Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401

Civil (802)863-3467
Small Claims (802)651-1952
www.vermontjudiciary.org

Maxine Grad, Chair
House Judiciary Committee
115 State Street
Montpelier, VT 05633

February 11, 2016

Re: Proposed Amendments to the Stalking Statute

Dear Representative Grad:

Judge Grearson has asked me to review and comment upon the proposed amendments to the civil and criminal stalking statutes. I have been on the bench for sixteen years, and am currently sitting in the Chittenden Civil Division in Burlington, where we have a significant percentage of the state's civil cases. My comments are based upon my experiences sitting on numerous cases in which plaintiffs are seeking "no stalking" orders.

I think it is important to understand that most of the petitions we get under this law are not brought by victims of what most people think of as true stalking behavior: a stranger following you around, or an unwanted suitor obsessively showing up at your door or workplace or sending hundreds of texts or emails despite being told to stop. Those behaviors create a real risk of danger, and justifiable fear, and are appropriately addressed by the courts. However, many of the cases are not of this type. Instead, they are brought by ex-friends or acquaintances who are upset that the other person is badmouthing them to others on social media; or calling them derogatory names to their faces; or dating their ex and lording it over them. There are also quite a few cases between neighbors who are not getting along because of a dispute over noise, or a property line, or similar matters.

In sum, the statute is already bringing in many cases that are not really situations of true stalking. Many of the changes in the proposal would significantly broaden the scope of what could be the basis for an order, and would invite many more of these matters that in my view do not require court involvement, but are instead the challenges of ordinary life. I believe that the courts' scarce resources should be spent on matters of true importance to the public, not whether someone is calling an ex-friend a four-letter word on Facebook. I agree that the current statute is not perfect, and is hard to follow, but this proposal causes more problems than it solves. I will comment below on each significant change that I see in the proposal. I will conclude by making some suggestions as to how I believe the statute could be improved.

Constitutionally protected actions: The current statute says that constitutionally protected behavior—such as statements protected by the First Amendment—cannot be the basis for a restraining order. 12 V.S.A. § 5131(1). This still exists in the proposed amendment for the criminal stalking statute, but is removed from the civil one. *See* Id. and 13 V.S.A. § 1021(b). It should remain in the civil statute as well.

Reasonable fear of harm. The existing law defines stalking as two or more incidents of threatening, following, or lying in wait. Each of those has a definition that requires that it be such that a reasonable person would fear sexual assault, kidnaping, bodily injury or death. This bill removes that requirement and replaces it with a showing of conduct "that would cause a reasonable person to fear for his or her safety . . ." *See* 12 V.S.A. § 5131 (6). It removes the need to show that a reasonable person would fear some particular sort of serious harm, as opposed to the more general "fear for his or her safety." I don't necessarily see a problem with that, because it seems appropriate to protect people from any kind of physical harm, but the legislature should be aware that this does reduce the level of evidence needed.

Orders based solely on emotional distress. The proposal would allow an order when a reasonable person would not fear any physical harm, but only *emotional distress*.[1] Id. ("or would cause a person substantial emotional distress."). This is a huge expansion of the scope of the statute. It means that many things would come within the scope of this law merely because they are upsetting, regardless of whether the plaintiff is in any real danger.

Significant broadening of what would constitute stalking. Many of the terms in the new definition of course of conduct are undefined, and seem unnecessarily broad. The bill redefines stalking entirely. It replaces threatening, following or lying in wait with incidents in which a person "follows, monitors, observes, surveils, threatens, or communicates about, another person, or interferes with a person's property." 12 V.S.A. § 5131(1). This is a major change to the law, and raises all kinds of concerns. For example, the term "observes." How can merely "observing" someone be stalking? Likewise, it would be stalking if I twice "communicate" to someone else about you. The statute does not say I have to be saying threatening things, only that I am "communicating." If whatever I say "would cause a reasonable person substantial emotional distress," it is a violation of this statute.

