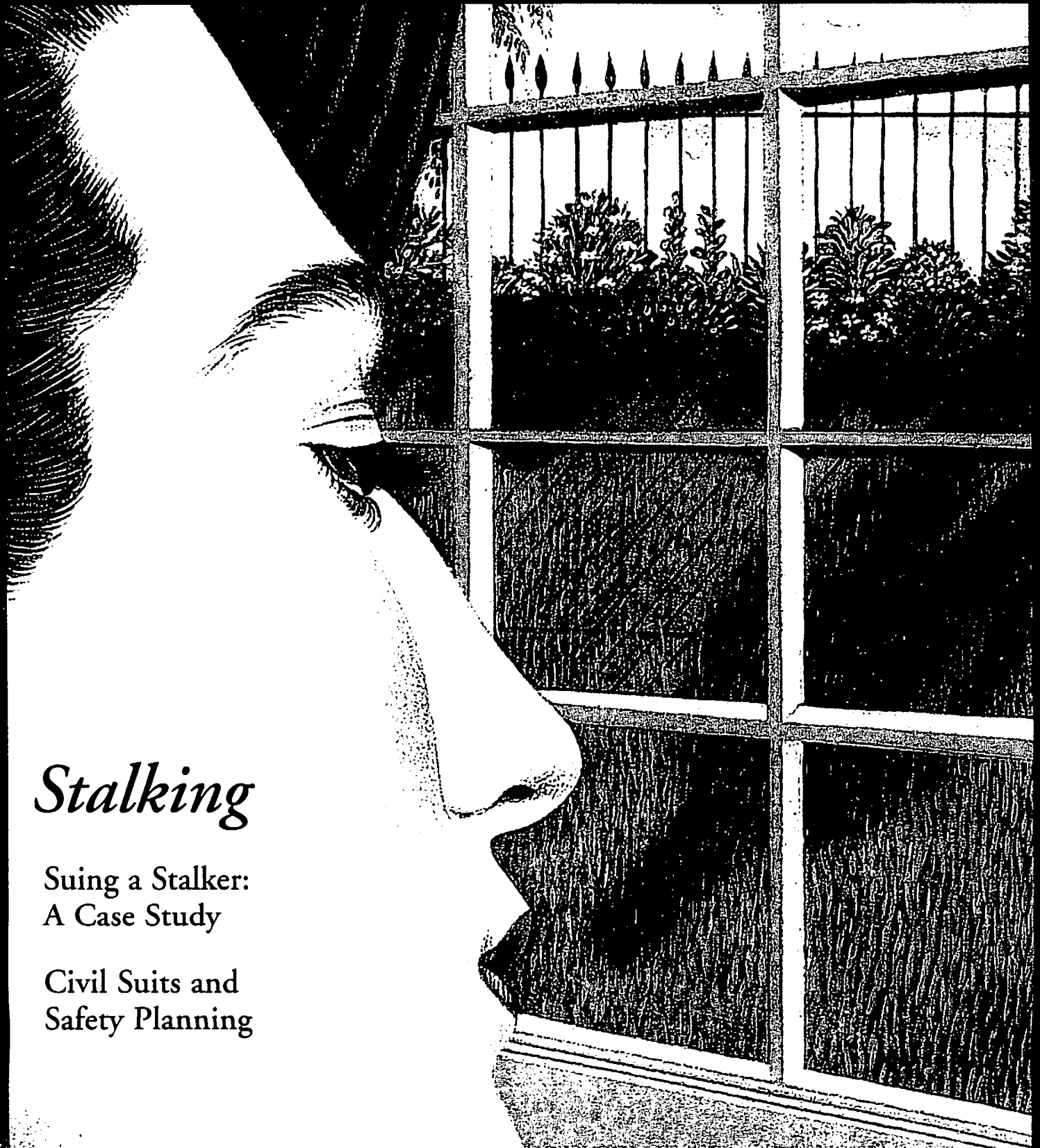


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Stalking

Suing a Stalker:
A Case Study

Civil Suits and
Safety Planning

Suing a Stalker: A Case Study

By Daniel A. Wolf, Esq.

This article describes a civil lawsuit recently pursued by a stalking victim against her stalker in Illinois. The real names of the parties have been withheld pursuant to a confidentiality agreement. Attorneys Daniel A. Wolf and Marc K. Schwartz of Buffalo Grove, Illinois represented the plaintiff. To these attorneys' knowledge, this was the first civil lawsuit in the State of Illinois in which a stalking victim sued her stalker for monetary damages.

