RESPONDING TO STALKING

A GUIDE FOR PROSECUTORS

Stalking resource center

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The **Stalking Resource Center,** a program of the National Center for Victims of Crime, works to enhance the ability of professionals, organizations, and systems to effectively respond to stalking. The Stalking Resource Center envisions a future in which the criminal justice system and its many allied community partners will have the best tools to effectively collaborate and respond to stalking, improve victim safety and well-being, and hold offenders accountable. For more information, visit *www.VictimsofCrime.org/src.*

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Since its inception in 1995, the **Office on Violence Against Women** of the U.S. Department of Justice has handled the Department's legal and policy issues regarding violence against women, coordinated Departmental efforts, provided national and international leadership, received international visitors interested in learning about the federal government's role in addressing violence against women, and responded to requests for information regarding violence against women. For more information, visit *www.ovw.usdoj.gov.*

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Responding to Stalking: A GUIDE FOR PROSECUTORS

Introduction

Stalking is a crime under Federal law and the laws of all 50 states, the District of Columbia, the U.S. Territories, and many Tribal codes. It is a crime that affects 7.5 million people in the United States a year, with 15 percent of women and 6 percent of men being stalked in their lifetime.[1] Stalking is unlike most other crimes in two important ways. First, it entails repeat victimization. It is, by its nature, a series of acts rather than one single incident. Second, the victim's state of mind is an element of the crime. In other words, did it cause the victim (or, under some statutes, would it cause a reasonable person) to feel fear or substantial emotional distress?

Despite the prevalence of stalking, it is a crime that is seldom charged or prosecuted. Seventy-two percent of stalking victims report that charges were not filed in their cases after reporting to law enforcement.[2] In cases where police have all the information they need to charge stalking, stalking is only charged 5 to 16 percent of the time.[3] One of the reasons for the low charging and prosecution rates is that stalking is seen as a difficult crime to prove. Many of the acts that make up the crime of stalking may not be criminal in and of themselves and are, therefore, not obvious. Because of this seeming ambiguity, stalking is often misunderstood, minimized, or missed entirely by law enforcement, prosecutors, and even the victims themselves. However, it is one of the few crimes for which timely prosecution can save lives.

> Since the first stalking law was enacted in California in 1990, stalking statutes have evolved to meet our growing understanding of this crime. In 2007, the Stalking Resource Center published *The Model Stalking Code Revisited: Responding to the New Realities of Stalking* as a resource to states and territories that are working to strengthen their stalking laws. To read more, please visit www.VictimsofCrime.org/ModelStalkingCode.

This guide is intended as a resource for prosecutors in stalking cases. It provides an overview of what stalking is and the best practices for prosecuting offenders. It should not be taken as legal advice but instead used as a guide for attorneys to support their own research and for problem-solving in prosecuting these types of cases.

Defining Stalking

Stalking Behaviors

Stalking is a unique crime in that it involves a course of conduct rather than a single incident. Therefore, context is absolutely critical when identifying stalking behaviors. Many stalking behaviors appear innocuous and may even be legal in a different context. For example, it typically is not illegal to call or text someone. However, when done repeatedly, under circumstances that instill fear or distress in the victim, then the conduct may constitute the crime of stalking.

1 Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011," *Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report* 63, No. 8 (2014): 7.

2 Katrina Baum et al., "Stalking Victimization in the United States," (Washington, DC: Bureau of Justice Statistics, 2009).

3 Andrew Klein et al., "A Statewide Study of Stalking and Its Criminal Justice Response," (Advocates for Human Potential, Inc., 2009).

The most commonly reported stalking behaviors include:

- Approaching the victim or showing up in places (e.g., home, school, or workplace) in which the victim didn't want them to be
- Making unwanted telephone calls, including hang-ups
- Leaving unwanted text or voice messages
- Watching or following the victim from a distance, or spying on the victim with a listening device, camera, or global positioning system (GPS)
- Sending the victim unwanted emails, instant messages, or messages through social media websites
- Leaving strange or threatening items for victim to find
- Leaving the victim cards, letters, flowers, or presents, despite knowing they were unwanted
- Scaring the victim by sneaking into the victim's car or home and then doing something that would alert her or him to the trespassing.[4]

Stalkers frequently use technology when commiting these actions. Most often that technology is legal to obtain and has legitimate purposes but is being misused by the stalker. The stalker may also engage in outright illegal behavior such as vandalizing the victim's property, stealing items from the victim, or violating an order of protection. But, because many behaviors will seem benign or trivial on the surface, it is imperative that you put them in context from the victim's perspective to identify them as stalking.

Stalkers can be relentless in pursuing their victims. One study found that 78 percent of stalkers use more than one means of approach when stalking a victim.[5] For example, a stalker may use social networking sites along with making phone calls to contact the victim. If these tactics do not obtain the desired reaction, the stalker may take more invasive steps, such as putting a global positioning system (GPS) device on or in the victim's car. Stalkers are also manipulative; many will use a third party or proxy to stalk for or with them. Fifty to 60 percent of intimate-partner stalking victims say that others were involved in the stalking.[6] Stalkers will often use children from the relationship to control or spy on the victim, or will use the legal system to harass the victim or cause economic hardship. Stalkers also have a high recidivism rate. One study found that recidivism occurred in 60 percent of stalking cases and that the new offense occurred anywhere from one day to six years after some type of criminal justice intervention.[7] Recognition that most stalkers will reoffend should guide you in determining the type of sentence you are willing to accept as part of a plea agreement.[8]

Intersection of Stalking with Other Crimes

The research is clear that stalking intersects with other crimes. A study by the Bureau of Justice Statistics found that among stalking cases, 24 percent involve damage to property, 21 percent involve a direct attack on the victim, and 15 percent involve an attack on another person close to the victim or on a pet.[9] The study also found a correlation between stalking and economic crimes, such as identity theft, with 52 percent of stalking cases involving the stalker taking money from the victim's bank accounts, 54 percent involving the stalker's opening or

4. Matthew J. Breiding, "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization."

5. Kris Mohandie et al., "The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of American Stalkers," *Journal of Forensic Science* 51, No. 1, (2006): 150.

6. T.K. Logan, "Research on Partner Stalking: Putting the Pieces Together," (Lexington, KY: University of Kentucky, Department of Behavioral Science & Center on Drug and Alcohol Research, 2010), 5.

7. Kris Mohandie, "The RECON Typology of Stalking."

8. The stalker may also direct stalking behaviors at people who are close to the victim, such as a new intimate partner. Consider filing separate charges for each additional stalking victim.

