

# COMMONWEALTH OF MASSACHUSETTS TRIAL COURT



## GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS

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Administrative Office of the Trial Court

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## Foreword

The Administrative Office of the Trial Court issues these Guidelines to assist judges and court personnel in addressing the many complex and sensitive issues that arise in the course of abuse prevention proceedings under G.L. c. 209A. The Guidelines are intended to promote the safety of those who seek abuse prevention orders and ensure the due process rights of those against whom these orders are sought.

This fourth edition of the Guidelines was developed with significant assistance from the Boston Municipal Court, District Court, Probate and Family Court and Superior Court Departments. The prior edition was issued in 2000.

These Guidelines reflect a number of substantive and procedural changes. Some changes are based on appellate case law concerning what constitutes notice and when findings are necessary, as well as the relationship of no-contact and stay-away orders, standards for extension of orders, expungement of records, mutual orders, and the ability to issue orders of prevention and protection even without personal jurisdiction. Other revisions are based on statutory changes, which include amendments to the bail statute and the requirement of an order to complete a certified batterer intervention program when abuse prevention orders have been violated.

Procedural issues addressed include:

- Requirement to enter emergency orders issued under the Judicial Response System into the Statewide Registry of Civil Restraining Orders, even if the plaintiff does not appear.
- Protocols applicable when a plaintiff comes to a court where a judge is not sitting or comes to a court without venue.
- Protocols applicable when a plaintiff seeks an *ex parte* order that would conflict with an existing order in a Probate and Family Court domestic relations matter.
- Limiting the use of side bar.
- Logistics for getting documents to the police for service.
- Request for identification from plaintiffs moving to terminate orders.
- Expanded sections on child support and on minors as plaintiffs and as defendants.
- Terminology change from 'vacated' to 'terminated' order.

In addition, the revised Guidelines reference newly-revised c. 209A forms that will go into effect December 1, 2011.

The prior use of appendices also has changed. The Guidelines will be posted as a web-based resource with appropriate links to references and the printed copies of the Guidelines will include those referenced documents.

I would like to thank everyone who contributed to the major undertaking required to update these Guidelines. In particular, I would like to recognize the commitment of Judge Mary Hogan Sullivan, Judge Marianne C. Hinkle, Judge Michele B. Hogan, and the other members of the District Court

Professional Development Group on Domestic Abuse Proceedings, including law clerk Lizabeth Marshall, as well as the representatives of the Trial Court Administrative Offices who led the effort to analyze and update this important resource: Ellen Shapiro, Cheryl Sibley, Lisa Yee, Kim Wright, Ilene Mitchell, Maria Pena, Jamie Sabino, and Ann Archer.

In addition, I commend the judges and court staff across the state who implement these Guidelines every day, rendering an invaluable service in this complex and important area of law.



Robert A. Mulligan  
Chief Justice for Administration & Management

Sept. 28, 2011

Date

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1:00 In General. These Guidelines apply to proceedings under the Abuse Prevention Act, G.L. c. 209A, in the District Court, Boston Municipal Court, Probate and Family Court, and Superior Court departments of the Trial Court, to related criminal proceedings in the District Court, Boston Municipal Court and Superior Court departments and to related matters in the Probate and Family Court Department. These Guidelines also apply to protection orders issued by other jurisdictions. General Laws c. 209A, § 5A provides that “any protection order issued by another jurisdiction, as defined in section one, shall be given full faith and credit throughout the Commonwealth and enforced as if it were issued in the Commonwealth for as long as the order is in effect in the issuing jurisdiction.” *See Guideline 8:00, Venue; Territorial Jurisdiction for Criminal Prosecution of Violations of c. 209A Orders*, and *Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*. All such proceedings under c. 209A should be undertaken with sensitivity to safety, the need to ensure due process, and the personal and emotional nature of the issues involved.

Please note the word “Clerk” in these Guidelines, unless otherwise expressly provided, shall mean anyone serving in the position of Clerk Magistrate, Clerk of Courts, Clerk or Register. The words “clerk” or “clerk’s office” shall mean any staff person working in the office of the Clerk Magistrate, Clerk of Courts, Clerk or Register

The Guidelines describe abuse prevention orders issued under c. 209A in three categories:

Emergency Orders. General Laws c. 209A, § 5 provides temporary relief, “[w]hen the court is closed for business or the plaintiff is unable to appear in court because of severe hardship due to the plaintiff’s physical condition . . . .” When relief is granted under § 5 without the filing of a complaint, a complaint shall be filed in court on the next business day. Orders issued pursuant to § 5 are described in these Guidelines as “emergency” orders. *See Guideline 11:00, Procedure for Response to Complaints When Court is Not in Session: Judicial Response System*, and *Guideline 1:08, Plaintiff Unable to Appear in Court*. Emergency orders expire at the end of the next available court business day when a judge is sitting.

Ex Parte Orders. General Laws c. 209A, § 4 provides for the issuance of abuse prevention orders without notice to the defendant if the plaintiff comes before the court and “demonstrates a substantial likelihood of immediate danger of abuse . . .” Orders obtained pursuant to c. 209A, § 4 have a maximum duration of ten court business days and are described in these Guidelines as “*ex parte*” orders. *See Guidelines 3:00 - 4:07.* They are initiated by the filing of a complaint. A hearing is held forthwith but with no notice to the defendant.

Orders After Notice. Abuse prevention orders issued under c. 209A that are not issued on an emergency or *ex parte* basis require the filing of a complaint, notice to the defendant and an opportunity for the defendant to be heard. Such orders are described in these Guidelines as “orders after notice.” These orders may be issued in five different contexts: (1) after a hearing held within ten court business days after the issuance of an *ex parte* order; (2) when no *ex parte* order has been issued, but the defendant is present for the hearing (e.g., at an arraignment); (3) on motion for modification by either party during the life of an order; (4) on the expiration date of an order that was issued after notice; and (5) at a two-party hearing after notice to the defendant, with no prior *ex parte* order having been issued. Initial orders after notice have a maximum duration of one year. Orders issued on the expiration date of an existing order after notice may be issued for any additional time necessary to protect the plaintiff. This could include a permanent order.

Terminated Orders. Previous versions of the Guidelines, certain forms and case law have used the term “vacate” or “vacated order” to describe those orders that have been terminated upon motion of either party or because the plaintiff did not appear at a scheduled hearing. In contexts other than c. 209A, the word “vacate” carries the connotation that the order should not have been originally issued. In the instance of c. 209A orders, however, vacating an order

merely terminates the order as of the date it was vacated, with the record of the order remaining in the Statewide Registry of Civil Restraining Orders. Therefore, to avoid confusion, both the Guidelines and forms will henceforth use the word “terminated” to describe those orders that have been terminated upon motion of either party or because the plaintiff did not appear at a scheduled hearing. Please note, however, “vacate” will still be used when referring to specific language in a statute or case.

Expungement is inappropriate for terminated orders, other than orders obtained through the commission of fraud on the court. See Vaccaro v. Vaccaro, 425 Mass. 153, 157-159 (1997), Commissioner of Probation v. Adams, 65 Mass. App. Ct. 725 (2006).

#### COMMENTARY

The Abuse Prevention Act, G.L. c. 209A, is one of the most sensitive and potentially volatile areas of Trial Court jurisdiction. These Guidelines are intended to provide an analysis of the legal requirements of that law and to recommend particular interpretations in the many areas where the statute is vague or silent. The Guidelines also address the many unique practical, procedural and policy issues presented by c. 209A.

Although the Guidelines apply to c. 209A proceedings in four court departments, some of the Guidelines are not applicable to one or more of the departments because of the differences in jurisdiction on related matters. Nonetheless, all departments are encouraged to be aware of the Guidelines to promote a coordinated response by the Trial Court to domestic violence cases.

While the procedures in G.L. c. 258E for harassment prevention orders are largely parallel to abuse prevention orders under c. 209A, c. 258E permits anyone “suffering from harassment” to seek and obtain a harassment prevention order. Since there are many substantive differences in terms of eligibility, jurisdiction, and available relief, these Guidelines, while informative on procedural issues, are not intended to apply to orders issued under c. 258E.

1:01 Protective Purpose of c. 209A. The fundamental purpose of proceedings under c. 209A is to adjudicate the need for protection from abuse and, if that need is found to exist, to issue abuse prevention orders. Given this protective purpose, it is inappropriate for the court in c. 209A proceedings to attempt to reconcile the parties or to mediate disputes.

The court may provide information about domestic violence advocacy, counseling for substance abuse or certified batterer intervention programs, but such services are not a substitute for protective relief in the form of specific orders.

#### COMMENTARY

The protective purpose of proceedings under c. 209A can be jeopardized if the court attempts to resolve any perceived underlying conflict or problem in the relationship between the parties. While it might seem desirable for the court to play what it believes to be a helpful and constructive role, this is not the purpose of the proceedings. The plaintiff has a right to invoke the court's protective authority against abuse. More importantly, any attempt to explore the nature of the underlying relationship between the parties can inappropriately shift the focus of the proceedings away from the issue of whether the plaintiff requires the protection of the court in the form of an abuse prevention order under c. 209A. Such a shift of focus can weaken the plaintiff's resolve to seek protection and, if a defendant is a batterer, provide a context for a defendant's denial, domination and control. If the plaintiff desires counseling, it is available from professionals who are trained to provide it. The issues for the court before which a plaintiff brings a c. 209A complaint are limited in scope: is protection under the law warranted and, if so, what form should that protection take?

Judges, clerks and other court personnel should be aware that these proceedings often take place in times of great turmoil in the lives of the parties. Both plaintiffs and defendants sometimes come to court dressed differently from other litigants, or even dressed inappropriately, and they may display emotions infrequently observed in a courtroom. While overt disrespect for the court should not be tolerated, some sensitivity is called for. *See Commonwealth v. Contach*, 47 Mass. App. Ct. 247 (1999) (regarding the use of contempt power in an abuse prevention order hearing and citing this Commentary on the need for sensitivity in such matters).

*See also Guideline 4:05, Reconciliation; Guideline 6:01, Referral for Treatment or Supportive Services; Guideline 10:00, Civil Commitment for Alcoholism or Other Substance Abuse; and Guideline 12:05, Proceedings in Probate and Family Court: Pre-Trial Conferences and Other Court Proceedings.* For a list of certified batterer intervention programs go to [www.mass.gov/dph/violence](http://www.mass.gov/dph/violence), click on Batterer Intervention Program Services, then click on Certified Batterer Intervention Programs and Services.

1:02 Due Process Considerations. The adjudication of cases by a neutral court is a fundamental element of due process. In c. 209A cases, as in all other court proceedings, the court is responsible for protecting the rights of the parties and adjudicating each complaint on a case-by-case basis.

Particular care is warranted regarding the following:

(A) An order should not issue unless the court is satisfied that it has jurisdiction, and that the facts alleged constitute abuse, or a substantial likelihood of abuse. *See Guideline 3:02, Subject Matter Jurisdiction; Guideline 3:03, Venue; Territorial Jurisdiction for c. 209A Complaints; Guideline 3:03A, Personal Jurisdiction over a Non-Resident Defendant; and Guideline 3:07, Conduct of Ex Parte Hearings.*

(B) The court should require evidence of notice to the defendant before issuing an order for longer than ten court business days. *See Guideline 5:05, Failure of the Defendant to Appear.*

(C) When possible (and when effective service can be made), the court should limit the duration of an *ex parte* order to fewer than the maximum ten days in order to minimize the deprivation of the defendant's rights before the defendant is given notice and an opportunity to be heard. *See Guideline 3:00, Ex Parte Hearings: General; and Guideline 5:00, Scheduling Hearings After Notice.*

(D) The plaintiff must prove, by a preponderance of the credible evidence, that the requested relief is legally warranted. *See Guideline 3:06, Rules of Evidence and Standard and Burden of Proof; Guideline 5:03, Rules of Evidence; and Guideline 5:04, Standard and Burden of Proof.*

(E) In appropriate circumstances, the court may decline to issue an *ex parte* order and delay action on the complaint until both parties have been given notice and an opportunity to be heard.

(F) Although the court should not permit harassment or intimidation, in contested proceedings each party must be given a meaningful opportunity to challenge the other party's evidence. *See Guideline 5:01, Conduct of Hearings After Notice When Both Parties Appear: General.*

(G) In determining whether to exercise jurisdiction under the emergency exception to the Uniform Child Custody Jurisdiction Act (G.L. c. 209B, § 2(a)(3)) in an interstate custody dispute, a judge must, at minimum, hear argument from and review the affidavits from both parents. Orchard v. Orchard, 43 Mass. App. Ct. 775, 781 n.11 (1997), citing Umina v. Malbica, 27 Mass. App. Ct. 351, 360 n.11 (1989).

#### COMMENTARY

As recognition that its scope and nature has increased, the issue of domestic violence has become the focus of legitimate and increasing public concern. However, that concern must not be permitted to affect or diminish the court's responsibility to remain neutral, to protect the rights of the parties in each case, and to address each case individually on its own merits. "Whether a defendant's constitutional rights have been violated [in a c. 209A proceeding] will depend on the fairness of a particular proceeding." Frizado v. Frizado, 420 Mass. 592, 598 (1995). *See also*, C.O. v. M.M., 442 Mass. 648, 656-659 (2004) (court found that defendant's right to due process had been denied where defendant was not given the opportunity to present or cross-examine witnesses during a hearing on the question of continuing a temporary order). *See Guideline 3:00, Ex Parte Hearings: General.*

Massachusetts's courts may issue an abuse prevention order under c. 209A against an out-of-state defendant even in cases where the court does not have personal jurisdiction over the defendant. Caplan v. Donovan, 450 Mass. 463, 463-64, (2008), *cert. denied*, Donovan v. Caplan, 553 U.S. 1018 (2008). However, such orders "cannot impose any personal obligations on a defendant, and [are] limited to prohibiting actions of the defendant." *Id.* at 469-471. *See Guideline 3:03A, Personal Jurisdiction over a Non-Resident Defendant.*

1:03 Procedural Rules; Discovery. In the Probate and Family Court Department, the Massachusetts Rules of Domestic Relations Procedure apply to c. 209A actions. In the Boston Municipal Court, District Court and Superior Court departments, the provisions of the Massachusetts Rules of Civil Procedure may be applied.

Discovery orders are within the court's discretion and should be issued only after a hearing and only upon a showing that such discovery is necessary to provide specific information essential to the adjudication of the case or the issuance of particular abuse prevention orders.

#### COMMENTARY

With the exception of the Probate and Family Court Department, where the Massachusetts Rules of Domestic Relations Procedure specifically apply to c. 209A actions, none of the departments of the Trial Court with jurisdiction over c. 209A proceedings have formal procedural rules that specifically govern c. 209A proceedings. Chapter 209A sets out procedural requirements that must be followed. In addition, the Rules of Civil Procedure may be applied in the District Court, Boston Municipal Court and Superior Court departments, where the provisions of c. 209A itself leave a procedural question unanswered.

Discovery is not mentioned in c. 209A and should be considered a matter of the court's discretion, to be allowed only when determined by the court to be necessary for a particular purpose. Discovery should not be ordered if the information would be merely "relevant" or "interesting." The test should be one of necessity. Generally, the testimony of the parties and any witnesses will provide an adequate basis for the adjudication of domestic abuse cases and, when warranted, the issuance of abuse prevention orders.

1:04 Court's Relationship With Local Advocacy Groups. Courts should be open to contact from advocacy groups concerned with the issues of domestic violence. Meeting to discuss appropriate matters with representatives of such groups can be constructive for judges and other court personnel, as well as for the members of the groups themselves.

#### COMMENTARY

While the effectiveness of court procedures can be improved through open and constructive dialogue with all individuals and entities involved, it is essential that such meetings are open to all court personnel, the general public, and the defense bar, among others. The Supreme Judicial Court Committee on Judicial Ethics (“CJE”) has issued two opinion letters on the subject of participation by judges in roundtable meetings with advocacy groups. See CJE Opinion 98-16, (Sept. 15, 1998) <http://www.mass.gov/courts/sjc/cje/98-16h.html> ; CJE Opinion 01-7, (May 31, 2001) <http://www.mass.gov/courts/sjc/cje/2001-7h.html>

The opinion letters provide specific guidelines under which the propriety of judicial participation in roundtable meetings should be assessed. Judicial attendance at roundtables or other forums is only appropriate when invitations are extended to people representing a variety of perspectives so there is no appearance of being “exposed to an essentially one-sided format.” CJE Opinion 01-7. See also CJE Opinion 98-16.

The occasional participation of the court with advocacy groups in a mutual exchange of appropriate information and a discussion of concerns, does not jeopardize the court’s fundamental role as neutral finder of fact, as long as substantive matters and individual pending cases are not discussed. See Guideline 2:08, Role of Advocates in Assisting Parties; Guideline 3:09, Role of Advocates at Ex Parte Hearings; and Guideline 5:02, Role of Advocates at Hearings After Notice.

Providing essentially a two-part test to assess the propriety of judicial participation in roundtable meetings, the CJE indicated that it would focus on a consideration of the specific subject matter discussed at the meetings and the frequency of the judge’s participation in those meetings. CJE Opinion 98-16. “Confidence in the judge’s impartiality will not be undermined and any perception of favoritism will be sufficiently minimized if participation is occasional, and if the judge avoids repeated attendance at meetings when substantive issues are to be discussed in a one-sided fashion.” *Id.* For example, the CJE determined that judicial participation in meetings at which procedural issues are addressed, such as logistical concerns regarding the processing of petitions, is not prejudicial to the interests of defendants and any perception of partiality would be mitigated by the beneficial nature of such meetings. *Id.* The opinion letters clearly state that a judge’s frequent participation in roundtables or attendance at times when the discussion concerns issues not related to court administration is inappropriate. CJE Opinion 01-7. As such, in order to mitigate the risk of compromising the court’s appearance of impartiality as a

result of judicial participation in such meetings, “judges may consider notifying the private bar that they will be attending a meeting” or request that the organizers of an event make such notice. CJE Opinion 98-16. Judges may also consider “limiting attendance to a designated portion of the meeting, perhaps at the beginning, when matters related to court administration could be placed on the agenda,” thereby allowing the judge to participate only in those neutral matters. *Id.*

1:05 Public Access to c. 209A Case Files. Public access to documents and case files in c. 209A proceedings is governed by c. 209A itself and by the law and procedures for court impoundment of court documents generally.

All records of cases in which the plaintiff and/or the defendant is a minor must be withheld from public inspection except by order of the court. *See* G.L. c. 209A, § 8; *Guideline 1:06, Minors as Plaintiffs in c. 209A Actions*; and *Guideline 1:06A, Minors as Defendants in c. 209A Actions*.

Pursuant to G.L. c. 209A, § 8, certain portions of all cases are “confidential” and shall be withheld from public inspection except by order of the court. The confidential information consists of the plaintiff’s residential address, residential telephone number and workplace name, address, and telephone number. However, the plaintiff’s residential address and workplace address shall appear on the order and be accessible to the defendant and the defendant’s attorney unless the plaintiff specifically requests that the information be withheld from the order.

The confidential information is provided to the court by the plaintiff’s completion of the Plaintiff Confidential Information Form (FA/HA-8). This form is kept by the court but is not part of the public record. Confidential information shall be accessible at all reasonable times to the plaintiff and plaintiff’s attorney, to those specifically authorized by the plaintiff to obtain such information and, if necessary in the performance of their duties, to prosecutors, victim witness advocates, domestic violence victim counselors, sexual assault counselors, and law enforcement officers. Any authorized person who wishes to access the confidential information must complete a Request for Access to Plaintiff Confidential Information (FA/HA-7). The clerk’s office should request identification from all individuals requesting confidential information.

The provisions of § 8 apply to any protection order issued by another jurisdiction that is filed with the court pursuant to G.L. c. 209A, § 5A. Confidential portions of the record are not deemed to be public records under the provisions of G.L. c. 4, § 7, clause 26. G.L. c. 209A, § 8.

### COMMENTARY

Plaintiff safety is the most important aspect of the confidentiality requirements in c. 209A proceedings. In every case, § 8 prohibits public access to certain categories of information about the plaintiff. Section 8 also permits the plaintiff to request that the plaintiff's residential address and workplace address be withheld from the order so as to be inaccessible to the defendant and the defendant's attorney.

The confidential information is provided to the court by the plaintiff's completion of the Plaintiff Confidential Information Form (FA/HA-8). This form is kept by the court but is not part of the public record.

Before any confidential information is provided to a person authorized to receive it pursuant to G. L. c. 209A, § 8, the case file should be carefully reviewed to determine if the information has also been impounded. *See* Memorandum from Chief Justice for Administration and Management Barbara Dortch-Okara, November 10, 2000, "Amendments to the confidentiality provisions of c. 209A". <http://www.mass.gov/courts/209a/docs/aotc-confidentiality-memo.pdf> The person requesting the information must complete a Request for Access to Plaintiff Confidential Information (FA/HA-7). The clerk's office should request identification from all individuals requesting confidential information.

The plaintiff may also request that other information be impounded, that is, kept confidential from the general public by court order. The plaintiff may use the Motion for Impoundment & Affidavit (FA/HA-8).

Except as noted above, judicial records of c. 209A proceedings are presumptively open to the public. *The Boston Herald, Inc. v. Richard J. Sharpe*, 432 Mass. 593, 608 (2000).

It should be noted that, pursuant to G.L. c. 6, § 172D, child support enforcement agencies may be granted access to records contained in the Statewide Registry of Civil Restraining Orders.

1:06 Minors as Plaintiffs in c. 209A Actions. Generally, if a minor (person under the age of 18) seeks an abuse prevention order, a parent or guardian should file the petition on behalf of the minor. If a minor plaintiff appears in court seeking an abuse prevention order against someone who is not a family member or a caretaker, the judge should attempt to secure the presence of a parent or guardian before proceeding with the hearing. If that is not practical, the judge may consider obtaining some form of authorization for the minor to proceed without a parent or guardian present. If neither is practical, the judge should consider appointing a or counsel for the minor before proceeding with the hearing. However, particularly in the case of a mature minor, the court should not refuse to issue an abuse prevention order simply because no adult is present.

Where a minor plaintiff appears in court, without a parent or guardian, seeking an abuse prevention order against a family member or caretaker, the judge should appoint a *guardian ad litem* or counsel for the minor before proceeding with the hearing. If the judge finds a basis to issue an order, the judge should direct that, pursuant to G.L. c. 119, § 51A, a report be filed by court personnel with the Department of Children and Families. In appropriate circumstances, it may be necessary to request that the Department respond to the court on an emergency basis to take custody of the minor.

Although by statute all case records of cases involving minor plaintiffs must be withheld from public inspection except by order of the court, *see* G.L. c. 209A, § 8, the courtroom should not be closed during c. 209A proceedings involving minors unless the strict requirements for closing the courtroom have been met. *See* Commentary to *Guideline 3:04*, Public Nature of *Ex Parte* Hearings.

COMMENTARY

The court should be conscious of the sensitive nature of a request for an abuse prevention order on behalf of a minor. Although proceedings in the Juvenile Court (or the Juvenile Sessions of the District Court in those courts that retain juvenile jurisdiction) are closed to the public, there is no similar provision allowing closure during proceedings under c. 209A involving minors. However, care should be taken to minimize, to the extent possible, disclosure of unnecessary identifying information about the minors involved in such proceedings. Cases involving minors may require involvement of other governmental agencies and the court should not hesitate to direct court personnel to notify the Department of Children and Families or any other agency where such notifications are required or advisable.

Although a petition under c. 209A on behalf of a minor should generally be made by a parent or guardian, in some circumstances the court can and should allow a minor to proceed without a parent or guardian. The court should not refuse to act solely because the court cannot secure the presence of a parent or guardian, particularly where the minor is mature (16 or 17), and where the defendant is an intimate partner or a family member who is not a parent or guardian or where there is an imminent threat of bodily injury. Authorization from a parent or guardian in writing or over the phone may, in appropriate circumstances, substitute for the presence of such a person.

The standard for issuance of an order under c. 209A is the same for minors as for adults. Abuse is defined as attempting to cause or causing physical harm, placing another in fear of imminent serious physical harm or causing another to engage involuntarily in sexual relations by force, threat or duress. G.L. c. 209A, § 1. Duress requires an immediate threat, no reasonable opportunity to escape, and no other choice in the circumstances. Smith v. Jones, 67 Mass. App. Ct. 129, 136-137 (2006), citing Commonwealth v. Perl, 50 Mass. App. Ct. 445, 446-450 (2000). Sexual contact between minors that is not accompanied by force, threat, or duress does not meet the definition of abuse, although it may constitute a criminal offense. *Id.*

1:06A Minors as Defendants in c. 209A Actions. A parent or guardian should accompany a minor defendant (under the age of 18) at a hearing involving a request for an abuse prevention order by a plaintiff who is not a family member or caretaker. If a minor defendant appears alone, the judge should attempt to secure the presence of a parent or guardian before proceeding with the hearing. If that is not practical, the judge may consider obtaining some form of authorization from a parent or guardian for the minor to proceed alone. If neither is practical (or if the abuse prevention order is sought by a family member or caretaker), the judge should consider appointing a *guardian ad litem* for the minor.

Under c. 209A, the judge may order a minor defendant to refrain from abusing the plaintiff and to refrain from contacting the plaintiff. In some cases, this request might be made by a family member or caretaker in which case such an order might result in the defendant having to vacate and stay away from his or her residence. The statute does not explicitly provide that the judge may order a minor defendant to vacate and stay away from his or her residence, although this Guideline takes the position that such authority is inferred from the overall protective purpose of the statute. If a minor defendant is ordered to vacate or stay away from his or her home, the parent or guardian retains the responsibility to provide a safe residence for the minor. The parent or guardian should be required to identify where the minor defendant will reside. If no appropriate placement is identified, the judge should request, pursuant to G.L. c. 119, § 51A, that court personnel immediately file a report with the Department of Children and Families and that the Department respond to the court on an emergency basis to take custody of the minor.

If the plaintiff seeks an abuse prevention order against a minor defendant who is a family member, the judge should consider informing the plaintiff that the Juvenile Court can provide

information about possible related actions, such as delinquency, criminal, mental health or child in need of services complaints. *See Guideline 10:03, Care and Protection Proceedings; Guideline 10:05, Child in Need of Services (CHINS) Actions; and Guideline 10:06, Mental Health Actions.* Providing this information should be in addition to, and not in lieu of, receiving, hearing and ruling on the

c. 209A complaint. In appropriate circumstances, the judge may also consider requesting that court personnel file a report with the Department of Children and Families pursuant to G.L.

c. 119, § 51A .

Although all records of cases involving minor defendants must be withheld from public inspection, except by order of the court, *see* G.L. c. 209A, § 8, the courtroom should not be closed unless the strict standards for closing the courtroom have been met. *See* Commentary to *Guideline 3:04, Public Nature of Ex Parte Hearings.*

#### COMMENTARY

The court should be conscious of the sensitive nature of a request for an abuse prevention order against a minor defendant. Although proceedings in the Juvenile Court (or the Juvenile Sessions of the District Court in those courts that retain juvenile jurisdiction) are closed to the public, there is no similar provision that permits closing the courtroom during proceedings under c. 209A involving minors. However, care should be taken to minimize, to the extent possible, disclosure of unnecessary identifying information about the minors involved in such proceedings.

Judges should be aware that orders that might otherwise be appropriate for adults might not be appropriate when dealing with minors. For example, an order for a minor defendant to vacate and remain away from the home might render a minor homeless. If the judge finds a basis to issue an abuse prevention order against a minor defendant at the request of a family member or caretaker that requires the defendant to vacate his or her residence, the parent or guardian remains responsible for providing a safe residence for the minor defendant. Often a family member or close friend can provide such a residence, but if no such placement is identified during the hearing, the court should request that the Department of Children and Families respond on an emergency basis to take custody of the minor defendant. The court should develop a working relationship with the Department that will facilitate such requests when they are necessary.

Similarly, an order to stay away from school might result in a truancy situation. Such an issue should be brought to the attention of parents, guardians or, if involved, the Department of Children and Families.

Cases involving minor defendants will often require involvement of other governmental agencies and the court should not hesitate to direct court personnel to notify the Department of Children and Families or other agencies where such notifications are required or advisable. Depending on the situation, care and protection, child in need of services, mental health or delinquency proceedings may provide needed services to the minor defendant and his or her family. *See Guideline 10:03, Care and Protection Proceedings; Guideline 10:05, Child in Need of Services (CHINS) Actions; and Guideline 10:06, Mental Health Actions.*

The standard for issuance of an order under c. 209A is the same for minors as for adults. Abuse is defined as attempting to cause or causing physical harm, placing another in fear of imminent serious physical harm or causing another to engage involuntarily in sexual relations by force, threat or duress. G.L. c. 209A, § 1. Duress requires an immediate threat, no reasonable opportunity to escape and no other choice in the circumstances. *Smith v. Jones*, 67 Mass. App. Ct. 129, 136-137 (2006) citing *Commonwealth v. Perl*, 50 Mass. App. Ct. 445, 446-450 (2000). Sexual contact between minors that is not accompanied by force, threat, or duress does not meet the definition of abuse, although it may constitute a criminal offense. *Id.*

1:07 Non-English Speaking Parties in c. 209A Actions. Non-English speaking parties have a right to the assistance of a qualified interpreter in court proceedings. *See* G.L. c. 221C, § 2. The Office of Court Interpreter Services (OCIS) schedules and deploys spoken language interpreters to all departments of the Trial Court. Upon written request, OCIS will provide interpreters to appear in criminal or civil proceedings. In emergency situations, where it is not feasible to schedule interpreter services in advance, upon request from a court, OCIS will attempt to provide an interpreter, and, if none is available, will provide interpreter services via telephone.

The Massachusetts Commission for the Deaf and Hard of Hearing is statutorily responsible for providing interpreters for American (and other) sign languages. *See* G.L. c. 6, §§ 194 and 196. All requests for sign language interpreters, however, must be made through OCIS, which enters all requests directly into the Commission's scheduling database.

If no OCIS interpreter is available, either in person or via telephone, as a last resort, the court should determine whether any court personnel might be able to interpret for the parties. If no qualified interpreter is available, either in person or through the telephone, and there is no other option for obtaining interpreter services, individuals who have accompanied the plaintiff to court, or who happen to be in the court and speak the plaintiff's language may be asked to assist by interpreting for the plaintiff. Courts should never allow minor children to serve as interpreters, even in emergency situations. All interpreters should be sworn and should give their names for the record.

Courts should never permit the defendant in the c. 209A action, nor anyone accompanying the defendant to court, to interpret for the plaintiff, even if there are no other interpreter services available. Similarly, the plaintiff should never be permitted to interpret for the defendant.

COMMENTARY

Chapter 221C of the General Laws sets out a process by which interpreters are to be made available to every non-English speaker in a “legal proceeding.” This chapter appears to apply to civil, as well as criminal, proceedings, and to everyone participating, whether as a witness or a party.

Interpreter services may be arranged by the court by contacting OCIS at (617) 878-0343. Guidelines for telephone interpreting are posted on the OCIS webpage of the Trial Court’s intranet site at <http://trialcourtweb/admin/planning/interpreters.html>.

If an interpreter is assisting a non-English speaking plaintiff in completing an Affidavit, the plaintiff should write the affidavit in his or her language. The interpreter shall then provide a translation. The interpreter may use form entitled Translation of Affidavit (FA/HA-15). If the non-English speaking person is not literate, he or she should dictate the information to the interpreter, who will then also complete a translation of the Affidavit.

1:08 Plaintiff Unable to Appear in Court. When a plaintiff is unable to appear in court because of severe hardship due to the plaintiff's physical condition, G.L. c. 209A, § 5 allows a representative of the plaintiff to appear in court on the plaintiff's behalf and file a complaint requesting an abuse prevention order. The plaintiff's representative must also file an affidavit describing the circumstances that prevent the plaintiff from personally appearing.

In such circumstances, any justice of the Superior Court, Probate and Family Court, District Court or Boston Municipal Court may grant an abuse prevention order, provided that the plaintiff is able to demonstrate a substantial likelihood of immediate danger of abuse.

#### COMMENTARY

General Laws c. 209A, § 5 provides that when “the plaintiff is unable to appear in court because of severe hardship due to the plaintiff's physical condition, any justice of the superior, probate and family, district or Boston municipal court departments may grant relief to the plaintiff as provided under section four if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse.”

In some cases, the plaintiff's physical condition may be only a temporary barrier to his or her ability to appear in court (e.g., a plaintiff may be hospitalized and unable to be present in court to request an abuse prevention order, but will be physically able to appear at future dates). In other cases, the plaintiff's physical disability may prevent him or her from being able to appear in court at any foreseeable point in the future (e.g., the plaintiff is elderly and bedridden).

In handling abuse prevention orders involving plaintiffs who cannot be physically present, it is essential that the court confirm the plaintiff's identity. The court must also be satisfied as to the identity of the plaintiff's representative and the representative's authority to act on behalf of the plaintiff. In many cases, the local police may be able to assist the court in making these determinations.

Where the plaintiff's inability to appear is only temporary, the court may issue a temporary order following the Guidelines established for conducting an *ex parte* hearing and issuing an *ex parte* order. See *Guidelines 3:00-3:09*, generally, and *Guidelines 4:00-4:07*, generally. The court should take the plaintiff's physical condition into consideration in scheduling the hearing after notice within ten court business days. In this circumstance, it is expected that the plaintiff would be able to be present for the hearing after notice.

Where the plaintiff's physical condition is expected to prevent him or her from appearing at the courthouse, either permanently or within the ten court business days in which the hearing after notice will occur, the court, in its discretion, may conduct the hearing by telephone. In this circumstance, the court should conduct the hearing in the courtroom using a speakerphone. In

this way, the hearing will be recorded. This procedure can be utilized for the *ex parte* hearing as well as for the first hearing after notice and any subsequent hearings.

1:09 Plaintiff in Court Without Territorial Jurisdiction/Proper Venue. Proceedings under c. 209A shall be filed, heard and determined in the court having venue over the plaintiff's residence. If the plaintiff has fled a residence or household to avoid abuse, the plaintiff may commence the action either in the court with venue over the prior residence or in the court with venue over the present residence. *See* G.L. c. 209A, § 2; *Guideline 3:03, Venue; Territorial Jurisdiction for c. 209A Complaints.*

Occasionally, a plaintiff may mistakenly seek an abuse prevention order in a court that does not have venue over the plaintiff's prior or current residence. In that event, the court has two options. The primary issue for the court in making this decision is to ensure the safety of the plaintiff.

If the court is satisfied that the plaintiff can safely travel to the appropriate court, that it is early enough in the day, and the plaintiff has appropriate transportation, the court may send the plaintiff to that court. The court should notify the appropriate court of the plaintiff's impending arrival in order to ensure that the plaintiff may be heard that same day. If there is any question of the plaintiff's safety or the ability to be heard on the same day (whether due to scheduling issues in the other court or the plaintiff's inability to travel, etc.), the court should not send the plaintiff to the other court.

If the judge makes the determination that it would not be appropriate to send the plaintiff to the court with venue for any reason, including, but not limited to, safety concerns, inability of the plaintiff to travel to the other court, or lateness of day, the judge may act for the appropriate court and conduct a hearing on the plaintiff's request.

This *ex parte* order should be issued for ten court business days or for such shorter duration as the court finds appropriate. The *ex parte* order should be returnable to the court with proper venue and the hearing after notice shall occur in that court.

#### COMMENTARY

Trial Court judges have been authorized by the Chief Justice for Administration and Management, pursuant to G.L. c. 211 §9, to conduct a c. 209A hearing on behalf of the appropriate Trial Court Department and Division, when a plaintiff appears in a court location that does not have proper venue to hear the matter and the judge determines that it would not be appropriate to send the plaintiff to the court with venue for any reason, including, but not limited to, safety concerns, inability of the plaintiff to travel to the other court, or lateness of day.