This is extremely broad. Any time one person says something nasty about someone else this could get them into court. If a teenager texts some nasty comments about another teenager to a mutual friend, the subject of the nasty comments could get an order even if there had been no direct communications ever made to him. I foresee endless cases involving Facebook comments about someone, made to a third person. We already get many of these cases, where one teenage girl calls another a "fat %#&*" on Facebook. Of course—speaking as someone who was once a teenage girl—that kind of comment can cause a teenage girl substantial emotional distress. But the goal here should be to protect people from actual risk of physical harm, not from every upsetting thing that occurs in their lives. While on-line bullying of students is a serious issue and may well need to be addressed by some sort of legislation, this statute is not the right setting in which to do that.

The same is true of allowing stalking to mean interfering with someone else's property. So when a high school student grabs another's baseball cap on the way home and tosses it in the air, that is now stalking? This brings way too much harmless activity into the courts.

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[1] While emotional distress is mentioned in the current statute in the definition of stalking, the subparts of the definition—following, lying in wait, and threatening—all require proof related to a fear of physical/sexual harm.

In addition, the new definition allows one person to seek an order when they fear harm to *another* person. 12 V.S.A. § 5131(6) (acts that "would cause a reasonable person to fear for . . . the safety of another."). While it makes sense for a parent to be able to get an order to protect a child, that is already allowed. This new language has no limits at all. First of all, it is unclear who the order would protect: the plaintiff or the person they feared would be harmed. It seems to allow for both sorts of orders. Under this language, if Donald Trump insults Bernie Sanders and a Bernie Sanders supporter is emotionally distressed by it, in theory she could obtain an order keeping the defendant away from Donald Trump. That makes no sense. Alternatively, the plaintiff could seek an order to protect herself from Trump merely because he had threatened Bernie Sanders. That also makes no sense.

What we should be doing is trying to protect people from true harassment that may become dangerous, not inserting the court into every communication that is less than sweet and kind. This proposal also raises serious questions about whether one person, not a parent, should be allowed to keep someone away from a third person.

Removing the requirement of intent from the definition of threats. The statute states that for purposes of getting a restraining order "[i]ntent is not required" to show a threat. The proposed changes to the criminal statute would make lack of intent an affirmative defense rather than making intent part of the state's burden of proof. 13 V.S.A.§ 1064(2).

Thus, even a comment that was not motivated by anger, intent to cause fear, or anything other than perhaps a tasteless joke, can now be the basis for a restraining order or a criminal charge. The U.S. Supreme Court recently addressed the need to show intent in Elonis v. United States, 135 S. Ct. 2001 (2015). In that criminal case, a jury found a man guilty of making threatening communications to his soon-to-be ex-wife and others on Facebook. The jury was only asked to determine whether a reasonable person would regard the posts as threatening, but was not asked to decide whether the defendant intended them to be threats. The court held that to find the defendant guilty of making threatening statements, a jury needs to find that the defendant *intended* the statements to be threats, or *knew* that they would be so interpreted. Id. at 2012.

Although I have not researched this issue thoroughly, it seems that making lack of intent an affirmative defense in the criminal statute may not comply with Elonis. In addition, while that decision applies to criminal cases, not necessarily civil cases, it makes sense to apply the same requirement in the civil context. If the purpose of this law is to protect people from harm, a joking statement that was not meant as a threat, or a passing comment "I'm gonna kill you if you leave the toothpaste out one more time," is not something that should be the basis for a court order against the person who made the comment. Unless there really is a potential threat to safety, what business do the courts have inserting themselves into people's personal interactions?

Removal of the requirement that the conduct "serve no legitimate purpose." The current statute says that conduct is not stalking if it serves a legitimate purpose. 12 V.S.A. § 5131(6)(A). The proposal removes this language. This is important when, for example, a tenant brings a case against his landlord for repeatedly entering his apartment without notice. While such conduct by someone other than a landlord might be stalking, if the landlord did it to fix the plumbing, it is not stalking. It is important to maintain such a distinction in the statute.