In the winter of 1982, Plaintiff Jane Doe, a married forty-one-year-old woman, and Defendant John Smith, a married fifty-five-year-old man, commenced an extramarital affair. The relationship continued uninterrupted and undisclosed for the next twelve years. During the last few years of the affair, Jane Doe regularly saw a therapist in connection with various familial issues. In the course of her therapy, Doe decided to end her relationship with Smith, and in spring of 1995, she told him that it was over. Doe's therapist later testified that this decision was the last step in Doe's achieving a level of sound mental health such that she was prepared to discharge Doe from therapy.

After the breakup, Smith continued to visit Doe's home and to telephone her without Doe's consent. Doe occasionally received letters or small gift packages from Smith. She also observed Smith on a number of occasions following her in his

car. The visits and calls continued throughout the summer of 1995. Doe repeatedly told Smith that she was not interested in continuing the relationship on either a romantic or platonic level. During these first few months after the breakup, Doe attributed Smith's persistence to the "typical" backlash following a unilateral break up.

Jane Doe's house was secluded on several heavily wooded acres off of a dead-end street at the end of long circular driveway. Smith lived only a few miles away. In the early morning hours of September 1, 1995, Smith twice drove his car around Jane Doe's driveway. Doe called the county sheriff's department to make a complaint for harassment. On September 2nd, upon the advice of the investigating deputy sheriff, Doe gave Smith unequivocal instructions to never visit, call, or communicate with her in any fashion again.

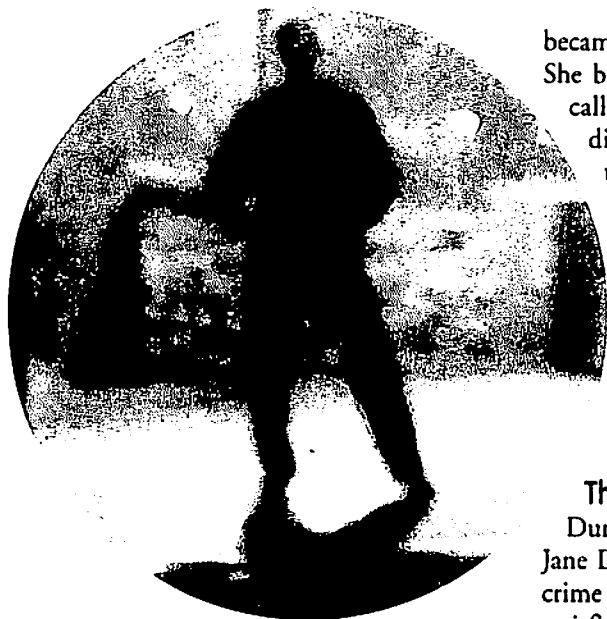
There were no further incidents for the next several weeks. However, during October of 1995, Smith again drove past Doe's house, and called her at least twenty-five times, on one occasion leaving a message on her answering machine. During this time, Smith also called two of Doe's friends to ask about her and why she would not talk to him. He drove past one of the friend's homes while the friend was outside and attempted to engage her in a conversation about Doe. He also called Doe's therapist and requested an appointment to discuss Doe.

On November 1, 1995, Jane Doe filed a second complaint with the county sheriff. On the same day, at the advice of the investigating deputy, Doe obtained

an *ex-parte* temporary order of protection from the court. The order of protection prohibited Smith from communicating with Doe in any fashion, and from committing "physical abuse, harassment, interference with personal liberty and stalking." The investigating deputy telephoned Smith to advise him of the entry of the order, and personally served him the following day. Smith told the deputy that he understood the order, and would not be making any further contacts with Doe. Smith did not contest entry of the order, and the temporary order became a two-year plenary order on November 21, 1995.

On December 3, 1995, Doe was leaving her house when she saw Smith's vehicle pass her driveway toward the dead end on her street. Doe pulled her vehicle across the road to block his return, ran back into her house, and called the sheriff. Smith was gone by the time a deputy arrived. On December 13, 1995, suspecting that Smith knew when Doe's regular appointments were scheduled, the investigating deputy set up surveillance near Doe's therapist's office. The deputy observed Smith drive by in his vehicle. On December 20, 1995, the court modified the plenary order of protection to bar John Smith from coming within 1000 feet of Jane Doe, and requiring him to remove himself to that distance in the event of an incidental meeting.