When the plaintiff appears at a court without venue (Court A), and the judge determines to act on behalf of the court with venue (Court B), the following steps must be taken:

#### **Court A:**

1. The clerk's office in Court A shall open the case in Court A.
2. The clerk's office in Court A shall immediately contact the clerk's office in Court B to inform them of the judge's decision to hear the case and to determine an acceptable return date should an order issue.
3. The probation department in Court A shall obtain the criminal record and any record in the Statewide Registry of Civil Restraining Orders for the defendant.
4. The clerk's office in Court A shall check the Warrant Management System for the defendant's name to ascertain the existence of any warrants. If the matter is in the Probate and Family Court, the staff that currently checks the Warrant Management System for the defendant's name to ascertain the existence of any warrants shall conduct such a check.
5. The judge in Court A will conduct the hearing. The docket shall indicate that the session was conducted on behalf of Court B. All subsequent hearings, if any, will be held in Court B and any initial order will be returnable to Court B.
6. If an abuse prevention order is issued, the clerk's office in Court A shall immediately provide copies of the complaint and order to the appropriate police department for service on the defendant.
7. The clerk's office in Court A should clearly specify on all transmittals or copies provided to the police that the return of service must be delivered to Court B. Should the return of service be delivered in error to Court A, Court A shall immediately fax the return of service to Court B and mail the original return of service to Court B.
8. The probation department in Court A shall promptly enter any order issued into the CARI system for transmittal to the Statewide Registry of Civil Restraining Orders.

9. The clerk's office in Court A shall immediately notify the clerk's office in Court B by telephone whether or not an order has been issued and the date of return.
10. Court A will docket that the matter is being forwarded to Court B with the original papers and docket, that the matter will proceed in Court B as if originally commenced therein, and will close its case.
11. The clerk's office in Court A must immediately transmit electronically or by facsimile a copy of the case file and docket, which docket shall include an indication of the location of the court recording of the hearing conducted in Court A.
12. By the end of the next business day, the clerk's office at Court A shall mail the original c. 209A case file and docket to Court B. Court A will retain a copy of the case file and docket.

**Court B:**

1. Court B shall open a case with its own docket number no later than the end of the next business day after the initial hearing and the matter shall proceed in Court B as if originally commenced therein.
2. The docket in Court B shall indicate that the matter has been transferred from Court A.
3. If Court B modifies or extends the original order, the clerk's office in Court B shall be responsible for providing copies of the modified or extended order to the appropriate police department for service on the defendant.
4. If Court B modifies or extends the original order, the probation department in Court B shall be responsible for entry of the modified or extended order into the CARI system for transmittal to the Statewide Registry of Civil Restraining Orders.

**Referrals to Court with Venue:** If the court refers the plaintiff to a court with venue, and the plaintiff already has completed an affidavit and/or Plaintiff Confidential Information Form and/or Defendant Information Form, the clerk's office should transmit the plaintiff's completed affidavit and forms to the proper court, so as to expedite the proceedings and to prevent the need for the plaintiff to complete an additional affidavit or forms. The papers may be sent by facsimile and/or given to the plaintiff to take to the court with venue.

**Interdepartmental Transfers:** There will be cases in which a plaintiff appears in a court without proper venue and the judge's determination to act on behalf of the court with venue will result in the judge acting on behalf of another Trial Court Department and returning the case to the court with venue in the other Trial Court Department.

It is anticipated that such cases will usually involve divisions of District Court Department and the Boston Municipal Court Department.

However, there may be instances where a plaintiff comes to a Probate and Family Court Division without venue. Before returning the matter to the Probate and Family Court with venue, the court should ascertain whether the plaintiff has the ability to travel to that Probate and Family Court or whether the District or Boston Municipal Court with venue might afford better access for the plaintiff.

In addition, there may be cases in which a plaintiff has come to a District or Boston Municipal Court without venue and the court learns that the parties in the c. 209A matter are also parties in a pending action in the Probate and Family Court involving issues of child custody or visitation. The District or Boston Municipal Court may consider having the matter returned to the Probate and Family Court with venue after determining the plaintiff's ability to travel to that court and whether the plaintiff consents to this decision.

1:10 Plaintiff in a Court Where There is No Judge Sitting. When a plaintiff seeking an abuse prevention order under c. 209A appears in a court where no judge is presently sitting, the clerk's office should assist the plaintiff in obtaining a hearing by telephone with a judge from the same department sitting in another location. If the court has jurisdiction over the plaintiff's residence, *see* G.L. c. 209A, § 2, the plaintiff should not be sent to a different court or instructed to wait until the Judicial Response System goes into operation at 4:30 p.m.

An *ex parte* order issued over the telephone during court business hours should be for a duration of ten court business days or such shorter time as the court finds appropriate. The hearing after notice should be scheduled for hearing on a date on which a judge will be sitting in that court.

#### COMMENTARY

When the plaintiff appears at the court with venue over the plaintiff's residence and there is no judge available, the clerk's office should process the complaint for the abuse prevention order. The clerk's office in the original court (Court A) must gather all of the necessary paperwork, including a blank order with its docket number, the complaint and affidavit prepared by the plaintiff, the defendant's criminal record, if any, any record in the Statewide Registry of Civil Restraining Orders, and the results of a check of the Warrant Management System. These documents must then be transmitted by facsimile to the judge in the other court who will conduct the hearing (Court B).

The judge in Court B will, after reviewing the documents, telephone the clerk's office in Court A. The judge will conduct a hearing on the request for a c. 209A abuse prevention order. If possible, the judge should conduct the hearing with the plaintiff on speakerphone in a courtroom, thus ensuring that the hearing is preserved on the record.

If the judge determines that the plaintiff has met the burden for the issuance of the order, the order should be issued for ten court business days or a shorter duration at the discretion of the court. The hearing after notice should be scheduled for a date on which a judge will be present in Court A.

This situation is distinguishable from emergency orders issued when the court is not in session. Those orders should expire at the end of the next court day. *See* Commentary to Guideline 11:00, Procedure for Response to Complaints When Court is Not in Session.

Following the hearing, the judge in Court B should send a copy of the issued order to Court A. It is the responsibility of the clerk's office in Court A to transmit the order to the appropriate police department for service on the defendant and to the probation department in Court A for the immediate input of the order into the Statewide Registry of Civil Restraining Orders. The judge in Court B should also send the signed original documents to Court A by mail.

This procedure also may be used when the judge in a one-judge court must recuse him- or herself.

1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order. At the beginning of each hearing, the judge should ask the plaintiff whether there are any outstanding court orders involving the same parties in the same or a different court. Except as noted below, the court should not order any relief that is inconsistent with any existing order in any other court. *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders*, with regard to inconsistencies between an order issued by a District Court, the Boston Municipal Court or the Superior Court and a decision of a Probate and Family Court.

In emergency circumstances, the District Court, Boston Municipal Court, or Superior Court (including a judge on the Judicial Response System) may issue an order that conflicts with an existing custody or visitation order issued by a Probate and Family Court. These emergency circumstances are limited to those cases in which there is an allegation or threat of serious harm to the children who are the subject of an existing custody or visitation order and the plaintiff is unable to reach the Probate and Family Court. In such cases, the judge in the other court may issue the requested order for a short period of time (usually no more than 72 hours) to permit the plaintiff to go to the Probate and Family Court for relief, and should make findings of fact setting forth the reasons for that order. *See Smith v. Joyce, 421 Mass. 520, 523-524 (1995).*

#### COMMENTARY

If there is an existing Probate and Family Court custody and/or visitation order, the court in another department of the Trial Court (second court) may not issue custody or support orders. If a current Probate and Family Court order exists but the plaintiff seeks an order from a second court ordering the defendant to stay away from, or to have no contact with, the defendant's minor children because of allegation or threat of serious harm to the children, that court may enter a temporary order of protection (usually no more than 72 hours) and refer the plaintiff to the Probate and Family Court for an immediate review hearing. Since the Probate and Family Court has superseding jurisdiction in custody and support matters, its exclusive jurisdiction over visitation matters may be seriously hampered by a subsequent no-contact or stay-away order

issued by a different court and made applicable to the defendant's minor children. *See Guideline 2:07, Referral to and from Other Courts and Avoiding Inconsistent Orders; Guideline 4:01, Content of Ex Parte Orders; Guideline 5:01, Conduct of Hearings After Notice When Both Parties Appear: General; and Guideline 6:00, Orders After Notice: General. See also Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders.*

While the preferred practice is to avoid inconsistent or conflicting orders, and while the Probate and Family Court Department has superseding jurisdiction over custody issues and exclusive jurisdiction for visitation orders, in emergency circumstances, a District Court, Boston Municipal Court, or Superior Court may issue an order which conflicts with an existing custody or visitation order issued by the Probate and Family Court. These emergency circumstances are limited to those cases in which there is an allegation or threat of serious harm to the children who are the subject of an existing custody or visitation order, and the plaintiff is unable to reach the Probate and Family Court. In such cases, the judge in the other court may issue the requested order for a short period of time (usually no more than 72 hours) to permit the plaintiff to go to the Probate and Family Court to seek the same relief. *See Guideline 2:07, Referral to and from Other Courts and Avoiding Inconsistent Orders.*

Where there is an existing c. 209A abuse prevention order in the second court and the judge in the second court determines to suspend the custody and/or visitation order of the Probate and Family Court for a short period of time, it is imperative that the judge in the second court carefully amend the order to provide the temporary relief while not changing the other pre-existing terms of the order. In this regard, it is important that the original expiration date remains in effect and that the 72 hours or less period applies only to the custody and/or visitation terms.

Whenever a case is filed in the Probate and Family Court and there is an outstanding order issued by the District Court, Administrative Order 96-1 provides that the Boston Municipal Court or the Superior Court, the Probate and Family Court justice shall be temporarily assigned to the department that issued the outstanding order for the sole purpose of hearing and determining whether to modify, extend or vacate<sup>1</sup> the outstanding order to eliminate any conflict between the existing order and a decision of the Probate and Family Court. *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders.*

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<sup>1</sup> Please note that Administrative Order 96-1 uses the term "vacate."

### **FILING OF THE COMPLAINT**

2:00	Designation of Staff
2:01	Assisting the Plaintiff
2:02	Ensuring Privacy
2:03	Completing the Complaint; Obtaining Required Information
2:04	Plaintiff's Affidavit
2:05	Processing the Complaint
2:06	Clerk's Response to the Filing of Repetitious Complaints
2:07	Referral to and from Other Courts and Avoiding Inconsistent Orders
2:08	Role of Advocates in Assisting Parties
2:09	Guideline Intentionally Deleted
2:10	Check of the Court Activity Record Information System, Including the Statewide Registry of Civil Restraining Orders, and Other Probation Department Involvement at the Complaint Stage
2:11	Check of the Court Activity Record Information System and the Warrant Management System
2:12	Referral for a Criminal Complaint
2:13	Guideline Intentionally Deleted

2:00 Designation of Staff. The Clerk and the Chief Probation Officer in each court should designate particular personnel to respond to plaintiffs seeking relief under c. 209A.

COMMENTARY

The nature of c. 209A cases makes the selection of personnel to handle these actions particularly important. Personnel assignments should be made with an eye toward choosing people who will be sensitive to the safety concerns and the often intimate nature of the issues involved, as well as to the potential that the parties are unfamiliar with court procedures. Even in small courts, more than one person should be assigned to handle these cases to ensure that plaintiffs are assisted throughout the business day and when the primary employee is not available. Designated personnel should be thoroughly familiar with the procedures and forms involved in c. 209A cases and should receive regular training in domestic violence issues. Such training should include a thorough review of these Guidelines.

2:01 Assisting the Plaintiff. The primary role of court personnel when a plaintiff seeks relief under c. 209A is to facilitate the filing of the complaint. The plaintiff should be questioned briefly about the nature of the case and then assisted in completing the complaint form, affidavit and other documents. Court personnel should proceed with patience, respect, professionalism and objectivity, but should not offer legal advice. In appropriate circumstances, court personnel should refer the plaintiff to the victim witness advocates who are permitted to offer additional assistance and advice to plaintiffs.

Only the judge should rule on the facts of a request for a c. 209A order. Court personnel should not attempt to “screen out” complaints or investigate the accuracy of allegations. Nor should they challenge a plaintiff’s motives or intent or attempt to refer the plaintiff to service providers in lieu of filing the complaint.

#### COMMENTARY

The role of the clerk’s office in processing c. 209A cases is to provide assistance. If it appears that the complaint is not one within the subject matter jurisdiction of c. 209A, or that the court does not have territorial jurisdiction over the action, the matter should be referred to the Clerk-Magistrate or an Assistant Clerk-Magistrate, or, in the Probate and Family Court, to the Register or an Assistant Register, Judicial Case Manager or Assistant Judicial Case Manager, who may determine and explain the jurisdictional prerequisites. No attempt should be made to “screen out” such cases. *See Guideline 2:05, Processing the Complaint; Guideline 3:00, Venue; Territorial Jurisdiction for c. 209A Complaints; and Guideline 3:03A, Personal Jurisdiction over a Non-Resident Defendant*. Staff members should also be prepared to assist those seeking to file a certified copy of a protection order issued by other jurisdictions, as well as the requisite affidavit attesting to the validity and effectiveness of the other jurisdiction’s order. *See Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*. Courts should encourage the involvement of victim assistance personnel or advocates in assisting the plaintiff with the complaint form. *See Guideline 2:08, Role of Advocates in Assisting Parties*. When no advocate is available, staff members may provide plaintiffs with information regarding community support services (e.g., shelters, advocacy groups, Al-Anon, etc.).

Finally, court personnel should provide information developed by the Massachusetts District Attorneys Association on behalf of all of the District Attorney’s offices, pursuant to G.L. c. 209A, § 3A, regarding the options available for criminal prosecution. *See Guideline 2:11, Check of the Court Activity Record Information System and the Warrant Management System; and Guideline 8:01, Issuance of Criminal Complaint*.

2:02 Ensuring Privacy. A person requesting relief under c. 209A should be directed by the person designated to receive such requests to an area, preferably separate, where the matter can be discussed and the complaint form completed with as much privacy as possible. At a minimum, the matter should be discussed out of the hearing of all persons, court personnel and general public alike, who are not directly involved.

#### COMMENTARY

Despite the volume of activity in the typical clerk's office, efforts must be made to ensure privacy for the plaintiff seeking relief under c. 209A. Where a separate room or area is not available, the discussion should be conducted so as to protect the plaintiff's privacy (e.g., perhaps at one end of the counter.)

In the process of seeking relief under c. 209A a party may disclose information that is not known to family, friends, and associates. While no special procedures are required or recommended, it is important that court staff be aware that such disclosure might present concerns for a party and attempt to accommodate the privacy concerns of the individuals involved as much as possible.

2:03 Completing the Complaint; Obtaining Required Information. Staff members designated to assist plaintiffs seeking to file c. 209A complaints should explain, as necessary, the various sections of the complaint form that the plaintiff must fill out.

Each plaintiff should complete an affidavit describing the facts that form the basis for the relief sought. While not required by statute, requiring the affidavit in each case is highly recommended. *See Guideline 2:04, Plaintiff's Affidavit.* In the Probate and Family Court Department, a request for an *ex parte* order requires the filing of an affidavit or a verified complaint. *See* Mass. R. Dom. Rel. P. 65 (a).

The plaintiff should enter the appropriate information on the Plaintiff Confidential Information Form (FA/HA-6). The information provided on this form is accessible only by the plaintiff, those authorized by the plaintiff, those authorized by statute and by court order. *See Guideline 1:05, Public Access to c. 209A Case Files.*

Each plaintiff should also complete the Defendant Information Form (FA/HA-5), providing all of the available information about the defendant that is necessary for a check of the Statewide Registry of Civil Restraining Orders and for service of an order, should one be issued. If the case involves the care and custody of a child, the plaintiff should be assisted in completing the Affidavit Disclosing Care or Custody Proceedings that is required by Uniform Trial Court Rule IV, *Uniform Rule Requiring Disclosure of Pending and Concluded Care or Custody Matters.* <http://www.mass.gov/courts/209a/docs/care-custody-affidavit.pdf>

#### COMMENTARY

Court personnel who assist plaintiffs in completing the forms should be thoroughly familiar with those forms and with the instructions for their use which are printed on the back of the form. It is important that the Plaintiff Confidential Information Form (FA/HA-6) be completed in each case to ensure that "confidential" information is not provided to unauthorized persons.

In some cases, the plaintiff may not be able to provide all of the information requested on the Defendant Information Form. Even though the court might not have sufficient data to run a complete search of the Statewide Registry of Civil Restraining Orders or enter an order into the Registry, the case should proceed, as these steps are not prerequisites to issuing an order.

Plaintiffs should not be discouraged from filing a complaint because they may lack some particular piece of information requested on the complaint form. The Guideline recommends the use of the Defendant Information Form (FA/HA-5) to obtain information important for completing the record check and for locating the defendant for service, should an order issue. Court personnel should obtain as much identifying information as possible, including the defendant's date of birth, Social Security number, mother's maiden name, father's name, and alias for the record check. It is essential to have the defendant's date of birth for effective use of the Statewide Registry of Civil Restraining Orders and the Warrant Management System. Information necessary for service of an order is equally important, including the location where the defendant can be found, his or her physical appearance, whether the defendant has access to weapons, etc. This inquiry must be conducted with sensitivity. While plaintiffs should not be discouraged from seeking the court's protection because they cannot provide some of this information, they should be apprised that law enforcement efforts to protect them are considerably hampered if the defendant cannot be accurately identified or served with notice. Some plaintiffs may be able to obtain additional information from home or other sources. In such cases, the issuance of the order should not be delayed, but plaintiffs should be instructed to provide such information to the court, preferably through the victim witness advocate or to the police department later in the day, but as soon as reasonably possible.

When a plaintiff cannot complete an affidavit, due to limited proficiency in English, inability to read or write, or other language difficulties, an advocate or interpreter may assist the plaintiff by transcribing the plaintiff's statement in the affidavit. If an interpreter transcribes the statement, it should be done in the plaintiff's native language. The interpreter shall then translate the statement in writing for the court. In any of the above circumstances, the individual assisting the plaintiff must accurately transcribe the plaintiff's statement and must include his or her name and role in drafting the affidavit. The interpreter may use the form entitled Translation of Affidavit (FA/HA-15).

*See Guideline 1:08, Plaintiff Unable to Appear in Court, regarding a complaint filed on behalf of a plaintiff seeking temporary relief who is unable to appear in court.*

2:04 Plaintiff's Affidavit. Plaintiffs should file a signed, sworn statement (“Affidavit”) describing the factual basis of the complaint on the reverse side of the original court copy (top sheet) of the Complaint Form (FA-1). *See Guideline 2:03, Completing the Complaint; Obtaining Required Information*, regarding affidavits in *ex parte* cases in Probate and Family Court Department. Plaintiffs should be encouraged to provide as much information as possible about the allegations of abuse, including specific information about the most recent incident of abuse and the most serious incident, even if the most serious incident occurred some time ago. The plaintiff should be informed that the defendant will have access to the affidavit. If the plaintiff seeks an order that the defendant have no contact with or must stay away from the defendant’s minor children, the grounds for that request should be set forth on Page 2 of the Complaint (FA-1A). The affidavit should also set forth the basis for such an order concerning the children.

#### COMMENTARY

The advantage of obtaining a signed statement, or affidavit, is that factual allegations are then preserved in the case file. This can also obviate the need for the judge to question the plaintiff extensively when the matter comes before the court at the *ex parte* hearing, saving time and embarrassment. However, the plaintiff’s failure or inability to complete such a statement cannot be grounds for denial of the right to file a complaint and obtain a hearing. *See Guideline 2:05, Processing the Complaint*.

The plaintiff must establish a basis for requesting that the court order no contact with the defendant’s minor children. “If there is to be a G.L. c. 209A order that a defendant stay away from and have no contact with his or her minor children, there must be independent support for the order.” Smith v. Joyce, 421 Mass. 520, 523 (1995). Appropriate reasons for issuing such an order may include (but are not limited to) a finding that the children themselves have been abused; that they have witnessed the defendant’s abuse of the plaintiff and are, therefore, afraid of the defendant and would be harmed by seeing him or her; or that no visitation can be arranged with the children in the plaintiff’s custody without endangering the plaintiff. *See, e.g., Vittone v. Clairmont*, 64 Mass. App. Ct. 479, 486-489 (2005), *rev. denied*, Vittone v. Clairmont, 445 Mass. 1106 (2005) (proper for court to issue abuse prevention order against father who abused mother and was convicted of sexually assaulting two of the parties’ five children, where mother remained in reasonable fear of imminent serious physical harm to herself and one of the parties’ children, who had not been abused by the defendant, once father was released from prison). If the plaintiff’s children, or the children in the plaintiff’s custody, are not the defendant’s children, there need be no such showing. With respect to the effect of orders precluding contact between

the defendant and his or her children, *see Guideline 1:11, Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order; Guideline 2:07, Referral to and from Other Courts and Avoiding Inconsistent Orders; and Guideline 12:00, Visitation Proceedings in Probate and Family Court: Considered in Only Limited Circumstances.*

2:05 Processing the Complaint. Persons seeking to file complaints under c. 209A should not be denied the right to do so. Only when it is absolutely clear that the facts alleged by the plaintiff do not fall within the terms of c. 209A, or that the court lacks jurisdiction over the matter, should court personnel indicate that the court cannot grant the relief sought. Even in such cases, if the plaintiff continues to request an order, the form should be completed and the matter brought before the court.

#### COMMENTARY

Courts should not authorize or permit a step in the abuse prevention procedure similar to the “screening out” process that can occur in the complaint application stage in criminal cases. The only circumstance in which court personnel should attempt to dissuade a plaintiff is when a clear jurisdictional defect is apparent. Any such issue regarding jurisdiction should be brought to the attention of the Clerk-Magistrate or an Assistant Clerk-Magistrate, or Register or Assistant Register, Judicial Case Manager or Assistant Judicial Case Manager in the Probate and Family Court, to ensure that it is correctly determined and explained, and that no “screening out” occurs. As stated above, if the plaintiff continues to request an order, the complaint form should be completed and the matter brought before the court for a formal ruling on jurisdiction. Where venue appears to be defective under G.L. c. 209A, § 2, refer to *Guideline 1:09, Plaintiff in Court Without Territorial Jurisdiction/Proper Venue*; *Guideline 3:03, Venue; Territorial Jurisdiction for c. 209A Complaints*; and *Guideline 3:03A, Personal Jurisdiction over a Non-Resident Defendant*.

2:06 Clerk's Response to the Filing of Repetitious Complaints. No person seeking relief under c. 209A should be denied the right to file a complaint. Court personnel should treat a plaintiff with respect and courtesy, regardless of how many times the plaintiff has appeared before the court seeking relief and regardless of the outcome of any previous proceedings.

#### COMMENTARY

A plaintiff may initially seek relief, and then fail to follow up by not appearing at a subsequent hearing, by requesting to “drop” an order, or by deciding not to report violations of an order. Many complex dynamics contribute to this behavior. These can include the plaintiff's need for financial support, a desire to reconcile with the defendant, coercion or intimidation by the defendant, family pressures, children's issues, and a plaintiff's lack of self-esteem or sense of heightened danger at the time of separation.

It may seem frustrating to court personnel to go through the necessary procedures in processing a c. 209A action repeatedly. This Guideline, however, makes it clear that such past experience is not relevant to the question of whether the plaintiff needs protection in a new action, at least insofar as the right to file a new complaint is concerned. No plaintiff should be turned away based on the outcome of past efforts to seek and obtain abuse prevention orders.

2:07 Referral to and from Other Courts and Avoiding Inconsistent Orders. If the court has jurisdiction based on the facts as alleged by the plaintiff, the court should accept the complaint and proceed to hear and rule on the matter. However, the court should not order relief inconsistent with any existing order, except in the emergency circumstances described in Guideline 1:11, Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order. At the beginning of each hearing, whether an *ex parte* hearing or a hearing after notice, in order to avoid issuing inconsistent orders, the judge should ask the parties whether there are any outstanding court actions or orders in the same or a different court. The clerk's office should bring into the courtroom any related matters between the parties, including prior abuse prevention orders, complaints for abuse prevention orders, and any related criminal matters.

Plaintiffs seeking relief initially in the District Court, the Boston Municipal Court or the Superior Court Department should not be referred to the Probate and Family Court Department for any relief that is within the initial court's jurisdiction, regardless of marital status or the involvement of children. This includes the plaintiff's request for child support. *See Guideline 3:07, Conduct of Ex Parte Hearings; Guideline 4:02, Ex Parte Orders to Vacate; Guideline 5:01, Conduct of Hearings After Notice When Both Parties Appear: General; and Guideline 6:00, Orders After Notice: General.*

A plaintiff who has been improperly referred to one court by another court within the same or a different department should not be sent back to the referring court, even if the latter had jurisdiction. Such actions should proceed in the referral court as though the plaintiff had come there originally.

#### COMMENTARY

If the court in which a person initially seeks protection under c. 209A has jurisdiction, the person should be heard as soon as possible in that court, and should not be sent to another court. Referring a plaintiff to another court may discourage the person from seeking the relief to which

he or she is entitled under the law, and may expose the person to additional danger. This is particularly so where the other court is at some distance and may be inaccessible to the plaintiff.

Similarly, fragmenting the relief available in the initial court, such as refusing to deal with support orders even when they are necessary to assure a plaintiff's ability to live independently and free from abuse, denies the plaintiff rights which the law provides, and may discourage a victim of abuse from seeking any relief at all.

However, in order to avoid issuing orders inconsistent with those issued by another court, the judge should ask the parties about the existence of other court actions or orders; the parties are required to disclose this information under G.L. c. 209A, § 3, par. 8. Although this requirement appears to relate only to Massachusetts orders, the parties should also be asked to inform the court of any similar orders which may have been issued by other jurisdictions so that such orders can be given due consideration. *See Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders from Other Jurisdictions*. The existence of other pending court orders may determine the type of relief available. For example, if there is an outstanding Probate and Family Court order involving custody or support for minor children, that order will prevent a District Court, Boston Municipal Court or Superior Court from issuing custody or support orders, except in emergency situations, (*see Guideline 1:11, Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order*), since the Probate and Family Court has superseding authority in those areas and exclusive authority over visitation.

Whenever a case is filed in the Probate and Family Court and there is an outstanding order issued by the District Court, the Boston Municipal Court or the Superior Court, the Probate and Family Court justice shall be temporarily assigned to the department that issued the outstanding order for the sole purpose of hearing and determining whether to modify, extend or vacate the outstanding order to eliminate inconsistencies between the existing order and a decision of the Probate and Family Court. *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders*. For emergency situations, where the plaintiff alleges the likelihood of immediate harm to the children, *see* Commentary to *Guideline 2:04, Plaintiff's Affidavit*; *Guideline 3:07, Conduct of Ex Parte Hearings*, and related Commentary.

To the extent possible, the Probate and Family Court judge should specifically and clearly identify the modified provisions on the face of the c. 209A order. The modified order should not simply refer to an attached order or agreement, particularly with respect to modification of the provisions regarding the contact and stay-away orders between the parties and/or children.

In accordance with Administrative Order 96-1, the probation department in the modifying court will immediately transmit a copy of the order, including all additional pages of the order if there was inadequate space on the original order to include complete details of the modification, by facsimile to the issuing court. The issuing court must then enter the order into the Registry of Civil Restraining Orders, notify the appropriate police department of the modified order, and update its case file. *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders*.

2:08 Role of Advocates in Assisting Parties. The court should support the participation of advocates at each stage of the c. 209A process, regardless of whether such persons are volunteers from a local advocacy group, law students, employees of the district attorney or of some other state, community or legal service agency, or friends or family members of either party. Where possible, such support should include providing an area of the courthouse where advocates can operate, allowing sufficient time in the complaint filing process for an advocate to speak to the party, individually or, if there are multiple parties, in a group setting, assisting the party in filing the complaint, and permitting the advocate to accompany the party, when so requested, to the courtroom. *See Guideline 1:04, Court's Relationship With Local Advocacy Groups; Guideline 3:09, Role of Advocates at Ex Parte Hearings; and Guideline 5:02, Role of Advocates at Hearings After Notice*. Advocates should coordinate their efforts with the appropriate staff in each court.

#### COMMENTARY

When parties in a c. 209A action come to court, the experience can be overwhelming.

Advocates can be helpful in directing a person seeking relief under c. 209A through the myriad of court procedures. In so doing, advocates should consult with the personnel in each court identified by the Clerk or Chief Probation Officer to promote efficiency and effectiveness in the processing of these matters. A victim of abuse may experience feelings of shock, fear, depression, shame and helplessness. Trained advocates can remind the plaintiff to provide the court with all the information necessary for the judge to make an informed decision, explain to a plaintiff the various questions which the judge may ask, and encourage the plaintiff to consider and to decide upon what relief to request.

An advocate may also be aware of potential problems which can be solved before the hearing (e.g., identifying the address, or other identifying information, of a defendant who does not live with the plaintiff), or can identify other problems of which the judge should be aware (e.g., the presence of weapons in the home which have been used in an abuse incident). An advocate may facilitate the service of the orders by acting as a liaison with the police department. Moreover, an advocate may be in a position to assist a plaintiff in developing a plan of action which will help to keep the plaintiff safe after the order is issued and in making referrals for other appropriate kinds of assistance, such as support groups, shelters, etc.

Other individuals, such as family members or friends, may also provide support for the parties, and such individuals should be encouraged to accompany parties at each stage of the proceedings.

The assistance of any advocate in any particular situation should not be permitted to interfere with the party's wishes or with the court's ability to conduct an orderly proceeding.

2:09 Guideline Intentionally Deleted.

2:10 Check of the Court Activity Record Information System, Including the Statewide Registry of Civil Restraining Orders, and Other Probation Department Involvement at the Complaint Stage. As soon as the complaint is filed, the court's probation department must check the Court Activity Records Information (CARI) database, including the Statewide Registry of Civil Restraining Orders, and provide the judge with information on any criminal record which the defendant has in Massachusetts and any previous or current abuse prevention orders. When appropriate, the judge may request that the probation department obtain an out-of-state criminal record.

If the court issues an abuse prevention order, the probation department must, on the same day, record that order in the Statewide Registry of Civil Restraining Orders. Similarly, once a person files a certified copy of a protection order issued by another jurisdiction, along with an affidavit, the probation department must also record that order in the Statewide Registry of Civil Restraining Orders on the same day. *See Guideline 1:05, Public Access to c. 209A Case Files; Guideline 2:01, Assisting the Plaintiff; Guideline 2:04, Plaintiff's Affidavit; Guideline 2:12, Referral for a Criminal Complaint; and Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions.*

The probation department may assist in gathering information needed from the parties, such as identifying information. The probation department may also perform financial support guideline calculations. However, the parties should not be referred to the probation department, or elsewhere, for diversion of the c. 209A complaint or for mediation or couple's counseling of any kind. *See Guideline 1:01, Protective Purposes of c. 209A; Guideline 4:05, Reconciliation; and Guideline 6:01, Referral for Treatment or Support Services.*

COMMENTARY

General Laws c. 209A, § 7, states that the judge “shall cause a search to be made” of the Statewide Registry of Civil Restraining Orders and shall review the resulting data. The probation department is required to make this search. It must be completed as soon as possible after the complaint is received, so that the judge will have the results when the case proceeds in court. This search must be repeated before each subsequent hearing.

The purpose of the search is to provide the court with information about the defendant that can be essential to providing protection for the plaintiff, either in terms of immediate court action (where the defendant is on default or probation status, *see Guideline 3:05, Court Action on the Defendant’s Default, Probation, Parole or Warrant Status at Ex Parte Hearings*; and *Guideline 5:07, Court Action on Defendant’s Warrant Status*), or in terms of appropriately adjudicating or fashioning abuse prevention orders. The Statewide Registry of Civil Restraining Orders contains records of active, expired and terminated c. 209A orders.

The probation department may also be called upon by the court to perform other functions at later stages of the case. However, use of probation officers to “help resolve the parties’ problem” or to mediate disputes is fundamentally inconsistent with the protective purpose of the c. 209A procedure.

A check of the Court Activity Records Information database (CARI), including the Statewide Registry of Civil Restraining Orders, may also reveal information pertinent to federal law regarding possession of guns by defendants convicted of “misdemeanor crimes of domestic violence.” *See Guideline 4:04, Ex Parte Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards*; and *Guideline 6:05, Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards*.

2:11 Check of the Court Activity Record Information (System and the Warrant Management System). When the complaint is filed, the probation department must check the Court Activity Record Information System (CARI) system and the clerk's office must check the Warrant Management System (WMS) to see if there exists an outstanding warrant for the defendant's arrest. If so, that information must be provided to the judge at the time of the c. 209A hearing. These checks must be made each time the case is before the court.

#### COMMENTARY

These checks must be made before each abuse prevention order hearing so that the court can comply with c. 209A, § 7. "In all instances where an outstanding warrant exists, a judge shall make a finding, based upon all of the circumstances, as to whether a threat of bodily injury exists to the plaintiff. In all instances where such an imminent threat of bodily injury is found to exist, the judge shall notify the appropriate law enforcement officials of such finding . . . ." G.L. c. 209A, § 7. It is critical that the judge in the session have warrant information from both the probation computer (CARI) and the clerk's office computer (Warrant Management System) every time the case is before the court.

2:12 Referral for a Criminal Complaint. Court personnel should inform the plaintiff that c. 209A proceedings are civil in nature and that certain violations of the orders issued under c. 209A are criminal in nature, as required by G.L. c. 209A, § 3A. Violations of orders (1) to refrain from abuse, (2) to vacate the household, or (3) to have no contact with and/or stay away from the plaintiff, are criminal violations. *See Commonwealth v. Finase*, 435 Mass. 310, 313-314 (2001). In addition, G.L. c. 209A, § 3B makes a violation of an order to surrender guns, ammunition, and gun licenses a criminal offense. *See Guideline 8:00, Venue; Territorial Jurisdiction for Criminal Prosecution of Violations of c. 209A Orders.*

In all cases, particularly those involving allegations of serious injury, court personnel should provide information developed by the District Attorney pursuant to G.L. c. 209A, § 3A regarding the options available for criminal prosecution. A plaintiff who wishes to pursue criminal charges should be referred to the District Attorney's office, the police, or advocates within the court to discuss the ramifications of that decision. Alternatively, a plaintiff may immediately file an application for a criminal complaint in the clerk's office in a District Court or Boston Municipal Court.

Providing information regarding procedures for a criminal complaint should be in addition to, and not in lieu of, receiving and processing the c. 209A complaint.

#### COMMENTARY

Many plaintiffs may not understand the difference between the civil relief provided by c. 209A and criminal penalties. The law requires that the plaintiff be advised that the abuse prevention order is civil in nature, but that certain violations of the order constitutes a criminal offense. The law requires that the information be given in the plaintiff's native language "whenever possible." G.L. c. 209A, § 3A.

In certain cases, the degree of harm, or threat of harm, is so great that protection under c. 209A alone may not be sufficient. Particularly in those cases, court personnel should inform the plaintiff about the availability of criminal prosecution and provide information developed by the Massachusetts District Attorneys Association on behalf of all of the District Attorney's offices, pursuant to G.L. c. 209A, § 3A, regarding the options available for criminal prosecution.

Referral to the police or to the District Attorney's office is often appropriate because it permits the prosecutor to assess, and to discuss with the plaintiff, the strength of a prospective criminal action, the level of participation required of the plaintiff in such an action, and the likely outcome. Referral to a court advocate may assist an undecided plaintiff in choosing a course of action that meets the plaintiff's needs.

2:13 Guideline Intentionally Deleted.