9. Katrina Baum, "Stalking Victimization in the United States."

closing bank accounts in the victim's name, and 30 percent involving unauthorized charges to the victim's credit card.[10]

CRIMES THAT MAY INTERSECT STALKING

- Assault
- Burglary
- Child abuse
- Domestic violence
- Harassment
- Hate crimes
- Home invasion
- Identity theft
- Kidnapping
- Murder
- Sexual assault
- Theft
- Threats
- Trespass
- Utility theft
- Vandalism
- Violations of protective orders
- Wiretapping

Intersection of Stalking and Domestic Violence

The majority of stalking victims know the offender in some capacity. The National Intimate Partner and Sexual Violence Survey found that 61 percent of female sexual violence victims and 44 percent of male sexual violence victims are stalked by a current or former intimate partner.[11] Therefore, it is unsurprising that stalking intersects with domestic violence.

One study found that 81 percent of victims who were stalked by a current or former intimate partner had been physically assaulted by that partner.[12] It is important to recognize that the majority of intimate partner stalking victims (57 percent) report that the stalking behaviors began *before* the relationship ended.[13] Abusers and batterers will often engage in stalking as a means to maintain or regain power and control over a victim. While the stalking behavior is part of the pattern of domestic violence (e.g., checking the victim's cell-phone call logs, reading the victim's emails, or driving by a location to confirm that the victim is there), it is critical to name these behaviors as stalking. The research is clear: when physical abuse and stalking co-occur, the victim is at greater risk of violence and homicide.

Research shows that, of the women murdered by a current or former intimate partner, 76 percent experienced at least one stalking episode in the 12 months prior to the murder.[14] But of the 67 percent of women murdered who had experienced physical abuse prior to the murder, nearly 90 percent had also been stalked.[15] Ensure that you read everything—the police reports, supplemental reports, criminal complaints, charging documents—with a keen eye for both physical abuse and stalking behaviors.

Intersection of Stalking and Sexual Assault

Stalking and sexual assault intersect in a number of ways. Research shows that two percent of stalking victims were raped or sexually assaulted by the stalker.[16] Among women who had been stalked by an intimate partner, 31 percent had also been sexually assaulted by that partner.[17] Additionally, a stalker might make threats to sexually assault the victim or attempt to get someone else to sexually assault the victim. An increasingly common tactic of stalkers is to create a website that appears

PRACTICE TIP: Work collaboratively with officers investigating domestic violence, sexual assault, criminal damage to property, and other crimes to determine whether stalking behaviors are also involved.

10 Ibid.

11 Matthew J. Breiding, "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization."

12 Patricia Tjaden and Nancy Thoennes, "Stalking in America: Findings from the National Violence Against Women Survey," *National Institute for Justice Centers for Disease Control Research in Brief* (1998): 8.

13 Ibid.

14 McFarlane et al., "Stalking and Intimate Partner Femicide," *Homicide Studies* 3, No. 4 (1999): 308.

15 Ibid., 309.

16 Katrina Baum, "Stalking Victimization in the United States."

17 Patricia Tjaden and Nancy Thoennes, "Stalking in America: Findings from the National Violence Against Women Survey," 8.

to belong to the victim that includes the victim's contact information and encourages people to approach the victim for some type of sexual encounter.

Strategic Value of Charging Stalking

If you are working a case that is not charged as stalking and you recognize any of the stalking behaviors described above, consider amending the charging document to include a count for stalking. First, charging stalking may lead to enhanced penalties, greater plea-bargaining options, and increased sentencing options. A conviction for stalking also can be important for future cases should the stalking behavior continue. In many jurisdictions, second or subsequent offenses of stalking incur enhanced penalties.

Second, there are benefits to charging stalking even when you are dealing with a more serious crime such as homicide or sexual assault. By charging stalking you can present additional evidence typically prohibited by Federal Rule of Evidence 404(b) (Character Evidence, Crimes or Other Acts).[18] Because you have to a prove a course of conduct or pattern of behavior as an element of stalking, you are allowed to recreate that timeline, going as far back as necessary to bring in all of the behaviors. For the most part, if you are dealing with an incident-based crime such as battery, robbery, or sexual assault, the rules of evidence do not allow you to introduce evidence of other crimes to show conformity. However, since those other crimes are part of the course of conduct you must prove in a stalking case, you will be able to admit that evidence without justifying its admission under Rule 404(b).

PRACTICE TIP: When reading through reports and criminal complaints, be alert for stalking behaviors even if stalking was not the basis for the initial police response or the victim did not identify the conduct as stalking. Amend or add the charge of stalking as appropriate.

Finally, we know that when stalking occurs with other criminal behavior such as physical abuse, that victim is at higher risk of further violence and homicide. By charging stalking now, you may stop the stalking behavior and prevent more serious harm to the victim.

There are times, however, when a stalking charge may be less advantageous to your case or to the victim. Sometimes you will not have sufficient or strong enough evidence. If the victim is not in imminent danger and is comfortable with delaying charges, you may want to continue documenting and collecting the stalking evidence in order to charge stalking at a later time. A more expedient charge, such as violation of a protection order, may adequately protect the victim by mandating immediate arrest. There are also instances where the victim's safety and offender accountability are competing interests. For instance, if the victim has relocated, is safer, and does not want to risk the offender finding her or him, it may be in the victim's best interest *not* to prosecute the case.

Elements of a Stalking Statute

What You Need to Prove

Every jurisdiction has its own stalking statute, and each one is different. Analyzing your specific state statute will help you determine the elements you will need to prove. And, in turn, the particular elements will dictate the kind of evidence you must gather. Being thoroughly familiar with the statute's provisions will help you work more effectively with law enforcement in investigating and prosecuting this crime. Familiarity will also help when you work with victim advocates or service pro-

[18] State rules of evidence vary but most are modeled after the Federal Rules of Evidence. This recommendation is based primarily on the Federal Rules of Evidence.

viders, who can better inform victims of how to more effectively document stalking behaviors and preserve evidence. Being aware of the specific elements is crucial not only for meeting your burden of proof but also for explaining to a victim why a case will not be moving forward or why a case was dismissed by the judge.

That said, every stalking statute has four basic elements: intent, course of conduct, standard and level of fear, and threat.

Intent

Laws, including stalking laws, fall into two types of intent categories—general and specific. General intent laws do not require that the stalker actually intend the *consequences* of his or her actions (i.e., that the victim became fearful). Instead, general intent laws require proof that the offender intended the actions performed. In a stalking case the proof may be that the stalker intended to text-message the victim or that the stalker intended to monitor the victim via GPS. Under a general intent statute you do not have to prove the stalker intended to scare the victim by doing these acts. A general intent stalking statute might read:

> *A person is guilty of stalking when the person knowingly engages in a course of conduct directed at a specific person and that conduct would cause a reasonable person to:*
>
> *(1) Fear physical injury to himself or herself or that of another person; or*
>
> *(2) Suffer other significant mental anguish or distress that may, but does not necessarily, require medical or other professional treatment or counseling.*[19]

Since general intent laws do not require the state to prove the stalker's intent to cause the victim fear or distress, these types of laws are typically easier to prove than specific intent laws. In the example above, the state need only prove that the offender had intent to carry out the behaviors and need not prove an intent to cause fear or distress.

