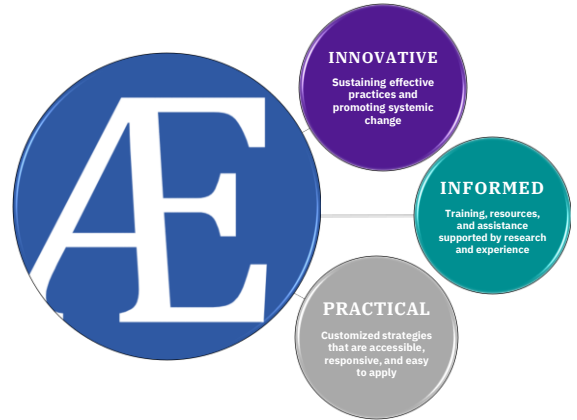




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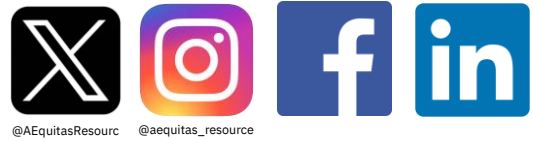
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What We Do

 Resources Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices	 Consultations Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions
 Training Events Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals	 Partnerships & Initiatives Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training

3

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Support

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Presenter

Jonathan Kurland



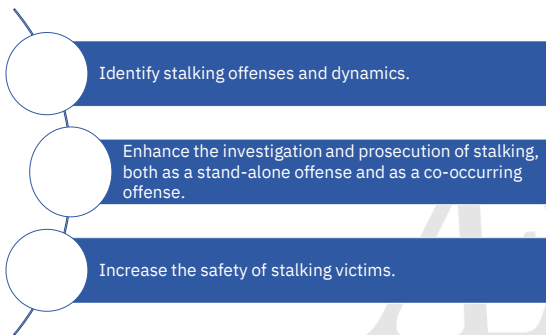
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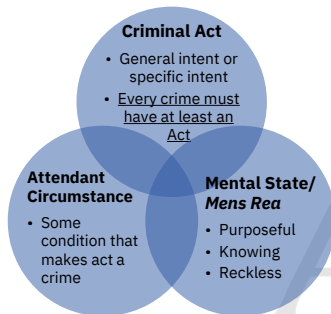


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Different Parts of Criminal Violation



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Federal Definition of Stalking under Title 25

25 U.S.C. § 1304(16)

The term “stalking” means engaging in a **course of conduct** directed at a specific person proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that would cause a reasonable person--
(A) to fear for the person's safety or the safety of others; or
(B) to suffer substantial emotional distress.

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Definition under title 18

Course of conduct.--The term “course of conduct” means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.

18 U.S.C. § 2266(2)

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The Parts of Stalking Violation under Title 25

Criminal Act

“[E]ngaging in a **course of conduct** directed at a specific person”

Alternate Attendant Circumstance #1

“that would cause a reasonable person to fear for the person’s safety or the safety of others”

Alternate Attendant Circumstance #2

“that would cause a reasonable person to suffer substantial emotional distress”

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What about *Counterman v. Colorado*?

15

Counterman Background

143 S. Ct. 2106 (2023)

- Defendant was convicted of stalking in CO for communicating hundreds of messages from various social media accounts to the victim, an aspiring singer
- CO proved that the messages were unwanted and would make a reasonable person feel afraid and threatened

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Selection of Messages Sent by Counterman

- “Was that you in the white Jeep?”
- “Five years on Facebook. Only a couple physical sightings.”
- “Seems like I’m being talked about more than I’m being talked to. This isn’t healthy.”
- “I’ve had tapped phone lines before. What do you fear?”
- An image of stylized text that stated, “I’m currently unsupervised. I know, it freaks me out too, but the possibilities are endless.”
- “F[***] off permanently.”
- “Your arrogance offends anyone in my position.”
- “You’re not being good for human relations. Die. Don’t need you.”
- “Talking to others about me isn’t prolife sustaining for my benefit. Cut me a break already.... Are you a solution or a problem?”
- “Staying in cyber life is going to kill you. Come out for coffee. You have my number.”