### ***EX PARTE* HEARINGS**

3:00	<i>Ex Parte</i> Hearings: General
3:01	Scheduling of <i>Ex Parte</i> Hearings
3:02	Subject Matter Jurisdiction
3:03	Venue; Territorial Jurisdiction for c. 209A Complaints
3:03A	Personal Jurisdiction over a Non-Resident Defendant
3:04	Public Nature of <i>Ex Parte</i> Hearings
3:05	Court Action on the Defendant's Default, Probation, Parole or Warrant Status at <i>Ex Parte</i> Hearings
3:06	Rules of Evidence and Standard and Burden of Proof
3:07	Conduct of <i>Ex Parte</i> Hearings
3:08	Repetitious Complaints
3:09	Role of Advocates at <i>Ex Parte</i> Hearings

3:00 Ex Parte Hearings: General. A plaintiff applying for an abuse prevention order under c. 209A should be brought before the court for a possible *ex parte* hearing as soon as is practicable. The clerk's office should notify the judge when a plaintiff seeking a c. 209A protection order has entered the courtroom. *See Guideline 3:01, Scheduling of Ex Parte Hearings*.

Court personnel or others assisting the plaintiff in filing the complaint should not attempt to determine whether an *ex parte* hearing is appropriate. It is for the judge to decide whether the grounds are sufficient to conduct an *ex parte* hearing.

If a plaintiff is "unable to appear in court without severe hardship due to the plaintiff's physical condition," a representative of the plaintiff may, "appear in court on the plaintiff's behalf and file the requisite complaint with an affidavit setting forth the circumstances preventing the plaintiff from appearing personally." G.L. c. 209A, § 5. *See Guideline 1:08, Plaintiff Unable to Appear in Court*, and *Guideline 11:00, Procedure for Response to Complaints When Court is Not in Session*.

#### COMMENTARY

Just as non-judicial personnel should not attempt to screen out cases on jurisdictional or other grounds (*See Guideline 2:01, Assisting the Plaintiff*, and *Guideline 2:05, Processing the Complaint*), neither should they attempt to determine which cases do not warrant an *ex parte* hearing. This issue should be addressed by the court. In other words, all complaints should be brought promptly before the court.

In Commonwealth v. Gordon, 407 Mass. 340, 349 (1990), the Supreme Judicial Court found that the abuse required for the plaintiff to be put "in fear of imminent serious physical harm" under c. 209A is also consonant with the common law definition of assault, an act placing another in reasonable apprehension that force may be used. *Id.* In Commonwealth v. Matsos, 421 Mass. 391, 394-395 (1995), the Supreme Judicial Court, citing Gordon, held that placing a victim "in fear of bodily injury" approximates the common law definition of the crime of assault and the court should look to the words and actions of the defendant in light of the attendant circumstances to determine if the apprehension is reasonable. *Id.* Moreover, the "plaintiff's apprehension that force may be used" must be objectively, rather than subjectively, reasonable. Carroll v. Kartell, 56 Mass. App. Ct. 83, 87 (2002) (plaintiff's apprehension of imminent harm

was not objectively reasonable, as defendant's persistent attempts to contact her, coupled with his criminal charges connected to the shooting death of his ex-wife's boyfriend, did not rise to the level of "abuse" for the purposes of c. 209A); *see also* Ginsberg v. Blacker, 67 Mass. App. Ct. 139 (2006) (where defendant's actions, which included flying into a rage at an "objectively trivial incident," arriving uninvited at plaintiff's home and screaming at her while gesticulating wildly, were sufficient to cause plaintiff to have had a reasonable fear of imminent serious physical harm constituting abuse). *Contrast* Keene v. Gangi, 60 Mass. App. Ct. 667 (2004) (plaintiff's testimony that defendant had placed a surveillance camera in her bedroom and her understanding that he possessed a firearms identification card and/or license to carry, even if true, were insufficient to justify the issuance of an abuse prevention order, as there was no history of violence or abuse between the parties and she had failed to show fear of imminent serious physical harm).

Proceeding with a hearing on a c. 209A complaint without prior notice to the defendant and a right to be heard constitutes an exception to fundamental due process. This exception, i.e., the right to proceed *ex parte*, is justified only when there is "a substantial likelihood of immediate danger of abuse." G.L. c. 209A, § 4. Past abuse alone, without plaintiff's present fear of imminent physical harm, is insufficient to justify the issuance of an abuse prevention order. Dollan v. Dollan, 55 Mass. App. Ct. 905 (2002).

3:01 Scheduling of *Ex Parte* Hearings. *Ex parte* hearings should be held as soon as practicable after the complaint has been completed, signed, and the appropriate record checks are completed. Each court should hear c. 209A *ex parte* hearings expeditiously so as to minimize the time a plaintiff must wait.

The clerk's office must notify the judge immediately when an *ex parte* c. 209A complaint is brought to the courtroom. Without such notice from the clerk's office, it is possible that the c. 209A *ex parte* hearing will not be given the immediate preference it should be given, especially in those courts where the c. 209A case files do not have a distinctive color. This practice is particularly important when a c. 209A *ex parte* matter is brought into a courtroom where a visiting judge is sitting.

#### COMMENTARY

No plaintiff should be turned away, asked to make another trip to the courthouse (except in the circumstances described in *Guideline 1:09, Plaintiff in Court Without Territorial Jurisdiction/Proper Venue*), or required to wait an unreasonable period of time to be heard. Such delay could discourage a plaintiff in need of protection from remaining at the court or from returning to obtain necessary relief. Courts may adopt one, both, or a combination of the following approaches: (1) interrupt regularly scheduled court business and bring such cases before the court during "breaks" in the proceedings; or (2) schedule c. 209A hearings for a certain time of the day in a particular session. In choosing the time, the court should consult with victim witness personnel of the District Attorney's office, the police, and/or any participating advocacy groups, as appropriate. However, in cases where waiting until the assigned time would cause significant inconvenience to the plaintiff, the matter should be brought before the court as soon as possible.

In exceptional circumstances, where the presence of the defendant can be obtained easily, the court may briefly delay the hearing until the defendant is present, provided that doing so does not compromise the plaintiff's safety. The court must be cognizant that when a matter is scheduled for a two-party hearing without the issuance of an *ex parte* order, the plaintiff will not have the protection of a c. 209A order in the interim between the filing of the complaint and the subsequent two-party hearing. For this reason, such practice should be used only in situations in which it is clear that the delay will not present an elevated danger to the plaintiff.

Two examples of such situations are: (1) when the defendant is at the court being arraigned for the same conduct which is the basis for the c. 209A complaint, and (2) where the defendant may be available (e.g., at work) a short distance from the courthouse and can be

notified of the hearing by telephone. *See Guideline 1:02, Due Process Considerations*. In light of the potential complications of such a practice, the court should employ it sparingly, and should consider other options for minimizing the delay between issuance of the order and the two-party hearing, including the issuance of an order with a return date of less than 10 days.

3:02 Subject Matter Jurisdiction. A court has subject matter jurisdiction to issue an abuse prevention order under c. 209A where the plaintiff and defendant:

- (a) are or were married to each other;
- (b) are or were residing in the same “household”;
- (c) are or were related by blood or marriage;
- (d) have a child together, regardless of whether they have ever married or lived together;
- (e) are or have been in a substantive dating or engagement relationship.

The basis for jurisdiction contained in section (e) does not extend to the Superior Court.

Where there is no subject matter jurisdiction under c. 209A, the plaintiff may qualify for a harassment order pursuant to G.L. c. 258E.

#### COMMENTARY

Chapter 209A confers broad jurisdiction to issue abuse prevention orders regarding interpersonal violence. Current or previous marriage between the parties is only one basis of such jurisdiction. Unmarried persons who currently live together, or who did so in the past, are also within the court’s jurisdiction under c. 209A, regardless of whether the relationship between them is sexual in nature. In addition, a substantive dating relationship between the parties confers jurisdiction on the District Court, Boston Municipal Court and Probate and Family Court departments, regardless of whether the parties ever lived together.

Under G.L. c. 209A, § 1(e), whether a “substantive” dating relationship does or did exist depends upon the following statutory factors:

- (1) the length of time of the relationship;
- (2) the type of relationship;
- (3) the frequency of interaction between the parties; and,
- (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

In these cases, the court should give broad meaning to the term “substantive dating relationship” to assure that the protective purposes of the statute are achieved. The existence of a “substantive dating relationship” is to be determined on a case by case basis applying the factors set forth in G.L. c. 209A, § 1(e)(1)-(4), while keeping in mind the statute’s protective purposes. *C.O. v. M.M.*, 442 Mass. 648, 651 (2004). The plaintiff bears the burden of demonstrating by a preponderance of the evidence that such a relationship existed between the parties. *Id.* at 654. The lifestyles of the parties, e.g., unmarried cohabitation, or same-sex relationships, are not an

appropriate subject for comment by anyone in the court. However, the court should make appropriate inquiry to ascertain that the relationship between the parties is one that is covered under the statute. The Superior Court Department does not appear to have jurisdiction over c. 209A cases in which the plaintiff seeks relief based on the statutory criterion of “substantive dating or engagement relationship.” See G.L. c. 209A, § 1.

The court should give broad meaning to the words “related by blood or marriage.” The test should be whether the relationship puts the parties into contact with one another, even though they might not otherwise seek or wish for such contact. For example, in Sorgman v. Sorgman, 49 Mass. App. Ct. 416 (2000), the Appeals Court found that an unadopted “stepdaughter,” who had not lived in her “stepfather’s” household for twenty years following her biological mother’s divorce from him, had the requisite relationship for the purposes of the issuance of a c. 209A order against him. *Id.* at 417-418. The Court expressly rejected the defendant’s argument that the statute did not apply to “‘ex-stepchildren’ . . . whose ‘ex’ status has persisted for so many years,” on the basis of the “plain statutory language” of G.L. c. 209A, § 1 and 3, and the fact that “the parties continued to have contact and involvement with each other long after the marriage and living arrangement which initially gave rise to their relationship ended.” *Id.* at 418. Similarly, in Turner v. Lewis, 434 Mass. 331, 334 (2001), the Court held that the paternal grandparent of a non-marital child was “related by blood” to the child’s mother through the child and therefore able to invoke the protection of a c. 209A order. In reaching this conclusion, the Supreme Judicial Court explicitly noted the “social reality that the concept of ‘family’ is varied and evolving and, that as a result, different types of ‘family’ members will be forced into potentially unwanted contact with one another.” *Id.* at 334-335.

In Sorgman v. Sorgman, 49 Mass. App. Ct. 416 (2000), the Appeals Court also considered the definition of “household member” and found that the “plain statutory language” of G.L. c. 209A, § 3 includes both past and present members of the household. *Id.* at 417-418. The Court found that, despite her having left the household approximately twenty years earlier, an unadopted “stepdaughter’s” residence in the defendant’s household for a period of ten years satisfied the “household” requirements of G.L. c. 209A, §§ 1 and 3. *Id.* at 417. However, the concept of how much time a person must spend in order to be considered a member of a household would appear to be a flexible one. The Appeals Court again considered the definition of “household member” in Aguilar v. Hernandez-Mendez, 66 Mass. App. Ct. 367 (2006). In that case, the defendant had lived with his father, the plaintiff, and her two teenage children for approximately two years before moving to a new residence, but still possessed keys to the apartment, received mail there, frequently used the premises to shower, and occasionally spent the night. The Appeals Court held that, in light of the broad interpretation of the statute, the defendant was a household member and the plaintiff could obtain an abuse prevention order under the statute. *Id.* at 370.

Harassment prevention orders under G.L. c. 258E are available from the District Court, Boston Municipal Court, Juvenile Court, and Superior Court departments. Unlike c. 209A, c. 258E does not require the plaintiff to have a familial, household, or substantive dating relationship with the defendant. Anyone “suffering from harassment” may seek to obtain a harassment prevention order under c. 258E.

In appropriate circumstances, the plaintiff may be referred to the District Attorney’s office to obtain information about seeking a criminal complaint. See Guideline 2:12, Referral for a Criminal Complaint. The plaintiff should be provided information developed by the District Attorney pursuant to G.L. c. 209A, § 3A, regarding the options available for criminal prosecution.

Household resident status, for the purpose of determining jurisdiction, should not be applied to those who live in different apartments in multiple family dwellings. The provision in the law which refers to multiple family dwellings provides that vacate orders can extend to a defendant living in the same building (though in a different unit) as the plaintiff, where the court otherwise has jurisdiction, e.g., because the plaintiff and the defendant are family members or were dating. Unless the parties meet the other statutory requirements for subject matter jurisdiction, c. 209A does not apply to landlord-tenant situations and should not be used as a substitute for the procedural requirements of summary process. *See Guideline 4:02, Ex Parte Orders to Vacate.* In addition, a defendant who is ordered to vacate the plaintiff's household may be ordered to stay away from the entire building, including apartments other than the one occupied by the plaintiff, if such an order is necessary to assure the plaintiff's safety.

3:03 Venue; Territorial Jurisdiction for c. 209A Complaints. The requirements set forth in G.L. c. 209A, § 2 regarding where abuse prevention actions must be filed and heard should be considered jurisdictional. That is, if these requirements are not met, the court should be considered to have no authority to act on the complaint.

#### COMMENTARY

General Laws c. 209A, § 2 is entitled “Venue.” However, the requirements set forth there appear to be jurisdictional.

Those requirements are that the action must be “filed, heard and determined” (1) in the court within whose judicial district the plaintiff resides, or (2) where the plaintiff has left a residence or household to avoid abuse, in the court within whose judicial district that prior residence or household is located or in the court within whose judicial district the plaintiff’s current residence is located. *See* G.L. c. 209A, § 2. Since these appear to be prerequisites to the court’s authority to act, they should be considered jurisdictional. Thus, inability to meet these requirements does not constitute a defect that may be waived by the defendant’s failure to raise it. Rather, such defect renders the court without authority to act.

Jurisdiction, however, is personal. That is, once the court has jurisdiction over the parties, as described above, the court’s order is valid anywhere in the Commonwealth. To determine whether the court has personal jurisdiction over a non-resident defendant, *see Guideline 3:03A, Personal Jurisdiction over a Non-Resident Defendant*. Thus the same court may order the defendant to stay away from the plaintiff’s new residence, which is in the territorial jurisdiction of the court, and the plaintiff’s parents’ home, where the children stay regularly, and the plaintiff’s workplace, even though the latter two locations are not within the territorial jurisdiction of the issuing court.

As indicated in *Guideline 2:05, Processing the Complaint*, where the initial interview with the plaintiff reveals that the case does not meet the requirements of territorial jurisdiction, this should be explained to the plaintiff and he or she should be directed to the proper court. If the plaintiff persists in the desire to file the complaint, however, this must be allowed, even if it is clear that the court will refuse to issue the order on jurisdictional grounds. If there are any factual questions concerning territorial jurisdiction, the complaint should be completed and the matter brought before the judge. *See Guideline 1:09, Plaintiff in Court Without Territorial Jurisdiction/Proper Venue*.

3:03A Personal Jurisdiction over a Non-Resident Defendant. Exercise of personal jurisdiction over a non-resident defendant is proper when he or she acts directly or by an agent as to a cause of action in law or equity arising from the actions described in G.L. c. 223A, including causing a tortious injury (G.L. c. 223A, §3(b)) or maintaining a domicile in the Commonwealth while a party to a personal or marital relationship out of which a claim is raised relating to divorce, alimony, property settlement, parentage of a child, child support or child custody (G.L. c. 223A, § 3 (g)). Even in the absence of personal jurisdiction over a non-resident defendant, a court may nevertheless issue an abuse protection order, provided that the order does not impose any affirmative duties on the defendant.

#### COMMENTARY

In Caplan v. Donovan, the Supreme Judicial Court held that “a court may issue . . . an order of prevention and protection even without personal jurisdiction over the defendant, but may not impose affirmative obligations on the defendant if there is no personal jurisdiction.” Caplan v. Donovan, 450 Mass. 463, 463-464 (2008), *cert. denied*, Donovan v. Caplan, 553 U.S. 1018 (2008).

3:04 Public Nature of *Ex Parte* Hearings. All c. 209A hearings should be held in the courtroom and recorded. They should never be held in the judge's lobby or off the record.

As a general rule, *ex parte* hearings should not be conducted at sidebar. There are, however, specific circumstances in which sidebar may be appropriate, including cases involving sensitive issues such as sexual assault or abuse of children.

Although the hearings should presumptively be open to the public, in the most extraordinary circumstances, for good cause shown and based on specific findings indicated on the record, the court may close the courtroom.

#### COMMENTARY

All proceedings under c. 209A should be electronically recorded. In the Boston Municipal Court and the District Court, electronic recording is mandatory by Rule. *See* Rule 211, District Court Special Rules. Recording of court proceedings is required in the Probate and Family Court pursuant to the Supplemental Rules of the Probate and Family Court. *See* Suppl. Rule 201. *See also* Superior Court Standing Order 2-87.

Despite the emotional and volatile issues often involved in a c. 209A *ex parte* hearing, the matter should be treated like any other civil proceeding. The preferred practice is to conduct the hearing in open court. The judge always has discretion to hear from a party at sidebar when appropriate circumstances require.

A decision to close the courtroom in a c. 209A action should be made only in the most extraordinary circumstances. The party seeking to close the hearing has the burden of proving good cause, and good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. *Zenith Radio Corp. v. Matsushita Electrical Industrial Co.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981). The injury must be shown with specificity. *Id.* The trial court, in closing a proceeding to the public, must both articulate the countervailing interest it seeks to protect and must make "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *See* *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984).

3:05 Court Action on Defendant's Default, Probation, Parole or Warrant Status at *Ex Parte* Hearings. General Laws c. 209A, § 7 requires that the judge “shall review the defendant’s criminal history and history of civil restraining orders.” The clerk’s office should also check the Warrant Management System.

If the judge receives information from either source that an outstanding warrant exists against the defendant, the judge “shall [(1)] order that the appropriate law enforcement officials be notified,” (2) order that “any information regarding the defendant’s most recent whereabouts . . . be forwarded to such officials,” (3) “make a finding based on all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner,” and (4) if such a threat is found to exist, “notify the appropriate law enforcement officials of such finding and such officials shall take all necessary actions to execute any such outstanding warrant as soon as practicable.” G.L. c. 209A, § 7.

Where the defendant is determined to be on probation, the judge should consider ordering that the supervising probation officer receive immediate notice of the issuance of the c. 209A order.

#### COMMENTARY

The defendant’s criminal history and previous abuse prevention order history must be reviewed at the *ex parte* hearing for a variety of reasons. In addition to alerting the judge of outstanding warrants or other abuse prevention orders, this information is helpful in identifying situations in which the plaintiff may face a particularly heightened degree of danger.

The requirement that the judge notify the “appropriate law enforcement officials” about an outstanding warrant is triggered by the existence of any outstanding warrant. It is not clear from the statute who the “appropriate law enforcement officials” are, but they should be considered, at a minimum, to be the police department to which the c. 209A order is sent for service. Officers from that department will be attempting to serve the defendant with the order; they should be notified about outstanding warrants so that they can arrest the defendant on the warrants if and when they find him or her. In addition, such notice is important for the safety of the serving police officer. The Order provides a place to notify anyone reading it that a warrant exists, (section A.16, FA-2A), and completing this part of the order would seem to comply with the statute’s notice requirement. It also provides the plaintiff with the warrant numbers so that, if the defendant violates the order, and the plaintiff calls the police for emergency assistance, he or

she can give the warrant numbers to the responding police officers. (However, arrest in such circumstances does not usually require the existence of a warrant. *See Guideline 8:01, Issuance of Criminal Complaint.*)

Because the statute places the burden specifically on the judge, it is the judge who must review the record to ascertain the existence of any warrants.

In the District Court, Boston Municipal Court, and Superior Court departments, the printed copy of the defendant's criminal record should be returned to the defendant's probation file. In the Probate and Family Court, in accordance with Probate and Family Court Standing Order 1-11, no CARI/WMS information should be stored in the case file. <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/standingorder1-11.pdf>. The printed copy should not be placed in the case file since doing so could result in a violation of the CORI law if the criminal record is inadvertently revealed to one who has obtained public access to that file. *See Guideline 1:05, Public Access to c. 209A Case Files.* In addition, it is important that an up-to-date copy of the defendant's criminal record be obtained for each hearing; an old copy of the record may give inaccurate or incomplete information.

In some cases the judge may find that the nature of the warrant alone, or the nature of the warrant combined with the assertions of the party seeking c. 209A relief, presents an imminent threat of bodily injury to the plaintiff that goes beyond that required for the issuance of any c. 209A order. The judge may also find such an imminent threat of bodily injury exists based solely upon the assertions of the party seeking c. 209A relief. When the judge finds that such a threat exists, the judge should make the finding in the designated section on page two of the c. 209A order (section A.17, FA-2A), and direct the clerk's office or the victim witness advocate or the district attorney's office to notify the appropriate law enforcement officials of the situation and the circumstances that give rise to the imminent threat of bodily injury. Those officials would include, at a minimum, the police department that is responsible for serving the c. 209A order on the defendant and/or the District Attorney's Office.

Probation departments are notified each day about the court activity of their probationers during the previous day. Therefore, each supervising probation officer should learn on the next court day about any c. 209A abuse prevention orders issued against his or her probationer and entered on the CARI system. In situations of particular danger or urgency, however, it may be appropriate for the judge to order that the probation officer supervising a c. 209A defendant be notified immediately. This notice can serve two purposes. First, the actions that constitute the basis for the c. 209A order may be sufficient to constitute a violation of the terms of the defendant's probation. The supervising probation department may wish to bring the allegations to the attention of the sentencing court, either by sending the defendant a notice of probation violation, or, in situations of particular danger, requesting an arrest warrant. The Commissioner of Probation has issued guidelines for the commencement of probation violation proceedings on the basis of the issuance of abuse prevention orders under c. 209A. *See "Recommended Guidelines Regarding (1) 209A actions against active probationers and (2) Enforcement of stay-away orders"* issued by Commissioner of Probation Donald Cochran on October 12, 1993. <http://www.mass.gov/courts/209a/docs/probation-guidelines-probation-violation-proceedings.pdf>

*See also* District Court Transmittal No. 723, December 16, 1999, “New District Court Rules for Probation Violation Proceedings” (Rules not attached).

<http://www.mass.gov/courts/209a/docs/districtcourt-trans723-probation-violation-rules.pdf>

Second, the supervising probation department can sometimes assist the court in notifying a defendant of the issuance of the *ex parte* order. This is particularly useful in situations where the plaintiff does not know where the defendant can be served.

3:06 Rules of Evidence and Standard and Burden of Proof. The common law rules of evidence, e.g., those regarding hearsay, authentication, and best evidence, should be applied with flexibility at the *ex parte* hearing, subject to considerations of fundamental fairness. The standard of proof is a preponderance of the evidence. The plaintiff has the burden of proof.

#### COMMENTARY

At the *ex parte* hearing, as at the hearing after notice in c. 209A proceedings, strict adherence to the common law rules of evidence is not expressly required by the statute. *See Guideline 5:03, Rules of Evidence*. For example, the court can properly receive testimony that would otherwise be hearsay (e.g., “the doctor said that I had a concussion”). “The rules of evidence need not be followed, provided there is fairness in what evidence is admitted and relied on.” Frizado v. Frizado, 420 Mass. 592, 597-598 (1995).

The regular civil standard of proof, preponderance of the evidence, should be applied. *Id.* The plaintiff bears the burden of proof. Jones v. Gallagher, 54 Mass. App. Ct. 833, 890 (2002). *See Guideline 5:04, Standard and Burden of Proof*. Since the plaintiff is unopposed at the *ex parte* hearing, it is essential that the court be satisfied that the evidence submitted is credible, and sufficient as a matter of law, to justify the issuance of an order. The court should question the plaintiff, if necessary, to make this determination. In certain circumstances, inquiry beyond the face of the written affidavit or the plaintiff’s oral statement is not only appropriate, but essential, to the proper exercise of the court’s authority to decide these significant issues in the absence of the opposing party. *See Guideline 4:01, Content of Ex Parte Orders*; and *Guideline 4:05, Reconciliation*.

3:07 Conduct of *Ex Parte* Hearings. The court should decide whether there is territorial and subject matter jurisdiction before proceeding with the *ex parte* hearing.

The *ex parte* hearing itself should consist of testimony by the plaintiff under oath as to the factual grounds for the complaint and the need for the relief sought. If the plaintiff has filed an affidavit that provides the court with substantive information supporting the complaint, the judge may incorporate the affidavit into the record to simplify the plaintiff's testimony. If the content of the affidavit alone does not provide sufficient evidence on the issue of abuse and the need for an abuse prevention order, the court may consider additional evidence, including further testimony, police reports or other documents, or observations of the plaintiff's visible physical injuries. The court may wish to memorialize this additional evidence and attach it to the affidavit or may wish to ask the plaintiff to add to the plaintiff's original affidavit additional facts that were set forth orally during the hearing. The court should question the plaintiff as necessary in order to obtain relevant information and assess credibility. The court should also hear the sworn testimony of any available witnesses offered by the plaintiff. The court may also consider applicable police reports provided by a party or otherwise available to the court.

The court should decide the facts and determine whether there is a statutory basis for relief before addressing the nature of the relief sought. This need not be a formal or time-consuming process, and the judge need not necessarily announce each finding on the record.

The court should not routinely refuse to grant particular types of relief available under c. 209A. For example, plaintiffs who are entitled to such relief as stay-away, no-contact, or vacate orders should not be referred to the Probate and Family Court Department for support or custody orders unless those issues are already the subject of a prior or pending order in that court. *See Guideline 2:07, Referral to and from Other Courts and Avoiding Inconsistent Orders.*

At the beginning of each hearing, the judge should ask the plaintiff whether there are any outstanding court orders involving the same parties in the same or a different court. The court should not order any relief that is inconsistent with any existing order in any other court, except in emergency circumstances. *See Guideline 1:11, Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order*. *See also Guideline 2:07, Referral to and from Other Courts and Avoiding Inconsistent Orders*, and *Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders*, with regard to inconsistencies between an order issued by the District Court, the Boston Municipal Court or the Superior Court and a decision of the Probate and Family Court.

*See Guideline 1:08, Plaintiff Unable to Appear in Court*; *Guideline 3:00, Ex Parte Hearings: General*; and *Guideline 11:00, Procedure for Response to Complaints When Court is Not in Session*, regarding *ex parte* plaintiffs who are unable to appear to file a complaint.

#### COMMENTARY

The court should begin the *ex parte* hearing with a review of jurisdiction. If the court lacks subject matter or territorial/personal jurisdiction, the resulting order will be invalid and successful prosecution for a violation of that order will not be possible. *See Guidelines 3:02, Subject Matter Jurisdiction*; *Guideline 3:03, Venue; Territorial Jurisdiction for c. 209A Complaints*; and *Guideline 3:03A, Personal Jurisdiction over a Non-Resident Defendant*.

Harassment prevention orders under G.L. c. 258E are available from the District Court, Boston Municipal Court, Juvenile Court, and Superior Court departments. Unlike c. 209A, c. 258E does not require the plaintiff to have a familial, household, or substantive dating relationship with the defendant. Anyone “suffering from harassment” may seek to obtain a harassment prevention order under c. 258E.

If there is an existing Probate and Family Court custody, visitation and/or support order, the court in another department of the Trial Court may not issue custody or support orders. If such a current order exists but the plaintiff seeks an order from another court ordering the defendant to stay away from, or to have no contact with, the defendant’s minor children, the court should refer the plaintiff to the Probate and Family Court for only that relief. While the other court has statutory authority to issue such an order, it is more appropriate that it be heard in the court where the parties have already appeared. The Probate and Family Court will also have superseding jurisdiction in custody and support matters: its exclusive jurisdiction over visitation

matters may be seriously hampered by a subsequent no-contact or stay-away order issued by a different court and made applicable to the defendant's minor children. *See Guideline 2:07, Referral to and from Other Courts and Avoiding Inconsistent Orders; Guideline 4:01, Content of Ex Parte Orders; Guideline 5:00, Scheduling Hearings After Notice; and Guideline 6:00, Orders After Notice: General. See also Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders.*

However, in an emergency situation, the District Court, Boston Municipal Court, or Superior Court (including a judge on the Judicial Response System) may issue an order that conflicts with an existing custody or visitation order issued by the Probate and Family Court. These emergency circumstances are limited to those cases in which there is an allegation or threat of serious harm to the children who are the subject of an existing custody or visitation order and the plaintiff is unable to reach the Probate and Family Court. In such cases, the judge in the other court may issue the requested order for a short period of time (usually no more than 72 hours) to permit the plaintiff to go to the Probate and Family Court for relief, and should make findings of fact setting forth the reasons for that order. *See Smith v. Joyce*, 421 Mass. 520, 523-524 (1995). *See Guideline 1:11, Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.*

3:08 Repetitious Complaints. The fact that a plaintiff has unsuccessfully sought relief previously, or has previously obtained abuse prevention orders but not sought to extend them, is not relevant to the decision on the need for relief in response to the new complaint. Each complaint must be evaluated on its own merits to determine whether evidence exists to support issuance of an abuse prevention order.

Court staff should provide the court with all prior related abuse prevention orders involving the parties presently before the court at the time of the hearing.

#### COMMENTARY

A plaintiff may initially seek relief, and then fail to follow up by not appearing at a subsequent hearing, by requesting to “drop” an order, or by deciding not to report violations of an order. Many complex dynamics contribute to this behavior. These can include the plaintiff’s need for financial support, a desire to reconcile with the defendant, coercion or intimidation by the defendant, family pressures, children’s issues, and a plaintiff’s lack of self-esteem or sense of heightened danger at the time of separation.

Although the filing of repetitious complaints may be frustrating to the court and to the court staff, the plaintiff should be assured that the court’s only concern is to adjudicate the new complaint on its merits and to provide any abuse prevention orders that are warranted by the evidence. *See Guideline 2:12, Referral for a Criminal Complaint*, and *Guideline 5:08, Request by the Plaintiff or Defendant to Modify or Terminate the Abuse Prevention Order*. If the same court where the current complaint is being heard issued a previously terminated protection order, it may be helpful for the judge to review that previous order.

3:09 Role of Advocates at Ex Parte Hearings. Judges should permit advocates to stand with the parties whom they are assisting throughout the proceedings and to aid and support a party during the hearing to the extent that the party wishes it and the court deems it helpful.

#### COMMENTARY

Trained advocates and friends or relatives of the party can play an important role in supporting the party through what may be a difficult process and in reminding the party to provide the court with all relevant information. See *Guideline 1:04, Court's Relationship With Local Advocacy Groups*; *Guideline 2:08, Role of Advocates in Assisting Parties*; and *Guideline 5:02, Role of Advocates at Hearings After Notice*.

The role of the non-lawyer advocates in the courtroom should be limited to aiding the parties in their presentation to the court. Such aid may involve reminding the party of relevant factual information or pertinent circumstances that a party may have forgotten to state or, for whatever reason, did not bring to the court's attention. An advocate with personal knowledge pertaining to the allegations raised by the party may testify to such facts upon being sworn as a witness.

***EX PARTE ORDERS***

4:00	Duration of <i>Ex Parte</i> Orders
4:01	Content of <i>Ex Parte</i> Orders
4:02	<i>Ex Parte</i> Orders to Vacate
4:03	<i>Ex Parte</i> Support and Compensation Orders
4:04	<i>Ex Parte</i> Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards
4:05	Reconciliation
4:06	Information for the Plaintiff
4:07	Transmission of <i>Ex Parte</i> Orders to the Police for Service on the Defendant

4:00 Duration of *Ex Parte* Orders. Orders entered after an *ex parte* hearing should have duration of no more than ten court business days. They should be effective through 4 p.m. on the date set for the hearing after notice.

#### COMMENTARY

It is a fundamental tenet of due process that one cannot be deprived of personal or property rights without advance notice and the right to be heard. Departures from this principle are allowed only on exceptional grounds. *Ex parte* orders in domestic abuse cases (e.g., requiring a defendant to leave the home with no right to be heard in opposition) are justified only insofar as the danger of physical abuse to the plaintiff is immediate and outweighs the defendant's right to be heard before the order issues. This exception to the defendant's due process rights can last only until the defendant can be notified and a hearing can be scheduled and conducted.

Accordingly, the *ex parte* orders should last only until the hearing after notice can be held, and that hearing should be scheduled for a date as soon as possible, consistent with service on the defendant, and, in any event, no more than "ten court business days" after the *ex parte* hearing. G.L. c. 209A, § 4, second par.

4:01 Content of *Ex Parte* Orders. If the plaintiff demonstrates a “substantial likelihood of immediate danger of abuse,” as defined in the statute, the court should issue an *ex parte* order. The court may enter any order that it deems necessary to protect a plaintiff from further abuse, including, but not limited to, any of the orders expressly authorized by G.L. c. 209A, §3. Such orders MUST include the surrender of guns, ammunition and gun licenses. *See Guideline 4:04, Ex Parte Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards.* Judges should proofread the order before signing it and should review the relief ordered by reading the order aloud to the plaintiff.

#### COMMENTARY

The authority granted to the court under c. 209A is not limited to any specific type of relief. G.L. c. 209A, § 3. Nor is the court limited to the forms of relief originally requested by the plaintiff on the complaint form. The court should fashion its relief order in response to the need for protection shown by the facts presented at the hearing. For example, it may be determined that the defendant should be specifically ordered not to call or otherwise contact the plaintiff at the plaintiff’s place of employment, despite the fact that this was not included on the complaint.

The protective purpose of *ex parte* orders may be interpreted broadly. For example, under appropriate circumstances, an *ex parte* order requiring the defendant to provide the keys to the family car to the plaintiff (e.g., by leaving them with police) might be deemed “protective,” in the sense that it eliminates one reason for the plaintiff to contact the defendant during the duration of the *ex parte* order. When justified by the facts, the court has authority to order a defendant to stay away from a particular school or job site, even if the defendant attends the school or works at the same location. In such cases, the plaintiff should be provided with an additional copy of the order for the school or employer, so that responsible parties in those places will be notified of the court order, as well as of the possibility of danger to the plaintiff.

Judges should be mindful when crafting abuse prevention orders that, with respect to the terms “stay away” and “no contact”, they are “not interchangeable.” However, a “no contact” order includes a “stay away” order. Commonwealth v. Finase, 435 Mass. 310, 314 (2001) (“Pursuant to a ‘stay away’ order, the defendant may not come within a specified distance of the protected party, usually stated in the order, but written or oral contact between the parties is not prohibited. By contrast, a ‘no contact’ order mandates that the defendant not communicate by any means with the protected party, in addition to remaining physically separated. Thus, a ‘no

contact’ order is broader than a ‘stay away’ order.”). It may also be prudent to include a warning that intentional contact effectuated by the defendant through a third party may violate the no-contact provision of the order. *See, e.g., Commonwealth v. Consoli*, 58 Mass. App. Ct. 734, 741 (2003), *rev. denied*, *Commonwealth v. Consoli*, 440 Mass. 1103 (2003) (a defendant cannot make comments to a third party that they intend or know will be heard by a plaintiff standing nearby).

No-contact orders can be violated through use of Facebook, Twitter, texting, or other use of social media. In cases where this may be an issue, judges may wish to specifically prohibit such use of social media to contact the plaintiff.

The terms of the orders must be reasonable. They must be clear in their language, so that the parties as well as the police know what has been ordered and what conduct violates the order. Plain language should be used (e.g., “100 yards,” not “the length of a football field”). Conditional language should not be used (e.g., contact with the children should not be conditioned on the defendant’s sobriety). In particular, an order which requires the defendant to stay a great distance, such as 1,000 yards, or even 500 or 200 yards, away from the plaintiff is difficult to enforce because it is almost impossible for such a defendant to know when he or she is in violation. Similarly, a District Court order that requires a defendant to stay more than 100 yards away from the plaintiff may make it difficult for the Probate and Family Court to craft an appropriate visitation order without amending the District Court order. *See Guideline 12:07 Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders*. Orders that require a defendant to stay from twenty to 100 yards away from the plaintiff are usually sufficient. An order requiring the defendant to stay “at least one hundred yards away” from the plaintiff and her job has been interpreted to require the defendant to stay one hundred yards away from “all of the property on which the workplace is located including the adjacent parking lot.” *Commonwealth v. O’Shea*, 41 Mass. App. Ct. 115, 118 (1996), *overruled on other grounds*, *Commonwealth v. Delaney*, 425 Mass. 587 (1997). A defendant may be found guilty of a violation of an order to stay away from the protected person’s workplace when he or she visits the plaintiff’s workplace, even if the plaintiff is not at work at the time of the visit. *See Commonwealth v. Habenstreit*, 57 Mass. App. Ct. 785, 787 (2003), *rev. denied*, *Commonwealth v. Habenstreit*, 439 Mass. 785 (2003) (since the purpose of the abuse prevention order is to provide a safe haven for the victim and to lessen the chances for contact between the victim and the defendant, to interpret the order to apply only when the victim was physically present would “encourage a defendant to keep himself or herself informed about a protected person’s schedule,” a result that would be contrary to the intent of the order itself.)