A specific intent law requires the state to prove that the stalker actually intended the consequences of the actions. In other words, the stalker intended to cause the victim to feel fear. A specific intent statute might define stalking as:

> *[K]nowingly pursuing a pattern of conduct, without lawful authority, directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual.*[20]

A specific intent statute puts the burden on the state to produce evidence of the stalker's intent to cause a reaction in the victim. In other words, did the stalker intend to cause fear when engaging in the behaviors? While intent can be difficult to prove, there are several strategies you can employ. One way to prove that the offender had knowledge of the consequences of his or her behavior is to present evidence that the victim has an order of protection or no-contact order in place, which clearly puts the offender on notice that any contact will cause the victim distress. You can also show intent by presenting evidence of how the victim's behavior has changed during this time, along with evidence that the offender was aware of these changes in behavior. For example, if the victim changed her or his phone number and the defendant managed to obtain it and contact the victim at the new number, the offender clearly knows that the number was changed—most likely due to the defendant's incessant phone calls or text messages. It may also be that someone—the victim or a family member or friend—has already communicated to the offender that the victim is fearful.

19 11 Del. C. § 1312 (2008).

20 N.M. Stat. Ann. § 30-3A-3 (2009).

Another option is to have law enforcement warn the stalker to stop the behavior and explain how the behavior is causing the victim fear. This notification ensures that the offender knows any future behavior will also cause the victim fear or distress. Criminal or civil justice system intervention, however, may escalate the offender's behavior and put the victim at greater risk of harm. Similarly, if the victim makes any contact with the stalker, it can reinforce the stalker's behavior. Therefore, all of the above suggestions should be evaluated on a case-by-case basis.

Course of Conduct/Pattern of Behavior

The premise of every stalking case is a *course of conduct* or *pattern of behavior* perpetrated by the offender—usually defined as more than one act or incident. However, it is imperative to examine the requirements of your state statute and any relevant case law. Some states will impose minimum or maximum time limits on the course-of-conduct behavior or require a continuity of purpose in the stalking behavior. Some states require that the incidents occur within a certain proximity to each other—for example, that they be separated by no more than five years.[21]

As described above, the most common stalking behaviors include making unwanted phone calls and messages, following or spying, sending unwanted letters and emails, showing up at places where the victim is, waiting for the victim (e.g., outside the victim's workplace), and leaving unwanted gifts or other items. Offenders may use a wide variety of technologies to facilitate stalking, including cell phones (calls, texts, location-based apps), email, global positioning systems (GPS), spyware, and social media. Because most stalking cases will involve some form of technology, you should determine how your statute addresses the use of technology to stalk. Does technology-based tracking or monitoring fall under your stalking statute, or does your jurisdiction have a separate and distinct "cyber-stalking" statute? If your statute includes "following" as a prohibited behavior, would the use of GPS meet the definition?

PRACTICE TIP: Remember that course-of-conduct crimes may include both individually legal (e.g., texting) and illegal (e.g., criminal damage to property) behaviors.

Stalkers may make explicit or implicit threats of harm or violence toward the victim or others, such as the victim's family members, friends, or pets. The stalker may threaten to make a false report to child protective services, claiming that the victim is a bad parent, or to make a false report to law enforcement about the victim. In some cases, the offender may follow through on these threats. These behaviors should all be considered as part of the course of conduct.

Stalkers often engage third parties to assist in the stalking (i.e., proxy stalking). The stalker may engage others to follow or harass the victim. They may attempt to obtain information about the victim from the victim's family members or friends. If there are children in common, the stalker may ask the children to provide information about the victim. The stalker may also reach out to the victim's friends, family, children, co-workers, or new intimate partner; however, the victim remains the true target of the stalking. By focusing on the larger context of these individual acts, the course of conduct and its ultimate goal will be evident.

[21] For example, the State of Minnesota requires that no more than five years pass between the acts that make up the pattern of behavior. Please see: *Minnesota vs. Kerry Leigh Kelly*, 2013 Minn. App. Unpub. LEXIS 420.

PRACTICE TIP: Read all statutory definitions carefully. Your statute might include definitions for such terms as:

- pattern of behavior
- course of conduct
- emotional distress
- mental distress
- electronic communication
- computer system
- electronic device
- following
- repeatedly
- third person
- family member
- immediate family
- reasonable person

Standard and Level of Fear

The crime of stalking is defined in part by a victim's reaction. While we may refer generally to the "fear element" in a stalking case, we actually are referencing two distinguishable, key points: the standard of fear and the level of fear.

Many statutes have incorporated the "reasonable person" standard. A reasonable-person standard of fear asks the question, "Would the perpetrator's conduct cause a *reasonable person* in similar circumstances as the victim to be afraid?" Some states, however, require proof of actual fear in the victim. An actual-fear standard asks the question, "Did the defendant's conduct actually cause this particular victim to feel afraid?" This standard creates a burden of proof that can only be satisfied by introducing evidence of the victim's fear. The victim's fear can be proved by the victim testifying to her or his level of fear or possibly through the victim's statements to family, friends, neighbors, police, and 911 operators.

Actual-fear statutes can be difficult to work with because in some cases stalking victims do not present as fearful. Instead, a victim might only report frustration, annoyance, or anger with respect to the defendant's behaviors. To demonstrate fear in these circumstances, examine what actions the victim has taken in response to the stalking. What lifestyle changes has the victim made to cope with the stalker's behavior? For example, has the victim changed phone numbers? Has the victim installed an alarm system in the home? Does the victim no longer go out alone at night? Asking these types of questions can reveal the victim's actual level of fear regardless of initial impressions.

Some statutes require proof of both a reasonable-person standard of fear and actual fear on the part of the victim. Under these statutes the state must show that a reasonable person in the victim's circumstances would have felt fear *and* that the victim did indeed feel fear.