17

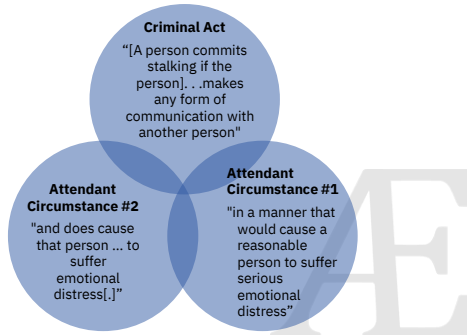
The Colorado Stalking Statute

Colo. Rev. Stat. Ann. § 18-3-602(1)(c)

“[A person commits stalking if the person]. . . makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer emotional distress[.]”

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The Parts of CO's Stalking Statute



19

No Mental State/ *Mens Rea* required to be proven

Just like Stalking definition under Title 25

20

Counterman's Argument

- CO's stalking statute does not require showing of mental state /*mens rea*
- Without showing of mental state/*mens rea* for making communication, the statute was facially unconstitutional because it could chill communications/speech protected by 1st Amendment
- CO argued, in part, that stalking statute criminalized "true threats", which aren't protected by 1st Amendment
 - *Counterman* rebutted that for communication to be "true threats", prosecution must prove it was purposefully intended to be threatening

21

What does 1st Amendment say?

22

Congress shall make no law . . .abridging the freedom of speech[.]

U.S. Constitution, First Amendment

23

Speech not Protected by 1st Amendment

- True Threats
- Incitement
- Libel/Defamation
- Obscenity
- Fighting Words

24

Incitement

- Statements directed at producing imminent lawless action
- Words must be intended to produce imminent disorder
- Harder to prove because this area can intersect with political speech

25

Defamation/ Libel

- False statements/writings of fact harming another's reputation
- If public figure is harmed by false statement, must show that speaker knew it was false or was reckless as to whether it was false
 - Intended to prevent people "chilling" legitimate speech in effort to avoid being sued.
- Private figure harmed by false statement just has to show statement was false, regardless of speaker's mental state.

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Obscenity

- Valueless material appealing to sexual/prurient interest and describing sexual conduct in an offensive way.
- Offender/ Speaker must be aware of nature of material, *i.e.*, what it depicts
 - Does not have to "know" it was obscene

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Fighting Words

- Personally abusive epithets that are inherently likely to provoke violent reaction.
- Fighting words restrictions on speech have not been upheld in 80 years.

Counterman, 143 S.Ct. at 2116, fn. 4

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What are True Threats?

True Threats

- "True" precludes hyperbole, jokes, or anything that does not convey the possibility of coming violence
- Subjects listener/victim to fear of violence and many kinds of disruption that fear engenders.

Counterman, 143 S.Ct. at 2214

29

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The *Counterman* Decision

- Communications at issue fit the definition of “true threats”
- “True threats” are not protected under the 1st Amendment
- For “true threats” to be punishable, there must be proof that defendant had subjective understanding of the threatening nature of communication(s)
 - Proof of intent/*mens rea* of recklessness is sufficient

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The *Counterman* Decision

Cont'd

- Conviction reversed and remanded because no factual finding that *Counterman* acted recklessly
 - *I.e.*, that he “consciously disregarded a substantial risk that his communication would be viewed as threatening violence”
- Justice Sotomayor and Justice Gorsuch concurred
- Justice Barrett and Justice Thomas dissented

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What are the different kinds of mental states/*mens rea*?

Purposefully

- A person acts purposefully when they “consciously desires” a result—such as wanting their words to be received as threats.
- Sometimes “purposefully” and “intentionally” are used interchangeably

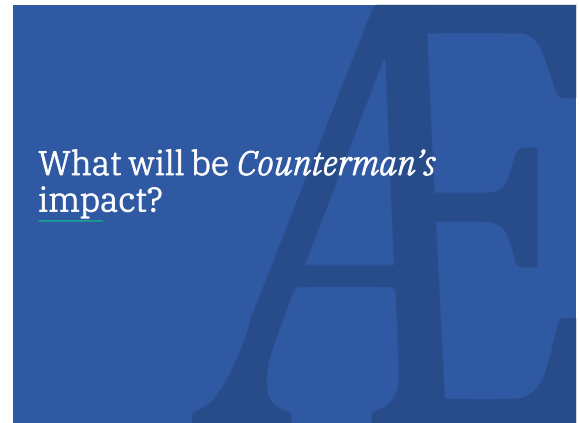
Knowingly

- Awareness that a result is practically certain to follow—such as knowing to a practical certainty that others will take words as threats.