In addition, as noted in *Guideline 3:07, Conduct of Ex Parte Hearings*, courts generally should avoid issuing inconsistent orders. However, in extraordinary circumstances, the District Court, Boston Municipal Court, or Superior Court may issue an order, which conflicts with an existing custody or visitation order issued by the Probate and Family Court. *See Guideline 1:11, Plaintiff’s Requested Order Will Contradict Existing Probate and Family Court Order*.

Reading the terms of the order to the plaintiff before signing it allows the judge to make sure that the order is complete. For example, a no-contact order (sections A.2 or A.7, FA-2) should always include a reasonable distance in yards, which the defendant should observe in staying away from the plaintiff (A.2) or the children (A.7). Reading the order aloud also allows a plaintiff to bring to the judge's attention any requested relief that may have been forgotten or overlooked.

4:02 *Ex Parte* Orders to Vacate. The court's decision to issue an *ex parte* order to the defendant to vacate the household residence should be based solely upon the plaintiff's need for such an order as a means of protection from abuse. The defendant's property interest in the household residence is irrelevant to the issuance of an order to vacate.

The court may also order the defendant not only to vacate an apartment, but also to stay away from the entire building or to stay away from a workplace. Implicit in an order to vacate is that the defendant remains away from the location while the abuse prevention order is in effect.

#### COMMENTARY

For an *ex parte* order to vacate, the only relevant issues are (1) whether the plaintiff shows, by a preponderance of the evidence, that there is "a substantial likelihood of immediate danger of abuse," and (2) whether an order to vacate is needed to protect the plaintiff from that abuse.

The defendant's property interest in the residence is not relevant to this inquiry. Thus, if the plaintiff and the defendant reside in the same household and there is a substantial likelihood of abuse to the plaintiff, then a vacate order is appropriate, irrespective of whether the defendant is the owner or lessee of the household premises. A defendant who is the owner or lessee of the premises might argue that the plaintiff's right to occupy the premises as an invitee has terminated and that the plaintiff is a trespasser. This is a separate issue. The defendant may seek relief in other forums, including summary process proceedings, but until the plaintiff leaves, the defendant's property interest in the household premises is subordinate to the protection afforded by the order to vacate. The defendant remains the owner or lessee, but this does not affect the court's authority to issue an order to vacate, especially for the brief duration of an *ex parte* order. This interpretation is consistent with the section of G.L. c. 209A, § 3, which states that "[n]o order shall in any manner affect title to real property."

Given the impact of a vacate order on the defendant, there is a particular need, when such an order is issued *ex parte*, to limit its duration to the minimum time consistent with notice to the defendant. Ten court business days is the maximum duration of such orders under the statute and should not be the presumptive or automatic term for scheduling the hearing after notice.

Under G.L. c. 209A, § 3(c), the court may order the defendant to vacate a multiple family dwelling (section A.3, FA-2) and to stay away from a workplace or school (sections A.4a and 4b, FA-2). Both orders require specific notation on the order form.

Unless the parties meet the other statutory requirements for subject matter jurisdiction, c. 209A does not apply to landlord-tenant situations. Chapter. 209A should not be used as a substitute for the procedural requirements of summary process. *See Guideline 3:02, Subject Matter Jurisdiction.*

*See Commonwealth v. Gordon, 407 Mass. 340, 347 (1990) regarding the “stay away” aspect of vacate orders, noting that “the Legislature intended the word ‘vacate’ to include the concept of ‘remain away.’” See also Commonwealth v. Finase, 435 Mass. 310, 314 (2001) (with respect to the terms “stay away” and “no contact”, they are “not interchangeable.” However, a “no contact” order includes a “stay away” order.) The Finase Court noted that “[p]ursuant to a ‘stay away’ order, the defendant may not come within a specified distance of the protected party, usually stated in the order, but written or oral contact between the parties is not prohibited. By contrast, a ‘no contact’ order mandates that the defendant not communicate by any means with the protected party, in addition to remaining physically separated. Thus, a ‘no contact’ order is broader than a ‘stay away’ order.” *Id.**

4:03 Ex Parte Support and Compensation Orders. Orders issued in the course of *ex parte* hearings should not ordinarily include terms of support or compensation for damages. Claims for such relief should be considered at the hearing after notice. The fact that the plaintiff is requesting such relief should be indicated on the complaint and also on the *ex parte* order so as to provide notice to the defendant that the issue will be addressed at the hearing after notice. The court should check the box in section 13 of the Order (FA-2) which notifies the defendant that at the next scheduled hearing testimony will be heard and evidence considered the issue of support for the plaintiff and/minor children and that the defendant is ordered to bring to that hearing any financial records that provide evidence of his or her current income.

#### COMMENTARY

There are several significant difficulties with ordering support and compensation on the *ex parte* order.

First, it is unlikely that the court will obtain adequate information in an *ex parte* hearing to make an informed decision in these matters, which can require substantial fact finding and testimony from both sides. The hearing after notice provides a more appropriate forum for such fact finding.

Second, even if an order for support or compensation were issued, it is not likely to be enforced prior to the expiration of the *ex parte* order. In fact, attempts by the plaintiff to demand payment from the defendant before the hearing after notice could be the occasion of further danger of abuse.

The plaintiff should never be discouraged from seeking support or compensation, but should be told that the court will consider these issues at the hearing after notice, when the defendant has an opportunity to be heard. See *Guideline 6:00, Orders After Notice: General*, and *Guideline 6:05B, Support Orders*. The complaint should indicate that the plaintiff is seeking restitution for damage done or support for minor children. The court should check the box in section 13 of the Order (FA-2) which notifies the defendant that at the next scheduled hearing testimony will be heard and evidence considered the issue of support for the plaintiff and/minor children and that the defendant is ordered to bring to that hearing any financial records that provide evidence of his or her current income.

Chapter 209A, § 3(e) requires that all orders of support “issued, reviewed or modified” under the statute also conform to and be enforced under the provisions of G.L. c. 119A, § 12 (pertaining to child support enforcement). *Guideline 6:05B, Support Orders*.

4:04 *Ex Parte* Orders to Surrender Guns, Licenses to Carry Firearms and FID cards. All *ex parte* orders MUST include (1) an order for the “immediate suspension and surrender of any license to carry firearms, and/or Firearm Identification Card which the defendant may hold” and (2) an order that the defendant surrender to the police “all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses.” G.L. c. 209A, § 3B. Any license to carry firearms or firearms identification cards that the defendant may hold shall be surrendered to the appropriate law enforcement officials. G.L. c. 209A, § 3B. This provision MUST be included in any *ex parte* order regardless of whether there is any evidence presented that the defendant has a firearms identification card or license to carry or possesses any firearms or ammunition.

#### COMMENTARY

Since all *ex parte* orders issued under c. 209A must include an order that the defendant surrender any firearms or firearms licenses, the box in section A. 12 of the Order (FA-2) must be checked on all *ex parte* orders.

State and federal law prohibits possession of firearms, ammunition, firearms identification cards and licenses to carry firearms by individuals subject to c. 209A orders except in certain limited situations. Upon the issuance of a c. 209A order, any license to carry firearms must be revoked or suspended by the licensing authority, ( G.L. c. 140, § 131 (d)(vi); G.L. c. 140, § 131 (f)), and any firearms identification card must be revoked or suspended by the licensing authority. G.L. c. 140, § 129B (1) (viii); G.L. c. 140, § 129B (4).

Upon service of an order issued under c. 209A, law enforcement officials must immediately take possession of all firearms, rifles, shotguns, machine guns, ammunition, any license to carry firearms and any firearms identification cards. G.L. c. 209A, § 3B. When the judge learns from the plaintiff in the course of a hearing that the defendant possesses firearms or ammunition, any information regarding the number and type of firearms and the location where they are kept should be memorialized on the order itself and conveyed to the law enforcement officials responsible for serving the order on the defendant. This notation will assist police officers to implement the requirements of the order safely and effectively.

Each time an order issued under c. 209A is extended or modified the judge must determine if returning the defendant's firearms or firearm identification card would present a likelihood of abuse to the plaintiff. If the judge makes such a determination, the court shall continue the firearm surrender order and shall in sections C or D of the Order (FA-2a) by checking the box that provides, "Firearm surrender order continued. The items surrendered under section 12 will NOT be returned since doing so would present a likelihood of abuse to the plaintiff." See *Guideline 6:05, Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards*. Enforcement of this provision in another state may be dependent upon whether the order contains such a finding.

Federal law prohibits possession of a firearm or ammunition by any person who is subject to a qualifying domestic violence protective order. 18 U.S.C. § 922 (g)(8). A protective order must meet certain requirements in order to qualify under that statute. The order must: (1) have been issued after a hearing of which the defendant received actual notice and had an opportunity to participate; (2) must restrain the defendant from harassing, stalking, or threatening an intimate partner or that partner's child or placing those individuals in reasonable fear of bodily injury; (3) must include a finding that the defendant represents a credible threat to the physical safety of the intimate partner or the partner's child; and (4) must prohibit the use, attempted use, or threatened use of physical force against the partner or child. There is an exception limited to only 18 U.S.C. 922 (g) (8) that permits law enforcement officers and military personnel in certain situations to possess an officially issued firearm while on duty even if they are currently subject to a qualifying protective order. 18 U.S.C. § 925 (a)(1).

Federal law also prohibits possession of a firearm or ammunition by any person who has a misdemeanor conviction for domestic violence. 18 U.S.C. § 922 (g) (9). Qualifying misdemeanors must have as an element the "use or attempted use of physical force, or the threatened use of a deadly weapon" and the named victim of the crime must be the current or former spouse of the defendant, a person with whom the defendant shared a child in common, a person who was cohabitating with or who had cohabitated with the defendant as a spouse, parent or guardian or a person who was similarly situated to a spouse, parent or guardian of the defendant.

4:05 Reconciliation. At the *ex parte* stage, the court should not attempt to compel or even suggest to the plaintiff that reconciliation be attempted. The sole issue is the alleged need for protection on an immediate basis. If that need is found to exist, an appropriate order or orders should issue. If not, the complaint should be denied or the matter deferred to the hearing after notice.

#### COMMENTARY

It is not appropriate for the court in a c. 209A proceeding to explore, or to ask the plaintiff to explore, the possibility of improving the underlying relationship. The issue presented is whether immediate protection is needed and, if so, what form it should take. *See* G.L. c. 209A, § 3; *Guideline 1:01, Protective Purpose of c. 209A*, and *Guideline 6:01, Referral for Treatment or Support Services*.

4:06 Information for the Plaintiff. If an *ex parte* order issues, the plaintiff should be told:

- (1) the contents of the order;
- (2) that the police will serve the order on the defendant;
- (3) the date and time of the hearing after notice;
- (4) what will happen if either or both parties fail to appear at that hearing;
- (5) that the order remains in effect until a judge changes the terms of or terminates the order;
- (6) that the proceedings are civil in nature and certain violations of the order are criminal in nature; and
- (7) that in the event that the defendant violates the order, the plaintiff should contact police immediately.

The Regional Administrative Justices of the Superior Court and the First Justices of the divisions of the Boston Municipal Court, District Court and the Probate and Family Court departments should coordinate with their staff to ensure that either court personnel or an advocate effectively communicates this information to the plaintiff.

#### COMMENTARY

For an *ex parte* order to be fully effective, its contents and meaning should be explained to the plaintiff. The plaintiff should be told that the police will attempt to serve the defendant with a copy of the order as issued. The plaintiff should contact the police immediately if the defendant violates the order.

The plaintiff should also be told that the order remains in effect until a judge changes or terminates the order. Any action by the defendant contrary to its terms will subject the defendant to immediate, warrantless arrest and possible criminal prosecution. *See Guideline 8:03, Acquiescence by the Complainant to an Act Which May Violate the Terms of an Order.*

The plaintiff should also be told that certain violations of c. 209A orders are criminal offenses. Violations of orders (1) to refrain from abuse, (2) to vacate the household, or (3) to have no contact with and/or stay away from the plaintiff, are criminal violations. *See*

Commonwealth v. Finase, 435 Mass. 310, 313-314 (2001). In addition, G.L. c. 209A, § 3B makes a violation of an order to surrender guns, ammunition, and gun licenses a criminal offense.

4:07 Transmission of *Ex Parte* Orders to the Police for Service on the Defendant. When an order under G.L. c. 209A is issued, the clerk's office must transmit two certified copies of the order and one copy of the complaint to "the appropriate law enforcement agency." G.L. c. 209A, § 7. The Defendant Information Form (FA/HA-5) should accompany these forms. The appropriate law enforcement agency should be the police department of the municipality wherein the defendant can be found. If the defendant's whereabouts or likely whereabouts are unknown, the clerk's office should transmit these documents to the police department of the city or town wherein the plaintiff resides.

Transmission of the papers for service on the defendant should take place immediately after the order is issued. Transmission should be accomplished in the manner best designed for speed and effectiveness. In many courts, this will be by facsimile. In other courts, arrangements are made to have police personnel pick up the order for service. In every case, the c. 209A order must be immediately transmitted by the court to the police, either by facsimile or being made available for pick up at the courthouse.

In no circumstances, however, should the order be given to the plaintiff to bring to the police station to effectuate service, nor should the order be mailed to the police station to effectuate service. If a plaintiff would like a copy of the order to bring directly to the police station, a copy of the order should be provided for that purpose. If a police department would like a "hard" copy of an order that has been faxed to it for service, the clerk's office may provide a copy by mail upon request.

The police must serve a copy of the order and a copy of the complaint on the defendant. Service should be made in hand, unless the court specifies otherwise. The police are required to make a return of service to the court. If the defendant is incarcerated and will be incarcerated at

the time scheduled for the hearing after notice, a notice should accompany the order informing the defendant of his or her right to be present at the hearing and providing a mechanism for doing so. If the defendant asks to attend the hearing, the court should issue a writ of *habeas corpus* to produce the defendant for the scheduled hearing. See Commonwealth v. Henderson, 434 Mass. 155 (2001).

### COMMENTARY

“Forthwith” transmission of the necessary papers to the police is specifically required by law. G.L. c. 209A, § 7, second par. The clerk’s office is in the best position to determine the most expedient method of transmitting the documents to the appropriate police department for service on the defendant. A facsimile has the benefit of providing printed documentation that the transmission was made, when it was made and to whom it was made. The police department is then required to serve one copy of each order on the defendant, together with a copy of the complaint. The clerk’s office should question the plaintiff if that would be helpful in determining which police department is the appropriate law enforcement agency to make service on the defendant. For example, when a defendant previously has been ordered to vacate the household by means of an emergency order, a plaintiff who does not know the location of the defendant’s current residence may know where he or she works. In any event, all of the information which the plaintiff possesses about the defendant’s whereabouts should be contained on the Defendant Information Form described in *Guideline 2:03, Completing the Complaint: Obtaining Required Information* (FA/HA-5).

In-hand service should be obtained if at all possible. Failure to make in-hand service may render the *ex parte* order ineffective. Further abuse will not be deterred if the defendant does not know that the order exists. Leaving the order and complaint at the “last and usual place of abode” may be ineffective if this is the address that the defendant was ordered to vacate in the emergency order.

In appropriate circumstances, the court may order an alternative method of service. Specifically, the Supreme Judicial Court has held, “when the appropriate law enforcement agency has made a conscientious and reasonable effort to serve the statutorily specified documents on the defendant, but has nevertheless failed, the agency should promptly notify the court so that a judge, if satisfied after a hearing that an appropriate effort has been made, may order that service be made by some other identified means reasonably calculated to reach the defendant. Where such substituted service appears unlikely to notify the defendant, the judge may excuse service.” Zullo v. Goguen, 423 Mass. 679, 681 (1996). Alternative service may include service at last and usual address, leaving at an address a defendant is known to frequent (e.g., parent’s home) and notice by publication. See also Commentary to *Guideline 5:05, Failure*

of Defendant to Appear; and Guideline 6:03, Service of Orders on the Defendant. If alternative service is ordered, the judge should check the appropriate box in section B1 of the Order (FA-2a).

The “necessary papers” to be served include a copy of the order and the complaint, but not the affidavit. See Flynn v. Warner, 421 Mass. 1002, 1002 (1995) (rescript). The statute also refers to service of a “summons,” but this appears to be an error since the defendant is given an opportunity to appear at subsequent hearings, but is not required to do so. For this reason, summonses are not issued for defendants in c. 209A cases.

The police are required to “promptly” make a return of service. If the return is not made prior to the date of the hearing after notice, and there is no other evidence of notice to the defendant, an order after notice may not be issued at that time. See Guideline 5:05, Failure of the Defendant to Appear. Furthermore, successful prosecution for violation of an order of which the defendant is unaware is probably impossible. See Commentary to Guideline 5:05, Failure of the Defendant to Appear; and Guideline 6:03, Service of Orders on the Defendant, regarding service of orders after notice. If the case must be continued because there is no evidence that the defendant received notice, the same ten-day time limit as for *ex parte* orders should be observed.

Incarcerated defendants have the right to be heard on a requested extension of the *ex parte* order at a hearing after notice. The court should take steps to inform them of this right and to secure their presence in court if requested to do so. In the alternative, the court may issue a writ of *habeas corpus sua sponte*. While the court is under no obligation to issue a writ of *habeas corpus* absent a request by the defendant, Commonwealth v. Henderson, 434 Mass. 155, 163, n. 12 (2001), the issuance of a writ of *habeas corpus* is the preferred practice so that notice is clear in the event the defendant is subsequently charged with violating the restraining order.

In a prosecution for a violation of a c. 209A order, actual service of the order is unnecessary if the Commonwealth can prove beyond a reasonable doubt that the defendant had actual knowledge of the terms of the order. Commonwealth v. Delaney, 425 Mass. 587, 589-593 (1997), *cert denied*, Delaney v. Commonwealth, 522 U.S. 1058 (1998); *Contrast* Commonwealth v. Welch, 58 Mass. App. Ct. 408 (2003). In Delaney, the defendant was initially served with a 10-day abuse prevention order issued *ex parte* under c. 209A, which was left at his last and usual address and which warned him, in pertinent part, that if he failed to appear on the hearing date “an extended or expanded [o]rder may remain in effect for up to one year.” Delaney, 425 Mass. at 588. The defendant failed to appear at the hearing, a 1-year order was issued, but not served, although there was evidence that the defendant had verbally acknowledged its existence. Delaney, 425 Mass. at 589. The court stated that “[i]n these circumstances the service of the extended order on the defendant was not a prerequisite to his prosecution for violating the terms of the order” since “the jury could have found that the defendant had actual and constructive notice of the order and that it continued in effect after the hearing date.” Delaney, 425 Mass. at 591; *see also* Commonwealth v. Munafu, 45 Mass. App. Ct. 597, 601-602 (1998), *rev. denied*, Commonwealth v. Munafu, 428 Mass. 428 Mass. 1110 (1998) (concurring with Delaney that

failure to serve an extended order was not fatal error). Failure to serve the order is, however “relevant to a determination as to whether the defendant possessed the knowledge required” for a conviction. Delaney, 425 Mass. at 593. Thus, where the victim testified that “once or twice maybe” she had spoken to the defendant about the existence of the abuse prevention order, there was insufficient evidence that the defendant knew of the order, and he could not be found guilty of a criminal violation. Commonwealth v. Welch, 58 Mass. App. Ct. 408, 410-411 (2003); *compare* Commonwealth v. Henderson, 434 Mass. 155, 161-164 (2001) (although the defendant was unaware that the protective order had been extended, he was given constructive notice thereof due to the inclusion of the scheduled hearing date on the initial order.); Commonwealth v. Melton, 77 Mass. App. Ct. 552, 555-556 (2010), *rev. denied*, Commonwealth v. Melton, 458 Mass. 1109 (2010) (where court found that a telephone conversation between the defendant and the victim, initiated by defendant, during which the victim asked the defendant why he was calling her and said “there’s a restraining order,” was sufficient for a jury to have found that the defendant was put on notice of the existence of a restraining order).

**HEARING**

**S AFTER NOTICE**

5:00	Scheduling Hearings After Notice
5:01	Conduct of Hearings After Notice When Both Parties Appear: General
5:02	Role of Advocates at Hearings After Notice
5:03	Rules of Evidence
5:04	Standard and Burden of Proof
5:05	Failure of the Defendant to Appear
5:06	Failure of the Plaintiff to Appear
5:07	Court Action on Defendant's Warrant Status
5:08	Request by the Plaintiff or Defendant to Modify or Terminate the Abuse Prevention Order

5:00 Scheduling Hearings After Notice. A hearing after notice in a c. 209A case should be scheduled as soon as possible after an *ex parte* order is issued, but in no event later than ten court business days after the issuance of such an order. *See Guideline 4:00, Duration of Ex Parte Orders.*

However, hearings after notice may be held at any time within ten business days when both parties are present, including at the initial appearance or during the course of an arraignment on related criminal charges. *See Guideline 8:06, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings.*

When scheduling the hearing after notice, the court should consider the plaintiff's ability to appear and the defendant's right to be heard within a minimum time following the issuance of an *ex parte* order.

#### COMMENTARY

Scheduling of the c. 209A hearing after notice should be expedited to the extent possible. If an *ex parte* order is issued, the hearing after notice must be held within "ten court business days" after the date of issuance. "Ten court business days" should be interpreted to mean ten days during which the court is open. Saturdays, Sundays and holidays are excluded. Courts should attempt to schedule hearings after notice sooner than the ten-day maximum if effective service of notice on the defendant and return of service can be made.

Nothing in the law requires two hearings, or a "cooling off period" between the *ex parte* and the hearing after notice. If both parties are present in court at the time of the plaintiff's initial contact with the court, or if the defendant's presence can be promptly obtained, there is no justification for proceeding *ex parte*.

If the judge is satisfied that notice of an order that was issued through the Judicial Response System was served on the defendant and that the notice informed the defendant of the date, time and place of the hearing, the court may hold the hearing on that date. *See Guideline 11:00, Procedure for Response to Complaints When Court is Not in Session.* Conducting a hearing after notice without a prior *ex parte* proceeding is particularly appropriate when the plaintiff is present and the defendant is before the court for arraignment, following arrest for an abuse related crime, and when no previously issued order is in effect. *See Guideline 8:06, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings.*

5:01 Conduct of Hearings After Notice When Both Parties Appear: General. The hearing after notice in a c. 209A action at which both parties appear is an adversarial proceeding in which both parties must be allowed to present evidence. The plaintiff bears the burden of proof.

The court should ensure an orderly proceeding and should be cognizant of safety issues. The court should address placement of participants in the courtroom with this in mind. All parties and witnesses should testify under oath.

Before the hearing begins, the judge should ask both parties whether there are any outstanding orders from any court involving the same parties. The response will govern the relief available. *See Guideline 2:07, Referral to and from Other Courts and Avoiding Inconsistent Orders; Guideline 3:07, Conduct of Ex Parte Hearings; Guideline 4:01, Content of Ex Parte Orders; Guideline 6:00, Orders After Notice: General; Guideline 6:07, Mutual Abuse Prevention Orders; and Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders.*

Both parties have a general right to cross-examine witnesses, but the judge should not permit cross-examination to be used for harassment or intimidation or for discovery purposes. Each side must be given a meaningful opportunity to challenge the other's evidence. In some circumstances, it is appropriate for the judge to remind the parties of their rights under the Fifth Amendment. Neither the plaintiff nor the defendant should be compelled to provide incriminating information against him- or herself.

Both parties should be told that the defendant must comply with a no-contact or vacate order unless and until those specific orders are terminated in writing by the court. The plaintiff has no authority to "waive" the orders without going to court to ask to have them terminated, and

the defendant is subject to mandatory warrantless arrest for violating these orders, notwithstanding the plaintiff's "consent."

The clerk's office should provide the court with all prior related abuse prevention orders involving the parties presently before the court at the hearing after notice. See *Guideline 3:08, Repetitious Complaints*.

### COMMENTARY

A two-party hearing in a c. 209A matter is like any other contested civil proceeding. The plaintiff presents his or her evidence, the defendant presents his or her evidence, and the court decides if the plaintiff has proven the case by a preponderance of the credible evidence.

There are unique aspects to hearings under c. 209A. Most obvious are the interpersonal nature of these cases and the emotional and volatile issues involved. The court must control the hearing and address any hostility or safety issues that may emerge. As a general rule, two-party hearings should not be conducted at sidebar. The court should consider where each party is placed during the hearing in order to eliminate any possibility that either party will attempt to dominate the proceedings or to intimidate the other. As in any proceeding, the court must always exercise appropriate control. Orderly procedure requires, for example, that each participant, including the parties, witnesses, and counsel, address remarks only to the court. In cases where serious abuse has taken place, a plaintiff may be intimidated merely by the defendant's presence. While there are specific circumstances in which sidebar might be appropriate, such as sexual assault or abuse of children, the court should also consider the safety implications of having the parties in such close proximity to one another. Many courts position court officers and advocates between the parties during the hearing, particularly a hearing conducted at side bar, to prevent intimidation and any direct interaction between the parties.

These cases carry the potential for physical danger to court personnel as well as to the parties. It is important that each session be conducted with this consideration in mind, and at least one court officer be present at all times.

In many cases an *ex parte* hearing will have been held, and an *ex parte* order issued against the defendant. Nevertheless, the plaintiff still bears the burden of proof at the hearing after notice. See, e.g., *Jones v. Gallagher*, 54 Mass. App. Ct. 883, 890 (2002). Fairness requires that the plaintiff's case be restated so that the defendant will know what has been alleged. This restatement may take the form of permitting the defendant to read the plaintiff's affidavit if one is contained within the file, and if the defendant is able to read English. *Frizado v. Frizado*, 420 Mass 592, 597 (1995). "A defendant or his counsel should be given adequate opportunity to

consider any affidavit filed in the proceeding on which the judge intends to rely before being required to elect whether to cross-examine the complainant or any other witness.” *Id.*

The defendant must then be given an opportunity to respond to the allegations bearing in mind that the defendant does not bear the burden of disproving the allegations or of proving that the *ex parte* order should not continue. “An inference adverse to a defendant may properly be drawn, however, from his or her failure to testify in a civil matter such as this even if criminal proceedings are pending or might be brought against the defendant.” Frizado v. Frizado, 420 Mass. at 596 (1995). The plaintiff may then, in the court’s discretion, be given an opportunity to supplement the allegations in the affidavit and respond to the defendant’s statements.

“A defendant has a general right to cross-examine witnesses against him. There may be circumstances in which the judge may deny that right in a G.L. c. 209A hearing, and certainly a judge may limit cross-examination for good cause in an exercise of discretion.” Frizado v. Frizado, 420 Mass. at 597 (1995). In a footnote, the Supreme Judicial Court agreed that cross-examination should not be permitted for harassment or discovery purposes in c. 209A actions, but also observed that the “judge’s discretion in restricting cross-examination may not be unlimited in particular situations.” *Id.* at 598, n.5. *See also* Silvia v. Duarte, 421 Mass. 1007 (1995). In that case, the Supreme Judicial Court upheld the trial judge’s refusal to allow any cross examination where the parties were not married, shared no common domicile and no children, the defendant had served prison time for violence against the plaintiff, the plaintiff appeared *pro se* and the defendant was represented by counsel, the defendant asserted his Fifth Amendment privilege and declined to offer any evidence, and the only order entered was one to stay away from the plaintiff, an order that the court described as a “minimal intrusion.” Silvia v. Duarte, 421 Mass. at 1008. *But see* C.O. v. M.M., 442 Mass. 648, 659-659 (2004) (court found that, absent grounds that would justify a limitation on the defendant’s right to present evidence and cross-examine witnesses, the defendant’s right to due process was denied him where the defendant was not given the opportunity to present and cross-examine witnesses).

5:02 Role of Advocates at a Hearing After Notice. At a hearing after notice, an advocate should be permitted to accompany a party in the courtroom, stand with the party throughout the proceedings, and assist and support the party to the extent that the party wishes it and the court deems it helpful. The court should allow an advocate to speak with the party in order to help the party to provide the court with relevant additional information.

#### COMMENTARY

The role of an advocate at a hearing after notice is essentially the same as at an *ex parte* hearing, whether or not the other party is represented by counsel. See *Guideline 1:04, Court's Relationship With Local Advocacy Groups*; *Guideline 2:08, Role of Advocates in Assisting Parties*; and *Guideline 3:09, Role of Advocates at Ex Parte Hearings*.

5:03 Rules of Evidence. The common law rules of evidence, e.g., those regarding hearsay, authentication, and best evidence, should be applied with flexibility, subject to considerations of fundamental fairness.

#### COMMENTARY

At the hearing after notice, as at the *ex parte* hearing in c. 209A proceedings, strict adherence to the common law rules of evidence is not required. Frizado v. Frizado, 420 Mass. 592, 597-598 (1995) (holding that “the rules of evidence need not be followed, provided that there is fairness in what evidence is admitted and relied on”). *See also Guideline 3:06, Rules of Evidence and Standard and Burden of Proof*. For example, the court can properly receive testimony that would otherwise be hearsay. (“The doctor said that I had a concussion.”) Similarly, an answering machine message, voicemail, e-mail or other electronic transmission containing threats made by the defendant may be admitted without a formal authentication procedure, if the court is satisfied that it is reliable.

The spousal disqualification set forth in G.L. c. 233, § 20 does not extend “to words constituting or accompanying abuse, threats, or assaults of which the other spouse is the victim.” Commonwealth v. Gillis, 358 Mass. 215, 218 (1970). “Even if induced by private conversation, such abusive or threatening words do not have any confidential aspect within the purpose of the protection” and may therefore be admitted. *Id.*

For a more detailed discussion of evidentiary issues, *see Massachusetts Guide to Evidence*, § 1106 (Supreme Judicial Court, 2011) <http://www.mass.gov/courts/sjc/guide-to-evidence/>

5:04 Standard and Burden of Proof. The standard of proof in c. 209A hearings is the civil standard of preponderance of the evidence. The plaintiff has the burden of proof at both the *ex parte* hearing and any subsequent hearing after notice. Both sides have the right to introduce evidence.

#### COMMENTARY

Proceedings under c. 209A are not criminal. The usual civil standard of preponderance of the credible evidence should be applied in c. 209A actions, Frizado v. Frizado, 420 Mass. 592, 597 (1995), and the plaintiff bears the burden of proof. Jones v. Gallagher, 54 Mass. App. Ct. 883, 890 (2002). The standard and burden of proof for obtaining an extension are similar to the criteria for obtaining an initial order. *See*, Iamele v. Asselin, 444 Mass. 734, 734-735 (2005) (“A plaintiff seeking an extension of a protective order must make a showing similar to that of a plaintiff seeking an initial order.”).

When requesting an extension of an abuse prevention order, the plaintiff need not make a showing of new abuse. *See* Rauseo v. Rauseo, 50 Mass. App. Ct. 911, 913 (2001), *rev. denied*, Rauseo v. Rauseo, 434 Mass. 1103 (2001) (“At a hearing on the plaintiff’s request for an extension of an order . . . the plaintiff is not required to re-establish facts sufficient to support that initial grant of an abuse prevention order.”); *see also* G.L. c. 209A, § 3; Mitchell v. Mitchell, 62 Mass. App. Ct. 769, 774 (2005) (“[T]he fact abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient grounds for allowing an order to be vacated.”); Doe v. Keller, 57 Mass. App. Ct. 776, 778 (2003). However, the threat of abuse that formed the basis for entry of the original abuse prevention order must continue to exist. *See* Pike v. Maguire, 47 Mass. App. Ct. 929 (1999) (rescript) (“The only criterion for extending the original [abuse prevention] order is a showing of continued need for the order.”).

The appropriate inquiry at the extension hearing is “whether the plaintiff has shown by a preponderance of the evidence that an extension of the order is necessary to protect her from the likelihood of ‘abuse’ as defined in G.L. c. 209A, § 1. Typically, this inquiry will be whether a plaintiff has a reasonable fear of ‘imminent serious physical harm.’” (citation omitted). Iamele v. Asselin, 444 Mass. at 739-740.<sup>2</sup> “In evaluating whether the plaintiff has met her [or his] burden, a judge must consider the totality of the circumstances of the parties’ relationship.” *Id.* at 740. In considering the risk of future abuse should the existing order expire, the factors that the judge should examine include, but are not limited to: “the defendant’s violations of protective orders, ongoing child custody or other litigation that engenders or is likely to engender hostility, the parties’ demeanor in court, the likelihood that the parties will encounter one another

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<sup>2</sup> The Court noted, however, that if the plaintiff were suffering from attempted or actual physical abuse or involuntary sexual relations, “there is no question than an extension should be granted.” Iamele v. Asselin, 444 Mass. at 740, n. 3.

in the course of their usual activities (e.g., residential or workplace proximity, attendance at the same place of worship), and significant changes in the circumstances of the parties.” *Id.* at 740; *see also* Vittone v. Clairmont, 64 Mass. App. Ct. 479, 486-489 (2005), *rev. denied*, Vittone v. Clairmont, 445 Mass. 1106 (2005) (discussing factors for a judge to consider when deciding whether there was a continued need for an abuse prevention order where parties have not been in contact for eight years).

The court may not extend an *ex parte* abuse prevention order under c. 209A because of a subjective fear that allowing the parties to have contact with one another would lead to violence where plaintiff is unable to establish by a preponderance of the evidence that “abuse” within the definition of the statute occurred. Corrado v. Hedrick, 65 Mass. App. Ct. 477, 483-485 (2006). *See also* Banna v. Banna, 78 Mass. App. Ct. 34, 35-36 (2010) (where the only evidence at the hearing was the original affidavit, and the judge did not ascertain the nature of the interaction of the parties as it related to the likelihood of physical abuse in the future at the time of the hearing; merely asking the plaintiff if she wanted to extend the order was insufficient to extend the *ex parte* order).

5:05 Failure of the Defendant to Appear. If the defendant fails to appear at the hearing after notice, and the plaintiff does appear, and if there is evidence of notice of the hearing to the defendant and no reason for excusing the defendant's absence, the court should consider the defendant to have forfeited his or her opportunity to be heard. In such cases the order after notice may issue as the court deems appropriate, and the existing terms of the *ex parte* order may be modified.

The defendant must be served with any order issued after notice, whether there has been a modification or not, and whether he has appeared or not.

If there is no return of service to the court, and no other acceptable evidence that the defendant has received notice of the hearing, or if the court is given an acceptable reason for the defendant's absence, the hearing should be continued for no more than ten court business days. The *ex parte* order may be extended during that time. New notice of the rescheduled hearing should be provided to the defendant.

#### COMMENTARY

Due process requires that no order after notice be issued against a person without actual notice and the opportunity to be heard. If the defendant fails to appear, the court must have some basis on which to conclude that the defendant received notice, but, by ignoring the proceedings, waived the right to be heard. *See Commonwealth v. Henderson*, 434 Mass. 155, 163 (2001) (defendant waived opportunity to be heard by receiving actual notice of scheduled hearing date and failing to appear at hearing without good cause).

The best evidence that the defendant received notice is the return of service that the police are required to make. The court can take testimony from the plaintiff and/or from a police officer that they have verbally advised the defendant of the existence of the abuse prevention order, the terms of the order, and the date of the hearing. If the court finds such testimony credible, the court can make a finding that the defendant had notice. In-hand service of the order may not be required if the Commonwealth can establish that the defendant had actual notice of the terms of the order. *See Commonwealth v. Delaney*, 425 Mass. 587, 589-593 (1997), *cert denied*, *Delaney v. Commonwealth*, 522 U.S. 1058 (1998); *see also* Commentary to *Guideline*

4:07, Transmission of Ex Parte Orders to the Police for Service on the Defendant. If the case must be continued because there is no evidence that the defendant received notice, the same ten-day time limit as for *ex parte* orders should be observed.