Once you have identified your statute's standard of fear, you'll need to determine what level of fear you're required to prove. Some states require fear of bodily harm or death, while others require fear for the victim's safety or the safety of a third person. Fear of bodily harm or death is a high burden to meet, even if you are working with a reasonable-person standard. Examine the offender's behaviors to determine if an explicit or implicit threat of bodily harm or death has been made to the victim. Offenders will often broadcast what they plan to do before they do it. Other behaviors might indicate a greater probability of bodily harm, as in the case of harming a pet or gaining access to the victim's residence. Take into account a previous history of abuse by the offender against the victim as potential evidence that the victim was both intended to feel fear of bodily harm and actually experienced such fear. States that require proof of fear for the victim's safety or the safety of a third person or that the victim suffer emotional distress have lower thresholds of fear, which are more easily met. Determine what level of fear your statute requires.

Threat

Only one state still *requires* that a credible threat be made to the victim in order to charge simple stalking (though others include it as an aggravating factor). A "credible threat" means that the stalker has the means to carry out the threat at the time the threat is made. For

example, if the stalker threatens to kill the victim, the stalker must have, at that very moment, some means of carrying out that threat—whether a weapon of some type or sheer physical strength. Working with a credible-threat statute creates an additional burden for the prosecution: you must consider how the stalker would have carried out the threat and then produce evidence that the threat *could have* been carried out.

Working with Your Stalking Statute

Because every jurisdiction has a different stalking statute, no one guide can fit every case. Only by analyzing your statute can you determine whether your case satisfies all of its elements. Parsing those elements in writing—including any subsections—and comparing them with the facts of your case will help ensure you meet every requirement. Your ultimate task is to show the jury how these individual actions on the part of the defendant—some of which may not be criminal or even threatening on their face—would be threatening to this victim. Talk to your victim. Ask when the victim first became concerned, and why, and how the victim felt as the course of conduct progressed. Do not neglect the history of their relationship, which will put the conduct into context. This framework will help you prepare your case for trial.[22]

Educating Judges and Juries

Stalking has its own unique challenges for judges and juries that you must be aware of before going into the courtroom. The first, and arguably the biggest, challenge you will encounter is the "social normalization" of stalking. When we look at how society thinks about stalking, we find that this crime is not taken seriously—that it is frequently thought of as a joke, as an expression of romantic feeling, or as behavior that "everyone" engages in. This light-hearted view of a very serious crime can be seen in entertainment media (films, music, television shows), t-shirts and greeting cards, commercials, and the casual or colloquial use of the term in everyday conversation. People say things such as "I'm Facebook-stalking him/her," simply meaning that they follow someone's social networking site. We hear casual use of the term from our friends, family, and significant others. It's everywhere. Much of our society brushes off the notion of stalking as a simple misunderstanding of expressions of love. The social normalization of stalking in our society is so pervasive that getting a judge or a jury to take it for what it is—a serious and often lethal crime—can be a daunting task.

Another obstacle you may encounter is the admission and understanding of technology-based evidence. Because the majority of stalking cases involve some form of technology, you may need to educate the jury or even the judge on the technologies the defendant used to stalk the victim. This education might include information about both the existence of the technology and also how it works. Do not overestimate the level of technological understanding your judge or jury may possess: many commonplace forms of technology—social networking sites, for instance—may be unfamiliar or poorly understood.

Educating the judge begins before trial. The crime of stalking and the technology that often accompanies it may be issues of first impression for the court and therefore may seem especially complex to your judge. By filing pretrial motions, or motions in limine, you accomplish several things: (1) you educate the court about the crime, the technology, and related issues, (2) you are able to address your key points before you are in front of the jury, (3) you can determine in advance what facts, theory, and evidence will be admissible at trial, and (4) you can identify problems with your theory of the case and admissibility of your evidence in time to correct

22 Additional resources on state specific stalking law are available through the Stalking Resource Center at www.victimsofcrime.org/src/stalking-information.

them, if possible. Filing motions well in advance of trial will help guide how you prepare and present your case in court.

Educating the jury begins with voir dire. In planning for jury selection, you must first consult the jury instructions for your case. Knowing the precise elements you must prove, as well as what you do **not** have to prove, will help you craft your voir dire. The lanugage you use in your questions should mirror that of the jury instructions and should be used consistently throughout the trial. Doing so helps helps jurors make connections and transition to the jury room. It also enhances your credibility as an advocate when the judge repeats to the jury, in the formal jury instructions, the same principles to which you have alluded throughout the trial.

PRACTICE TIP: File motions *in limine* early to acquaint the judge with your evidence and obtain rulings ahead of time so you are not battling it out in front of the jury. This also helps identify potentially objectionable points in your case.

As you prepare your questions, consider what type of juror is the ideal juror for your case. Which type of juror would not be good for you? Identify issues in your case that might cause jurors to find reasonable doubt. For example, are there concerns about proving fear because of the victim's behavior? Sometimes a victim may maintain or initiate contact with the stalker; how will you address this? If the defendant used a variety of technologies, would you want a more tech-savvy panel? Being forthcoming during voir dire with the potential issues in your case will help you identify jurors you want and those you do not want, and will enhance your credibility with the jury by acknowledging any perceived "weaknesses" in your case.

Learn as much about your panel members as possible. Start a mini dialogue in the group by creating questions that elicit information. Use panel members' experiences to your advantage and to educate the other panel members. Highlighting how crime, particularly stalking, affected others can be effective. Negative comments from panel members can be helpful by allowing you to address their concerns head on and to identify others who agree or disagree. Seek commitments from the panel members who agree with you and use your preemptory strikes or challenges for cause for those who do not. Lastly, have questions relating to stalking already prepared and be ready to defend why you asked a particular question.

The examples listed below are only a starting a point. Not all of these questions will be appropriate for every stalking case. Be sure to ask questions relevant to your facts.

- What does it mean to stalk someone?
- What behaviors come to mind when you think of stalking?
- Do you think it is possible to stalk someone without physically following them?
- Do you think stalkers are typically strangers?
- Can someone be stalked by someone they know?
- Can stalking occur in the context of a relationship?
- Do you think stalkers are just misunderstood or just trying to convey their love?
- Might you see stalking in situations where there is also domestic violence?
- Has anyone here ever been a victim of stalking behavior? Did you report the behavior to police? If so, what came of it? If not, why not?
- Are there reasons why a stalking victim may not report to the police?

- If a victim is afraid of an offender, what behaviors might you see from the victim? Could there be reasons why a victim would not do those things?
- Has anyone here ever been accused of stalking? If so, what happened?

PRACTICE TIP: Know your local courtroom procedure and, more specifically, how the judge hearing your case conducts voir dire.

Evidence: How to Build Your Case

Obtaining and preserving evidence of stalking behaviors is critical to proving the pattern-of-behavior or course-of-conduct element. The majority of stalkers will use a variety of tactics to harass, monitor, and track victims, providing many forms of evidence that can make up your stalking case. Below we discuss what evidence of stalking you might find and how to work with law enforcement, victim advocates, and victims to preserve that evidence.