Redefining "nonphysical contact." The definition of what nonphysical contact means (in an order barring it) is modified in this proposal to add "social media commentary or comment." This is extremely overbroad. It would include what the defendant posts on Facebook to a friend about the plaintiff, even though it was not sent to plaintiff. The point of these orders is to protect the plaintiffs, not to limit the defendants from talking to others. I believe I may have placed such language in one order when the plaintiff was a journalist and the defendant was posting threats to the paper's staff on its own Facebook or Twitter pages. We have the ability to do this when it is appropriate, because a judge can always add language tailored to the case. But to make this part of the standard order seems to me to be inappropriately restricting people's freedom of speech. It is entirely appropriate for us to restrict what the defendant says to the plaintiff, but not to restrict the defendant from ever criticizing or even mentioning the plaintiff to others.

The sexual assault section. The alternative basis for a restraining order is a sexual assault. *See* 12 V.S.A. § 5131(5), incorporating 13 V.S.A. §§ 2602, 3252, etc. Currently, something such as a man touching his genitals over his pants in a suggestive way would not qualify because the definitions require more significant sexual conduct. The proposed amendments would change this by allowing an order for any sort of "lewd and lascivious conduct as defined in 13 V.S.A. § 2601." Fraternity parties may be a whole new court docket.

Alternative proposal. I do believe the current statute is convoluted and essentially requires a chart to understand how all the definitions fit together. It is hard for judges to follow, much less unrepresented litigants. I also believe that it invites complaints against minors, who should not be the subject of such orders just as they cannot bring their own cases. *See, e.g.*, V.R.C.P. 17(b) (A minor's representative "may sue or defend on behalf of" the minor); Miller v. Miller, 677 A.2d 64, 67 (Me. 1996) (Interpreting similar rule to mean that minors may not generally "sue *or be sued* unless they are represented by a guardian or next friend.")(emphasis added); Dye by Dye v. Fremont County School Dist. No. 24, 820 P.2d 982, 985 (Wyo. 1991) ("An unemancipated minor, by himself, has no procedural capacity to sue or be sued.").

Thus, I would recommend that the statute be amended to (1) expressly state that a restraining order cannot be obtained against a minor, and (2) replace the current language of 12 V.S.A. §§ 5131(1)-(3), (6) and (8) with the following language:

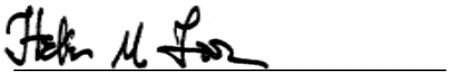
> A person (the plaintiff) may obtain an order to keep another person (the defendant) from contacting him or her if the plaintiff establishes by a preponderance of the evidence that:
>
> 1. The defendant has on two or more occasions, reasonably connected in time, intentionally done the following:
>   a. Threatened the plaintiff with physical harm by words or actions; and/or
>   b. Followed or surveilled the plaintiff without a legitimate reason; and /or
>   c. Hidden out of sight for the purpose of attacking or harming the plaintiff; and
> 2. The conduct would cause a reasonable person to fear that the defendant is going to physically harm or kidnap the plaintiff; and

3. The actions of the defendant serve no legitimate purpose; and
4. The actions of the defendant are not constitutionally protected activity.

I would also rewrite the confusing definition of "stay away" as used in our orders (in Section 5131(7)) as follows:

> "Stay away" means the defendant (1) must not knowingly approach or stay near the plaintiff, (2) must not knowingly communicate with the plaintiff in person, by phone, by mail, by email, by text, by social media, or in any other manner, and (3) must not have another person communicate a message to the plaintiff.

I hope these comments are helpful. As I noted above, there may be a need to address on-line bullying in separate legislation, but this statute is overbroad and not targeted at that area of need. Please let me know if I can provide any further input on the proposed amendments to the statute.



Helen M. Toor
Superior Court Judge