To prevent a long series of extended *ex parte* orders where service of notice cannot be made because of lack of knowledge of the defendant's whereabouts or for any other reason, it should be kept in mind that notice can be given in several ways, including service at last and usual address, leaving at an address a defendant is known to frequent (e.g., parents' home) and notice by publication. See Commentary to Guideline 4:07, Transmission of Ex Parte Orders to the Police for Service on the Defendant; and Guideline 6:03, Service of Orders on the Defendant. When the court authorizes service by alternative means, the judge should check the appropriate box in section B1 of the Order (FA-2a). See also Zullo v. Goguen, 423 Mass. 679, 681 (1996), regarding court orders for alternative methods of service.

General Laws c. 209A, § 4, last par., provides that, "[i]f the defendant does not appear at such subsequent hearing [i.e. the hearing after notice], the temporary order shall continue in effect without further order of the court." However, case law is clear that an initial order "expires unless extended after a judicial determination, essentially, a new finding, that the plaintiff continues to require protection from 'abuse' as explicitly defined in c. 209A, § 1." Jones v. Gallagher, 54 Mass. App. Ct. 883, 889 (2002). Thus, even when the defendant does not appear, and there is evidence of notice, the court must be satisfied that sufficient grounds exist for extending or modifying the order. See Iamele v. Asselin, 444 Mass. 734, 739 (2005) ("The inquiry at the extension hearing is whether the plaintiff has shown by a preponderance of the evidence that an extension of the order is necessary to protect her from the likelihood of 'abuse' as defined in G.L. c. 209A, § 1."). The affidavit may be sufficient, but it may be supplemented by oral testimony. See also Banna v. Banna, 78 Mass. App. Ct. 34, 35-36 (2010) (where the only evidence at the hearing was the original affidavit, and the judge did not ascertain the nature of the interaction of the parties as it related to the likelihood of physical abuse in the future at the time of the hearing; merely asking the plaintiff if she wanted to extend the order was insufficient to extend the *ex parte* order).

5:06 Failure of the Plaintiff to Appear. If the plaintiff fails to appear at the hearing after notice, and the defendant does appear, or if neither party appears, the order expires by its terms, unless the court is given an acceptable reason for the plaintiff's absence. If the court is given an acceptable reason, the hearing should be continued and the *ex parte* order extended. However, the new hearing date should be as soon as possible and no later than ten court business days from the original hearing date. The defendant must be provided with notice of the new hearing date, regardless of whether he or she appeared.

#### COMMENTARY

General Laws c. 209A, § 4, last paragraph, provides that:

[i]f the defendant does not appear at such subsequent hearing [i.e. the hearing after notice], the temporary order shall continue in effect without further order of the court.

This provision contains no requirement that the plaintiff appear in order for the order to be extended. However, as in any civil case, the failure of the plaintiff to appear may be grounds for dismissal. The court may elect to permit the order to expire by its terms when the plaintiff does not appear.

The court is not compelled to allow the order to expire on its own terms if the plaintiff does not appear. If there is an acceptable reason for plaintiff's absence, or some grounds to believe that such absence is not voluntary, the case and the order can be extended. This is true whether or not the defendant appears. In appropriate circumstances, the case may be held while an advocate or victim witness staff member contacts the plaintiff to determine the reason for the absence.

5:07 Court Action on Defendant's Warrant Status. If, at the time of a hearing after notice, the court becomes aware, by means of the required check of the Statewide Registry of Civil Restraining Orders or the Warrant Management System or otherwise, that a warrant for the defendant's arrest is outstanding, and the defendant is present, the court should address the warrant before the end of the hearing. The District Court, Boston Municipal Court or Superior Court should release the defendant on personal recognizance, bail the defendant under G.L. c. 276, § 29-30, or hold the defendant without bail and order him transported to the court that issued the warrant under G.L. c. 37, § 24(a). The Probate and Family Court should arrange to have the defendant transported to the nearest court with jurisdiction to address the warrant.

#### COMMENTARY

Courts should not allow a defendant against whom a criminal default warrant is outstanding to leave the courthouse without addressing the warrant. If the defendant is not present, the court must note the existence of the warrant on the abuse prevention order. (section A.16, FA-2A).

5:08 Request by the Plaintiff or Defendant to Modify or Terminate the Abuse Prevention Order. If the plaintiff appears on the date scheduled for the hearing after notice, or at any other time, and requests that the abuse prevention order be terminated, the judge should ask certain questions before acting on the request.<sup>3</sup> First, the court should ask about the reasons for the request. Such an inquiry is appropriate so that the reasons for the request appear on the record, and so that the plaintiff may be referred for supportive services, if needed. Second, the court should inquire whether any different or lesser order or component of the existing order (e.g., a refrain from abuse order) should be left in effect to accomplish the plaintiff's purpose. Third, the court should inquire whether vacating the order will place at risk any children living in the home. If the judge has reason to believe that terminating the abuse prevention order will place minor children in danger of physical harm or other abuse, the judge should advise the plaintiff that a report pursuant to G.L. c. 119, § 51A will be filed immediately. *See Guideline 10:03, Care and Protection Proceedings.*

Nevertheless, a plaintiff who wishes to terminate the order should be permitted to do so, regardless of the reason given or the presence of children. *But see Guideline 10:03, Care and Protection Proceedings.* It is also important for the judge to state that terminating the order will not prevent a plaintiff suffering from abuse from seeking a new order or other protection from the court at any time in the future.

The request to terminate or modify the order should be done by written motion indicating the requested actions and stating the reasons therefore. The clerk's office should also request identification from all individuals seeking to modify or terminate an order.

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<sup>3</sup> *See Guideline 1:00, In General*, for discussion of the current use of the term "terminated" instead of "vacated."

A defendant may also request to modify or terminate an order. The request must be done by written motion, a hearing must be set and the plaintiff must be served with the motion and notified of the hearing date. *See Guideline 6:04, Modification of Orders; Terminating Orders.*

### COMMENTARY

The courts alone cannot protect a victim of domestic violence from an abuser who is undeterred by the threat of arrest or incarceration. A victim of such abuse is in the best position to decide what course of action will provide more safety. At a given time, an abuse prevention order might exacerbate the plaintiff's danger. Similarly, a plaintiff may feel compelled for economic or family reasons to seek to terminate an abuse prevention order. Thus, the plaintiff's decision to terminate an order must be respected.

It is appropriate to refer plaintiffs who wish to terminate an abuse prevention orders to advocates who can review information about supportive services that might assist them. This information might include referrals to shelters and support groups for victims of battering, information about applying for public assistance or for obtaining support from the defendant through the court and the Department of Revenue (*See Guideline 6:05B, Support Orders*) and information about certified batterer intervention programs and any other appropriate services. For a list of certified batterer intervention programs go to [www.mass.gov/dph/violence](http://www.mass.gov/dph/violence), click on Batterer Intervention Program Services, then click on Certified Batterer Intervention Programs and Services.

There are several instances in which a different order would serve the plaintiff's purpose as effectively as terminating the original order. For example, a plaintiff might wish to attend some function with the defendant, or to see him or her outside the home. In that case, it would be appropriate to terminate the "no-contact" part of the order, but to leave the "stay away from the residence" and "no abuse" orders in effect. Each time an order issued under c. 209A is extended or modified the judge must determine if returning the defendant's firearms or firearm identification card would present a likelihood of abuse to the plaintiff. If the judge makes such a determination, the court shall continue the firearm surrender order and shall check the box in sections C or D of the Order (FA-2a) that provides, "Firearm surrender order continued. The items surrendered under section 12 will NOT be returned since doing so would present a likelihood of abuse to the plaintiff." *See Guideline 6:05, Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards.*

If the judge has reason to believe that terminating the abuse prevention order will place minor children in danger of physical harm or other abuse, the judge should advise the plaintiff

that a report pursuant to G.L. c. 119, § 51A will be filed immediately. See *Guideline 10:03, Care and Protection Proceedings*.

Once a plaintiff has appeared before the court to terminate an order, the plaintiff may be reluctant to return no matter how great the danger. The judge should assure the plaintiff that he or she may always return to the court to seek a new order or, if the court is not open, secure an emergency order through the police utilizing the Judicial Response System.

It is recommended that the plaintiff's request to terminate or modify the order should be done by written motion indicating the requested actions and stating the reasons therefore. The Trial Court has promulgated a form for this purpose. Plaintiff's Motion to Modify or Terminate Abuse Prevention Order (FA-13). The signature on the form provides a record of the plaintiff's action and some means of assuring the plaintiff's identity. The clerk's office should also request identification from all individuals seeking to modify or terminate an order.

A motion by a defendant to terminate or modify the order must be done by written motion indicating the requested actions and stating the reasons therefore. The Trial Court has promulgated a form for this purpose. Defendant's Motion to Modify or Terminate Abuse Prevention Order Restraining Order (FA-14). The defendant must request that the motion be scheduled for a hearing. The plaintiff must be served with a copy of the motion and notice of the date and time of the hearing. In some courts, the practice is for the court schedule the hearing and notify both parties by mail. In other courts, the defendant must mail to the plaintiff a copy of the motion along with the information as to the date and time of the hearing.

**ORDERS**

**AFTER NOTICE**

6:00	Orders After Notice: General
6:01	Referral for Treatment or Supportive Services
6:02	Duration
6:03	Service of Orders on the Defendant
6:04	Modification of Orders; Terminating Orders
6:05	Orders to Surrender Guns, Licenses to Carry Firearms and FID cards
6:05A	Custody Orders
6:05B	Support Orders
6:06	Visitation Orders and Other Courts
6:07	Mutual Abuse Prevention Orders
6:08	Further Extending an Order After Notice on Its Expiration Date
6:09	Extension of Orders for a Term of Years: Permanent Orders

6:00 Orders After Notice: General. Upon a finding of a substantial likelihood of an immediate danger of abuse in a hearing of which the defendant had notice (whether or not preceded by an *ex parte* or emergency order), the court may issue orders protecting the plaintiff from abuse, including but not limited to the following:

(a) ordering the defendant to refrain from abusing the plaintiff, whether the defendant is an adult or a minor;

(b) ordering the defendant to refrain from contacting the plaintiff, unless authorized by the court, whether the plaintiff is an adult or a minor;

(c) ordering the defendant to vacate forthwith and remain away from the household, multiple family dwelling, or workplace;

(d) awarding the plaintiff temporary custody of a minor child;

(e) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person;

(f) ordering the defendant to pay the plaintiff monetary compensation for losses suffered as a direct result of the abuse (compensatory losses may include, but not be limited to, loss of earnings or support, costs for restoring utilities, out-of-pocket losses for injuries sustained, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable attorney's fees);

(g) ordering information in the case record to be impounded;

(h) ordering the defendant to refrain from abusing or contacting the plaintiff's child, or child in plaintiff's care or custody, unless such contact is authorized by the court; and

(i) recommending to the defendant that the defendant attend a batterer intervention program as certified by the Department of Public Health.

The court may issue mutual abuse prevention orders only if the court has made specific written findings of fact. *See Guideline 6:07, Mutual Abuse Prevention Orders.*

Plaintiffs should receive all of the relief to which the law and the facts entitle them. Judges should not, as a matter of practice, eliminate any option (e.g., support) from the relief statutorily available. *See Guideline 6:05B, Support Orders.*

However, in a court other than the Probate and Family Court, if the judge orders the defendant to stay away from or to have no contact with the defendant's minor children for more than a 10-day period, the judge should make written findings of fact that explain for the record the reason for the order. Such findings will serve as information for any Probate and Family Court judge who may hear the case at a later time and who may amend the order to eliminate inconsistent provisions pursuant to *Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders.*

The Probate and Family Court judge will have superseding jurisdiction over custody and support and exclusive jurisdiction over visitation of minor children. Orders issued by the Probate and Family Court involving parents should indicate whether the non-custodial parent has sought and been denied shared legal custody based upon a threat to the safety of the child or custodial parent and whether the non-custodial parent is entitled to unsupervised visitation with the child. An order allowing, or not allowing, visitation affects a parent's access to information concerning a child. For example, G.L. c. 71, § 34H (amended by St. 2006, c. 62, § 1) provides that any parent without physical custody of his or her child may receive school information concerning said child unless: (a) the parent's access to same has been prohibited by a temporary

or permanent protective order; (b) the parent has been denied visitation; or (c) based upon a threat to the child's safety, as specifically noted in the custody or visitation order, the parent has been denied legal custody, or has been restricted to supervised visitation only.

#### COMMENTARY

This Guideline lists the types of orders that are expressly authorized by law. However, the list is not exclusive. *See* G.L. c. 209A, § 3. The statute specifically provides that the court is not limited to the listed options and may issue any order warranted by the facts found. *See* Commentary to *Guideline 4:01, Content of Ex Parte Orders* (“[w]hen justified by the facts, the court has authority to order a defendant to stay away from a particular school or job site, even if the defendant attends the school or works at the same job.”); *see also* Commonwealth v. Habenstreit, 57 Mass. App. Ct. 785 (2003), *rev. denied*, Commonwealth v. Habenstreit, 439 Mass. 1106 (2003).

Ordering a defendant to stay away from and to have no contact with his or her minor children is tantamount to extinguishing parental rights, at least for the duration of the order. Before issuing such an order, the judge should assess the danger of abuse to the children independently from the danger of abuse to the plaintiff. It is important that the plaintiff provide the court with a reason for ordering the defendant to have no contact with the defendant's minor children. “If there is to be a G.L. c. 209A order that a defendant stay from and have no contact with his or her minor children, there must be independent support for the order.” Smith v. Joyce, 421 Mass. 520, 523 (1995). However, a defendant who abuses his or her child's other parent in the child's presence is likely abusing the child as well, by placing that child in fear of imminent serious physical harm and/or by causing emotional and psychological harm to the child. *See* *Guideline 2:04, Plaintiff's Affidavit*, regarding reasons to be set forth by plaintiff in an affidavit. Accordingly, it may be necessary and appropriate to issue a no-contact order concerning the defendant's minor children.

In certain cases, but particularly in a court other than the Probate and Family Court, the judge should make written findings to explain the reasons for the no-contact order. *See, e.g.*, Care and Protection of Lillith, 61 Mass. App. Ct. 132, 139-142 (2004), citing Custody of Vaughn, 422 Mass. 590, 599 (1996) (requirement of findings in custody cases when there has been evidence of domestic violence). Such findings will offer guidance to the Probate and Family Court in any later proceeding relating to custody of or visitation with the minor children, and will provide the best protection against the issuance of conflicting orders by the two courts. *Cf.*, Smith v. Joyce, 421 Mass. 520, 523 (1995). Appropriate reasons may include, but are not limited to, a finding that the children themselves have been abused, that they have witnessed the defendant's abuse of the plaintiff and are therefore afraid of the defendant, and would be harmed by seeing him or her, or that no visitation can be arranged with children in the plaintiff's custody without endangering the plaintiff.

General Laws c. 209A, § 3(e) requires that all orders of support “issued, reviewed or modified” under the statute must also conform to and be enforced under the provisions of G.L. c.

119A, § 12 (pertaining to child support enforcement). Any such orders of support should be issued in accordance with the Trial Court Child Support Guidelines (effective January 1, 2009) (available at <http://www.mass.gov/courts/childsupport/guidelines.pdf> ). The child support worksheet may be accessed at <http://www.mass.gov/courts/childsupport/worksheet-child-support-guidelines.pdf>. See 6:05B, Support Orders.

6:01 Referral for Treatment or Supportive Services. In addition to including in the order terms necessary to ensure the safety of the plaintiff, the judge or court personnel may recommend and refer the parties to appropriate agencies for victims of violence, including but not limited to certified batterer intervention programs and counseling for substance abuse. The court should not recommend or suggest joint counseling or mediation. *See* G.L. c. 209A, § 3. For a list of certified batterer intervention programs go to [www.mass.gov/dph/violence](http://www.mass.gov/dph/violence), click on Batterer Intervention Program Services, then click on Certified Batterer Intervention Programs and Services.

The Probate and Family Court may issue orders contingent on the defendant's efforts to participate in and benefit from such services. The court should not attempt to order the plaintiff to participate in any such services.

#### COMMENTARY

In a case where social services can address some of the factors relating to abuse, such as alcohol or other substance abuse, the court may properly recommend or make referrals to such services, although these do not replace intervention to address the abuse. *See Standards on Substance Abuse*, Supreme Judicial Court, Approved April 28, 1998, Standard V, <http://www.mass.gov/courts/formsandguidelines/substancev.html> . In addition, G.L. c. 209A, § 3 expressly authorizes the court to “recommend to the defendant that the defendant attend a batterer’s intervention program that is certified by the department of public health.” The Department of Public Health certifies batterer intervention programs. St. 1990, c. 403, § 16. Similarly, the court may recommend services helpful to the plaintiff. Such recommendations are not inconsistent with the protective purpose of c. 209A.

However, as discussed in *Guideline 1:01, Protective Purpose of c. 209A*, the purpose of c. 209A actions is to provide protection, when such is found to be warranted, and not to encourage reconciliation or joint counseling for the parties. Attempts by the court to require or even to promote reconciliation or joint counseling are inconsistent with the protective purpose of c. 209A. Such procedures can expose a plaintiff to further abuse and can provide an abuser with a forum for continued contact and domination. At the very least, such matters should be left to the plaintiff to decide. Moreover, the fear of being placed in such a situation may discourage or

prevent a plaintiff from seeking the court's protection at all. Chapter 209A, § 3 provides specifically that:

No court shall compel parties to mediate any aspect of their case. Although the court may refer the case to the family service office of the probation department or victim/witness advocates for information gathering purposes, the court shall not compel the parties to meet together in such information gathering sessions.

In addition to including in the order terms necessary to ensure the safety of the plaintiff, the judge or court personnel may recommend and refer the parties to appropriate agencies for victims of violence and certified batterer intervention programs. Among these may be counseling for substance abuse. *See Guideline 10:00, Civil Commitment for Alcoholism or Other Substance Abuse.*

The Probate and Family Court alone may indicate that modification of the terms of its order may be contingent on the defendant's efforts to participate in and benefit from such services. G.L. c. 276, § 42A.

Further, regarding visitation (which is not within the jurisdiction of the District Court, Boston Municipal Court or Superior Court departments), G.L. c. 209A, § 3 provides:

[i]f ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider: . . . (c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation; (d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation . . . (i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent . . . Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearing.

G.L. c. 209A, § 3(d).

6:02 Duration. Each order issued after notice (except permanent orders) should be for a minimum of one year, unless the plaintiff requests a lesser period or the court finds that a lesser period is warranted. The parties should be informed that the plaintiff must appear before the court on the date set for expiration of the order if the plaintiff wishes the order extended. The parties should be told that the order cannot be terminated prior to the termination date without an appearance in the same court. *See Guideline 4:06, Information for the Plaintiff*; and *Guideline 6:04, Modification of Orders; Terminating Orders*. If neither party appears on the expiration date, the order will expire by its own terms. *See also Guideline 6:09, Extension of Orders for a Term of Years; Permanent Orders*.

#### COMMENTARY

The court should not, as a matter of policy, routinely issue orders for less than a one-year period over the plaintiff's objection. Also, there is usually no reason for the civil order to track the schedule of a related criminal case. Nor is it appropriate to "see how the relationship goes" if the law and the facts support the issuance of an abuse prevention order and the plaintiff wishes it to be effective for a full year. If the defendant feels at some future point that an order should be terminated or its duration or terms limited, the defendant may move to modify the order. On the expiration date of an order after notice, the plaintiff may request a permanent order pursuant to G.L. c. 209A, § 3, which provides,

[i]f the plaintiff appears at the court at the date and time the order is to expire, the court shall determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order.

In *Crenshaw v. Macklin*, 430 Mass. 633, 635 (2000), the SJC affirmed a court's authority to issue a permanent order following a "renewal hearing. *See also Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 239-241 (2001) (one-year time limitation for c. 209A orders applies only to initial hearing; judge may permanently extend order at subsequent hearing).

*See Guideline 6:08, Further Extending an Order After Notice on Its Expiration*, and Commentary thereto; *Guideline 6:09, Extension of Orders for a Term of Years; Permanent Orders*; and Commentary to *Guideline 12:10, Issuance of Protective Orders: Divorce Proceedings*; and *Guideline 12:11, Issuance of Orders to Vacate Marital Residence: Divorce, Separate Support or Maintenance*.

In some cases, at the expiration date of an order after notice it may be appropriate to issue an order for a period of time that is longer than an additional year but less than a permanent order. *See Crenshaw v. Macklin*, 430 Mass. 633, 635 (2000). In determining whether to issue a permanent order or an order for a particular period of years, the court may consider the severity

and frequency of the violence involved, threats to do harm in the future and the ages of minor children, and any other relevant facts. For example, the court may determine that it is appropriate to extend an order until the youngest child of the parties reaches age 18. At the hearing, both parties should be informed that, as with all types of orders, the defendant must comply with a no-contact or vacate order unless and until those specific orders are terminated in writing by the court. The plaintiff has no authority to “waive” such orders, without going to court to ask to have them terminated, and the defendant who violates those orders is subject to mandatory warrantless arrest, regardless of the plaintiff’s “consent.”

6:03 Service of Orders on the Defendant. Service of the order after notice should be made in-hand by court personnel when the defendant is before the court for the hearing after notice or for any other purpose. This service should be recorded on the order form at section B.3. A copy of the order must also be sent to the appropriate police department.

If the defendant does not appear, the order must be transmitted to the police for service in accordance with G.L. c. 209A, § 7. The court should require that such service be made in the same manner as service of the *ex parte* order or in whatever manner is most likely to result in actual notice to the defendant.

A Defendant Information Form should always accompany the police copy and the service copies of the order.

#### COMMENTARY

General Laws c. 209A, § 7, second par., sets forth the required procedure for service of all orders issued under that law, including transmitting the documents to the appropriate police department, service by the police, and the filing of a return of service. However, if the defendant is before the court, direct in-hand service is appropriate and obviates the need for police service. Whenever it is possible, defendants should be instructed to remain in the courtroom until service is made. The plaintiff should receive a copy of the completed order before the defendant is served so that the plaintiff has the opportunity to leave the courthouse and avoid possible contact with the defendant. A copy of the order should nonetheless be sent to the appropriate police department for notification and enforcement purposes.

The judge and court personnel should be aware that a defendant subject to a recently issued abuse prevention order from that court may not yet have been served with a copy of that order. If a defendant is before the court at any other time, whether for related or unrelated criminal charges, or for subsequent c. 209A hearings, or for any other reason, he or she should be served with a copy of the order and such service should be reflected on the order.

If the defendant is not before the court when an order after notice is issued, service is required. See Commonwealth v. Griffen, 444 Mass. 1004 (2005) (service made via telephone is improper). If the *ex parte* order has been served on the defendant, the form itself notifies the defendant of the date for the hearing after notice and that, “[t]he Defendant may appear, with or

without attorney, to oppose any extension or modification of this Order. If the Defendant does not appear, the Order may be extended or modified as determined by the Judge.” (FA-2).

If the defendant is served with the *ex parte* order and fails to appear for the hearing after notice, the extended order will be valid, even if it is not subsequently served on the defendant. Commonwealth v. Delaney, 425 Mass. 587 (1997), *cert denied*, Delaney v. Commonwealth, 522 U.S. 1958 (1998). *See also* Commonwealth v. Henderson, 434 Mass. 155 (2001). In Delaney, the court stated that, “evidence that the *ex parte* order delivered to the defendant’s last and usual address was actually received warrants the conclusion that the defendant had actual knowledge of the terms of the extended order, as does the defendant’s testimony that, following his arrest after the [order was extended], he was aware that there was a protective order against him.” *Id.* at 593. In addition, the court stated that this provision on the *ex parte* order form provides that, “the defendant, who with reasonable inquiry could have discovered that the temporary order had been extended, cannot be heard to complain that he was deprived of any opportunity to seek to have that extended order vacated.” *Id.* at 592.

However, such constructive notice is not sufficient for successive orders issued after the one-year date. *See Guideline 6:08, Further Extending an Order After Notice on Its Expiration Date*, and the discussion regarding Commonwealth v. Delaney, *supra*, and Commonwealth v. Munafo, *supra*. Both Commonwealth v. Delaney, *supra*, and Commonwealth v. Munafo, *supra*, involve *ex parte* orders that were extended. In Commonwealth v. Molloy, 44 Mass. App. Ct. 306 (1998), *rev. denied*, Commonwealth v. Molloy, 427 Mass. 1107 (1998), the Appeals Court reversed a conviction for violation of an order that had been extended annually, distinguishing between service regarding extension of temporary orders and such “successive annual extensions.” *Id.* at 308. The court stated, “the extension of an annual order pursuant to [c. 209A] § 3, in contrast to a § 4 continuation of a temporary order, is . . . by no means automatic, even if a defendant fails to appear.” *Id.* at 309. The court added that there was no evidence at trial, “that anyone made a ‘conscientious and reasonable effort to serve . . . the defendant’ or that some alternative means of service was used to notify him.” *Id.* at 309.

In Commonwealth v. Crimmins, 46 Mass. App. Ct. 489 (1999), the court affirmed a conviction for violation of an order extended annually where the serving officer signed the return of service but failed to check off the box on the order form to indicate the means of service. *Id.* at 492. The court stated that where a return of service of an extension of an annual order fails to indicate the manner in which service was achieved, “[t]he Commonwealth can meet that burden with evidence of proof of service of the order by means reasonably calculated to reach the defendant.” *Id.* at 491. The court opined that the serving officer knew the defendant’s address and that three and one-half hour period between issuance of the extended order and the officer’s time of return of service suggests that there was no difficulty serving the defendant. Further, the court stated, the three and one-half hour time frame also precluded the seeking of an order for substituted service if the officer found it difficult to serve the order. *Id.* at 493–494. *See also Guideline 6:08, Further Extending an Order After Notice on Its Expiration Date*, and

Commentary thereto regarding standard of proof and service of extended orders and *Guideline 8:01, Issuance of Criminal Complaint*, regarding prosecution for violation of orders.

This guideline recommends in-hand service of each abuse prevention order issued by the court or service through whatever manner is most likely to result in actual notice to the defendant. Without such notice, the deterrent effect of the order is lost, and prosecution for a subsequent violation of the order is compromised.

In appropriate circumstances, the court may order an alternative method of service. Specifically, the Supreme Judicial Court has held, “when the appropriate law enforcement agency has made a conscientious and reasonable effort to serve the statutorily specified documents on the defendant, but has nevertheless failed, the agency should promptly notify the court so that a judge, if satisfied after a hearing that an appropriate effort has been made, may order that service be made by some other identified means reasonably calculated to reach the defendant. Where such substituted service appears unlikely to notify the defendant, the judge may excuse service.” *Zullo v. Goguen*, 423 Mass. 679, 681 (1996). Alternative service may include service at last and usual address, leaving at an address a defendant is known to frequent (e.g., parent’s home) and notice by publication. *See also* Commentary to *Guideline 4:07, Transmission of Ex Parte Orders to the Police for Service on the Defendant*, and *Guideline 5:05, Failure of Defendant to Appear*.

6:04 Modification of Orders; Terminating Orders. After a hearing, the court may modify or terminate an existing order upon motion by either party.<sup>4</sup> Such motions should be in writing and should be served on the opposing party and filed in court at least seven days in advance of the date requested for a hearing, unless the court otherwise permits. Where a plaintiff seeks to terminate an order in part or in its entirety, the court may hear that motion without advance notice to the defendant, since allowing the motion would reduce or eliminate the restrictions on the defendant. If a defendant seeks to modify an order and the plaintiff's address is inaccessible to the defendant as provided in G.L. c. 209A, § 8, the court is responsible for notifying the plaintiff. In no event shall the court disclose any such inaccessible address. G.L. c. 209A, § 3. Whenever a c. 209A order is modified or extended, the judge must determine if returning the license or guns or ammunition of the defendant would present "a likelihood of abuse to the plaintiff." G.L. c. 209A, § 3C. *See Guideline 6:05, Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards.*

If the court modifies or terminates an order, it should transmit a copy of the modified or terminated order to the police department where the order is on file.

The police should be instructed to serve a copy of any modified order on the defendant, unless the defendant appeared in court at the hearing and was given a copy of the modified order at that time.

If an order is terminated, the court must notify the police in writing and direct the department to destroy all records of the terminated order. All changes should be entered promptly in the Statewide Registry of Civil Restraining Orders. Records of orders are not to be

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<sup>4</sup> *See Guideline 1:00, In General*, for discussion of the current use of the term "terminated" instead of "vacated."

expunged from this record keeping system, except in the rare case when the order was obtained through the commission of fraud on the court. Comm’r of Probation v. Adams, 65 Mass. App. Ct. 725, 728-737 (2006). *See also* Commonwealth v. Boe, 456 Mass. 337, 347, n. 14 (2010).

### COMMENTARY

Both parties have the right to ask the court to modify an existing order, by either increasing or decreasing the severity of the terms, or by terminating the order. Any motion to modify or terminate order by the Probate and Family Court must be filed with the court and served on the opposing party in compliance with Rule 6(c) of the Massachusetts Rules of Domestic Relations Procedures. *See Guideline 1:03, Procedural Rules; Discovery*, regarding application of rules of procedure.

Written notification from the court to the police directing them to destroy a vacated or terminated order, and compliance with such directive, are required by G.L. c. 209A, § 7, third par.<sup>5</sup> In most instances however, records of orders are not to be expunged from the Registry of Civil Restraining Orders, Vaccaro v. Vaccaro, 425 Mass. 153, 155-159 (1997), absent a showing that the order was obtained through the commission of fraud on the court. Comm’r of Probation v. Adams, 65 Mass. App. Ct. 725, 728-737 (2006). *See also* Commonwealth v. Boe, 456 Mass. 337, 347, n. 14 (2010).

In Vaccaro, “the Supreme Judicial Court held that the District Court has no authority to order that the name of a defendant in an abuse prevention proceeding under G.L. c. 209A be expunged from the Statewide Domestic Violence Registry.” Vaccaro, 425 Mass. at 155-156. *But see* Faye v. Flemming, 48 Mass. App. Ct. 1113 (1999) (rescript) (ordering that a mutual *ex parte* order issued without sufficient factual support and without written findings of fact be vacated *nunc pro tunc*). The Appeals Court has modified the holding in Vaccaro, finding that a judge has the inherent authority to expunge an order issued under c. 209A in the “rare and limited circumstances” that the party seeking the expungement can demonstrate by clear and convincing evidence that the order was obtained through commission of fraud on the court. *See Adams*, 65 Mass. App. Ct. at 737.

If, at the hearing on a motion by either party to modify an order, it is determined that there has been no prior service on the other party giving notice of the hearing, the court should defer action on the motion until service is made and adequate notice is given, at least when the new terms are adverse to the absent party. Action on a motion to modify filed by the plaintiff should not be deferred pending notice to the defendant if the grounds for an *ex parte* order are met, namely, the modification is needed because there is “a substantial likelihood of immediate danger of abuse.” G.L. c. 209A, § 4. If the judge issues the modification *ex parte*, a hearing with notice to the other party should be scheduled within ten court business days. However,

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<sup>5</sup> Please note that G.L. c. 209A, § 7 uses the term “vacated”.

where a plaintiff seeks to terminate an order in part or in its entirety, the court may hear that motion without advance notice to the defendant. *See Plaintiff's Motion to Modify or Terminate Abuse Prevention Order (FA-13) and Defendant's Motion to Modify or Terminate Abuse Prevention Order Restraining Order (FA-14).*

The police must be given all modified and terminated orders and should be instructed to serve such orders on any defendant who was not given the modified order when before the court regardless of whether the defendant received notice of the hearing. Even if the defendant received notice of the hearing and failed to attend, service of the modified order is necessary to inform the defendant of any new protective restriction or requirement, and may be necessary for prosecutorial purposes should any new terms be violated.

Each time an order issued under c. 209A is extended or modified the judge must determine if returning the defendant's firearms or firearm identification card would present a likelihood of abuse to the plaintiff. If the judge makes such a determination, the court shall continue the firearm surrender order and shall in sections C or D of the order by checking the box that provides, "Firearm surrender order continued. The items surrendered under section 12.A will NOT be returned since doing so would present a likelihood of abuse to the plaintiff." *See Guideline 6:05, Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards.*

*See Guideline 5:08, Request by the Plaintiff or Defendant to Modify or Terminate the Abuse Prevention Order, and Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders, regarding interdepartmental judicial assignments and modification of orders.*

6:05 Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards. An order for the suspension of a license to carry a firearm and for the surrender of a gun, ammunition, license and FID card issued *ex parte* must be continued in any order after notice, if the court finds that the return of the license, FID card, gun or ammunition presents “a likelihood of abuse to the plaintiff.” It appears that this requirement refers to a likelihood of abuse relating to the return of the license, gun or firearm.

In all other regards, the issuance of an order after notice requires proof, by a preponderance of the evidence, of a substantial likelihood of abuse.

#### COMMENTARY

All *ex parte* orders that are issued under c. 209A must contain orders that the defendant’s firearms and any firearms licenses be surrendered to the police. G.L. c. 209A, § 3B. *See Guideline 4:04, Ex Parte Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards.*

Each time an order issued under c. 209A is extended or modified the judge must determine if returning the defendant’s firearms or firearm identification card would present a likelihood of abuse to the plaintiff. If the judge makes such a determination, the court shall continue the firearm surrender order and shall in sections C or D of the Order (FA-2a) by checking the box that provides, “Firearm surrender order continued. The items surrendered under section A.12 will NOT be returned since doing so would present a likelihood of abuse to the plaintiff.” This determination must be made irrespective of whether the plaintiff requests it and the box indicating that the required finding has been made must be checked, even if the judge has indicated that the *ex parte* order will continue without modification. If the judge intends that the firearm restriction continue each time the order is modified or extended it must be made clear on the form. Enforcement of this provision in another state may be dependent upon whether the order contains such a finding.

Returning firearms while an abuse prevention order is in effect may place the defendant in violation of state and federal law. No firearms identification card may be issued to any person who is subject to a permanent or temporary protection order issued pursuant to c. 209A. *See* G.L. c. 140, § 129B(1)(viii)(b).

Similarly, no license to carry firearms may be issued to any person who is subject to a permanent or temporary protection order issued pursuant to c. 209A. G.L. c. 140, § 131(d)(vi)(B). *See* Commentary to Guideline 4:04, Ex Parte Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards. Subject to certain exceptions, possession of a firearm and/or ammunition while subject to a qualifying abuse prevention order is a federal crime. *See* 18 U.S.C. § 922 (g)(8).

6:05A Custody Orders. In a c. 209A proceeding brought in the Probate and Family Court Department, if the court finds by a preponderance of the credible evidence that a pattern or serious incident of abuse has occurred toward a parent or child, a rebuttable presumption is created that it is not in the best interest of the child to be placed in sole or shared custody with the abusive parent. If after so finding the court issues a temporary or permanent custody order, the court must within 90 days enter written findings as to the effects of the abuse on the child. These findings must demonstrate that the order is in the best interest of the child and provides for the child's safety and well-being.

#### COMMENTARY

General Laws c. 209A, § 3(d) provides that if the Probate and Family Court finds by a preponderance of the evidence that credible evidence was presented that a pattern or serious incident of abuse toward a parent or child has occurred, a rebuttable presumption is created that it is not in the best interest of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. This presumption may be rebutted if the court finds that awarding custody to the abusive parent is in the best interests of the child.

"Abuse" as defined in G.L. c. 208, § 31A occurs when the defendant has engaged in one or more of the following acts: attempted to cause bodily injury to the other parent or to the child; has caused bodily injury to the other parent or to the child; or placed the other parent or the child in reasonable fear of imminent bodily injury. Section 31A defines a "serious incident of abuse" as engaging in action that: attempts to cause serious bodily injury to the other parent or to the child; causes serious bodily injury to the other parent or to the child; places the other parent or the child in reasonable fear of imminent serious bodily injury; or causes the other parent or the child to engage involuntarily in sexual relations by force, threat or duress.

