes of ongoing safety-planning. Be sure the victim receives information about how to contact probation in the event of further contact by the defendant or, in the case of a defendant's sentence to jail or prison, how to ensure they receive notification about the defendant's parole hearings, release date, and parole plan. Ask the victim to keep your office advised about changes of address, as well, in the event you need to reach out with important information about the case, including the filing and result of any appeals. Take a few minutes to explain the appellate process—that appeals are typical rather than unusual, and that the victim will be notified during the appellate process.

CONCLUSION

Prosecution of stalking is a worthwhile endeavor. The advantages of presenting the jury with the most comprehensive picture of the defendant's campaign against the victim, along with enhancing victim safety and holding the defendant accountable for the full range of criminal conduct, outweigh the additional effort and resources these cases require. Stalkers are both persistent and dangerous—the effort involved in prosecution of stalking can be considered an investment in homicide prevention. Although every stalking case is unique, presenting different issues and challenges, each case prosecuted affords opportunities to refine strategies, skills, and trial tactics for future cases, as well as opportunities to educate the courts about the issues that commonly arise in stalking cases. And remember, you are not alone in your mission—assistance from experienced AEquitas Attorney Advisors is only a phone call or email away.

Voir Dire Questions for Stalking

Not all questions will be appropriate for every case. Many of these questions assume the victim is/was an intimate partner and address situations where the stalking is related to intimate partner violence. Choose appropriate questions, or use these as starting suggestions to think about unique issues that may be present in your case and draft questions based on type of case the jury will hear. When the stalking has arisen in the context of other criminal activity, such as domestic violence or human trafficking, remember also to ask questions to reveal juror knowledge about, experience with, and attitudes toward, such crimes.

The first goal of *voir dire* is to identify jurors with attitudes or experience that indicate they are likely to be biased or unwilling to follow the law. Secondly, *voir dire* offers the opportunity to educate the jury about your case, and for the members of the panel to educate each other in the course of their responses.

Begin by defining what you mean by “stalking” in these questions. For purposes of exploring juror attitudes and experience, you can briefly summarize your statutory definition. For example, you might preface the questions by stating something like this: “This case is about stalking, which has a specific legal definition in our state. The judge will explain the law to you in detail at the conclusion of the trial, just before you begin your deliberations. But for purposes of our discussion here, when I use the term ‘stalking,’ I am referring to situations where someone engages in a course of conduct or repeated acts, directed toward another person, that makes that other person feel fearful for the safety of themselves or a family member or that causes that other person serious emotional distress. When we talk about stalking in this case we are not talking about following someone’s public or willingly-shared social media presence or about behavior that is merely annoying. The word ‘stalking’ gets used a lot in casual ways, but here we are talking about behavior that constitutes a crime because of the serious impact it has on the victim.”

Allow the members of the panel to educate each other based on their personal knowledge and experience, but ensure that any potentially embarrassing or traumatizing questions can be answered at sidebar.

- Based on the definition of stalking I just gave, would a stalker have to be someone the victim does not know?
 - Could a person be stalked by someone close to them?
 - Can you explain that?
 - Could a person be stalked by someone with whom they are or were in a relationship?
- Has anyone here ever been in a situation where you felt stalked—when someone else did repeated things that made you fear for the safety of yourself or your family, or caused serious emotional distress?
 - Can you describe what happened?

- What was it about the other person's actions that made you feel unsafe or distressed? (If not volunteered, ask about the relationship between the juror and the stalker)
 - Did you ask the other person to stop?
 - If not, what was the reason you did not?
 - If you asked the other person to stop, did they?
 - If not, how did that make you feel?
 - Did the other person's behavior get better or worse over time?
 - Did you ever contact the police about it?
 - If not, what were the reasons you decided not to?
 - If so, what was the outcome?
 - Did you feel that the police and the legal system were responsive?
 - Did you ever try to obtain a court order to prevent the person from contacting or stalking you?
 - If not, were there reasons you decided not to? What were they?
 - If so, was the order granted?
 - If so, did the person abide by the order?
 - If not, was the person charged with violating the order?
 - If so, what happened?
 - Did you talk to anyone else about the stalking, like a friend or family member, or a professional such as a doctor, lawyer, therapist, or advocate?
 - If so, what was their reaction?
 - Did it help?
 - Did you change anything in your life due to the stalking, such as change your phone number, your email account, your routine, or anything else?
 - If so, did that help?
 - Did the stalking finally end?
 - If so, how?
 - If not, how are you currently dealing with the stalking?
- Has anyone here ever had a friend or family member who was stalked as we just discussed?
 - Can you describe what happened?
 - What was that person's reaction to being stalked?
 - Do you know how that person dealt with the stalking?
 - Do you know whether that person ever contacted the police, or got a no-contact order preventing the stalker from contacting or stalking them?
 - If so, what was the outcome?
 - Did that person feel the stalking was handled fairly by the police and the legal system?
 - What do you think about how it was handled by the legal system?
 - Has anyone here ever been charged with, or accused—even informally, though not as a joke—of stalking or harassing someone else?
 - What were the circumstances?
 - Were you criminally charged—either with stalking or with some other offense related