Evidence in a Stalking Case

Increasingly, technology is being used to pursue, spy on, and terrorize victims, yet most of the technology used has legitimate functions. Technology has become so pervasive, in fact, that we address it separately in this section. The following is a non-exhaustive list of forms of technology that you might see in your cases.

- Phone-based technology—calls, messages, texts (SMS), photos and video (MMS), location-based applications and services
- Cameras and listening devices
- GPS devices
- Computer-based technology—social networking sites, email and instant messages (IM), spyware
- Assistive technologies, such as telecomunication relay applications or services[23]

While technology has increased stalkers' access to victims, it has also provided evidence where none previously existed. For instance, if a stalker drives past a victim's home several times a day but claims to have been nowhere nearby, you may be able to use cell phone towers or location data on the stalker's cell phone to place the stalker in the victim's vicinity. The evidence you are looking for will vary from case to case. Work with law enforcement to obtain the evidence you need to present a strong case.[24]

Remember, too, that the rules of evidence apply with equal force to technological evidence. Be sure that your evidence is properly authenticated (which can sometimes be accomplished circumstantially), and that you can overcome any objections based on your state's hearsay rules or the Confrontation Clause.

Documentation and Preservation of Evidence

Unfortunately, the victim is often the person best positioned to document, collect, and preserve evidence. This burden can be onerous, particularly when the victim's initial response might be to delete whatever disturbing email or text message she or he just received. It is crucial to have a conversation with the victim about the value of contemporaneously documenting the stalking behaviors they are experiencing. One way to keep track of the stalking is by maintaining a Stalking Behavior and Incident Log or any tool (calendar, day planner, journal, app) to quickly record: the incident

23 To learn more about how technology is used to stalk and evidence considerations, take the online course at www.tech2stalk.org.

24 For additional information on digital evidence see *Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors*, (National Institute of Justice, NCJ 211314. January 2007, Special Report), available at https://www.ncjrs.gov/pdffiles1/nij/211314.pdf.

date, time, and location; a brief description of the incident; any witness information; whether police were called; whether a report was made; and the name of the responding officer.[25] A stalking incident log can be extremely helpful to a victim for several reasons: 1) it provides a dedicated place where the victim can describe the incidents and not worry about remembering every detail at a later point; 2) it provides context and history when shown to officers who respond to a call from the victim; 3) it can be used during trial to refresh the victim's memory; and 4) it helps the victim identify the course of conduct and may reveal an escalation in stalking behavior. The log can be eye-opening for a victim who may be questioning whether the behaviors actually constitute a crime. You will also want to work closely with law enforcement to collect and preserve the type of evidence you will need to build your case. This collaboration will lead to stronger, evidence-based prosecutions.

DOCUMENTATION vs INVESTIGATION

There is a difference between encouraging the victim to document stalking behavior and preserve evidence that comes into their possession and encouraging them to engage in their own investigation. Explain to the victim that law enforcement alone should be investigating the case and that it can be not only dangerous but even illegal for a victim to do certain things. For instance, victims may think they are helping the case by surreptitiously recording phone conversations with the stalker. However, if you are in a two-party consent state, it is illegal to record another party without that party's knowledge under the federal wiretap law. The last thing a stalking victim needs is to provide the stalker with a basis for filing a criminal charge against her or him.

Victim advocates can also play a large role in working with the victim to document and preserve evidence. While victim advocates should not collect any evidence themselves, they can walk a victim through the process of how to preserve it. Work with and communicate what you need to the victim service providers in your community. Creating this collaborative response goes a long way toward holding offenders accountable.

PRACTICE TIP: For a detailed analysis of how one court ruled on the objections regarding technology (relevance, overly prejudicial, BER, hearsay, authentication) please see: *Lorraine* v. *Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007).

How to Introduce Your Evidence in Court

Admitting evidence of the stalking behavior is paramount to proving your case, but the technology the stalker employs may seem confusing to introduce. Keep in mind that, despite the evolution of technology, the rules for admitting evidence remain the same. Whether you are admitting a text message or a hand written letter, the same rules of evidence apply.[26]

With that said, there are several typical objections to the evidence that you may want to anticipate from the defense. These objections include relevance, that the prejudicial effect outweighs the probative value, best evidence rule, hearsay, and lack of authentication. While you should be prepared to address each of these objections, this guide will only cover best evidence rule, hearsay, and lack of authenticity, as these can be particularly challenging to overcome in a stalking trial.

25. To download a copy of the Stalking Incident and Behavior log, visit www.victimsofcrime.org/docs/src/stalking-incident-log_pdf.pdf?sfvrsn=4.

26. To view case law related to technology evidence, please visit www.victimsofcrime.org/src/stalking-laws/stalking-case-summaries.

The best evidence rule is found in Federal Rules of Evidence (FRE) 1002 and states:

> *An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.*

What qualifies as an original? FRE 1001 states:

> *An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.*

There are also exceptions to the best evidence rule. FRE 1003 states:

> *A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.*

The exceptions for the best evidence listed in FRE 1004 include if the original evidence was lost or stolen, unobtainable, in the opponent's possession, or is not closely related to a controlling issue. Thus, when you are working with electronically stored data, a printout is considered an original. The same is true for a picture. No matter how many times these items are printed, they are considered originals for the purposes of the best evidence rule.

PRACTICE TIP: Remember to introduce evidence of the course of conduct/pattern of behavior not usually allowed under FRE 404(b).

Hearsay is frequently raised when a witness is retelling an incident that took place in the past. This rule of evidence is found in FRE 801(c) and states:

> *Hearsay means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.*

In a stalking case this definition might apply when a victim testifies to a statement by anyone other than the defendant. There are hearsay exceptions, however, so ensure whatever hearsay statement you are trying to introduce fits one of the exceptions. Most conversations between the defendant and victim will not be offered for their truth but rather to show that the defendant said or sent something to the victim and to describe its impact.

Finally, remember that even though the hearsay rule may not apply to statements you introduce, there may still be a Crawford issue as to whether the statements are testimonial or non-testimonial; the defendant's right to confront the witness who made the statement may come into play.[27] A more in-depth review of Crawford is provided in the section "Working with Victims."

Most of the physical evidence you try to introduce will require authentication. This rule of evidence is found in FRE 901. When you authenticate something you are providing context for why the item is what you claim it to be. For example, a witness can authenticate a text message from the defendant by testifying to facts or reasons why the witness believes it is from the defendant: e.g., the message uses her pet name or references a previous, private conversation. Authenticity does not have to be proved beyond a reasonable doubt. The standard is low and is one of likelihood. Note the difference between the admission of evidence and the weight to which a court or jury gives it. Each is distinct. The court may admit

[27] *Crawford v. Washington*, 541 U.S. 36 (2004)

certain evidence but also advise the jury that it is up to the jury to weigh it.