"Bodily injury" and "serious bodily injury" are defined for purposes of G.L. c. 208, § 31A by G.L. c. 265, § 13K. Bodily injury is that which causes "substantial impairment of the physical condition, including, but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any internal organ, or any injury which occurs as the result of repeated harm to any bodily function or organ, including human skin . . ." G.L. c. 265, § 13K. Serious bodily injury is defined as "bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death." *Id.*

For the purposes of G.L. c. 209A, § 3(d), the issuance of one or more orders pursuant to c. 209A does not in and of itself constitute a pattern or serious incident of abuse. In addition, an *ex parte* order or orders will not be admissible to show whether a pattern or serious incident of abuse has occurred. *Ex parte* orders may, however, be admissible for other purposes as the court

may determine. Finally, the underlying facts upon which an order or orders issued pursuant to c. 209A was based may form the basis for a finding by the Probate and Family Court that a pattern or serious incident of abuse has occurred.

General Laws c. 209A, § 3(d) requires that the court enter findings within 90 days indicating the effects of the abuse on the child and that the order is in the best interests of the child and provides for the child's safety and well-being when issuing any temporary or permanent custody order when there has been a pattern or serious incident of abuse. These findings must be made in the following circumstances: 1) if there is a pre-existing custody order and the court finds by a preponderance of the evidence that a pattern or serious incident of abuse has occurred such that the court changes custody from the defendant to the plaintiff; or 2) if there is no custody order and the court finds by a preponderance of the evidence that a pattern or serious incident of abuse has occurred and the court grants custody to the plaintiff. The findings should not be made until the full hearing since the determination of a pattern or serious incident of abuse should not be made *ex parte*.

If a pre-existing custody order exists and it will not be modified by the c. 209A order, the custody presumption statute does not apply to the c. 209A order. If the court finds that the plaintiff has been the perpetrator of the abuse, then the c. 209A should be dismissed and the custody issue should be heard in another proceeding. *See Guideline 12:05A, Custody Proceedings in Probate and Family Court: Custody Presumption Applicability.*

6:05B Support Orders. Plaintiffs who are otherwise entitled to relief under c. 209A should be permitted to address the question of support for themselves and their minor children in the c. 209A hearing after notice. *See Guideline 3:07, Conduct of Ex Parte Hearings, Guideline 4:03; Ex Parte Support and Compensation Orders; and Guideline 6:00, Orders After Notice: General*. General Laws c. 209A, § 3(e) provides that the court may order “the defendant to pay temporary support for the plaintiff or any child in the plaintiff’s custody or both, when the defendant has a legal obligation to support such a person.” The court should refer plaintiffs who have an existing support order from the Probate and Family Court to that court for enforcement of the support order, or for any requested modifications.

The Trial Court Child Support Guidelines should be applied in determining the presumptive amount of child support. G.L. c. 209A, § 3(e). To determine an appropriate amount of child support based upon the Trial Court Child Support Guidelines, the judge should consider proof of income and expenses from both parties. Judges sitting in District Court, Boston Municipal Court and Superior Court can obtain this information by requiring the parties to complete the Plaintiff’s Affidavit in Support of a Request for a Child Support Order (FA-11) and Defendant’s Affidavit in Connection with Plaintiff’s Request for a Child Support Order (FA-12). Deviation from the presumptive amount of child support provided by the Guidelines may be appropriate in certain circumstances. *See* Trial Court Child Support Guidelines (effective January 1, 2009) (available at <http://www.mass.gov/courts/childsupport/guidelines.pdf>).

General Laws c. 209A, § 3(e) provides that child support orders must conform to and be enforced in compliance with the provisions of G.L. c. 119A, § 12. General Laws c. 119A, § 12 establishes that income withholding, commonly known as income assignment or wage garnishment, is the standard method for collecting child support. The Department of Revenue,

Child Support Enforcement Division (DOR), is the agency designated to provide income withholding services for child support, either alone or in conjunction with support for the plaintiff. However, DOR does not provide income withholding services for support for the plaintiff, unless the court has ordered support for minor children.

To order the defendant to pay child support by income withholding, judges should check off the box in section 9 of the Order (FA-2), which orders the defendant to pay monthly or weekly payments of support to the child or children through the Department of Revenue, by income withholding. This also orders the defendant to send payments directly to DOR at P.O. Box 55144, Boston, Massachusetts, 02205, during the period of time (often several weeks) that DOR is setting up income withholding with the defendant's employer if any. All payments made directly to DOR should include the defendant's social security number. This type of order allows for child support to be collected with no contact between the parties.

General Laws c. 119A, § 12(c) allows a judge to "suspend" the income withholding and order child support to be paid directly to the plaintiff. Income withholding can be suspended if the parties agree in writing that the payment shall be made directly or if the judge finds good cause exists to order that the income withholding be suspended and makes written findings in support of suspension. "Such written findings shall include a determination by the court that immediate income withholding would not be in the best interests of the child and the reasons therefore and, in the case of a modification of a support order, shall include proof of timely payments made in compliance with the existing order." G.L. c. 119A, § 12(c).<sup>6</sup> If payment is to be made directly to the plaintiff, the judge must reconcile this order with any no-contact

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<sup>6</sup> G.L. c. 119A, § 12(c) also provides that the judge must, prior to a hearing on suspension, inform the defendant that the income withholding, even if suspended, will go into effect if there are two weeks of arrearages or if either party request, the withholding order go into effect.

provision in the c. 209A order. For example, if the judge orders that the defendant have no contact with the plaintiff, and that support payments be mailed to the plaintiff, the order should state this as an exception to the no-contact provision for the limited purpose of mailing of support payments. *See Guideline 4:01, Content of Ex Parte Orders*, regarding no-contact orders. A judge may also choose to suspend income withholding but still direct payments be made through DOR.

### COMMENTARY

The protective purpose of c. 209A is frustrated if the relief that it provides is not made available. Immediate support for the plaintiff and for any minor children may be a necessary precondition to the plaintiff's ability to seek other relief, e.g., the plaintiff may not be able to live away from a batterer unless he or she has enough money to feed the children or for a place to stay. Referring the plaintiff to the Probate and Family Court or to the Department of Revenue (DOR) to establish a child support order – a process that can take weeks or months – should not substitute for providing relief under c. 209A when the law and the facts warrant such relief.

Some courts, as a matter of course, provide the necessary Department of Revenue forms to c. 209A plaintiffs requesting child support. This makes beginning the process of enforcing a c. 209A support order easier for the plaintiff. While enforcing the c. 209A support order, DOR will typically pursue a child support order in the Probate and Family Court that will extend support until the minor children are emancipated. Thus, the DOR support process is one that may provide more long-term security for a plaintiff with minor children, along with the immediate relief that a c. 209A support order can bring. Upon request, DOR will provide any court with copies of the DOR forms.

The Trial Court Child Support Guidelines (effective January 1, 2009) (available at <http://www.mass.gov/courts/childsupport/guidelines.pdf> ) should be applied in determining the amount of support. The child support worksheet may be accessed at <http://www.mass.gov/courts/childsupport/worksheet-child-support-guidelines.pdf>. The Guidelines are revised periodically, so the current version should be consulted. If a c. 209A support order is reviewed or modified, the judge should apply the Guidelines and construct an order that is consistent with G.L. c. 119A, § 12.

The court may order support payments in cases where there is not a current support order, even if the plaintiff is currently receiving cash benefits through Transitional Aid to Families with Dependent Children (TAFDC).

Violations of c. 209A support orders are punishable only by contempt actions and not as criminal violations of the c. 209A order. *See Guideline 8:00, Venue; Territorial Jurisdiction for*

Criminal Prosecution of Violations of c. 209A Orders; Guideline 8:01, Issuance of Criminal Complaint; Guideline 8:02, Criminal Contempt; and Guideline 8:02A, Civil Contempt.

If legal paternity has not been established, and there is a dispute regarding paternity of the minor children, a judge cannot order c. 209A support. In most cases, legal paternity is established if the parties were married at the time the child was born, if defendant's name is listed on the birth certificate, or if the defendant has otherwise been adjudicated the father. The District Court, Boston Municipal Court and the Probate and Family Court can adjudicate paternity, but genetic marker testing to establish paternity is administered by DOR and is usually done in connection with an action in the Probate and Family Court.

6:06 Visitation Orders and Other Courts. The District Court, Boston Municipal Court and Superior Court do not have jurisdiction to order visitation with minor children at the request of a defendant in a c. 209A action. Where either party seeks a court ordered visitation plan, the parties should be referred to the Probate and Family Court for consideration of such an order. Similarly, if the plaintiff asks that the defendant be permitted to visit with the children only if the defendant complies with certain conditions (substance abuse treatment, random drug or alcohol screens, counseling), the parties should be referred to the Probate and Family Court for that relief only.

In some cases, where the plaintiff requests a no-contact order and/or a stay-away order, and the court finds a basis to issue such an order, but the plaintiff wants the defendant to have contact with the minor children, the order may be drafted in a way that facilitates contact with those children. For example, telephone or e-mail contact or indirect contact through a third party may be authorized in order to facilitate contact with the minor children. Alternatively, the distance restriction may be drafted to permit curbside pick-up and drop-off of minor children. Any such orders should be crafted in a way that does not expose the plaintiff to harm or risk of harm.

Where the court has found an independent basis to issue an order prohibiting contact with minor children and the defendant seeks to have contact with those children, the Boston Municipal Court, District Court, or Superior Court should refer the defendant to the Probate and Family Court with regard to the visitation issues.

Both parties should be told that the Probate and Family Court has superseding jurisdiction regarding custody, support and contact with minor children and exclusive

jurisdiction regarding visitation. *See Guidelines 12:00-12:14* generally, regarding, related proceedings in Probate and Family Court.

There may be cases in which the Probate and Family Court issues a visitation order that is inconsistent with an existing order issued by the District Court, Boston Municipal Court or Superior Court. Consistent with Administrative Order 96-1, a judge in the Probate and Family Court may sit as a judge of the District Court, Boston Municipal Court, or Superior Court and modify, extend or vacate an abuse prevention order issued by the District Court, Boston Municipal Court, or Superior Court to eliminate conflict between said order and any order issued by the Probate and Family Court.<sup>7</sup> *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders*. To the extent possible, the Probate and Family Court Judge should specifically and clearly identify the modified provisions on the face of the c. 209A order. The modified order should not simply refer to an attached order or agreement, particularly with respect to modification of the provisions regarding the contact and stay-away orders between the parties and/or children.

If the Probate and Family Court does not modify the existing order issued by the District Court, Boston Municipal Court, or Superior Court, any violation of the terms of the earlier order will expose the defendant to immediate arrest even if he or she is relying on the Probate and Family Court order.

#### COMMENTARY

District Court, Boston Municipal Court and Superior Court have no authority to order visitation for a defendant in a c. 209A action. Defendants seeking such orders should be referred to the Probate and Family Court.

However, the issue of contact with minor children arises frequently in the context of c. 209A proceedings in the District Court, Boston Municipal Court and Superior Court. In those

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<sup>7</sup>Please note that Administrative Order 96-1 uses the term “vacate.”

circumstances where the court is satisfied that the requirements for issuing a c. 209A on behalf of the plaintiff have been met, but plaintiff or both parties want the defendant to continue to have contact with minor children, this guideline recommends that the court craft an order that accommodates the plaintiff's desire that the defendant continue to have contact with the minor children. This Guideline recommends that the court do so only where the court is satisfied that such provisions do not expose the plaintiff (or the minor children) to harm or risk of harm. If the court finds an independent basis to issue an order that the defendant have no contact with his minor children, or if the parties do not agree on any provisions that would facilitate contact with minor children or if the court declines to craft an order that would facilitate that contact, the defendant should be told that visitation may be sought in the Probate and Family Court.

If the Probate and Family Court permits the defendant to have visitation or other contact with minor children, the Probate and Family Court can modify, extend, or vacate<sup>8</sup> any provisions of the original order to make them in order to eliminate any conflict between said order and the terms of the order issued by the Probate and Family Court. *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders. See also Administrative Order 96-1 reprinted at the end of Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders.* The Probate and Family Court should promptly provide a copy of the modified order and any Probate and Family Court visitation order to the court that issued the original order. Generally, this should be done via facsimile.

To the extent possible, the Probate and Family Court Judge should specifically and clearly identify the modified provisions on the face of the c. 209A order. The modified order should not simply refer to an attached order or agreement, particularly with respect to modification of the provisions regarding the contact and stay-away orders between the parties and/or children.

In accordance with Administrative Order 96-1, the probation department in the modifying court will immediately transmit a copy of the order, including all additional pages of the order if there was inadequate space on the original order to include complete details of the modification, by facsimile to the issuing court. The issuing court must then enter the order into the Registry of Civil Restraining orders, notify the appropriate police department of the modified order, and update its case file. *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders.*

If the Probate and Family Court orders visitation but does not modify the court's original no-contact or stay-away order as it relates to the plaintiff, the Probate and Family Court order will not supersede the original court's no-contact or stay-away order. G.L. c. 209A, § 3 "does not provide for automatic supersession of the protective provisions of a 209A abuse prevention order upon the issuance of an inconsistent visitation order issued in, for example, a divorce or paternity action. Rather, to supersede the protective provisions of another court's 209A order, the Probate Court must modify that other court's abuse prevention order by entering the modification on the 209A form of order . . . . If orders entered in a 209A proceeding and another

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<sup>8</sup> Please note that Administrative Order 96-1 uses the term "vacate."

action in the Probate Court are inconsistent, the protections afforded by the 209A order will take precedence over orders for custody or visitation entered in the other proceeding.”

Commonwealth v. Rauseo, 50 Mass. App. Ct. 699, 709-710 (2001), *rev. denied*, Commonwealth v. Rauseo, 434 Mass 1102 (2001).

Where the Probate and Family Court has not modified the terms of the prior abuse prevention order, the parties may return to the court that issued the original order to seek a modification of the order to make it consistent with the Probate and Family Court visitation order. No “stipulation” of the parties in the Probate and Family Court will itself serve to modify any outstanding order of another court, or require the original court to modify its order. If the parties seek to modify the original no-contact order to make it consistent with a Probate and Family Court visitation order, the judge should ask the plaintiff if reduction in the terms of the abuse prevention order is what the plaintiff actually desires. If not, the original court order should not be modified, unless the evidence otherwise warrants a modification. If the original order is not modified (either because neither party seeks such modification or because the judge in the original court declines to modify the original order) the defendant is subject to immediate arrest for violation of the no-contact or stay-away provisions of the original order even though the defendant was acting in accordance with the Probate and Family Court visitation order.

The original court is responsible for the protection terms of the order (or the lack of such terms), notwithstanding discussions that may have occurred between the parties in proceedings before the Probate and Family Court. The issue of protection should not be confused with the issue of visitation, and the latter should be considered subordinate to the question of protection. If the plaintiff does agree to the modification of the abuse prevention order, the modification should ordinarily be allowed.

As in other instances where the parties to an order issued by one court seek relief in another court and there is the potential for mutual abuse prevention orders *Guideline 6:07, Mutual Abuse Prevention Orders* should be consulted.

It should be noted that even if the parties resolve the issue of visitation consensually, if the non-custodial parent’s access to the child is restricted, the parent may be prohibited from contacting, and/or obtaining information from, the child’s school. *See G.L. c. 71, § 34H. See also Guideline 6.00, Orders After Notice: General.*

For visitation matters before the Probate and Family Court Department, *see Guideline 12:00, Visitation Proceedings in Probate and Family Court: Considered Only in Limited Circumstances.*

6:07 Mutual Abuse Prevention Orders. Where the parties seek abuse prevention orders against one another, the court has a responsibility to decide who is in danger from whom, who needs the court's protection and whether one party is the primary aggressor. A mutual abuse prevention order should only be issued when both parties are suffering from abuse, having proved that circumstance by a preponderance of the evidence, and both are genuinely in need of protection from such abuse. "A court may issue a mutual restraining order or mutual no-contact order pursuant to any abuse prevention action only if the court has made specific written findings of fact." G.L. c. 209A, § 3. The findings of fact should provide the basis for the court's conclusion that each party has proved, by a preponderance of the evidence, that he or she is suffering abuse by the other party and that the resulting abuse prevention orders are warranted. "The court shall then provide a detailed order, sufficiently specific to apprise any law officer as to which party has violated the order, if the parties are in or appear to be in violation of the order." G.L. c. 209A, § 3. All mutual orders must include a reference to the other order by court department, division and case number.

Consecutive orders, where the same parties reverse roles in different courts are, also, mutual orders. Sommi v. Ayer, 51 Mass. App. Ct. 207, 209-210 (2001). If the second order is sought in the same court that issued the first, the court has three options, depending upon the court's findings: 1) if the standard for issuance of a order has not been met, decline to issue an order; 2) if the court finds a substantial likelihood of immediate danger and the hearing after notice on the first order has not yet been held, issue the order and either make it returnable on the date scheduled for the hearing in the first case or on a different date; or 3) if the standard for an *ex parte* hearing is not met, defer the hearing on the second order until a hearing with all parties

is held. *See Guideline 6:04, Modification of Orders; Terminating Orders*. If, at the hearing, relief to both parties is warranted, mutual orders may be issued.

If the court in the second action is not the court that issued the first order, it has the following three options depending upon its findings: 1) if it finds that the standard for issuance of an order has not been met, decline to issue an order; 2) if it finds a substantial likelihood of immediate danger and the hearing after notice in the first court has not yet been held, the second court may issue the order and ask the departmental Chief Justice (or, if the courts are in different departments, the Chief Justice for Administration and Management) to transfer the second matter to the first court on the date scheduled for the hearing; or 3) the second court may schedule the complaint for a hearing in the second court after notice.

#### COMMENTARY

Mutual abuse prevention orders should be issued sparingly. *See Uttaro v. Uttaro*, 54 Mass. App. Ct. 871, 875 (2002). The law requires that the court issue specific written findings whenever mutual abuse prevention orders or mutual no-contact orders have issued. The purpose of these findings “is to ensure that the judge will carefully consider the evidence presented to determine who is the real victim and aggressor in an abusive relationship and if a mutual order is warranted.” *Sommi v. Ayer*, 51 Mass. App. Ct. 207, 211 (2001). These findings should explain the basis for concluding that each party has abused the other and that the protective terms imposed against each party are warranted. “In issuing a mutual order, a judge is required to set forth the bases for concluding that mutual abuse occurred and, thus, a reciprocal order is warranted. The judge’s failure to do so . . . requires the order to be vacated.” *Id.* at 211.

If such an order is issued, the police must have clear instructions about how it is to be enforced. For example, an order requiring A to stay away from B’s address and B to stay away from A’s address can be enforced. However, an order which orders both A and B to stay fifty yards away from one another cannot be enforced readily, because the responding officer often will not be able to say who approached whom.

The statute clearly appears to require that a single mutual order be issued, rather than separate orders in favor of each party. However, since this is not possible as a practical matter (each party is a plaintiff and each party is a defendant), the Guideline recommends cross-referencing each order in the other.

Consecutive orders from different courts involving the same parties in reverse roles are considered “mutual orders.” The second court, considering a complaint filed by a party who is

already the subject of a previous order, cannot amend or supersede the first order. Its order, if any, will run only in favor of the new plaintiff. Finally, the second court cannot change the first order.

Instead, if the second court has reason to believe that an order may be pending in another court against the plaintiff, in favor of the person now listed as defendant, the second judge should question the plaintiff about this and, if necessary, check the plaintiff's name on the Statewide Registry of Civil Restraining Orders. If the new plaintiff is the defendant listed in an existing order and does not appear to be in immediate danger, the court may suggest that he or she return to the court that issued that order and seek relief there by means of a motion to modify the existing order or issue a separate order in his or her favor. If the plaintiff in the second action declines to do so, the judge must rule on the second complaint.

If the plaintiff in the second action presents evidence that causes the judge to believe that there is a substantial likelihood of immediate danger of abuse and the hearing after notice has not yet been heard on the original order brought by the other party, the judge may issue an order *ex parte* and then, after receiving approval from the departmental Chief Justice (or, if the courts are in different departments, the Chief Justice for Administration and Management) to transfer the case, make it returnable to the first court for a joint hearing. The judge in the second court may obtain and consider the complaint, affidavit and, if necessary, the recording of the proceedings in the first court so as to assist in issuing the required written findings.

In those cases in which two different courts within the same department have jurisdiction over the different plaintiffs, the Chief Justice of that department may transfer the second case to the original court so that one judge can hear cases for both courts and decide which, if any, orders should issue. If two courts in different court departments have jurisdiction over the different plaintiffs, a request may be made to the Chief Justice for Administration and Management to transfer one of the cases to the other court so that one judge can hear both cases. In any of these instances, if the judge hearing both matters, after hearing, decides to issue mutual orders, that judge should be in a position to make the written findings required by the statute.

If the court hearing the second case, for whatever reason, does not refer the plaintiff back to the original court, any resulting order in favor of that new plaintiff cannot be inconsistent with the terms of the first order. The second order should also, in specific terms, acknowledge the existence of the first and specifically provide guidance on any enforcement issues that may arise.

If the plaintiff in the second case is seeking relief in the same court that issued the first order, the judge should consider whether the plaintiff is actually seeking to file a motion for modification in that pending case, or if the relief, if ordered, involves protection of that party and therefore must result in a mutual abuse prevention order.

6:08 Further Extending an Order After Notice on Its Expiration Date. If, subsequent to a hearing after notice, an order was issued for one year or some lesser period of time, that order may be extended further or made permanent at its expiration date regardless of whether there has been any new incident of abuse. The defendant must be served with a copy of the order that has been extended. Any such order should be entered in the Statewide Registry of Civil Restraining Orders immediately.

### COMMENTARY

At the time scheduled for the order to expire, the plaintiff may seek to extend the order. No new application or complaint is required. However, the plaintiff should file a supplemental affidavit that explains the continued need for an abuse prevention order. Moreover, so long as the court had jurisdiction for issuing the original order, the fact that the plaintiff may have moved out of the jurisdiction is not a reason for denying the extension, or requiring the plaintiff to reapply in the court within whose jurisdiction he or she now lives.

No new incident of abuse is required for extending the order. General Laws c. 209A, § 3 states that “the fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order, or allowing an order to expire or be vacated, or for refusing to issue a new order.” The statute also provides that a court “shall not deny any complaint filed under this chapter solely because it was not filed within a particular time period after the last alleged incident of abuse.” The only criterion is a showing of continued need for the order. *See, e.g., Pike v. Maguire*, 47 Mass. App. Ct. 929 (1999) (rescript); *Mitchell v. Mitchell*, 62 Mass. App. Ct. 769, 773-774 (2005) (“[T]he fact abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient grounds for allowing an order to be vacated.”); *Doe v. Keller*, 57 Mass. App. Ct. 776, 778 (2003); *Rauseo v. Rauseo*, 50 Mass. App. Ct. 911, 913 (2001), *rev. denied*, *Rauseo v. Rauseo*, 434 Mass. 1103 (2001) (“At a hearing on the plaintiff’s request for an extension of an order . . . the plaintiff is not required to re-establish facts sufficient to support that initial grant of an abuse prevention order.”). *Contrast Banna v. Banna*, 78 Mass. App. Ct. 34, 35-36 (2010) (where the only evidence at the hearing was the original affidavit, and the judge did not ascertain the nature of the interaction of the parties as it related to the likelihood of physical abuse in the future at the time of the hearing; merely asking the plaintiff if she wanted to extend the order was insufficient to extend the *ex parte* order). To obtain an extension of an abuse prevention order under c. 209A, the plaintiff must, by a preponderance of the evidence, demonstrate that an extension of the order is necessary to protect her from the likelihood of “abuse” as defined in G.L. c. 209A, § 1. *Iamele v. Asselin*, 444 Mass. 734, 739 (2005). “Typically, this inquiry will be whether a plaintiff has a reasonable fear or ‘imminent serious physical harm’.” (citation omitted). *Id.* at 739-740.<sup>9, 10</sup>

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<sup>9</sup> The court noted, however, that if the plaintiff were suffering from attempted or actual physical abuse or involuntary sexual relations, “there is no question that an extension should be granted.” *Iamele v. Asselin*, 444 Mass. 734, 740, n.3.

Although the absence of abuse during the pendency of an order, by itself, will not bar the issuance of an extension of an abuse prevention order, Doe v. Keller, 57 Mass. App. Ct. 776, 778 (2003), the court should consider all of the evidence in determining whether the plaintiff's continuing fear is reasonable. Smith v. Jones, 75 Mass. App. Ct. 540, 543-546 (2009). In Smith, the Appeals Court held that since defendant had not attempted to contact the plaintiff in three years and there was no additional evidence supporting the plaintiff's fear of imminent physical harm, a permanent extension of the abuse prevention order was inappropriate. *Id.*

If the plaintiff appears in court seeking to extend the order "at the date and time the order is to expire," G.L. c. 209A, § 3, and the defendant was served with notice of that scheduled hearing in the order, no new notice need be sent, and the same order may be extended. The extended order must be served upon the defendant in the same manner as the prior order. The court should ask if the plaintiff knows of any new address for the defendant.

In prosecutions for violations of orders, actual service of an extended order may not be required if a defendant was served with a copy of the *ex parte* order. See Commonwealth v. Delaney, 425 Mass. 587, 591 (1997), *cert. denied*, Delaney v. Commonwealth, 522 U.S. 1058 (1998); Commonwealth v. Munafo, 54 Mass. App. Ct. 597, 600-602 (1998), *rev. denied*, Commonwealth v. Munafo, 428 Mass. 1110 (1998). Both Delaney and Munafo involved *ex parte* orders that were extended. On the other hand, service of a further extension of an order after notice is required. In Commonwealth v. Molloy, 44 Mass. App. Ct. 306 (1998), *rev. denied*, Commonwealth v. Molloy, 427 Mass. 1107 (1998), the Appeals Court reversed a conviction for violation of an order that had been extended annually, distinguishing between service of extension of temporary orders and such "successive annual extensions." *Id.* at 308. See Guideline 6:08, Further Extending an Order After Notice on Its Expiration Date. The court stated, "the extension of an annual order pursuant to [G.L. c. 209A] § 3, in contrast to a § 4 continuation of a temporary order, is . . . by no means automatic, even if a defendant fails to appear." *Id.* at 309. The court added that there was no evidence at trial, "that anyone made a 'conscientious and reasonable effort to serve . . . the defendant' or that some alternative means of service was used to notify him." *Id.* at 309. See Commentary to Guideline 4:07, Transmission of Ex Parte Orders to the Police for Service on the Defendant. For issues related to the length of an extension of an abuse prevention order, see Guideline 6:09, Extension of Orders for a Term of Years; Permanent Orders.

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<sup>10</sup> Please note, in Iamele v. Asselin, the trial judge did not make findings and conclusions, and in absence of such findings the SJC was "unable to determine the standard the judge applied here" and remanded the case for a further hearing. *Id.* at 741.

6:09 Extension of Orders for a Term of Years: Permanent Orders. Following a hearing after notice, an order can be issued for up to one year. When the plaintiff appears on that date, the court has three options: (1) the court can decline to extend the order; (2) the court can extend the order for “any time reasonably necessary” to protect the plaintiff, G.L. c. 209A, § 3(e); or (3) the court can make the order permanent.

#### COMMENTARY

In Crenshaw v. Macklin, 430 Mass. 633, 635 (2000), the Supreme Judicial Court affirmed a court’s authority to issue a permanent order following a “renewal hearing.” *See also Doe v. Keller*, 57 Mass. App. Ct. 776, 778-779 (2003) (permanently extending abuse prevention order may be appropriate even when there is no evidence of contact between plaintiff and defendant for a significant period of time). However, there is no presumption that an order be extended nor is there an entitlement that the order be made permanent. Jones v. Gallagher, 54 Mass. App. Ct. 883, 889 (2002). *See Guideline 6:08, Further Extending an Order After Notice on Its Expiration Date*, and Commentary thereto; *Guideline 6:09, Extension of Orders for a Term of Years; Permanent Orders*; Commentary to *Guidelines 12:10, Issuance of Protective Orders: Divorce Proceedings*; and *Guideline 12:11, Issuance of Orders to Vacate Marital Residence: Divorce, Separate Support or Maintenance*.

In some cases, at the expiration date of an order after notice it may be appropriate to issue an order for a period of time that is longer than an additional year but less than a permanent order. Lonergan-Gillen v. Gillen, 57 Mass. App. Ct. 746, 747-748 (2003). In determining whether to issue a permanent order or an order for a particular period of years, the court may consider the severity and frequency of the violence involved, threats to do harm in the future and the ages of minor children, and any other relevant facts. For example, the court may determine that it is appropriate to extend an order until the youngest child of the parties reaches age 18.

**APPEAL**

7:00 Appeal

7:00 Appeal. There is no provision in c. 209A for appeal by either party. However, the Supreme Judicial Court has ruled that litigants seeking appeals are directed to the Appeals Court.

#### COMMENTARY

The sole avenue for review of the issuance of an abuse prevention order is an appeal in the Appeals Court. Zullo v. Goguen, 423 Mass. 679, 681 (1996). *See also* Watson v. Walker, 447 Mass. 1014, 1015 (2006).

In Zullo, the Supreme Judicial Court held that, “[u]nless and until the Legislature decides otherwise, litigants seeking judicial review of an order made pursuant to c. 209A are directed to the Appeals Court.” *Id.* at 682. The Court found this determination necessary to ensure “uniform treatment of litigants” and “the development of a consistent body of law” on the subject.

If either party seeks to pursue an appeal, the clerk’s office should be prompt in complying with Massachusetts Rules of Appellate Procedure 8 and 9 when assembling the record on appeal.

A defendant may appeal an order even if the order has expired. Such an appeal is not moot because the order has been entered in the Statewide Registry of Civil Restraining Orders and the defendant, “could be adversely affected by [the record] in the event of future applications for an order under G.L. c. 209A or in bail proceedings.” Wooldridge v. Hickey, 45 Mass. App. Ct. 637, 638 (1998), citing Frizado v. Frizado, 420 Mass. 592, 593-594 (1995).

**ENFORCEMENT OF ORDERS; CRIMINAL PROCEEDINGS; CRIMINAL AND CIVIL CONTEMPT**

- 8:00 Venue; Territorial Jurisdiction for Criminal Prosecution of Violations of c. 209A Orders
- 8:01 Issuance of Criminal Complaint
- 8:02 Criminal Contempt
- 8:02A Civil Contempt
- 8:03 Acquiescence by the Complainant to an Act Which May Violate the Terms of an Order
- 8:04 Bail Procedures in Criminal Cases Alleging Abuse or Violation of an Abuse Prevention Order: In General
- 8:05 Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Release on Pretrial Probation or Personal Recognizance
- 8:06 Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings
- 8:07 Bail Warnings in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Revocation Due to New Charge
- 8:08 Bail and Detention Hearing Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Notifying the Victim
- 8:09 Procedures when Defendant is Being Arraigned and Plaintiff is Requesting an Abuse Prevention Order
- 8:10 Default Warrants in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse
- 8:11 Dismissal of a Criminal Case Involving Alleged Violation of an Abuse Prevention Order or Abuse on Motion of the Prosecution
- 8:12 Dismissal of a Criminal Case Over the Prosecution's Objection
- 8:12A Dismissal of a Case: Accord and Satisfaction
- 8:13 Sentencing for Violation of a c. 209A Order or a Crime Involving Abuse
- 8:14 Sentencing Considerations Where Defendant Is Convicted of or Admits to Sufficient Facts for Conviction of a Violation of an Abuse Prevention Order or a Protection Order Issued by Another Jurisdiction or a Crime Involving Abuse

8:00 Venue; Territorial Jurisdiction for Criminal Prosecution of Violations of c. 209A Orders.

A violation of a c. 209A no-contact, stay-away, refrain from abuse, vacate or gun surrender order is a criminal offense and may be prosecuted in the court within whose territorial jurisdiction the act allegedly occurred, G.L. c. 218, § 26, or in the court that issued the order. G.L. c. 277, § 62A. A violation of such an order may also be prosecuted as criminal or civil contempt in the court that issued the order. *See Guideline 8:02, Criminal Contempt*, and *Commentary thereto*;, and *Guideline 8:02A, Civil Contempt*, respectively. Protection orders issued by other jurisdictions are to be enforced as though they were issued in the Commonwealth. *See* G.L. c. 209A, §§ 5A and 7; and *Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*.

The violation of any other provisions of an abuse prevention order (e.g., support, custody or compensation) may be addressed only as a criminal or civil contempt in the court that issued the order.

If the no-contact, stay-away, refrain from abuse, vacate or gun surrender order was issued by the Probate and Family Court, the criminal complaint must be sought in the appropriate District Court, or Boston Municipal Court, depending on the location of the alleged violation. The Probate and Family Court or Superior Court that issued such an order or any other abuse prevention order may itself proceed on an alleged violation as a criminal or civil contempt.

#### COMMENTARY

General Laws c. 209A, § 7 provides that, while abuse prevention orders are civil in nature, violations of such orders are criminal. However, case law has interpreted this language to mean that only violations of orders (1) to refrain from abuse, (2) to vacate the household, (3) to have no contact with or (4) stay away from the plaintiff, are criminal violations. *See Commonwealth v. Finase*, 435 Mass. 310, 313-314 (2001). In addition, G.L. c. 209A, § 3B makes a violation of an order to surrender guns, ammunition, and gun licenses a criminal offense. Such offenses may be prosecuted in the court within whose territorial jurisdiction the alleged offense occurred, G.L. c. 218, § 26, or in the court that issued the c. 209A order. G.L. c. 277, § 62A. *See Guideline 6:05, Orders to Surrender Guns, Licenses to Carry Firearms and FID Cards*, and *Commentary thereto*. Alleged offenses by juveniles are handled as delinquency matters in the Juvenile Court. Violations of other provisions of the order, such as orders for

support, custody, or compensation are punishable through civil contempt proceedings. G.L. c. 209A, § 7.

General Laws c. 209A, § 5A provides that “any protection order issued by another jurisdiction, as defined in section one, shall be given full faith and credit throughout the Commonwealth and enforced as if it were issued in the Commonwealth for as long as the order is in effect in the issuing jurisdiction.” General Laws c. 209A, § 7 includes foreign orders in the list of orders the violation of which are subject to criminal prosecution. *See Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions.*

Consequently, orders issued by other states may be prosecuted in Massachusetts. Since such orders were issued by other jurisdictions, venue for prosecution for violations of such orders would lie in the jurisdiction where the violation occurred.

8:01 Issuance of Criminal Complaint.<sup>11</sup> When a violation of a vacate, refrain from abuse, no-contact, stay-away, or gun surrender order under c. 209A is alleged in an application for a criminal complaint, and the accused has not yet been arrested, the issuance of a criminal complaint should be sought and a hearing promptly held.

If a felony is also alleged or if there is an imminent threat of bodily injury or of the commission of a crime or flight by the accused from the Commonwealth, the hearing should be conducted immediately, with no notice to the accused. *See* G.L. c. 218, § 35A. The magistrate should record the statutory exception to the notice requirement on the application for the complaint.