Recklessly

- Consciously disregarding substantial and unjustifiable risk that conduct will cause harm to another.
- Involves insufficient concern with risk, rather than awareness of impending harm.
- In the threats context, means that a speaker is aware “that others could regard his statements as” threatening violence and “delivers them anyway.”

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34

Most jurisdictions will not be impacted by *Counterman*.

- In the majority of jurisdictions, the stalking statute explicitly requires the prosecution to show an offender made a communication:
 - With the purpose of threatening the victim;
 - Knowing the victim would feel threatened; or
 - Recklessly as to whether the victim would be threatened
- Contact AEQuitas for compilation of Stalking statutes

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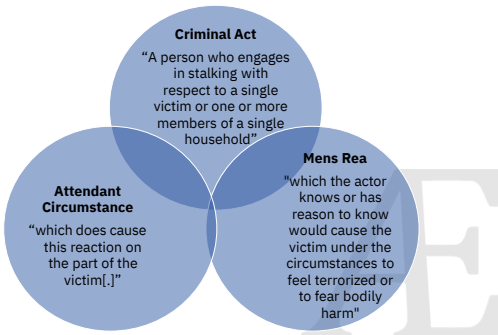
Example: Minnesota

“A person who engages in stalking with respect to a single victim or one or more members of a single household [✓] which the actor **knows or has reason to know** would cause the victim under the circumstances to feel terrorized or to fear bodily harm [✓] and which does cause this reaction on the part of the victim[.]”

Minn. Stat. Ann. § 609.749(5)(a) (emphasis added)

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The Parts of MN's Stalking Statute



37

How do we prove an offender's intent/*mens rea*?

If offender says the communication was not meant to threaten, does that have to be taken at face value?

38

Most offenders do not declare their intention/ mental state.

But, someone's actions can raise inferences about their intention.

39

What evidence can we use to prove *mens rea*?

40

Prosecutors are used to proving intent/*mens rea*.

- Inherent nature of statement(s) (e.g., "I'm going to kill you.")
- Circumstantial evidence—how did the offender try to hide their crime?
 - Attempts to conceal identity?
 - Were multiple accounts used to communicate (like in *Counterman*)?
 - Ignoring requests to stop?
 - Were methods other than communication used to threaten victim (following, surveillance, etc.)?
 - Malingering mental illness?

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Analyze Stalking Elements

Course of Conduct

Directed at a person

Impact

On a person

42

Course of Conduct

- Pattern of Behavior
 - At least 2 instances required
 - Over a certain period of time
- Continuity of purpose
- Behavior does not have to be illegal
- Separate incidents may also be charged as separate crimes

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Directed at a Person

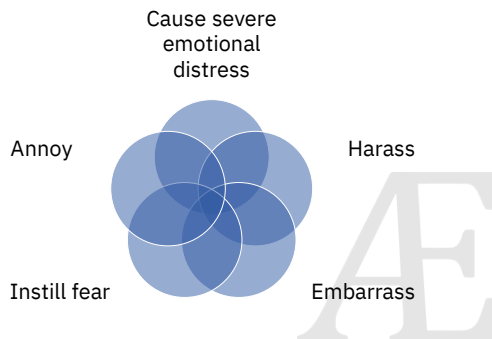
- Stalking can affect multiple people
- Consider multiple stalking charges with different victims
- Online posts may not be “directed at a specific person”

In a civil case, involving a business dispute, the court found that posts to online social media sites were not “directed to” a particular person.

David v. Textor, 189 So. 3d 871 (Fla. Dist. Ct. App. 2016)

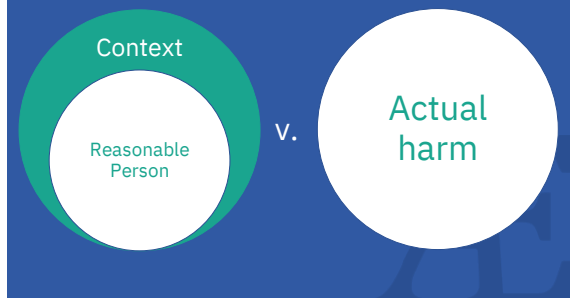
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Required Impact