Over the next several months, Smith continued to call Doe, to drive past her house, to drive by stores and restaurants where she was shopping or dining, and to contact her friends and family members to ask about her. He also delivered "anonymous" cards to her mailbox. There



became hypervigilant in her daily life. She began monitoring all of her phone calls with caller-ID, and she kept a diary of phone calls, including the date, time, and telephone number of all received calls. She placed video surveillance cameras in her car and front yard, and began sleeping with a handgun under her pillow. She limited her outside activities, and was on constant alert for John Smith's presence while driving her car.

The Civil Action

During the course of these events, Jane Doe began researching stalkers and crime victims' rights because she was not satisfied with what little impact the criminal justice system had on John Smith. She learned about the National Center for Victims of Crime, and through it, about the evolving concept of civil actions against perpetrators of crimes. Doe first consulted a well-known and highly successful personal injury lawyer. He declined to represent Doe, dismissing the case as trivial from a damages standpoint in the absence of any overt threats or physical harm. This author met with Doe in the spring of 1997. The novelty of the issues presented and the very apparent toll John Smith was taking on Jane Doe created a strong interest in pursuing the matter.

was never actual communication between the parties. Smith hung up without speaking in his numerous telephone calls to Doe. Smith never expressly threatened Doe. Doe reported Smith's activities to the sheriff's department on many occasions, and the investigating deputy continued to monitor Smith.

In April of 1996, the police arrested John Smith for violating the order of protection when surveillance again found him near Doe's therapist's office during one of Doe's appointments. Smith was arrested again in June of 1996 when he followed Doe into the parking lot of a local shopping center, parked his car near hers, and sat watching her for several minutes. A third arrest was made in February of 1997. Smith knew that Doe had a standing lunch date every Monday afternoon at a local restaurant. Doe reported seeing Smith in the parking lot on two consecutive Mondays. Sheriff department surveillance established that Smith followed Doe into the restaurant parking lot for the next three Mondays, and alternately circled the restaurant or sat in his car near a window. Upon each arrest, Smith was sentenced to fines and community service as part of negotiated pleas, but he continued his pattern of following Jane Doe.

Doe became increasingly fearful of John Smith in light of his obvious imperviousness to the criminal justice system, and the relatively minor criminal penalties imposed upon him. She suffered increased nervousness, anxiety, and sleeplessness, and

A lengthy interview with Doe revealed that Smith was the owner of a very successful company, and that he had both substantial wealth and a substantial ego. Doe believed that to attack Smith publicly and financially would have a far greater deterrent effect than the criminal proceedings to date. Jane Doe filed a civil lawsuit against John Smith in May of 1997. The suit pled intentional and negligent infliction of emotional distress, and intrusion upon personal seclusion (a form of invasion of privacy recognized as a distinct tort in Illinois), and sought compensatory and punitive damages. The suit alleged that as the proximate result of John Smith's actions, Jane Doe suffered severe emotional distress, sleeplessness, anxiety, depression, nervousness, fear for her personal safety, and loss of enjoyment of life.

Smith's defense counsel concluded that

Smith's homeowner's insurance policy with The Hartford covered liability for invasions of privacy, with benefits of \$500,000 per occurrence. Therefore, Smith made a claim on the policy for coverage and defense in the civil suit. The Hartford tendered a defense under a reservation of rights. The Hartford also filed a declaratory judgment action seeking to avoid liability under the policy. Under Illinois procedural law, that case followed and would not be tried until after Jane Doe's civil action.

Discovery Phase of the Case

The plaintiff propounded extensive fact discovery. In interrogatories and requests for production of documents, Doe sought all of Smith's home, business, and cellular telephone numbers; his automobile registration information; and his personal calendars. Subpoenas to local telephone carriers revealed that the hundreds of hang-up calls logged in Jane Doe's diary had come from John Smith's home, office, and cellular phone, as well as from at least twenty local payphones. Subpoenas were then sent to John Smith's home, office, and cellular telephone companies to obtain complete incoming and outgoing phone records for a period of more than two years.

Counsel reviewed the stacks of records produced line by line, and identified dozens of calls to Jane Doe's home and cellular phones; the call to her therapist; and several calls to Jane Doe's son, daughter, and friends.

Follow-up subpoenas revealed the locations of the payphones from which the calls to Doe were placed. The locations included gas stations and stores near Doe's and Smith's homes. Supplemental interrogatories and requests for production to Smith produced credit card receipts which showed that on several occasions, Smith made purchases at these gas stations and stores within minutes of pay phone calls to Doe from these locations. The plaintiff obtained from the county clerk's office aerial photographs and large-scale plats of the area around Doe's and Smith's homes. The locations of



EQUITABLE RELIEF: THE KEY TO CREATIVE JUSTICE

By Jeffrey R. Dion, Esq.