- to stalking (such as harassment or making threats)?
 - If so, what was the outcome?
 - Was there a no-contact order entered prohibiting you from stalking or contacting the other person?
 - If so, were you ever charged with violating the order?
 - If so, what happened?
 - Is that order still in effect?
- Has anyone here ever had a family member or close friend criminally charged with stalking or harassment, or who has been subject to a no-contact order based on stalking or harassment of someone else?
 - If so, what was the outcome?
 - Do you feel the proceedings were fair?
- Does anyone here believe that most stalking is innocent conduct that is misunderstood?
 - Can you explain why?
 - Does anyone here disagree with that?
 - Can you explain why?
- Does anyone here believe that most people who say they are being stalked are overly-sensitive or being paranoid?
 - Can you explain why?
 - Does anyone here disagree with that?
 - Can you explain why?
- Are there situations where an action or remark that doesn't appear to be threatening on the surface might become frightening or seriously upsetting in light of other circumstances?
 - Can you think of some examples?
 - Might a history of violence or abuse make other conduct threatening?
 - Might conduct become alarming as a result of sheer repetition?
 - Might conduct become frightening because the other person won't stop, in spite of being told to do so?
 - Might conduct seem threatening because it indicates someone has gone to great lengths to obtain personal or private information about someone else?
- Can anyone think of reasons a victim of stalking might decide against reporting the stalking to the police or seeking a no-contact order?
 - What are some possible reasons? [If none suggested, ask what they think about possible reasons relevant to your case: *e.g.*, whether the victim might fear making the stalker angry, causing the behavior to escalate; whether the victim might feel safer knowing what the stalker is doing instead of being in the dark about it; whether the victim might be reluctant to show the stalker that the behavior is "getting to them."]

[Ask questions probing juror attitudes about the specific types of conduct at issue in your case. For

example, if the case involves intrusion into the victim’s devices or online accounts, you can ask whether there are circumstances in which it would be acceptable for one partner or former partner to secretly monitor the other’s online activity, emails, or phone calls. Some jurors may feel such conduct is acceptable if the victim is suspected of infidelity or drug use, or if there is concern about the safety of children in common. Ask whether such circumstances would justify the conduct. If the “justification” is likely to be at issue in your case—particularly if the juror’s responses suggests an unwillingness to follow the law as given to them at the conclusion of the case—the juror should be stricken for cause or by peremptory challenge.]

[If technology is involved in your case, explore the jurors’ familiarity with technology—they need not be avid technology users but, ideally, they should have at least a passing familiarity with computers, mobile devices, email, text messaging, and social media, to the extent those kinds of technology will be at issue in the case.]

- How many of you use computers or mobile devices (like smartphones or tablets) to go online?
 - How many of you use email, either at work or at home?
 - How many of you use text messaging?
 - How many of you have used social media, like Facebook or Twitter?
 - Tell us about the ones you use the most, and what you use them for.
 - Is there anyone here who is uncomfortable using computers or other devices to communicate, or finds them too complicated to bother with?
- Is there anyone here who thinks that stalking should not be a crime?
 - As I mentioned previously, the judge will instruct you on the law at the conclusion of the trial, before you begin your deliberations. It will be your job to apply that law to the facts of the case as you find them to be, after hearing all the evidence and deciding what actually occurred, and determine whether the defendant is guilty or not guilty of the crime of stalking as it is defined in our jurisdiction. Is there anyone here who would find it difficult to follow the law if you disagree with it?

[Briefly summarize the facts in your case—for example, that the allegations are that the victim and the defendant briefly dated but then broke up. The defendant decided he wanted to get back together and he began calling, texting, and emailing the victim—sometimes dozens of times in one day. Many of these communications were abusive, calling her names and telling her that if he couldn’t have her, no one could. The victim finally called the police, who met with the defendant and told him to stop and to leave her alone. He promised he would, but she soon began getting hang-up calls from unknown numbers, along with texts and emails that contained the same kinds of language and threats that the defendant had sent before. She called the police one night because he was parked outside her house, but he was gone by the time the police got there. The next day she received an anonymous text, telling her that the next time she called the police would be her last.]

- Is there anyone here who believes, for *any* reason, that you cannot be fair and impartial in this case?