> **PRACTICE TIP:** There is a difference between computer-*stored* evidence and computer-*generated* evidence. Computer-stored evidence (e.g., document created by a person) raises both authentication and hearsay issues. On the other hand, much like information from an officer's radar gun or a breath alcohol machine, computer-generated evidence (such as an IP address in an email) only raises the issue of authentication, and not hearsay.

Anyone with knowledge of the evidence can authenticate it. Using our previous example, authentication for a text message can come from the sender, the receiver, or a third-party who saw the message. The form in which you enter the evidence is up to you. You may choose to print out screen shots of every text message or take a picture of each text message. Handwritten notes of the text messages are also admissible. Phone records can be authenticated by the owner or under the Business Records Exception. Regardless of what the evidence is, authenticating each piece is necessary. Do not assume that one authenticated text message means that the others have also been authenticated. This process can be long and time consuming over the course of a trial. Filing the motions in limine and obtaining advance rulings on this evidence will help cut down tremendously on trial time, which the jury will appreciate.[28]

[28] For additional assistance and resources for your case,please visit AEquitas: The Prosecutors' Resource on Violence Against Women at www.aequitasresource.org.

Trial: What to Anticipate

Preparing the Victim for Trial

Preparing the victim for what to anticipate during the trial is just as important as anticipating defense arguments. Plan to meet with the victim far enough in advance of the trial to discuss such things as how the proceedings will transpire, whether the victim needs an escort into the courthouse for protection, where the victim should park, and whether cell phones are allowed. Knowing what to expect will help reduce any anxiety the victim may be experiencing. You should also be prepared for the defendant or others in the court room to attempt to intimidate, threaten, or frighten the victim during the trial. These behaviors may be discreet or only having meaning to the defendant and the victim. For example, the defendant quietly may hum a song that has a specific, possibly threatening meaning to the victim but not to bystanders. Be aware of these types of behaviors and alert the judge and opposing counsel if you observe them or if the victim brings them to your attention.

Common Defense Arguments

It is helpful to anticipate common defense arguments in stalking cases. Common defenses in stalking cases include:

- **It wasn't me.**

  This defense will occur in situations where the defendant is claiming a mistake in identification by the victim. For instance, "the victim was mistaken when she thought she saw my car" or "when she thought she saw me in the store." Mistaken identity can also be used as a defense in instances where the technology used cannot be tied back to the defendant, for example, as with an email from a fake account or phone call from a shared telephone. Work with your investigators to gather evidence to support your case. 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.

- **I'm the one being stalked.**

  Stalkers are creative and resourceful. They may engage in behaviors that make it look like the victim is stalking them. For instance, stalkers might "spoof" calls or text messages to themselves to make it appear as thought the victim is the one calling or texting them. Work with your investigators to gather evidence to counter the offender's claims. Such conduct is, itself, part of the stalking course of conduct because the stalker is subjecting the victim to potential criminal liability. You might also consider an evidence-tampering charge for creating fabricated evidence.

- **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. This type of argument is frequently seen when the defendant's intent is at issue in a case. Pointing out that a reasonable person would react similarly to the victim will help construe that the defendant is trying to manipulate the system and the jury.

- **It was a coincidence.**

  This common defense argument occurs in cases in which the defendant 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 intent.

- **I was just concerned for my kids.**

  When children are involved it can be difficult to distinguish genuine concern for the children from tactics intended to gain access to the victim. Typically the underlying "concern" and number of times the behavior is repeated will demonstrate whether the welfare of the children is truly at issue. For example, if child protective services or the police investigate and confirm that the children are not at risk, the conduct should stop.

- **I'm being framed or set up.**

  The defendant may say that others—the victim, the victim's friends or family, or unknown enemies—are responsible for the acts, which they have committed for the purpose of "framing" him or her. While some acts potentially could have been committed by another person, others may clearly be attributable to the defendant. Identify those acts for which the defendant was clearly responsible. For example, a defendant might be able to claim that someone else sent threatening emails to the victim but cannot explain why his or her car was seen parked outside the victim's home for several hours. Who, then, is more likely to have sent the emails—the victim, some unknown party, or someone who clearly has been watching the victim?

How to Address "Weaknesses"

Whether you realize it, using the word "weakness" to describe challenges in your case can have a psychological effect on how you think about and present your case. Instead of defining potential issues as weaknesses, reframe them as opportunities to tell the jury more about the victim or more about your case.

For instance, one challenge you may encounter is if the victim's behavior differs from the jury's expectations of how a "real victim" would behave. If the victim maintained or initiated contact with the stalker, the jury may believe (or the defense may argue) that this contact proves the victim was not in fear of the offender. There are many protective reasons, however, for a victim to maintain contact with the stalker: to determine the stalker's whereabouts and, thus, whether it's safe to leave the victim's current location; to prevent the stalker from escalating to physical contact; to coordinate care for children in common—contact that may even be required by a custody order. In cases where the victim

maintains her or his old phone number, it also may be to keep the stalking behavior from escalating.

Part of your job is to understand these details from the victim's perspective and put them into context for the jury. Whatever the issue, frankly acknowledge it as early as possible in your case—laying the groundwork during voir dire and alluding to it in your opening statement, assuring the jury that these seeming contradictions will be explained. Ask the victim about these issues during direct examination, and present expert testimony to explain victim behavior if necessary.

Using an Expert in a Stalking Case

When we think about expert testimony, we typically think of the Daubert and Frye standards.[29] However, in stalking cases, consider using general expert witnesses to testify about general topics—all without reviewing the specific facts of your case. These types of experts can testify as to such things as typical victim behavior and what technology can and cannot do (e.g., how "spoofing" works or how to send anonymous emails). This use of testimony is different from calling someone to testify who has reviewed the facts of your case and is rendering an opinion. In this latter instance, you would need to review your state's standard on expert testimony to see whether it has adopted Daubert or Frye. Be aware that calling these types of experts may be cost-prohibitive.

Another reason to consider calling a general expert during your case is because jurors expect to hear expert testimony during a trial and may find it more credible than a victim's self-report. A stalking-behavior expert who explains, for example, how common it is for a victim to maintain contact with the stalker legitimizes the victim's actions as reasonable and believable.

Finally, merely listing an expert as a witness may give you enhanced bargaining power with the defense. Experts may be drawn from your local resources—stalking victim service providers, state crime lab staff, researchers from local colleges or universities—who frequently charge little or nothing to testify. The Stalking Resource Center can also provide staff members to serve as expert witnesses and provide assistance in identifying other national experts.