Justice comes in many forms. A stalking victim who turns to a civil attorney for assistance is often more concerned with safety and peace of mind than monetary damages. Consequently, equitable relief—in addition to monetary damages—may provide stalking victims more of the resolution they seek, or at least pull disparate parties a little closer to the settlement table.

Attorney Daniel Wolf believes the case he describes in the accompanying article settled because the parties agreed to a lifetime restraining order that would protect the plaintiff from contact with her stalker. While a court-imposed protective order would be limited to one year, the court could enforce the lifetime restraining order because the parties agreed to it. As the number of civil stalking cases has increased, so has the use of combined legal and equitable remedies.

In the case of *Haverbush v. Powelson*,¹ the plaintiff was an orthopedic surgeon who was stalked by a nurse who worked at the same hospital. Soon after they met, Nurse Powelson began to shower Dr. Haverbush with gifts, though he expressed no romantic interest in her. Powelson began to write letters to Haverbush that alternately threatened him and expressed her love for him. She also wrote disparaging letters to Haverbush's daughter and his fiancée's mother. She then began to threaten Haverbush and his fiancée. Haverbush sued, and the trial court awarded him monetary damages, as well as issuing a permanent injunction forbidding Powelson from contacting or harassing Haverbush. Additionally, the trial court ordered Powelson to apply for a lateral transfer to a position of equivalent duties, compensation, and benefits in a different part of the hospital so as to avoid to the greatest extent possible any contact between the parties.

The appellate court found Powelson's argument that the order requiring her to apply for a transfer was ineffectual and fraught with enforcement problems to be without merit. The court pointed out that all the order required Powelson to do was apply. If a lateral position was not available or did not exist, she would comply with the order simply by applying.

The Wisconsin Court of Appeals used a "carrot and stick approach" in *Gianoli v. Pfeiderer*.² In that case, the trial court awarded \$12,000 in compensatory damages, \$200,000 in punitive damages, and injunctive relief against the defendants for stalking and harassing the plaintiffs over a land dispute. The court also crafted an unconventional equitable remedy. It delayed enforcement of the punitive damages for a one year period, and directed that if the Pfeiderers sold their home and moved within that year, the punitive damages would be vacated.

The Pfeiderers raised several issues on appeal, including an assertion that the punitive damages award was unconstitutionally excessive. One of the measures the Court of Appeals used to evaluate whether the punitive damages award was excessive was to compare it to the criminal and civil penalties that could have been imposed for similar conduct. The court found that many of the Pfeiderers' activities could be construed as violations of Wisconsin's stalking, defamation, and trespass laws, which exposed them to significant financial penalties and incarceration. Accordingly, the financial aspect of the punitive damages award was not excessive.

The Court of Appeals then considered, as a matter of first impression, the question of whether the trial court had the power to make the punitive damages award conditional. The court found no fault with the trial court's intention to separate the parties, and held that "under the unique circumstances of this case, the conditional punitive award was a reasoned and appropriate exercise of the trial court's discretion to fashion an appropriate remedy."

By focusing on a stalking victim's real-world needs, the victims' bar and the courts can develop fair, creative remedies that not only provide equitable relief, but may also increase the parties' satisfaction with the results of litigation. ■

1. 551 N.W.2d 206 (Mich. Ct. App. 1996).

2. 563 N.W.2d 562 (Wis. Ct. App. 1997).

the payphones were pinpointed and marked on the aerials and maps, and the visual effect was striking: the payphone locations nearly created a "ring" around the parties' respective homes.

Depositions were taken from the parties, the primary investigating sheriff's deputy, Jane Doe's therapist, three of Doe's friends that Smith had contacted,

and Doe's son. The witnesses' statements, along with the phone records, sheriff surveillance tapes, and surveillance tapes from Jane Doe's yard and vehicle, clearly established that from 1995 to 1997, John Smith engaged in a continuous course of conduct stalking Jane Doe, including calling her repeatedly, driving past her house, driving by stores and restaurants

where she was shopping or dining, and contacting her friends and family members.

Expert Testimony

Jane Doe retained forensic psychologist Dr. J. Reid Meloy of San Diego as an expert witness. Dr. Meloy is one of the country's foremost authorities on the psychology of stalking and the editor of

one of the few scholarly texts on that subject.¹ Dr. Meloy conducted a full psychological interview and clinical evaluation of Doe, and reviewed all pleadings, discovery materials, and deposition transcripts from the case. He opined in his report and in his deposition testimony that John Smith's actions were consistent with those of a stalker. Dr. Meloy also opined that all of Jane Doe's psychological reactions were genuine, and that she suffered from a dysthymic disorder (as defined in *Diagnostic and Statistical Manual IV*) proximately caused by John Smith's behavior. He also concluded that as a result of Smith's harassment, Doe suffered from a "Specific Phobia, Other Type, with Situationally-Bound Panic Attack."