#### COMMENTARY

Violation of a vacate, refrain from abuse, no-contact, or stay-away order issued under G.L. c. 209A, 3, 4 or 5, G.L. c. 209, § 32, G.L. c. 209C, §§ 15 or 20, and G.L. c. 208, §§ 18, 34B or 34C is a criminal offense punishable under G.L. c. 209A, § 7 by a fine of not more than \$5,000 or by imprisonment for not more than 2 ½ years in a House of Correction, or both fine and imprisonment. *Commonwealth v. Finase*, 435 Mass. 310, 313-315 (2001). *See* G.L. c. 209A, § 5A and 7, and *Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*. Violation of an order to surrender firearms, rifles, shotguns, machine guns, ammunition, licenses to carry firearms and firearms identification cards is a criminal offense, punishable under G.L. c. 209A, § 3B, by a fine of not more than \$5,000, or by imprisonment for not more than 2 ½ years in the House of Correction, or both fine and imprisonment. Also, violation of a c. 209A vacate order is included under the specific crime of trespass. *See* G.L. c. 266, § 120). In addition, stalking in violation of certain court orders is a specific crime. *See* G.L. c. 265, §43(b). *See also* *Edge v. Commonwealth*, 451 Mass. 74, 76-77 (2008) (violation of a c. 209A order is a lesser included offense of stalking in violation of that same c. 209A order). *But see* *Commonwealth v. Kulesa*, 455 Mass. 447, 452 (2009) (violation of a c. 209A order is not a lesser included offense of criminal harassment, G.L. c. 265, § 43A). *See also* *Guideline 8:06, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings*, and *Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*. A plaintiff who comes to court complaining of a violation of an order should be informed of the right to file a criminal complaint application for these crimes and any other crime that may have been committed.

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<sup>11</sup> This Guideline applies only to the District Court and Boston Municipal Court.

It is important to note that the act that constituted the violation of the order may also itself be a separate crime (e.g., assault and battery). Charging both is not duplicative. In the alternative, all violations of the orders described above may be punished as contempt of court in the court that issued the order. Contempt is the only avenue for punishing violations other than vacate, refrain from abuse, no-contact, stay-away and gun surrender orders (e.g., failure to pay support or restitution, to turn over keys, etc.). See *Guideline 8:02, Criminal Contempt*, and *Guideline 8:02A, Civil Contempt*.

Criminal violations of c. 209A orders issued by the Probate and Family Court must be prosecuted in the appropriate District Court or Boston Municipal Court because, under G.L. c. 209A, § 7, the Probate and Family Court does not have criminal enforcement authority except in cases of contempt. See *Guideline 8:02, Criminal Contempt*, and *Guideline 8:02A, Civil Contempt*.

The law provides that when the police are provided with probable cause to believe that a c. 209A refrain from abuse, no-contact, stay-away, or vacate order (or any such abuse prevention order issued under G.L. c. 209, § 32; G.L. c. 209C, §§ 15 or 20; G.L. c. 208, §§ 18, 34B or 34C) or a protection order issued by another jurisdiction has been violated, an immediate warrantless arrest is required. G.L. c. 209A, § 6(7). Such mandatory arrests are made possible without a warrant by G.L. c. 276, § 28. The failure to surrender guns, ammunition, licenses to carry firearms and firearms identification cards under G.L. c. 209A, §§ 3B and 3C also gives rise to mandatory, warrantless arrest, pursuant to G.L. c. 209A, § 6(7).

When the police confront a situation of alleged “abuse” as defined in G.L. c. 209A, § 1, with no c. 209A order then existing, they are instructed that, if they have probable cause to believe a crime has been committed, arrest is the preferred response. G.L. c. 209A, § 6(7). Under this law, they are free to make a warrantless arrest, even though they did not observe the offense and it is a misdemeanor, if it involves abuse as defined in G.L. c. 209A, § 1.

However, police may not make a warrantless arrest for the crime of threatening to commit a crime, G.L. c. 275, § 2, even though the threat involves abuse, because G.L. c. 275, § 3 contains specific requirements for issuing a warrant for “threats.” *Commonwealth v. Jacobsen*, 419 Mass. 269, 273-274 (1995). When a defendant’s words place the victim “in fear of imminent serious physical harm,” the defendant may be charged instead with the crime of assault. G.L. c. 265, §13A. In such a case, a warrantless arrest is permitted and, in fact, is the “preferred response” under G.L. c. 209A, § 6(7).

Where the police are provided with probable cause to believe that an existing refrain from abuse, no-contact, stay-away or vacate c. 209A order or a protection order issued by another jurisdiction has been violated, they are required to make a warrantless arrest. G.L. c. 209A, § 6(7). See G.L. c. 276, § 28. The authority to make such arrests is provided in G.L. c. 276, § 28, and the use of that authority is mandated by G.L. c. 209A, § 6(7). General Laws c. 209A, § 6(7) also states that when no abuse prevention order is in effect, arrest shall be the preferred

response when a police officer witnesses or has probable cause to believe that a person either committed a felony, committed a misdemeanor involving abuse as defined G.L. c. 209A, § 1, or has committed an assault and battery in violation of G.L. c. 265, § 13A.

Victims of abuse are occasionally referred to court to file a complaint application. Rather than refer a complainant back to the police, this Guideline urges that the court should respond promptly to the complaint application.

If no arrest has occurred before an application is sought, a defendant accused of violating a c. 209A order is entitled to a hearing pursuant to G.L. c. 218, § 35A before the issuance of a misdemeanor complaint against him or her. Commonwealth v. Tripolone, 44 Mass. App. Ct. 23, 27-28 (1997) (dismissal of complaint affirmed). In Tripolone, the trial court judge found that the request for a hearing was denied on the basis of a policy issued by a First Justice, “directing the automatic issuance of a complaint without a prior hearing where there has been alleged a violation of a 209A order.” *Id.* at 25. The Appeals Court found that this policy “conflicts directly with the statutory requirement that there be a hearing unless there is a showing sufficient to satisfy the judge that one of the statutory exceptions is available.” *Id.* at 27. *See also* Commonwealth v. Irick, 58 Mass. App. Ct. 129, 132-133 (2003), *rev. denied*, Commonwealth v. Irick, 439 Mass. 1109 (2003) (show cause hearing required by statute, rather than by constitutional mandate). The statutory exemptions to the hearing requirement are imminent threat of bodily injury, the commission of a crime, or flight from the Commonwealth by the person who is the subject of the complaint. Tripolone, 44 Mass. App. Ct. at 27.

The court (usually the Clerk-Magistrate or an Assistant Clerk-Magistrate at this stage of proceedings) has discretion to issue a warrant rather than a summons. “The decision to issue a warrant may be based upon the representation of a prosecutor made to the court that the defendant may not appear unless arrested.” Mass. R. Crim. P. 6(a)(2).

*See Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions.*

8:02 Criminal Contempt. Violation of provisions of c. 209A orders, other than orders to refrain from abuse, for no-contact, to vacate and/or stay-away from a household, multiple family dwelling or workplace, or to surrender guns, ammunition, and gun licenses, may not be prosecuted as criminal violations, but may be addressed through contempt proceedings.

Criminal contempt must be charged in the court that issued the order, regardless of where the alleged violation occurred. Criminal contempt can be alleged and prosecuted even when the alleged violation occurred in another state.

In many circumstances, civil rather than criminal contempt proceedings are preferred.

The basic distinction lies, not in the contemnor's actions, but in the court's goal:

- if the court's purpose is *solely coercive or remedial*, the contempt is *civil*;
- if the court has *any punitive purpose* (to punish the affront to the law or to deter others), the contempt must be treated as *criminal*.

#### COMMENTARY

Only violations of orders to refrain from abuse, for no-contact, or to vacate and/or stay-away from a household, multiple family dwelling or workplace, or to surrender guns, ammunition, and gun licenses can be prosecuted as criminal violations of an abuse prevention order. Commonwealth v. Finase, 435 Mass. 310, 313-314 (2001). However, these violations can, as an alternative, be prosecuted as criminal contempt of court or be the subject of civil contempt proceedings. Violations of any other types of c. 209A orders (e.g., compensation, support or custody) can be prosecuted only as criminal or civil contempt.

In a case where the behavior constituting the violation of an order also gives rise to serious felony charges (e.g., assault with intent to murder, mayhem, rape, or kidnapping) or to an assault and battery with serious injuries, the court should proceed cautiously. Punishing the defendant for criminal contempt may preclude criminal prosecution on the underlying felonies or the assault and battery. See Mahoney v. Commonwealth, 415 Mass. 278, 283-287 (1993), and cases cited therein.

Suggested charging language to be set forth on a complaint charging criminal contempt is as follows:

Did commit an act of criminal contempt, to wit, [describe the act constituting the contempt], in violation of an order issued by this court pursuant to G.L. c. 209A on [date of issuance of order].

Prosecution of the criminal contempt case should proceed as any other criminal case. *See* Mass. R. Crim. P. 44.

Under certain circumstances, it may be preferable to initiate civil rather than criminal contempt proceedings, the key distinction being that criminal contempt must be used to punish the alleged contemnor, whereas civil contempt proceedings must be used where the object is to compel compliance to benefit the party in whose favor the order was issued. *See Guideline 8:02A, Civil Contempt*.

General Laws c. 209A, § 5A provides that “any protection order issued by another jurisdiction as defined in section one, shall be given full faith and credit throughout the commonwealth and enforced as if it were issued in the commonwealth for as long as the order is in effect in the issuing jurisdiction.” *See Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*. This may include enforcement through contempt proceedings. *See Guideline 8:02A, Civil Contempt*.

For an extensive analysis of contempt procedure, *see A Guide to Contempt Procedures in the District Court* (2009), available on the intranet at <http://trialcourtweb.jud.state.ma.us/courtsandjudges/courts/districtcourt/contempt-procedures.pdf>.

8:02A Civil Contempt. The court that issued a c. 209A order may enforce it by means of a proceeding for civil contempt in addition to, or in lieu of, criminal proceedings. The purpose of civil contempt is to coerce compliance with a court order, not to punish the defendant for violating an order.

Such proceedings should involve a civil complaint filed by the plaintiff, specifying the alleged violation, notice to the defendant and a hearing on the complaint. Actions for contempt filed in the Probate and Family Court should be on the pre-printed Complaint for Contempt form (CJ-D 103) and are governed by the Rules of Domestic Relations Procedure.

#### COMMENTARY

Civil contempt proceedings are expressly authorized in G.L. c. 209A, § 7. Since, by definition, civil contempt proceedings must be brought to coerce compliance with a court order for the benefit of the other party rather than to punish, they are appropriately used when the defendant has failed or refused to do something he or she has been ordered to do, rather than where the defendant has done something that has been forbidden. The most appropriate use of civil contempt (at least where the defendant is not before the court) is where some particular act, such as return of property, has been ordered but not accomplished by the defendant. In addition, civil contempt can be used for non-payment of child support and is particularly appropriate when standard methods of collection (e.g., income assignment) are unsuccessful. *See* G.L. c. 119A, § 12. Violations involving danger to the plaintiff will usually involve criminal charges or criminal contempt and prompt arrest with or without a warrant.

Commonly, if it is determined that the defendant knew of and understood the order, and has the present ability to take the required action but fails or refuses to do so, he or she is incarcerated until the act is accomplished. “[A] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command.” In re Birchall, 454 Mass. 837, 838-839 (2009).

A written complaint should be required from the victim, but may be informal. In the Probate and Family Court, plaintiffs should complete the Complaint for Contempt form (CJ-D 103). Reasonable notice and the opportunity to be heard must be provided to the defendant. There is no right to a jury trial in such proceedings. Presumably, appeal on issues of law would be available.

If the defendant in a civil contempt proceeding is not before the court when charged, he or she should be served with a complaint in hand, together with an order to show cause and notice of the date of the hearing. If the defendant fails to appear for the hearing, a *capias* should issue for the arrest of the defendant. The hearing would then proceed when the defendant is before the court. Service of process in civil contempt cases will require the plaintiff to pay the

constable or deputy sheriff. If the plaintiff is indigent, it is not clear how service can be obtained, even if the court orders state assumption of the cost under the provisions of G.L. c. 261, §§ 27A *et seq.*

General Laws c. 209A, § 5A provides that “[a]ny protection order issued by another jurisdiction, as defined in section one, shall be given full faith and credit throughout the Commonwealth and enforced as if it were issued in the commonwealth for as long as the order is in effect in the issuing jurisdiction.” *See Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*. This may include enforcement through contempt proceedings.

For an extensive analysis of contempt procedure, *see A Guide to Contempt Procedures in the District Court* (2009), available on the intranet at <http://trialcourtweb.jud.state.ma.us/courtsandjudges/courts/districtcourt/contempt-procedures.pdf>.

8:03 Acquiescence by the Complainant to an Act Which May Violate the Terms of an Order.

The court should instruct the parties that once a c. 209A order is issued, violation of certain of its terms constitute a criminal offense. *See Guideline 8:00, Venue; Territorial Jurisdiction for Criminal Prosecution of Violations of c. 209A Orders* and Commentary thereto. The court should further instruct the parties that the terms of the order remain in effect until the order is terminated by court order, expires by its own terms or until it is modified by the court. *See Guideline 4:06, Information for the Plaintiff.*

COMMENTARY

Abuse prevention orders under c. 209A can be terminated only by action of the court. Parties who appear before the court seeking such orders should be informed that the order remains in full force and effect until the order expires under its own terms or is modified or terminated by the court on motion of either party. *See Guideline 4:06, Information for the Plaintiff; Guideline 6:02, Duration; and Guideline 6:04, Modification of Orders; Terminating Orders.*

The plaintiff's acquiescence or consent to the violation is not a bar to criminal prosecution.

The issues of whether or why plaintiffs sometimes "acquiesce" in violations of c. 209A orders are complicated. They involve a variety of factual considerations, including a plaintiff's need for financial support or desire to reconcile with the defendant, possible intimidation or manipulation by either party, family pressures, children's issues, and others. For purposes of issuing a criminal complaint, however, these factors are not relevant to the question of whether the order was violated, although they may be relevant to disposition of the criminal charge.

8:04 Bail Procedures in Criminal Cases Alleging Abuse or Violation of an Abuse Prevention

Order or Abuse: In General<sup>12</sup> Several statutes are applicable to the arraignment of a defendant charged with abuse (including assault and battery, assault and battery with a dangerous weapon, assault with a dangerous weapon, etc.), and/or violation of an abuse prevention order. G.L.

c. 276, § 58 sets forth the standard for bail in all non-capital cases. General Laws c. 276, § 58A sets forth the standard by which a defendant may be held without bail or released on certain conditions if he or she is found to constitute a danger to the community. General Laws c. 276, § 58 also permits the court to revoke the prior recognizance of a defendant who has previously been released pursuant to § 58 but has now been charged with a new offense committed during the period of release and who can be shown to be a danger to the community. General Laws c. 276, § 42A and § 58 permit the imposition of terms of release.

Each of these circumstances will be covered in a separate section of the Guidelines as follows:

- *Guideline 8:05, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Release on Pretrial Probation or Personal Recognizance*
- *Guideline 8:06, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings*
- *Guideline 8:07, Bail Warnings in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Revocation Due to New Charge*

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<sup>12</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and to some extent, the Superior Court.

In addition to these statutes, c. 209A imposes other obligations on the arraigning court. (These factors are reviewed in *Guideline 2:10, Check of the Court Activity Record Information System, Including the Statewide Registry of Civil Restraining Orders, and Other Probation Department Involvement at the Complaint Stage*; *Guideline 3:05, Court Action on the Defendant's Default, Probation, Parole or Warrant Status at Ex Parte Hearings*; *Guideline 5:07, Court Action on Defendant's Warrant*; *Guideline 8:07, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings*; and *Guideline 8:08, Bail and Detention Hearing Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order*). These obligations include:

1. review of the defendant's Court Activity Record Information (CARI), including whether there are prior or pending abuse prevention orders (G.L. c. 209A, § 7);
2. review of the Warrant Management System;
3. issuance of a no-contact order as a condition of release if the named victim so requests (G.L. c. 209A, § 6); and
4. notice to the named victim if the defendant is going to be released (G.L. c. 209A, § 6).

#### COMMENTARY

Under current law there are three types of bail/detention hearings and decisions. The first, pursuant to G.L. c. 276, § 58, involves only considerations of whether the defendant is likely to appear for trial. This has been the bail guideline for non-capital cases since 1970. In such a hearing the court shall admit the defendant to bail on his personal recognizance unless the judge decides, "in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person before the court." G.L. c. 276, § 58, as amended, St. 2006, c. 48, § 8. If the judge decides that releasing the defendant on personal recognizance will not secure his

presence, the court sets a bond amount reasonably calculated to assure the defendant's presence. Recent amendments to § 58 provide for the imposition of certain conditions of release, specifically, to impose "restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release." G.L. c. 276, § 58.

In the second type of hearing, pursuant to G.L. c. 276, § 58A, the question is whether the release of a defendant charged with certain specifically designated offenses, "will endanger the safety of any other person or the community." *Id.* This statute provides procedures by which a defendant may be held without bail, or released only on certain conditions, if he or she is found to pose such a danger. The statute has withstood constitutional challenge. Mendonza v. Commonwealth, 423 Mass. 771 (1996); *See Guideline 8:05, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Release on Pretrial Probation or Personal Recognizance.*

In the third type of hearing, pursuant to G.L. c. 276, § 58, the Commonwealth seeks to revoke the bail of a defendant who was earlier released pursuant to § 58 (the first type of hearing), but who has now been arrested for a new offense and who can be shown to be a danger to any person or the community.

This Guideline, *Guideline 8:05, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Release on Pretrial Probation or Personal Recognizance,* and *Guideline 8:07, Bail Warnings in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Revocation Due to New Charge,* apply to bail hearings pursuant to G.L. c. 276, § 58. *Guideline 8:06, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings,* applies to detention or dangerousness hearings pursuant to § 58A. *Guideline 8:08, Bail and Detention Hearing Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order,* and *Guideline 8:09, Procedures where Defendant is Being Arraigned and Plaintiff is Requesting an Abuse Prevention Order,* apply to hearings held pursuant to both statutes.

The law requires that for offenses punishable by more than one year imprisonment (which include assault and battery and violation of c. 209A orders), the probation department must present the defendant's criminal record to the court before such person is admitted to bail. G.L. c. 276, § 85. This includes violations of protection orders issued by other jurisdictions. *See* G.L. c. 209A, §§ 7 and 8; *see also Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions.* The bail law should be read to require the judge to review the defendant's probation record before any § 58 pretrial release decision is made in cases involving abuse or a c. 209A violation, irrespective of the prosecution's recommendations on the question of bail. It is the court's responsibility to determine whether the defendant is in default or already on recognizance on a previous charge and to review all available information relevant to the issue of the defendant's likelihood of appearing for trial. The court should also review the

court case file on any c. 209A order that the defendant is accused of violating as well as any other c. 209A orders concerning the defendant, at least where those orders were issued by the same court in which the defendant is appearing.

Where the prosecutor is not familiar with the circumstances of the arrest or the nature of the alleged violation, and where neither the complaint application nor the police report nor the c. 209A file provides adequate information, the court should defer action on the case for a reasonable time until adequate information is obtained from the police or some other source.

8:05 Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Release on Pretrial Probation or Personal Recognizance.<sup>13</sup> When releasing a defendant before trial, on bail or personal recognizance, the court should consider the addition of specific terms that may reduce potential danger to the victim. General Laws c. 276, § 42A permits the imposition of “such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence. Such terms and conditions shall include reasonable restrictions on the travel, association or place of abode of the defendant as will prevent such person from contact with the person abused.”

The issuance of a separate no-contact order as a condition of pretrial release is authorized by G.L. c. 209A, § 6, last par. “When any person charged with or arrested for a crime involving abuse . . . is released from custody,” whether on personal recognizance or bail pursuant to G.L. c. 276, § 58 or on conditions after a detention or dangerousness hearing pursuant to G.L. c. 276, § 58A, the court must issue a no-contact order if the victim requests it. G.L. c. 209A, § 6, last par. When the victim is present at the arraignment or can be contacted, the victim should be asked about such an order.

#### COMMENTARY

General Laws c. 276, § 42A provides an independent basis for the imposition of protective terms during the period of release. In addition, the issuance of a separate no-contact order under c. 209A is required by law, if requested by the victim. G.L. c. 209A, § 6, last par.

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<sup>13</sup> The Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

8:06 Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Dangerousness Hearings.<sup>14</sup> When the Commonwealth moves for a pretrial detention hearing, and the defendant is before the court charged with an offense enumerated in G.L. c. 276, § 58A, the court must hold such a hearing pursuant to § 58A (5). Among the offenses designated by the statute are felony offenses that have “as an element of the offense the use, attempted use, or threatened use of physical force against the person of another,” violations of abuse prevention orders, misdemeanor or felony offenses involving abuse, or misdemeanor or felony offenses alleged to have been committed while a c. 209A abuse prevention order was in effect. G.L. c. 276, § 58A(1). If the court finds probable cause, the defendant must be detained pending the hearing.

If the court determines at such a hearing that personal recognizance “will endanger the safety of any other person or the community,” the court may order pretrial custody of the defendant or may order the defendant released upon conditions. G.L. c. 276, § 58A(2). Such conditions must include the requirement that the person not commit a federal, state, or local crime during the period of release and may include other conditions that the court finds necessary to assure the defendant's appearance at trial or the safety of a particular person or of the community. In abuse cases, such conditions should always include an order to have no contact with the victim, if the victim requests such an order. If, after the hearing, the judge finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, the judge must order the defendant detained for a period not exceeding ninety days. G.L. c. 276, § 58A(3).

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<sup>14</sup>This Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

If a defendant is ordered released on terms after a hearing on dangerousness under § 58A that order may be revoked if any of the terms are violated. The procedure for such revocation and for custody during any continuance of the revocation hearing is provided in G.L. c. 276, § 58B.

#### COMMENTARY

If the prosecution moves for a detention hearing pursuant to § 58A, the court must hold such a hearing, “immediately upon the person’s first appearance before the court,” unless the court allows a continuance of no more than three business days for the Commonwealth or seven days for the defendant. G.L. 276, § 58A(4). The court must make a determination that there is probable cause to believe that this defendant has committed a qualifying crime. A continuance of three business days may be granted to the Commonwealth only upon a showing of good cause. Mendonza v. Commonwealth and Commonwealth v. Callender, 423 Mass. 771, 773 (1996). A judge granting a three-day continuance to the Commonwealth “should then make a specific finding that such cause has been shown and what such cause is.” *Id.* at 792. Both the Mendonza and Callender cases involve violation of an abuse prevention order (Mendonza included other criminal charges as well). In Mendonza, the Court rejected the defendant’s numerous arguments and found that the challenged provisions of the preventive detention statute (G.L. c. 276, § 58A) pass constitutional muster on their face and as applied to the defendant. The statute has also been held to apply to juveniles. See Victor V. v. Commonwealth, 423 Mass. 793 (1996). The statute requires that the defendant be detained during a continuance, “upon a showing that there existed probable cause to arrest the person.” G.L. 276, § 58A(4).

At the hearing, the defendant has the right to counsel, to testify, to present witnesses, to cross-examine witnesses who appear, and to present information. When the defendant seeks to call a particular witness, however, the court may request an offer of proof as to the relevance of the proposed testimony. If the testimony, even if accepted in its entirety, would be irrelevant to the issue of dangerousness, it may be possible for the court to exclude the witness’s testimony or to accept a stipulation between the Commonwealth and the defendant for purposes of the detention hearing only. The rules concerning admissibility of evidence in a criminal case do not apply.

If the defendant is charged with violating a protection order issued by another jurisdiction, the Commonwealth moves for a pretrial detention hearing, and the defendant is before the court, the court should conduct the hearing as it would if the defendant were charged with violating an order issued by the Commonwealth. See G.L. c. 209A, § 5A (a protection order issued by other jurisdictions shall be given “full faith and credit” and “enforced as if it were issued in the commonwealth . . . .”); see also *Guideline 14:00, Filing and Enforcement of*

Abuse Prevention Orders Issued by Other Jurisdictions, regarding abuse prevention orders issued by other jurisdictions, generally.

For an analysis of proceedings under G.L. c. 276, § 58A to determine dangerousness, *see* District Court Transmittal No. 980, March 19, 2008, “Revised chart of predicate offenses for a § 58A dangerousness determination”. <http://www.mass.gov/courts/209a/docs/districtcourt-trans980-revised-chart-of-58a-predicate-offenses.pdf>

8:07 Bail Warnings in Criminal Cases Involving Alleged Violation of an Abuse Prevention

Order or Abuse: Revocation Due to New Charge.<sup>15</sup> In all criminal cases, if the defendant is released pursuant to the provisions of G.L. c. 276, § 58, the court must advise the defendant that, should he or she be charged with any crime during the period of release, the defendant's bail may be revoked, and the defendant can be held without bail for a period not to exceed 60 days. The clerk's office must record on the court docket that this bail warning was given.

A defendant who is arrested while on release pending the adjudication of a prior charge may be held for a period not to exceed sixty days upon a showing of probable cause for the new arrest and a finding, in the judge's discretion, that "the release of said person will seriously endanger any person or the community." G.L. c. 276, § 58, as amended, St. 2006, c. 48, § 8.

COMMENTARY

General Laws c. 276, § 58, as amended by St. 2006, c. 48, § 8, provides that when any person is released on bail, the person authorized to admit the person to bail, "shall provide as an explicit condition of release . . . that, should said person be charged with a crime during the period of his release, his bail may be revoked . . . and the court shall enter in writing on the court docket that the person was so informed and the docket shall constitute prima facie evidence that the person was so informed." Bail warnings are required when a prisoner is released after being charged for any offense, not merely for violations of c. 209A orders or crimes constituting abuse. However, it is particularly important that the warning be given in cases involving abuse. If the warning is not given, the defendant may not know that his bail may be revoked if he commits a new offense while on release. A single justice has held that the failure to give the warning is also a factor for the judge to consider when deciding whether or not to revoke bail based on commission of a new offense (although the failure to advise does not preclude revocation, *see Commonwealth v. Tice*, No. SJ-98-0349 (Sup. Jud. Ct. for Suffolk Cty., July 7, 1998) (Marshall, J., single justice)).

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<sup>15</sup> The Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

8:08 Bail and Detention Hearing Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Notifying the Victim.<sup>16</sup> In criminal cases involving abuse, it is mandatory to notify the alleged victim when the defendant is released from custody. G.L. c. 209A, § 6. Any Clerk-Magistrate, Assistant Clerk Magistrate or Bail Commissioner who *releases* on bail or personal recognizance a defendant who has been charged with an offense under c. 209A or some other offense involving abuse, as defined in G.L. c. 209A, § 1, must make reasonable efforts to notify the alleged victim of that release. This provision applies to both in-court and out-of-court releases on bail that was set by a judge or a bail magistrate, or on personal recognizance that was ordered by a bail magistrate other than a judge. The Clerk-Magistrate or his or her designee should make such notification, unless the police, the prosecutor's office or the sheriff's office agrees to do so.

Any judge who releases on personal recognizance a criminal defendant who has been charged with an offense under c. 209A or some other offense involving abuse, as defined in G.L. c. 209A, § 1, must make reasonable efforts to notify the alleged victim of that release. During court hours this can be done by requesting that the police, the prosecutor's office, or the sheriff's office, inform the alleged victim or by directing the clerk's office or the probation department to notify the alleged victim.

#### COMMENTARY

General Laws c. 276, § 57 prohibits a clerk or bail commissioner from setting out-of-court bail for a defendant charged with violations of abuse prevention orders and other crimes involving abuse committed while an abuse prevention order is in effect against the defendant. The statute also prohibits setting an out-of-court bail in a case alleging commission of a felony or

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<sup>16</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

misdemeanor offense involving abuse and the defendant is a defendant in a current abuse protection case. Note that it appears that alleged victim of the new offense need not be the plaintiff in the current abuse prevention order.

The judge's responsibility to see that a reasonable effort is made to inform the alleged victim of a defendant's in-court release does not depend on whether the victim is in court or not. It is appropriate for a judge to instruct police, prosecutor, or victim witness advocate to attempt to contact the victim. In the alternative, the judge can request a probation officer or a staff member of the clerk's office to make such contact. In either case, such request should be made on the record.

Pursuant to a memorandum from Chief Justice John Irwin, February 21, 1995, "Judicial Response System – Release of Persons on Bail or Recognizance," justices assigned to the Judicial Response System "should not entertain any requests for release of persons on bail or recognizance during their term of service on the Judicial Response System." That policy remains in effect. <http://www.mass.gov/courts/209a/docs/aotc-1995-bail-policy-memo.pdf>

8:09 Procedures where Defendant is Being Arraigned and Plaintiff is Requesting an Abuse Prevention Order.<sup>17</sup>

If a defendant is arraigned for a crime involving alleged “abuse,” as that term is defined in G.L. c. 209A, § 1, and there is no existing c. 209A order, and the victim is present in court seeking an abuse prevention order, the court should hold a hearing on the abuse prevention order at the same time as the arraignment. If the court decides to issue an abuse prevention order, because both parties are present, the order may be issued for up to one year.

If such order is issued, it should be served immediately on the defendant. If the defendant is arrested for a crime involving abuse and brought before the court for arraignment in the victim’s absence, any abuse prevention order previously issued by the court and still in effect should be served on the defendant at that time, and such in-hand service recorded on the docket of the c. 209A action. In either case, the service should be noted on the order and the police should be notified that service has been accomplished. The order should still be provided to the police to effectuate the gun surrender ordered in the box in section 12 of the Order (FA-2). Any member of the court staff may serve the order.

COMMENTARY

If both parties are present in court, and the victim in the criminal case involving abuse also seeks civil relief as a plaintiff in a c. 209A action, there is no reason to require either the plaintiff or the defendant to return in ten days for another hearing. If both parties are present, the court should have a hearing after notice and issue any appropriate order for a full year or such lesser time as the court decides. This obviates the need for another hearing on another day.

In-hand service of abuse prevention orders is critical to proper enforcement of those orders. Whenever a defendant appears in court, any current abuse prevention orders against the

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<sup>17</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and, to some extent, the Superior Court.

defendant in that court should be brought into the courtroom and a check should be done to determine whether in-hand service has been made on each order. If in-hand service has not been made, the defendant should be served with the order and such service should be documented in the court papers. Even when an abuse prevention order has previously been served on a defendant, such service may have been made at last and usual address or by alternate means. Serving the defendant in-hand while the defendant is before the court ensures that the defendant has actual notice of the terms of the order.

8:10 Default Warrants in Criminal Cases Involving Alleged Violation of an Abuse Prevention

Order or Abuse.<sup>18</sup> When a defendant charged with a violation of a c. 209A order, a protection order issued by another jurisdiction, or any crime involving “abuse,” as defined in G.L. c. 209A, § 1, defaults on the terms of recognizance by failing to appear or otherwise, the court should promptly issue a default warrant. When the default warrant is issued, the clerk’s office should promptly enter the warrant in the Warrant Management System for immediate execution by the police.

COMMENTARY

If a defendant fails to appear or otherwise violates the terms of pretrial release on a charge of violation of an abuse prevention order or any other crime involving abuse, the court should respond promptly. While default is not an uncommon occurrence in criminal cases, default in abuse cases can expose the victim to further danger. Accordingly, default warrants should be issued promptly and their priority communicated to police so that there is no confusion that such warrants are to be executed as soon as possible.

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<sup>18</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

8:11 Dismissal of a Criminal Case Involving Alleged Violation of an Abuse Prevention Order or Abuse on Motion of the Prosecution.<sup>19</sup> If the prosecution moves for dismissal of a criminal case charging abuse or a violation of a c. 209A order, the court should require that the motion be in writing, setting forth the reasons therefore, in accordance with the requirements of Mass. R. Crim. P. 13.

Where the prosecution's reason for requesting the dismissal is that the alleged victim has failed to appear, the court, as a condition of granting the motion, should be satisfied concerning the efforts of the prosecution to obtain the attendance of the victim, and those efforts should be noted on the record.

The prosecution can terminate the proceeding without court permission or approval by means of a *nolle prosequi* under Mass. R. Crim. P. 16.

#### COMMENTARY

All pretrial motions in criminal cases in the District Court, Boston Municipal Court, and Superior Court are required to be in writing, setting forth the reasons therefore. Mass. R. Crim. P. 13. Enforcement of this rule is particularly important when the case that the prosecution is asking the court to dismiss is one involving an alleged violation of a c. 209A order, a protection order issued by another jurisdiction (pursuant to G.L. c. 209A, § 5A; *See Guideline 14:00, Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions*), or a crime of domestic abuse, and the reason given is the reluctance or the refusal of the alleged victim to testify. There are a variety of reasons a prosecutor may request dismissal of the criminal charges, and the court may ask a prosecutor to provide an explanation on the record.

Where the prosecution intends to proceed notwithstanding the victim's reluctance or refusal to testify, the court should not attempt to terminate the case over the prosecution's objection. *See Guideline 8:12, Dismissal of a Criminal Case Over the Prosecution's Objection.*

However, the court is responsible for the decision to dismiss a case. If the court believes that dismissal may not be appropriate, it may deny the motion for dismissal. In such a case, the prosecution can terminate the case by filing a *nolle prosequi* under Mass. R. Crim. P. 16. If the

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<sup>19</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

prosecution will neither file a *nolle prosequi* nor proceed with the trial, the court should enter a dismissal on the record “for failure to prosecute.” The court should not attempt to compel the prosecution to try the case.

8:12 Dismissal of a Criminal Case over the Prosecution's Objection.<sup>20</sup> The court should not dismiss any criminal case over the objection of the Commonwealth without a basis grounded in a violation of the defendant's constitutional rights or, in appropriate cases, as part of an accord and satisfaction. *See Guideline 8:12A, Dismissal of a Case: Accord and Satisfaction.* In order to support a dismissal, any violation of the defendant's constitutional rights must prejudice the defendant such that dismissal is the only sufficient remedy. The court may not dismiss a complaint because the court believes, as a matter of policy, that the case should not be prosecuted.

#### COMMENTARY

There is no question that the court has the authority to dismiss a complaint over the objection of the prosecution based on a violation of the defendant's rights, such as a defective complaint or a violation of the right to speedy trial. Such dismissals must be requested by motion. Mass. R. Crim. P. 13.

A judge may not dismiss a criminal case because the judge has made a discretionary determination that the case should not be tried based upon the judge's view of the evidence. *See Commonwealth v. Taylor*, 428 Mass. 623, 628-630 (1999) (judge may not continue case for the sole purpose of a desire to see the case ultimately dismissed.)

"[P]retrial dismissal, over the Commonwealth's objection, of a valid complaint or indictment before a verdict, finding, or plea, and without an evidentiary hearing basically quashes or enters a *nolle prosequi* of the complaint or indictment." *Commonwealth v. Pellegrini*, 414 Mass. 402, 404 (1993). "A decision to *nolle prosequi* a criminal case rests with the executive branch of government and, absent a legal basis, cannot be entered over the Commonwealth's objection." *Id.* at 405; *see also Shepard v. Attorney General*, 409 Mass. 398, 401-402 (1991); *Pineo v. Executive Counsel*, 412 Mass. 31, 37 n. 9 (1992); *Commonwealth v. Henderson*, 411 Mass. 309, 310 (1991); *Manning v. Municipal Court of Roxbury District*, 372 Mass. 315, 318 (1977); *Commonwealth v. Dascalakis*, 246 Mass. 12, 18 (1923); *Commonwealth v. Hart*, 149 Mass. 7, 8 (1889); *Commonwealth v. Wheeler*, 12 Mass. 172, 173 (1806); *Commonwealth v. Manning*, 75 Mass. App. Ct. 829, 833 (2009).

Justice Morton stated in *Commonwealth v. Tuck*, 20 Pick. 356, 364-365 (1838), "the authority of the Attorney General [or District Attorney], when present, to conduct and manage all criminal prosecutions is unquestionable. It is his exclusive duty to do so." "The district attorney is the people's elected advocate for a broad spectrum of societal interests - from ensuring that

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<sup>20</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

criminals are punished for wrongdoing, to allocating limited resources to maximize public protection.” Commonwealth v. Gordon, 410 Mass. 498, 500 (1991).

While the phrase “the victim wants to drop the charges” is sometimes used in these cases, it is important to remember that the named victim is not a party in a criminal case. A criminal prosecution is not intended to vindicate the interests of the named victim, but rather, the interests of the public as a whole, as represented by the prosecutor. “In American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.” Whitley v. Commonwealth, 369 Mass. 961, 962 (1975), quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Thus, the law is clear, and this Guideline emphasizes that it is inappropriate for a judge, over the Commonwealth’s objection, to dismiss a criminal case because the judge has made a discretionary determination that the case should not be tried due to the alleged victim’s reluctance or otherwise. This is a decision that the law leaves to the prosecutor. The prosecutor may have facts that are not known to the judge. These facts may include information concerning the defendant and the named victim, such as past history, mental status, and potential for danger.