How to Argue Bail and Conditions of Release

The key to successfully arguing bonds and receiving the requested conditions of release is to be prepared well in advance of the bond hearing and to have your arguments laid out just as you would for trial.

Bail

Bail is generally based on the type of crime charged and the offender's criminal history. You must be thoroughly familiar with that history and, in particular, be prepared to highlight any arrests for violent offenses, regardless of disposition. Look for violation of court orders, including violation of protection orders, violation of probation, or failure to appear in court. Any of these indicate the defendant is at risk of ignoring orders to appear or ignoring bail conditions. You could also use any threat assessment conducted with the victim to inform the court of the level of risk the offender poses to the victim and that a no-bond hold or a high bond should be imposed.[30] Be sure to include in your argument any threats of violence, homicide, or homicide-suicide directed to the victim or a third party.

29 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). These two cases control the court's gate keeping function for allowing expert testimony. For a more comprehensive analysis, please visit the National District Attorneys Association at www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf. While this analysis is based on sexual assault, the principles are applicable.

30 For more information on threat assessments and safety planning strategies, please contact the Stalking Resource Center.

Conditions of Release

General conditions of release are imposed on every bond. These conditions typically include a prohibition on: drugs and alcohol, committing other crimes, returning to the location of the incident, and contact with the victim. These conditions are a good start. However, in a stalking case it is imperative that you ask the court to impose restrictions on the particular behaviors that the defendant engaged in when stalking the victim. For instance, if the defendant had installed spyware on the victim's cellphone and used it to spy on the victim or track the victim's whereabouts via GPS, merely advising the defendant not to contact the victim is insufficient. Instead, you need to be specific: ask that the defendant not be allowed to track, surveil, or monitor the victim. Be prepared to explain to the court why you are asking for a specific condition on the defendant's release.

Ask the court to impose a condition prohibiting possession of any firearms. Use a threat assessment to show the court the level of risk of violence or lethality for the victim, particularly if the defendant has made direct threats toward the victim.

Consider what level of supervision would adequately protect the victim. If the court is reluctant to hold the defendant without bail or impose a high bail (presumably because the court does not consider the defendant a threat to society), consider asking the court for an electronic ankle monitor, if available in your jurisdiction, or pretrial supervision. This request also underscores the importance of knowing the specific facts of your case. If the defendant's behavior includes driving by the victim's home or work, advise the court of this fact and explain that electronically monitoring the defendant will help keep the victim safe and will alert the court if the defendant does violate that condition of release.

Finally, encourage the victim to notify you if the defendant violates the conditions of release. In those instances, file a motion with the court asking for reconsideration of the conditions. Argue that the defendant be held without bond throughout the duration of the case. A motion can be filed with the court to modify the defendant's conditions of release any time there is a change in circumstances related to the case. Therefore, stay apprised of the victim's and defendant's circumstances.

Plea Agreements

Depending on your case and the willingness of the defendant, pleas can be difficult to negotiate. Remember the resources and bargaining tools available to you. Consider whether the defendant's criminal history would enhance the maximum penalty if the case went to trial. Also consider whether the threat assessment would support a higher sentence if the defendant were convicted after trial. Use these probabilities to negotiate with the defense. If possible, do not plead the stalking charge to another criminal charge, even if the penalty is similar. Doing so lessens the possibility of a felony enhancement on a second or subsequent stalking offense under the statute. Also, negotiating a plea to stalking sends a clear message that the behavior is criminal, unwanted, and taken seriously by the prosecutor's office.

As with any plea agreement a factual foundation must be presented before the court. Typically, the defense attorney will help walk the defendant through the factual foundation. Nonetheless, it is a best practice if you meet with defense counsel well in advance of the plea hearing to make sure both parties are in agreement and the attorney understands what elements must be satisfied when the defendant is allocuting to the crime. Using a checklist with the required elements will help ensure none is left out. The state can also ask the court for permission to question the defendant if certain elements are left out or if the state wishes for the defendant to admit particular facts. The court will usually ask if the state is satisfied with the factual foundation. Remember, this factual foundation is yours, and if you are not satisfied, you should say so. Not having the proper factual foundation on the record can result in the plea agree-

ment being rejected by the court or, worse yet, reversed on appeal or on a petition for post-conviction relief.

Sentencing

Everything you argued in the bond hearing and more can be argued at sentencing. In this stage of the case, the court needs to hear all of the facts and considerations that should factor into the sentence, as well as from the victim. The victim impact statement can be powerful. This point in the process will be the first time that the victim is allowed to speak freely about this experience.

There are several considerations for sentencing, including:

- Are you going to seek incarceration?
- If so, for how long?
- Are there programs that would reduce the likelihood of recidivism, such as a batterers' intervention program, counseling, drug court, mental health court, or a treatment facility?
- Will you ask for probation or a period of incarceration followed by probation?
- What conditions of probation will you ask for?

Suggested Special Conditions of Sentencing

A few conditions you may want to consider asking the court to impose during sentencing include:

- No contact or attempted contact, by any means including third parties, with the victim, the victim's family, or specifically identified other parties
- Random searches of the defendant's home, place of business,[31] and car, which will include access to all electronic devices
- Provision by offender to supervising agency of all aliases, screen names, ISP account information, cell phone numbers, and other identifying data
- Mental health evaluation of offender
- Limitations on where the offender may go, to prevent contact with the victim (e.g., exclusion from a county or neighborhood)
- No possession of weapons of any kind and immediate, appropriate disposal of weapons already possessed. Firearms must be transferred to a licensed firearms dealer or a court-approved third party, or forfeited to a law enforcement agency for disposal. Proof of transfer must be provided within a specified time period.
- No possession of a hunting license, pistol permit, or firearms ID card
- Restitution for the victim. The victim may have had to repair criminal damage to property or replace valuable items, and may have missed time and pay from work. All of these things should be considered when calculating and requesting restitution. In some jurisdictions there may be a monetary limit to what the victim can collect in criminal court.

PRACTICE TIP: Remember that threat assessments can be used: pretrial, as bargaining tools in plea offers, in sentencing, and in post-sentencing, when determining if the defendant should be released to probation or parole and what conditions of release should be included.

[31] The employer will need to give consent for the search.

Working with Stalking Victims

Keeping the Victim Engaged throughout the Process

The victim is a vital component in a stalking case. She or he is typically how you will introduce the evidence of stalking. Contact the victim early on and maintain that same level of contact throughout the case. Providing regular updates on what is happening with the case can keep a victim engaged throughout the lengthy process.