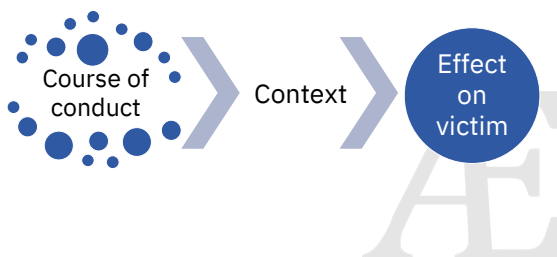
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“Reasonable Person” Standard



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Context is Critical

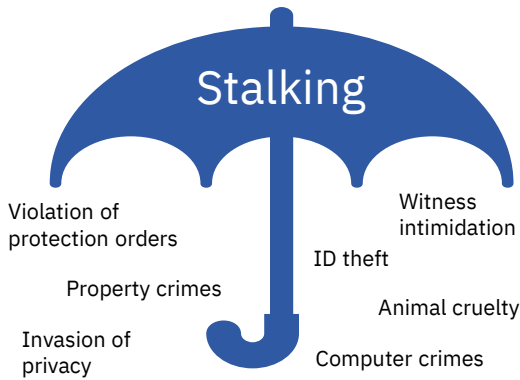


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Stalking-Related Charges

Harassment	Violation of Protection Order	Video Voyeurism	Invasion of Privacy
Extortion	Wiretapping	Unauthorized Use of Tracking Device	Nonconsensual Distribution of Intimate Images
Property Crimes	Burglary	Theft	Animal Cruelty
Computer Crimes	ID Theft	Witness Intimidation	Obstruction of Justice

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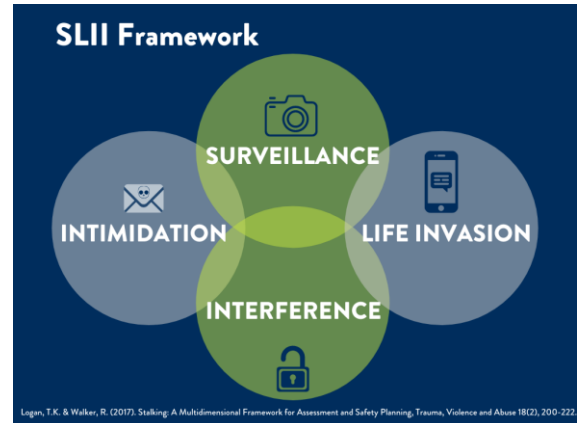
Charging Strategies

- Articulate stalking as a lethality indicator
- Introduce evidence of “course of conduct”
 - Does not require 404(b) motion
 - Presents more complete picture of relationship
 - Helps to explain victim behavior
 - Holds offender accountable for full range of criminal conduct
 - May require filing a Statement of Particulars
- Charge stalking against multiple victims

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SURVEILLANCE

- Follow
- Watch
- Wait
- Show up
- Tracking software
- Obtain information about victim
- Proxy stalking

53

LIFE INVASION

- Unwanted contact at home, work, etc.
- Showing up
- Phone calls
- Property invasion
- Public humiliation
- Harass friends/family

54



INTERFERENCE

- Financial and work sabotage
- Ruining reputation
- Custody interference
- Keep from leaving
- Road rage
- Attack family/friends/pets
- Physical/sexual attack

55



INTIMIDATION

- Threats
- Property damage
- Symbolic violence
- Forced confrontations
- Threaten or actually harm self
- Threats to victim about harming others

56

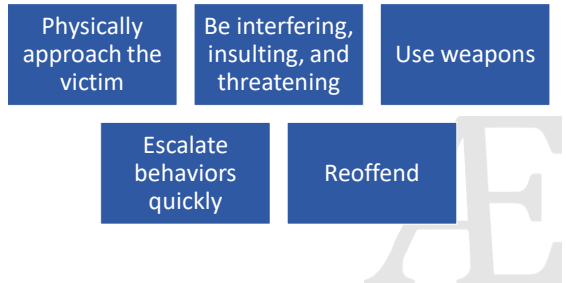


Stalking and Domestic Violence



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Intimate partner stalkers are more likely to...



58

In 85% of attempted and 76% of completed intimate partner femicides, stalking occurred in the year prior to the attack.

Judith McFarlane et al., *Stalking and Intimate Partner Femicide*, HOMICIDE STUDIES 3 (1999).

59

Stalking is a lethality risk.

