

STALKING

The defendant is charged with stalking [alleged victim] . Section 43 of chapter 265 of our General Laws provides as follows:

“Whoever . . .

willfully and maliciously

engages in a knowing pattern of conduct or series of acts

over a period of time

directed at a specific person

which seriously alarms or annoys that person

and would cause a reasonable person to suffer substantial

emotional distress,

and makes a threat

with the intent to place the person in imminent fear of

death or bodily injury,

shall be guilty of the crime of stalking”

In order to prove the defendant guilty of stalking, the Commonwealth must prove five things beyond a reasonable doubt:

First: That over a period of time the defendant knowingly engaged in

**a pattern of conduct or series of acts, involving at least three incidents,
directed at [alleged victim] ;**

***Second:* That those acts were of a kind that would cause a
reasonable person to suffer substantial emotional distress;**

***Third:* That those acts did cause [alleged victim] to become seriously
alarmed or annoyed;**

***Fourth:* That the defendant took those actions wilfully and
maliciously.**

**An act is “willful” if it is done intentionally and by design, and not out
of mistake or accident.**

**An act is done with “malice” if the defendant’s conduct was
intentional and without justification or mitigation, and any reasonable
prudent person would have foreseen the actual effect on [the alleged victim] .**

**And *Fifth:* The Commonwealth must prove beyond a reasonable
doubt that the defendant also made a threat with the intention of placing
 [alleged victim] in imminent fear of death or bodily injury.**

See Instructions 3.120 (Intent) and 2.240 (Direct and Circumstantial Evidence).

The model instruction uses the definition of stalking found in G.L. c. 265, § 43, as amended by St. 1996, c. 298, § 11 (effective November 7, 1996), which eliminated the two-pronged definition (stalking by harassing or stalking by following) found in the earlier version of § 43, as enacted by St. 1992,

c. 31 (effective May 18, 1992). The “threat” element “closely approximates the common law definition of the crime of assault” and should be so interpreted. *Commonwealth v. Matsos*, 421 Mass. 391, 394, 657 N.E.2d 467, 470 (1995).

The statutory phrase “pattern of conduct or series of acts” appears to require three or more incidents. See *Kwiatkowski*, 418 Mass. at 548 n.6, 637 N.E.2d at 858 n.6 (identical phrase in definition of “harasses” in prior version of § 43, coupled with phrase “repeatedly harasses,” requires proof of three or more incidents); *Commonwealth v. Martinez*, 43 Mass. App. Ct. 408, 410-411, 683 N.E.2d 699, 701-702 (1997) (phrase “repeatedly follows” in prior version of § 43 requires proof of three or more incidents). See also *Commonwealth v. Wotan*, 422 Mass. 740, 742, 665 N.E.2d 976, 978 (1996) (“repeatedly” in G.L. c. 269, § 14A requires three rather than two harassing telephone calls because defendant entitled to benefit of plausible ambiguity in statute).

SUPPLEMENTAL INSTRUCTION

Communications covered by statute.

The conduct, acts or threats

may be communicated by any means including, but not limited to (mail) (telephone) (facsimile transmission) (e-mail) (internet communications) (telecommunications device) (electronic instant messages) (any electronic communication device including any device that transfers [signs] [signals] [writing] [images] [sounds] [data] or [intelligence of any nature] transmitted in whole or in part by a [wire] [radio] [electromagnetic system] [photo-electronic system] [photo-optical system]).

NOTES:

1. **Stalking in violation of a court order.** General Laws c. 265, § 43(b) creates an aggravated form of this offense with a mandatory minimum penalty if it is committed in violation of a temporary or permanent vacate, restraining or no-contact order or judgment issued pursuant to G.L. c. 208, §§ 18, 34B or 34C, G.L. c. 209, § 32, G.L. c. 209A, §§ 3-5, or G.L. c. 209C, §§ 15 or 20, or a protection order issued by another jurisdiction, or a temporary restraining order or preliminary or permanent injunction issued by the Superior Court. The model instruction may be modified by adding as additional elements the existence and violation of such a court order.

2. **Subsequent offenses not within District Court jurisdiction.** General Laws c. 265, § 43(c) establishes a mandatory minimum penalty for repeat offenders. Subsequent offenses are not within the final jurisdiction of the District Court.

3. **Violation of c. 209A order is lesser included offense.** Violation of a 209A order (G.L. c. 209A, § 7) is a lesser included offense of stalking (G.L. c. 265, § 43), and therefore a defendant who has been convicted of violating a c. 209A order may not be convicted of stalking based upon the same conduct. *Edge v. Commonwealth*, 451 Mass. 74, 76-77, 883 N.E.2d 928, 931 (2008).

4. **Harassing letters.** In a prosecution under § 43, a judge should not exclude otherwise-admissible harassing letters sent by the defendant to the complainant, because they are repetitive or unduly prejudicial. The Commonwealth is entitled to present to the jury the totality of the defendant's conduct, since it must prove the victim's alarm or annoyance, and the likelihood that a reasonable person in the victim's position would suffer substantial emotional distress. *Matsos*, 421 Mass. at 392 n.3, 657 N.E.2d at 469 n.3.

5. **Willful and malicious conduct.** Willful conduct must be intentional (as opposed to negligent) but does not require that the defendant intend its harmful consequences as well. *Commonwealth v. O'Neil*, 67 Mass. App. Ct. 284, 290-293, 853 N.E.2d 576, 582-584 (2006) (criminal harassment). The modern definition of "malice" does not require any showing of "cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *Id.* Prior to the *O'Neil* decision, this instruction included language that: "An act is done maliciously if it is done out of cruelty or hostility or revenge, or other wrongful motive."

6. **Pre-1996 incidents.** The model instruction's description of the elements of the offense may also be used for incidents between August 3, 1994 and November 6, 1996 prosecuted under the "harassing" prong of the prior version of § 43. See *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 637 N.E.2d 854 (1994). *Kwiatkowski's* invalidation of pre-August 3, 1994 "harassing" convictions is to be applied retroactively in cases that were on direct appeal when it was decided if the defendant raised the constitutional validity of the statute at trial; if not, the defendant is entitled to have the conviction set aside only if there is a substantial risk of a miscarriage of justice. *Matsos*, 421 Mass. at 396-399, 657 N.E.2d at 471-472.

7. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

8. **Venue.** Violations of § 43 may be prosecuted wherever "an act constituting an element of the crime was committed." G.L. c. 277, § 62B.