Of vital importance to Jane Doe's case was Dr. Meloy's opinion that Doe's emotional reactions were the legitimate and reasonably foreseeable responses of a stalking victim to harassment like John Smith's, and that the impact of the psychological damage on the quality of her life was genuinely severe. This opinion was based in substantial part upon the writing of Doris M. Hall, Ph.D., author of one of the few academic studies focusing on stalking from the victim's perspective.²

John Smith retained forensic psychologist Dr. Eric Ostrov of Chicago as his expert witness. Dr. Ostrov also conducted a full psychological interview and clinical evaluation of Jane Doe. Dr. Ostrov opined in his report and deposition testimony that Doe suffered from anxiety disorder with histrionic and narcissistic personality traits (as defined in *DSM-IV*). Dr. Ostrov opined that Jane Doe's emotional reactions were genuine, but that pre-existing perceptions and propensities played a key role in engendering those reactions. However, Dr. Ostrov conceded that he had no basis to refute the authoritative nature of the academic research relied upon by Dr. Meloy in rendering his opinions, and he agreed that Dr. Meloy was the primary authority in the arena of the psychology of stalking.

Trial and Settlement

The case was called for jury trial on March 1, 1999. Prior to jury selection, John Smith brought a motion *in limine* seeking to bar the admission of Doe's telephone records, arguing that the evidence offered by Doe did not conclusively establish that Smith made the hundreds of hang-up telephone calls to Doe. The court ruled that evidence of the phone calls was admissible, and that the jury was competent to draw conclusions based upon the circumstantial evidence.

John Smith also sought to bar all references to himself as a "stalker" because he had never been charged under a criminal stalking statute. The court denied the motion, ruling that despite the existence of a criminal stalking statute, the word "stalker" was not a legal term of art and was commonly known to the public. The court held that the jurors could properly employ their own understanding of the word "stalker."

Those rulings proved to be pivotal because immediately thereafter, the defendants requested settlement discussions in the judge's chambers. There had been little discussion of settlement prior to trial. In chambers, Doe's counsel took the position that the evidence of Smith's liability was abundantly compelling, and that Dr. Meloy's opinions as to proximate cause and emotional distress could not be significantly refuted. The difficulty in settlement discussions was placing a dollar value on the emotional distress damages. Because there was no physical damage component with which to form a benchmark, and no remotely comparable fact patterns in the jury verdict reporters, both sides were playing in the dark. While Smith's counsel attempted to minimize the potential jury verdict, Doe's counsel focused on the \$500,000 per occurrence coverage under the homeowner's policy. At the same time, The Hartford was confident it would prevail on its pending declaratory judgement action, absolving it of any liability. Overriding all financial

considerations was Jane Doe's desire for finality—she was aware that even a large monetary settlement did nothing to address the approaching expiration of the plenary order of protection in November of 1997.

The case finally settled that day after six hours of negotiations. The settlement agreement contains a confidentiality provision prohibiting disclosure of the terms of settlement—specifically excepting publication with the National Center for Victims of Crime or similar organizations, provided the parties' identities are not disclosed.

The terms of the case settlement were as follows: Jane Doe received a lump sum payment of \$300,000, of which John Smith personally paid two-thirds, and The Hartford paid one-third. While negotiations toward the dollar figure neared agreement, plaintiff's counsel demanded that John Smith enter into a voluntary and permanent civil restraining order. This was an obvious and essential element of settlement: a criminal order of protection is not permanent, and Smith could hardly object to abiding by the law. Smith did enter into a voluntary, permanent civil restraining order which mirrored the terms of the existing criminal order of protection. The voluntary order provides for payment of liquidated damages to Jane Doe in the amount of \$5,000 per violation, as determined by a court of competent jurisdiction, in addition to any such criminal sentence or penalty as may be imposed as a result of the violation.

Shortly after settlement, Jane Doe moved to another county. As of September, 2000, there have been no known violations of the voluntary order. ■

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1. *The Psychology of Stalking: Clinical and Forensic Perspectives* (J. Reid Meloy, ed., Academic Press, 1998).
2. D.M. Hall, *The Victims of Stalking, in The Psychology of Stalking: Clinical and Forensic Perspectives* 113-137.