Top 10 risk factors for intimate partner homicide	Risk for male perpetrated & female IPH victimization
1) Direct access to guns	11-fold increase in risk of IPH
2) Threatened victim with a weapon	7-fold increase in risk
3) Non-fatal strangulation	7-fold increase in risk
4) Perpetrated rape/forced sex	5-fold increase in risk
5) Controlling behaviors	6-fold increase in risk
6) Threatened to harm the victim	4-fold increase in risk
7) Abused victim while pregnant	4-fold increase in risk
8) Perpetrated stalking	3-fold increase in risk of IPH
9) Jealousy	2-fold increase in risk
10) Substance abuse	2-fold increase in risk

Chelsea Spencer & Sandra Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis* 21(3) TRAUMA, VIOLENCE, & ABUSE 527-540 (2018)

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Assessing Risk in Stalking Cases



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Partner Stalking & Children

- Victims with children in common with their partner stalker were 8.4 times more likely to experience threats of child harm or interference after obtaining a civil protection order than domestic violence victims who were not stalked
- Children in common also increased likelihood of child being used as a tool to harass and stalk victim

Logan, Cole, Shannon and Walker (2006)

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IPV Stalking and Technology

- Stalker's access to victim accounts
 - Infer or compel disclosure of credentials
 - Offender is owner of account
- Victims often report having "no idea" of what stalker may have done to their device

Freed et al., *Digital Technologies and Intimate Partner Violence: A Qualitative Analysis with Multiple Stakeholders*, 1(46) PACM ON HUMAN-COMPUTER INTERACTIONS (2017)

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Who's stalking whom?

Stalker may fabricate evidence to accuse victim or victim's new partner of stalking/threats

- Part of overall stalking behavior
- Defense strategy, once charged

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Stalking and Sexual Violence

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Stalking & Sexual Assault

Cont'd

Interference	Intimidation
<ul style="list-style-type: none">• Sexual violence against victim or someone close to victim• Sharing sexual photos or videos with others• Stealthing/damaging access to contraceptive	<ul style="list-style-type: none">• Sextortion• Threatening the victim or others with sexual violence• Telling victim's intimate partner about the sexual assault• Symbolic sexual violence (cutting up underwear)

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Stalking & Sexual Assault

Cont'd

Surveillance	Life Invasion
<ul style="list-style-type: none"> Monitoring victim to identify when and how to commit sexual assault Gathering information as leverage to sexually exploit/blackmail victim Monitoring victim after sexual violence to see if they report the assault Nonconsensually watching the victim when nude or engaged in sexual activity 	<ul style="list-style-type: none"> Leaving sexual items/gifts Repeated contact using sexual language, images, threats, or referencing past sexual trauma Spreading sexual rumors and/or humiliating victim with personal information Impersonating victim online to discuss or share information about sexual activity

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Why name stalking?

Charging and prosecution

Safety planning

Victim empowerment

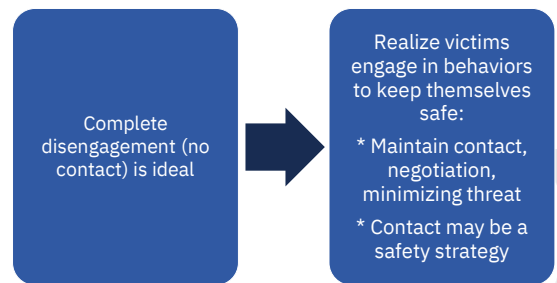
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Collaboration



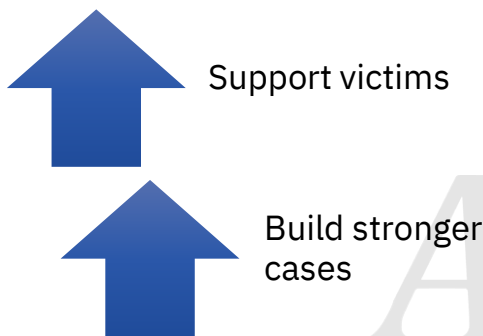
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Disengagement



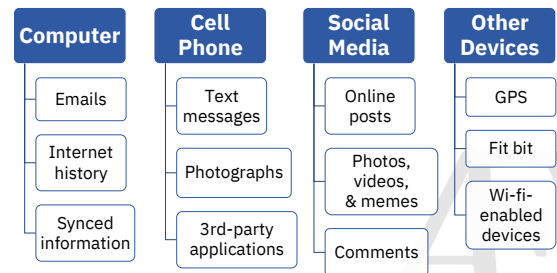
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Digital Evidence