If the victim suddenly decides not to move forward with the case or you lose contact, you may want to consider the reasons for the sudden change in behavior. If you believe that the defendant has played some role in the victim's failure to appear or refusal to testify, you may consider the doctrine of forfeiture by wrongdoing (FBW).[32] This doctrine, codified in the evidence rules of many states and recognized by the case law in others, allows the prosecution to introduce any hearsay statements by a witness if it can show that the witness is unavailable to testify because of acts by the defendant. Also worth noting about FBW is that it applies to both "bad" or threatening behavior on the part of the defendant as well as to the defendant's emotional manipulation, including declarations of love, promises to change for the better, or promises to marry.[33] Note that FBW only applies to victims who are unavailable to testify—not those who are merely reluctant, recanting, minimizing, or testifying on behalf of the defendant. By creating a special section in your trial file that would support a motion to admit evidence under FBW, you will be prepared to argue such a motion if the victim unexpectedly fails to appear for trial or refuses to testify.

If you find that the victim is unavailable to testify and it *is not* through the wrongdoing on the part of the defendant, you must consider the implications of Crawford *v.* Washington[34] and its progeny. Crawford addresses the defendant's Sixth Amendment constitutional right to confrontation in cases where the prosecution seeks to admit hearsay statements of a witness who is not testifying at trial. A "non-testimonial statement" under Crawford may be admitted if it is admissible under a hearsay exception. A "testimonial" statement under Crawford is admissible only if the witness is unavailable and if the defendant has had a prior opportunity to cross-examine the witness. A statement will generally be considered "non-testimonial" if it is made for some purpose other than to preserve evidence for later prosecution (e.g., a statement during a 911 call or that allows the police to respond to an ongoing emergency, or informal statements to family or friends). A statement will generally be considered "testimonial" if it is made to law enforcement in a non-emergency context or if it is a formal statement such as an affidavit, court testimony, or grand jury testimony. Crawford is a complex topic: any hearsay statements of non-testifying witnesses must be carefully examined, and their admissibility should be the subject of a motion in limine.[35]

Lastly, all states have codified various victims' rights. Be familiar with your state's rights and comply with their requirements. In the interest of public safety and as a best practice, always try to consult with the stalking victim about how to proceed on a case, regardless of whether the right to consult with the prosecution is codified. Stalkers not only pose a threat to the victim, but they can put others at risk for violence as well. Federal victims' rights, codified at 18 U.S.C. § 3771 as the Crime Victim's Rights Act, may also apply.[36]

32 For more information, please visit AEquitas at www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

33 For more information about witness intimidation, please visit AEquitas at www.aequitasresource.org/The-Prosecutors-Resource-Intimidation.pdf.

34 Crawford v. Washington, 541 U.S. 36, 51 (2004).

35 For more information, please visit AEquitas at www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf.

36 For more information on the Crime Victims' Rights Act and other victim assistance programs, please visit the Department of Justice, Office for Victims of Crime at www.ovc.gov. For more information on victims' rights, generally, please visit the National Crime Victim Law Institute of Lewis and Clark College at https://law.lclark.edu/centers/national_crime_victim_law_institute or the National Center for Victims of Crime at www.victimsofcrime.org.

Working with a Victim-Witness Coordinator versus a Victim Advocate

Victim-witness coordinators and community-based victim advocates are a tremendous help when working with stalking victims. However, they have different roles, with different obligations and confidentiality rules, and it is important for you to understand these differences.

As a prosecutor you may be more familiar with victim-witness coordinators. Victim-witness coordinators typically are based in government offices (such as the prosecutor's office) and help when a victim comes in for an interview or for a court proceeding. A witness coordinator's work is not confidential and is usually available to the defense, just as a information in a prosecutor's file might be. In other words, the defense may file motions of discovery to obtain the information that the witness coordinator has about the victim. Because of this access, it is advisable that victims work with a community-based victim advocate, as the communications between providers at local victim services agencies (e.g., domestic violence or rape crisis programs) and their clients are confidential and may be, depending on the state, privileged.[37]

Additionally, many community-based victim service providers will attend court proceedings with the victim and can provide a range of other services, including individual and group counseling, threat assessment, and safety planning.

Threat Assessment and Safety Planning

Threat assessment is simply a process to determine the level of danger posed by an offender to a victim at a particular point in time. In stalking cases, there are more dangerous offenders and more dangerous times for a stalking victim. The most dangerous offenders are those who:

- Engage in actual pursuit of the victim
- Possess or have a fascination with weapons
- Commit other crimes such as vandalism or arson
- Are prone to emotional outbursts and rage
- Have a history of violating protection orders
- Have a history of substance abuse
- Have a history of mental illness
- Have a history of violence, especially toward the victim
- Have made threats of murder or murder-suicide

The most dangerous times for a stalking victim are when:

- The victim has separated from the stalker
- The stalker has been arrested or served with a protection order
- The stalker has a major negative life event, such as the loss of a job or being evicted
- The stalking behaviors increase in frequency or escalate in severity

Bear these factors in mind when working with the victim or reviewing the facts of your case. These red flags indicate that the victim is at greater risk for stalking violence and homicide. Recommend to victims that they work with an advocate to develop a safety plan—an

[37] To learn more about state laws related to victim advocate confidentiality and privilege, visit http://nnedv.org/downloads/SafetyNet/OVW/CI_USAdvocateConfidentialityStateLawChart_Oct2010.pdf.

individualized plan that identifies specific strategies and interventions to help increase the victim's safety.

Finally, many victims will be unfamiliar with the criminal justice system. It is important that someone, such as a victim-witness coordinator or advocate, discuss with the victim how the system works and the time it may take for the case to move through it. They should set realistic expectations and address practical concerns, such as where to park, what to wear, how early to arrive for court proceedings, what to expect if there is security screening in the courthouse, and what to expect when in the courtroom. Just getting to court can be difficult for a victim who may already feel uncertain, scared, and traumatized. The more comfortable a victim feels with the process, the more likely it is that the victim will continue to participate.

Creating a Coordinated System Response to Stalking

A coordinated system response to stalking provides the most effective way to ensure victim safety and offender accountability. No single agency or organization can address all the needs and issues that arise within stalking cases. As such, it is important to start a dialogue in your community on how each local agency can play a role. This groundwork begins with raising awareness about stalking—about the behaviors and risks that are associated with the crime. Some communities have created task forces or regular meetings where prosecutors, law enforcement, civil attorneys, victim advocates, probation and parole officers, and other professionals collaborate on the issues they are facing in stalking cases. Whatever your community decides to do, make sure all of the participants are actively involved, communicating with each other, and working toward the same goals—enhancing victim safety and increasing offender accountability.