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Identifying Digital Evidence



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Tools



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Victim Privacy in Digital Investigations

- Consider whether victim’s cell phone or social media accounts need to be “seized”
- Preserve evidence relevant to the case
 - Screen shots
 - Screen recordings
- Redact evidence
 - Inform defense of redactions
 - Offer to conduct additional searches

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Cell Phones & Privacy

Riley v. California, 134 S. Ct. 2473 (2014)

Court recognized “several interrelated privacy consequences”

- Massive amounts of storage
- Interconnectivity of data
- Information dating back years

...more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives.

75

Subpoena

- Court order requiring someone to appear and/or provide documents or evidence

Motion to Compel

- Motion asking the Court to order that the prosecutor turn something over

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Subpoena

- Courts may allow legal arguments that support the victim’s interests, but the prosecutor is not the victim’s attorney
- Attorney for the victim may oppose a motion or move to quash a subpoena for the victim’s records

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In re B.H.

946 N.W.2d 860 (Minn. 2020)

- Trial court reversed for ordering victim to turn over cell phone to defense forensic expert
- Victim didn’t waive right to privacy in her phone by disclosing sexual assault and allowing prosecution to copy limited portion of her phone.
- Per *Riley* and privacy concerns with electronic devices, Courts should carefully examine motions for such data, particularly for sexual assault victim

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Motion to Compel

Victim has the phone

- Prosecutor should argue the phone is not in their “care, custody, or control”
- Victim is not subject to criminal discovery
- Victims’ Bill of Rights

Phone is in evidence

- Entire phone is not subject to discovery
- Defense is going on a fishing expedition
- Defense expert has limited access
 - Protective Order
- *In camera* inspection

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Going Forward

Recognize the prevalence and scope of stalking behavior

Identify elements of stalking statutes and analyze cases in relationship to those elements

Charge stalking and co-occurring crimes

Collaborate to hold offenders accountable and promote victim safety and privacy

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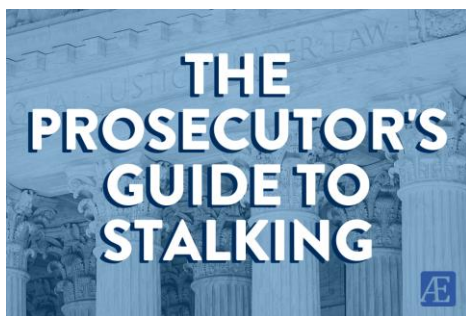
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Resources for Professionals

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<https://www.stalkingawareness.org/wp-content/uploads/2020/01/SPA-19.005-Prosecutors-Guide-to-Stalking-00000002-revised.pdf>

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THE INTERNET & INTIMATE PARTNER VIOLENCE:
TECHNOLOGY CHANGES, ABUSE DOESN'T
BY JANE ANDERSON, JD AND KAIFENG LEE*

<http://aequitasresource.org/resources>

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Safeguarding Victim Privacy in a Digital World

Webinar found at:
<https://aequitasresource.org/resources/>



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Resources for Non-Consensual Distribution of Intimate Images

Cyberrightsproject.com

Cybercivilrights.org

- For victims: 1-844-878-CCRI

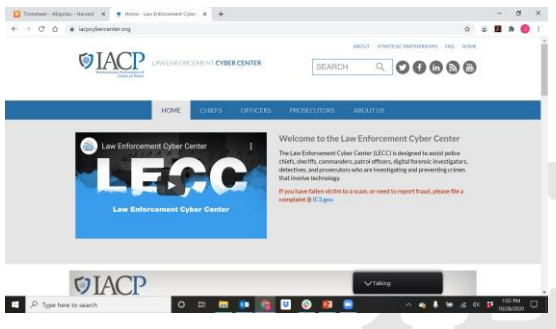
Cagoldberglaw.com

Dmca defender.com

Copybyte.com

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Resources for Law Enforcement



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Other National Resources

Without My Consent, Something Can be Done! Guide

- <http://withoutmyconsent.org/resources>

Cyber Civil Rights Initiative

- <https://www.cybercivilrights.org>

National Crime Victim Law Institute

- https://law.lclark.edu/centers/national_crime_victim_law_institute/

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