8:12A Dismissal of a Case: Accord and Satisfaction. General Laws c. 276, § 55 provides for dismissal of a charge of assault and battery or other misdemeanor for which the defendant could be liable in a civil action, except one committed upon a sheriff or other officer of justice or committed with intent to commit a felony, upon acceptance by the court of a written accord and satisfaction agreement signed by the victim named in the criminal complaint which acknowledges that the named victim has received satisfaction for the injury suffered. The nature of the satisfaction must be presented to the judge either in an affidavit or during a hearing.

The decision of whether or not to accept an accord and satisfaction in a particular case rests with the judge. The judge should make findings on the record regarding the reasons for accepting the accord and satisfaction to permit review of that decision.

#### COMMENTARY

A judge has discretion to determine whether or not to accept an accord and satisfaction. Commonwealth v. Guzman, 446 Mass. 344, 348 (2006). General Laws c. 276, § 55 requires the presence of the named victim in court at the time of the hearing and a written acknowledgement from the named victim that he or she has been satisfied. Credible evidence of the satisfaction involved must be set out in the accord and satisfaction agreement, or presented through an affidavit or it may be established at the hearing. *Id.*

An accord and satisfaction may be inappropriate in cases involving partner violence given the potential for coercion or intimidation. An accord and satisfaction may also be inappropriate in cases involving partner violence where the Commonwealth seeks to move forward with the prosecution using evidence other than the testimony of the named victim and/or where the defendant has a significant criminal history or history of prior abuse prevention orders.

8:13 Sentencing for Violation of a c. 209A Order or a Crime Involving Abuse.<sup>21</sup> If the victim is present at sentencing on a charge of violation of a c. 209A order or a crime involving “abuse,” as that term is defined in G.L. c. 209A, § 1, he or she has the right to be heard regarding “the effects of the crime on the victim and as to a recommended sentence.” G.L. c. 258B, § 3(p). General Laws c. 279, § 4B provides that prior to the disposition in any case involving a guilty finding on a felony charge or a crime against a person or where physical injury to a person results, and where the victim is identified and his or her whereabouts are known, “the district attorney shall give the victim actual notice of the time and place of sentencing and of the victim’s right to make a statement to the court, orally or in writing at the victim’s option.”

If the victim is not present at sentencing, the court should ask the prosecutor whether the victim has been consulted about the Commonwealth’s recommendation on sentencing, if any, and, if so, what comments the victim made. If the victim has not been consulted, sentencing may be postponed to give the victim an opportunity to be heard.

If the sentence involves immediate release of the defendant from custody, and the victim is not present, the judge must make a reasonable effort to see that the victim is notified about the release. G.L. c. 209A, § 6, last par. The judge may direct the police, prosecutor, or victim witness advocate to make the contact. If one of these parties does not agree to do so, the judge should assign the task to a probation officer or member of the clerk’s office.

#### COMMENTARY

It is important that the court obtain information from the victim upon sentencing of a defendant for a violation of a c. 209A order, or in any case involving abuse.

The duty to attempt to notify the victim when a defendant is released from custody at sentencing is the same as when a defendant is released from custody at any other time. *See*

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<sup>21</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

Guideline 8:05, Bail Procedures in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Abuse: Release on Pretrial Probation or Personal Recognizance. This requirement appears to apply when the charge is a violation of a c. 209A order or any other crime involving abuse.

8:14 Sentencing Considerations Where Defendant Is Convicted of or Admits to Sufficient Facts for Conviction of a Violation of an Abuse Prevention Order or a Protection Order Issued by Another Jurisdiction or a Crime Involving Abuse.<sup>22</sup> The court has a variety of sentencing options for defendants who are convicted of or who admit to sufficient facts for conviction of violation of an abuse prevention order, or domestic assault and battery or other assaultive offences against an intimate partner or family or household member.

In addition to the usual sentencing considerations, there are several statutory requirements that are applicable to domestic violence cases.

As in any criminal case, the named victim has the right to provide a victim impact statement at sentencing or the disposition of the case against the defendant about the effects of the crime on the victim and as to a recommended sentence. *See* G.L. c. 258B, § 3(p); G.L. c. 279, § 4B. Victim input can be made orally in the courtroom or in writing, which can be read into the record by the prosecutor or other representative of the victim. As in a c. 209A hearing, the court should take appropriate steps whenever necessary to separate the victim from the defendant. *See Guideline 5:01, Conduct of Hearings After Notice When Both Parties Appear: General.*

Whenever a defendant is convicted of a violation of an abuse prevention order, or admits to sufficient facts and the case is continued without a finding, the sentencing judge must order that the defendant complete a certified batterer intervention program, unless the court makes specific written findings of good cause for not so ordering, or the certified batterer intervention program finds that the defendant is not a suitable candidate for the program. *See* G.L. c. 209A, § 7. In addition, G.L. c. 209A, § 7 mandates that the court shall not order a substance abuse

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<sup>22</sup> This Guideline applies only to the District Court, the Boston Municipal Court, and the Superior Court.

program or an anger management program as a substitute for a certified batterer intervention program.

When the court imposes completion of a certified batterer intervention program as part of a sentence, G.L. c. 209A, § 10 imposes an assessment of \$350.00, in addition to the cost of the certified batterer intervention program. This assessment can be waived or reduced when the defendant is indigent or when payment would cause the defendant and/or his/her dependents severe financial hardship.

When a defendant is convicted of violating an abuse prevention order, G.L. c. 209A, § 7(5), requires the imposition of a fine of \$25.00.

Whenever a defendant is convicted of assault and battery in the jury session, G.L. c. 265, § 41 requires the court to make specific findings on the record for not imposing a sentence of incarceration.

In addition to the above statutory requirements, whenever a defendant is placed on probation<sup>23</sup> for violation of a c. 209A abuse prevention order or domestic assault and battery, the court has a wide range of options in ordering specific conditions of probation. These specific terms of probation can include:

1. abide by the terms of any c. 209A order or order of protection from another jurisdiction;
2. no abuse of and/or stay away from the named victim;
3. enter and complete a certified batterer intervention program (required as noted above for violation of a c. 209A abuse prevention order);

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<sup>23</sup> The defendant may be placed on straight probation or may be given a split sentence in which there is a committed portion of the sentence followed by a term of probation.

4. submit to a court clinic or other evaluation for substance abuse and comply with the recommendations of the evaluation, including inpatient or outpatient treatment;
5. submit to a court clinic or other evaluation for mental health issues, and comply with the recommendations of the evaluation, including inpatient or outpatient treatment;
6. abstain from drugs and/or alcohol with random testing; comply with the terms of a sobriety;
7. comply with orders of the Probate and Family Court and/or the Department of Families and Children;
8. comply with the terms of global positioning system (GPS) monitoring.

#### COMMENTARY

Probation terms must be clear and strictly enforced in order to be effective. Substance abuse and mental health issues often contribute to the occurrence of violence in intimate partner relationships. Substance abuse and/or mental health treatment alone does not address violence in intimate partner relationships and should not be used as a substitute for completion of a certified batterer intervention program.

Consistent reporting by the defendant to the probation officer as well as ongoing contact with the named victim by the probation officer is critical to a reliable assessment of the efficacy of the terms of probation, including participation in the certified batterer intervention program, in eliminating violence in the relationship.

While the court may not impose probationary terms unrelated to the substance of the underlying offense, Commonwealth v. Gomes, 73 Mass. App. Ct. 857, 857-860 (2009), the court retains the authority to impose probationary conditions appropriate to the defendant's history, the interrelationship between the defendant and victim, and the abusive nature of the case. See also District Court Transmittal No. 1018, June 22, 2009, page 26, "Legal Update: New Cases and Statutes of Interest to the District Court No. 34." <http://www.mass.gov/courts/209a/docs/districtcourt-trans1018-legal-update-34.pdf>

The Department of Public Health certifies batterer intervention programs for the Commonwealth. All offer sliding scales for their fees, and most permit participants to perform community service in lieu of fees. Certified batterer intervention programs are offered in a number of locations. Certified batterer intervention programs are conducted in a number of languages; and are available to persons of all sexual orientations. There are also programs specifically for juveniles. For a list of certified batterer intervention programs go to

[www.mass.gov/dph/violence](http://www.mass.gov/dph/violence), click on Batterer Intervention Program Services, then click on Certified Batterer Intervention Programs and Services.

As with any criminal case, it is important for the court to hear from all parties and to fashion a comprehensive and appropriate sentence. Advanced technical options, including GPS monitoring and sobriety tests, have enhanced the ability of the probation department to monitor defendants and thus have enhanced the ability of the sentencing judge to fashion appropriate sentences utilizing these options.

**9:00 GUIDELINE INTENTIONALLY DELETED**  
Guideline 9:00 is now Guideline 8:02A.

**OTHER COURT PROCEEDINGS RELATED TO  
ABUSE PREVENTION PROCEEDINGS**

10:00	Civil Commitment for Alcoholism or Other Substance Abuse
10:01	Guideline 10:01 is now Guideline 6:05B
10:02	Actions for Divorce or Separate Support
10:03	Care and Protection Proceedings
10:04	Elder Abuse Actions
10:05	Child in Need of Services (CHINS) Actions
10:06	Mental Health Actions
10:07	Actions Involving Disabled Persons

10:00 Civil Commitment for Alcoholism or Other Substance Abuse. Where testimony in a c. 209A case reveals an underlying problem of serious alcohol or other substance abuse, the court should consider advising an appropriate person of the availability of procedures for petitioning a District Court for involuntary commitment on the ground of alcoholism or other substance abuse under G.L. c. 123, § 35. Such a referral should not take the place of a c. 209A order or criminal proceedings where the plaintiff is otherwise entitled to c. 209A relief and wishes to have an order issued.

#### COMMENTARY

Substance abuse frequently contributes to the violence in relationships, although the exact nature of the connection remains unclear. One means of addressing this aspect of the problem, in extreme circumstances, is involuntary commitment of a party to a c. 209A action for up to 30 days under G.L. c. 123, § 35. That statute defines an “alcoholic” as “a person who chronically or habitually consumes alcoholic beverages to the extent that (1) such use substantially injures his health or substantially interferes with his social or economic functioning, or (2) he has lost the power of self-control over the use of such beverages.” A “substance abuser” is defined as a “person who chronically or habitually consumes or ingests controlled substances to the extent that (1) such use substantially injures his health, or substantially interferes with his social or economic functioning, or (2) he has lost the power of self-control over the use of such controlled substances.”

The persons who may file a petition under G.L. c. 123, § 35 include any police officer, physician, spouse, blood relative, guardian, or court official. The specific procedural requirements are set forth in the statute, and commitment is possible for up to 30 days.

In the Standards on Substance Abuse, Supreme Judicial Court (Approved April 28, 1998), Standard V recommends that:

[t]he court should take special precautions when dealing with orders of protection under G.L. c. 209A. When dealing with a batterer who is also a substance abuser, treatment for substance abuse should precede or be in conjunction with batterer’s treatment or the batterer’s treatment will be ineffective. Therefore, in cases involving batterers who are also substance abusers, the judge should order substance abuse treatment as well as a certified batterers’ program.

Standards On Substance Abuse.

<http://www.mass.gov/courts/formsandguidelines/substancev.html>

10:01 Guideline intentionally deleted.  
Guideline 10:01 is now Guideline 6:05B.

10:02 Actions for Divorce or Separate Support. Actions for divorce or separate support under G.L. c. 209 should be brought only in the Probate and Family Court. *See Guideline 12:10, Issuance of Protective Orders: Divorce Proceedings; Guideline 12:11, Issuance of Orders to Vacate Marital Residence: Divorce, Separate Support or Maintenance; and Guideline 12:12, Issuance of Protective Orders: Separate Support*, regarding divorce and separate support in particular and *Guidelines 12:00 - 12:14*, generally, regarding related proceedings in Probate and Family Court.

Regarding referral of a c. 209A plaintiff to Probate and Family Court and avoidance of inconsistent orders, *see Guideline 1:11, Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order; Guideline 2:07, Referral To and From Other Courts and Avoiding Inconsistent Orders; Guideline 3:07, Conduct of Ex Parte Hearings; Guideline 4:01, Content of Ex Parte Orders; Guideline 5:01, Conduct of Hearings After Notice When Both Parties Appear: General; and Guideline 6:00, Orders After Notice: General*. *See also Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders*.

#### COMMENTARY

The District Court, Boston Municipal Court, and Superior Court departments have no jurisdiction over divorce actions. The District Court and Boston Municipal Court have no jurisdiction over most actions for separate support, and the Superior Court has no jurisdiction over separate support. There is, however, a rarely used provision of G.L. c. 209, § 32F, which provides concurrent jurisdiction in the District Court, the Boston Municipal Court, and in the Probate and Family Court to grant a support order for married persons living apart.

10:03 Care and Protection Proceedings. If, in the course of proceedings under G.L. c. 209A, court personnel or the judge learns that harm or substantial risk of harm may have occurred to a child under the age of 18 in the household, that information should be reviewed by the judge, Clerk, or a probation officer to determine if a report should be made to the Department of Children and Families for an investigation under G.L. c. 119, § 51A. *See Guideline 1:06, Minors as Plaintiffs in c. 209A Actions*.

In addition, if a minor defendant is ordered to vacate or stay away from his or her home, the parent or guardian retains the responsibility to provide a safe residence for the minor. The parent or guardian should be required to identify where the minor defendant will reside. If no appropriate placement is identified, the judge should request, pursuant to G.L. c. 119, § 51A, that court personnel immediately file a report with the Department of Children and Families and that the Department respond to the court on an emergency basis to take custody of the minor. *See Guideline 1:06A, Minors as Defendants in c. 209A Actions*.

#### COMMENTARY

Information may come to light in a c. 209A case regarding child abuse. In such an instance, the c. 209A case should continue, but, in addition, the issue of child abuse should be referred to the Clerk or a probation officer who is in the best position to file a “51A report” if such action is warranted. Probation officers and Clerk-Magistrates of the District Courts are mandated reporters of child abuse under G.L. c. 119, § 51A. Depending on the outcome of its investigation in response to the report, the Department of Children and Families may initiate a care and protection proceeding.

Similarly, in cases where the defendant is a minor and has been ordered to vacate or stay away from his or her home and the parent or guardian has not identified an appropriate place for the minor to reside, the judge should request that court personnel file a “51A report” with the Department of Children and Families. Depending on the outcome of its investigation in response to the report, the Department of Children and Families may initiate a care and protection proceeding.

10:04 Elder Abuse Actions. When abuse allegedly has been inflicted on a parent or grandparent or other person in the household who is 60 years of age or older, by a child or grandchild or other household member, the court, in addition to proceeding with the c. 209A action, should refer that person to a probation officer who should review the allegations and, if warranted, make a report of elder abuse to the Department of Elder Affairs in accordance with G.L. c. 19A, § 15(a).

#### COMMENTARY

Domestic abuse may also constitute elder abuse under G.L. c. 19A, where the person abused is 60 years old or older and the alleged abuser is a family or household member.

Probation officers are “mandated reporters” of elder abuse under G.L. c. 19A, § 15. Therefore, such matters should be referred to the probation department and the required elder abuse report procedures followed. The Department of Elder Affairs, acting itself or through a designated agency, may provide protective services to an elderly person, including petitioning the Probate and Family Court for appointment of a conservator or guardian or for emergency protective services.

The disposition of such a c. 209A case should be compatible with whatever protective services are eventually provided through the Department of Elder Affairs.

In addition, a criminal action may be brought against an adult child under G.L. c. 273, § 20 for failure to provide support and maintenance for a parent. Support could be ordered as part of the disposition in such a case.

10:05 Child in Need of Services (CHINS) Actions. In appropriate cases, the court should consider informing parents of the availability of a Child in Need of Services (CHINS) petition against a minor defendant in a c. 209A action, in addition to the issuance of abuse prevention orders. *See Guideline 1:06A, Minors as Defendants in c. 209A Actions.*

#### COMMENTARY

One category of domestic abuse involves abusive conduct by a child against a parent, sibling, grandparent or other household member. In such cases, the conduct at issue may constitute grounds for a CHINS action under G.L. c. 119, §§ 39E and 39J. If it does, the court can refer the parent or other plaintiff to the appropriate Juvenile Court to file the required application for a petition to initiate the CHINS proceeding.

The filing of the CHINS petition is not meant to be a substitute for a c. 209A order. However, the initiation of a CHINS proceeding may offer a means of providing treatment and rehabilitative services to a child, while the c. 209A order ensures protection for the household members.

10:06 Mental Health Actions. In unusual circumstances, and in addition to considering the issuance of abuse prevention orders, the court before which a c. 209A complaint is pending may consider whether a party is a proper subject for involuntary civil commitment under the provisions of G.L. c. 123, § 12.

Consideration of the use of civil commitment procedures should be restricted to extreme cases, consistent with the requirements of applicable law. If civil commitment does appear warranted, the court may inform the appropriate person of the right to file the required petition.

#### COMMENTARY

On occasion, the behavior of a party involved in a c. 209A action is such that involuntary civil commitment may be appropriate. The standard for such commitment is: (1) the party suffers from a “mental illness,” which for the purposes of involuntary commitment is defined as “a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include alcoholism or substance abuse which is defined in G.L. c. 123, § 35,” 104 Code Mass. Regs. § 27.05(1) (promulgated by the Department of Mental Health); (2) poses a danger of serious harm, either to the person himself or to others; and (3) there is no less restrictive alternative to commitment available. If it does appear at a c. 209A hearing that these tests may be met, the court should consider advising the appropriate person of the right to file the necessary petition for commitment pursuant to G.L. c. 123, § 12(e). Given the nature and ramifications of the civil commitment procedure, it would appear that its use should be limited to unusual cases.

In any event, the use of this procedure should be seen as an additional step rather than an alternative to the issuance of abuse prevention orders under c. 209A.

10:07 Actions Involving Disabled Persons. When it is alleged that abuse has been inflicted on a disabled person, the court, in addition to proceeding with the c. 209A action, should refer the disabled person to a probation officer. The probation officer should review the allegations and, if warranted, make a report to the Disabled Persons Protection Commission in accordance with G.L. c. 19C, §§ 1 and 10.

#### COMMENTARY

Domestic abuse may also involve abuse of a disabled person, and probation officers are “mandated reporters” of such abuse under G.L. c. 19C, § 1. A “disabled person” is defined in G.L. c. 19C, § 1 as “a person between the ages of eighteen to fifty-nine . . . who is mentally retarded . . . or who is otherwise mentally or physically disabled and as a result of such mental or physical disability is wholly or partially dependent on others to meet his daily living needs.”

A “reportable condition” is a “serious physical or emotional injury resulting from abuse, including unconsented to sexual activity.” *Id.* Section 10 of the statute requires that “mandated reporters shall notify the [Disabled Persons Protection] commission orally of any reportable condition immediately upon becoming aware of such condition and shall report in writing within forty-eight hours after such oral report.”

The Disabled Persons Protection Commission refers complaints regarding individuals with physical disabilities to the Massachusetts Rehabilitation Commission and other complaints to the Department of Mental Retardation or Mental Health, depending on the disability of the individual being referred.

**EMERGENCY RESPONSE**

11:00 Procedure for Response to Complaints When Court is Not in Session:  
Judicial Response System

11:00 Procedure for Response to Complaints When Court is Not in Session: Judicial Response System. During the hours when the court is not open for business, a judge is available through the Judicial Response System to assist parties seeking a c. 209A abuse prevention order. In conducting this hearing, the on-call judge should follow the Guidelines established for conducting an *ex parte* hearing and issuing an *ex parte* order. Usually these hearings are conducted by telephone, with the plaintiff relating the facts directly to the judge.

Under the Judicial Response System, the police department will contact the regional on-call judge. The judge should first ascertain that the police have taken the following steps:

- (1) the plaintiff should have filled out a c. 209A complaint and affidavit, unless physically unable to do so;
- (2) the police should have run the defendant's Court Activity Record Information (also referred to as Board of Probation record), including information from the Statewide Registry of Civil Restraining Orders, as to any current or prior abuse prevention orders; and
- (3) the police should have run a Warrant Management System check of the defendant.

Once the police department has provided this information to the judge, the judge should speak directly to the plaintiff. The judge should ascertain the reasons for the plaintiff's request for an emergency abuse prevention order, the relationship between the parties, and the requested relief sought by the plaintiff. The judge must determine whether or not a substantial likelihood of immediate danger of abuse exists. It may also be appropriate for the judge to consult with the police or any other person present concerning the need for an abuse prevention order. If the judge decides to issue an order, he or she should review the terms of the order with the plaintiff.

The plaintiff should be told that the emergency order is only a temporary order, and will only be in effect until the close of business on the next available business day when a judge is sitting.

The plaintiff should be told to appear in court on the next available business day when a judge is sitting at 9:00 A.M. for a hearing before the judge, and that the order will expire at the close of business on that day if the plaintiff does not appear. In determining the next available business day, the judge should consult with the police officer to ensure that the next hearing date is a day when a judge will be sitting in the return court, not merely when that court is open for business.

When serving on the Judicial Response System, the judge has the authority to make the order “returnable” to the most appropriate court. In most instances, the most appropriate court will be the division of the District Court or Boston Municipal Court in the jurisdiction in which the plaintiff resides. However, the judge issuing the order should consider instructing the police to deliver a copy of the order to the appropriate division of the Probate and Family Court (rather than to a division of the District Court or Boston Municipal Court) if the judge determines that:

- (1) the parties in the domestic abuse action are also parties in a pending action in the Probate and Family Court in which the issue of child custody and/or child visitation/parenting time is disputed, or is likely to be disputed, as a result of the plaintiff’s complaint for a protective order, and
- (2) the plaintiff consents to this decision.

When appropriate and feasible, the judge should speak directly with the plaintiff in determining whether these two criteria are met.

Even if the two criteria listed above are met, emergency orders should not be returnable to a division of the Probate and Family Court if:

- (1) the defendant in the domestic abuse action has also been arrested in connection with the abuse alleged in the c. 209A complaint, or a warrant for his/her arrest has issued or will be sought, or
- (2) the appropriate division of the Probate and Family Court does not sit on a regular, full-time basis, or

(3) the plaintiff is unable to get to the division of the Probate and Family Court.

Any doubt regarding any of these three factors should be resolved in favor of making the order returnable to the appropriate division of the District Court or Boston Municipal Court Department.

The on-call judge should then review with the police officer the terms of the order form to ensure that it is properly filled out and that it accurately reflects the judge's decision. It is especially important that the date, time, and location of the next hearing date be noted accurately. If the defendant can be promptly served with a copy of the emergency order prior to the scheduled hearing, the hearing after notice can proceed on the next available business day when a judge is sitting. The emergency order should expire at the end of that day.

The police should deliver all of the paperwork, including the order, to the court where the order is returnable on the next business day when the clerk's office is open, whether or not there is a judge sitting in that court on that date. All emergency orders must be certified and docketed in the court that has jurisdiction over the c. 209A action on the next day when the clerk's office is open. The orders should also be entered that day into the Statewide Registry of Civil Restraining Orders. These orders should be entered into the Registry regardless of whether the plaintiff appears. It is particularly important in courts that do not have sessions every day that the order is docketed on the next day when the clerk's office is open, whether or not there is a court session so that the order is entered promptly into the Statewide Registry of Civil Restraining Orders.

If a plaintiff seeking temporary relief is unable to appear in court on the next court day to file the complaint without severe hardship due to a physical condition, a representative may appear and file the complaint with an affidavit that indicates the circumstances that prevent the plaintiff from appearing. *See* G.L. c. 209A, § 5. *See also* *Guideline 1:08, Plaintiff Unable to Appear in Court*.

#### COMMENTARY

The statewide Judicial Response System ensures that a judge is always available during non-court hours to handle a variety of emergency matters. The vast majority of calls to the Judicial Response System involve requests for the issuance of c. 209A abuse prevention orders. Virtually all of these c. 209A hearings are conducted over the telephone, although there is nothing to prevent a judge in a particular case from going to a police station or hospital or other location to conduct the hearing. Conducting these proceedings by telephone is expressly authorized by G.L. c. 209A, § 5. Often, the hearing may be conducted at a police station over a tape-recorded telephone line so that the substance of the hearing may be preserved.

The preferred practice in conducting emergency c. 209A abuse prevention order hearings by telephone is for the judge to speak directly to the plaintiff. By speaking directly to the plaintiff, the judge is in the best position to determine the appropriate terms and scope of the order, including the appropriate court to which to return the order. Direct contact with the plaintiff may also assist the judge in assessing the credibility of the plaintiff and in determining other actions that should be taken immediately, such as a report to the Department of Children and Families under G.L. c. 119, § 51A.

Occasionally, direct contact with the plaintiff is not possible, due to the plaintiff's physical condition or a language issue. Where the plaintiff is unable to communicate with the judge because of a physical disability, the judge may rely on information provided by the police, an eyewitness, and any other reliable sources. Where the plaintiff is unable to communicate with the judge due to a language issue, the judge may rely on information provided by the police or may utilize the assistance of a police officer or companion of the plaintiff for translation of the plaintiff's statements.

In appropriate circumstances, the judge may ask the police officer to provide other assistance to the plaintiff, such as reviewing the terms of the order with the plaintiff and making sure that the plaintiff has directions to the return court.

It is critical that the emergency order properly memorialize the terms of the order as well as the specific details about the date, time, and location of the next hearing. If the defendant is served with an order that clearly advises him or her of the date, time, and location of the next

hearing, the court, at that hearing may conduct a hearing after notice and may issue an order for up to one year.

All emergency abuse prevention orders issued by the on-call judge, and any supporting documents, must be brought to the return court on the next working day after they are issued, whether or not a judge is sitting that day. This practice will ensure that the probation department will immediately enter the emergency order into the Statewide Registry of Civil Restraining Orders. General Laws c. 209A, § 5 requires the Clerk to certify orders issued by the on-call judge; these orders should be docketed in the clerk's office files as well, regardless of whether the plaintiff appears.

The on-call judge should always consider carefully which court is the most appropriate forum for hearing the petition on the next available business day when a judge is sitting. The judge should consider returning a case to the appropriate division of the Probate and Family Court if the parties have an ongoing case in the Probate and Family Court and the plaintiff consents to this decision. However, orders should not be made returnable to the Probate and Family Court if the defendant has been arrested on criminal charges (and will thus be arraigned in the District Court or Boston Municipal Court), the appropriate division of the Probate and Family Court does not sit on a regular or full-time basis, or the plaintiff is unable to travel to the Probate and Family Court. The on-call judge should obtain input from the plaintiff in determining if there is an ongoing case in the Probate and Family Court, whether or not the plaintiff consents to the matter being returned to that court and the plaintiff's ability to travel to that court. The judge should also advise the police where the order is to be returned so that both the plaintiff and the defendant are properly advised where to go for the hearing.

**RELATED PROBATE AND FAMILY COURT MATTERS**

- 12:00 Visitation Proceedings in Probate and Family Court: Considered Only in Limited Circumstances
- 12:01 Visitation Proceedings in Probate and Family Court: Safety Assessment Pertaining to the Plaintiff in Abuse Prevention Proceedings
- 12:02 Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children
- 12:03 Visitation Proceedings in Probate and Family Court: Safety Assessment and Terms of Visitation
- 12:04 Proceedings in Probate and Family Court
- 12:05 Proceedings in Probate and Family Court: Pre-Trial Conferences and Other Court Proceedings.
- 12:05A Custody Proceedings in Probate and Family Court: Custody Presumption Applicability
- 12:06 Custody Proceedings in Probate and Family Court: Related Custody Issues in Domestic Relations Matters
- 12:07 Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders
- 12:08 Custody Proceedings in Probate and Family Court: Interstate Custody Issues
- 12:09 Custody Proceedings in Probate and Family Court: Non-Parent Custody and No-Contact Orders
- 12:10 Issuance of Protective Orders: Divorce Proceedings
- 12:11 Issuance of Orders to Vacate Marital Residence: Divorce, Separate Support or Maintenance
- 12:12 Issuance of Protective Orders: Separate Support
- 12:13 Issuance of Protective Orders: Paternity Actions
- 12:14 Service of Domestic Relations Protective Orders

12:00 Visitation Proceedings in Probate and Family Court: Considered Only in Limited

Circumstances. Visitation should be considered only in limited circumstances in c. 209A proceedings.<sup>24</sup>

COMMENTARY

In the context of a c. 209A proceeding, the statute defines the relief available to the plaintiff. General Laws c. 209A, § 3 lists the remedies that the plaintiff may request, including but not limited to, the following: refrain from abuse; refrain from contact; vacate and stay away from household, multiple family dwelling, and workplace; an award of temporary custody of child(ren) to plaintiff; spousal or child support; monetary compensation for losses related to the abuse; impounding an address; and refrain from abusing or contacting plaintiff's child(ren).

The focus of a c. 209A proceeding is the protection of the victim(s). Orders should be made to maximize the safety of the plaintiff and the child(ren), when applicable. If the plaintiff has not requested that the court permit visitation or does not readily agree to amend the petition to include visitation, the court ordinarily should not issue a visitation order in the c. 209A proceeding. The preferred practice would be not to address a contentious visitation issue at the hearing after notice, but to assign the matter for hearing on the visitation issue at a later date.

If the parties agree to visitation, the court should still make a determination that the visitation proposed by the parties is not injurious to the child.

General Laws c. 209A, § 3, provides, *inter alia*, that if the Probate and Family Court orders visitation to the abusive parent, the court must provide for the safety and well-being of the child and the safety of the abused parent. The court may consider, but is not limited to, an order for supervised visitation, ordering the parent to attend and complete a certified batterer intervention program as a condition of visitation, ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for twenty-four hours prior to visitation, or an order prohibiting overnight visitation. For a list of certified batterer intervention programs go to [www.mass.gov/dph/violence](http://www.mass.gov/dph/violence), click on Batterer Intervention Program Services, then click on Certified Batterer Intervention Programs and Services.

An order allowing, or not allowing, visitation affects a parent's access to information concerning a child. For example, G.L. c. 71, § 34H (amended by St. 2006, c. 62, § 1) provides that any parent without physical custody of his or her child may receive school information concerning said child unless: (a) the parent's access to same has been prohibited by a temporary or permanent abuse prevention order; (b) the parent has been denied visitation; or (c) based upon

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<sup>24</sup> Although *Guidelines 12:00 - 12:14* are directed to the Probate and Family Court, they should also inform proceedings in the District Court, Boston Municipal Court and Superior Court when appropriate. *Guidelines 12:00 - 12:04*, regarding safety assessments, may be particularly instructive.

a threat to the child's safety, as specifically noted in the custody or visitation order, the parent has been denied legal custody, or has been restricted to supervised visitation only.

*See Guideline 6:00, Orders After Notice; Guideline 6:06, Visitation Orders and Other Courts; Guideline 8:01, Issuance of Criminal Complaint; and Guideline 12:06, Custody Proceedings in Probate and Family Court: Related Custody Issues in Domestic Relations Matters.*

12:01 Visitation Proceedings in Probate and Family Court: Safety Assessment Pertaining to the Plaintiff in Abuse Prevention Proceedings. The risk of harm and potential for continuing abuse through the children must be considered when making visitation orders.

### COMMENTARY

Faced with evidence of abuse between partners, entering an abuse prevention order requiring the defendant to stay away from the plaintiff is reasonably straightforward. When children are involved the proceeding becomes much more complicated. Determining whether or not a parent should have access to or custody of his or her child involves complex considerations. The “Supervised Visitation Risk Assessment” guide developed by the Probate and Family Court presents a protocol for the court to use to assess the safety needs of children and families and appropriate parental access orders in cases where the parents are, or have been, involved in partner violence.

In crafting visitation orders, the court should conduct a safety assessment of the family unit. Whenever possible, orders should be crafted to protect the emotional and physical well being of the child and the non-abusing parent, while preserving both parent-child relationships.

The following factors are among those to consider:

#### **General Factors to Consider:**<sup>25</sup>

##### **1. About the nature of the abuse**

- What is the nature of the abuse?
- Is there a history of controlling or abusive behavior, including emotional abuse, threats and/or intimidation as well as physical abuse?
- Does the history include controlling or abusive behavior towards prior partner(s)?
- What is the frequency? What is the most recent episode?
- What is the most severe incident?
- Was this an isolated incident?

##### **2. About the child**

- Has the child witnessed, heard, seen the violence or aftermath?
- Has the child been used to further control parent?
- Has the child been hurt or neglected?

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<sup>25</sup> From *Supervised Visitation Risk Assessment For Judges, Probate and Family Court*, April 26, 2005, p. 20 <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/supervised-visitation-guidelinesfinal.pdf>

- Is the Department of Children and Families involved with the family? If so, for what reason? Was a report of abuse/neglect supported? Abuse/neglect by which parent?

### 3. About the abusive parent

- Is the abusive parent claiming to be the victim?
- Is the abusive parent using systems like DCF, the police, or the courts to control or have contact with the victim?
- Does the abusive parent have a history of restraining orders, criminal activity or violent behavior?
- Is there information that the abusive parent has been able to accept limits?

### 4. About the victim

- Is parent currently safe?
- Has parent sustained injuries?
- Can he/she separate his/her needs from those of children?
- Is there a history of prior victimization, mental illness, substance abuse?
- What is that parent's level of fear?

### **Factors to consider regarding each parent:**

#### 1. Takes responsibility for the situation.

A parent who is able to acknowledge his/her part in a situation is more likely to be able to consider the child's experience than a parent who projects blame onto others. Of greatest concern is a parent who believes that the child is responsible for the situation that led to a request for supervision. (This factor should not be read to mean that a victim of domestic violence should take responsibility for the abuser's behavior.)

#### 2. Awareness of the impact of the negative behavior on the child

Unfortunately, many parents have difficulty imagining that their children's experience may be different than their own. The father who, when asked how he thought sexual abuse affected his 9 year old daughter, replied, "If I'm okay, she's okay," or the robber who could not understand his son's sense of shame, are examples of this. Parents who cannot empathize with their children, that is cannot see the world through their eyes, are less likely to be aware of their child's needs and present a greater risk of harm to the child.

### **Recognizing Patterns of Abuse**<sup>26</sup>

Safe visitation is more likely to occur when the visitation order takes into account the specific patterns of domestic violence in the family. The following describe some of the different patterns of domestic violence and some of the considerations to take into account when ordering visitation in these circumstances.

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<sup>26</sup> See Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 Fam.Ct.Rev. 500 (2008).

Chronic pervasive control reinforced by severe violence is usually characterized by physical abuse that is intermittent or chronic over the course of the relationship or marriage. It is often associated with a more pervasive pattern of psychological and economic coercion and isolation, as well as more severe forms of violent acts. The prognosis for ceasing this pattern of violence is poor, even upon separation of the partners. Consideration should be given to a very strong response to any evidence of abuse prevention order violations, including referral for psychological evaluation and to certified batterer intervention programs. Consideration should be given to suspension of contact with children, or limiting contact to professionally supervised settings. Children will often exhibit signs of disturbed behavior. Exposure to the perpetrator may cause the child to be re-traumatized and contact should be suspended until the child feels, and is, safe.

Violence by a perpetrator who has psychiatrically impaired thinking. Illnesses such as psychosis or paranoia ordinarily stem from distorted or delusional thinking about the other person. In these cases the perpetrator may also experience serious bouts of depression with homicidal or suicidal thoughts. This may result in attempts or threats to harm self or others which may be very traumatic to the child(ren). It is difficult to predict what the prognosis is for cessation of the violence until there has been an adequate psychological evaluation of the perpetrating parent. Consider referral of the perpetrating parent for psychiatric evaluation to answer the specific question of the relationship of the possible mental illness to the violence in the relationship. Children may have been exposed to any number of violent incidents associated with the mental illness of the perpetrator. To protect and ensure the safety of the child, both physically and emotionally, consider suspension of visitation pending completion of a psychiatric assessment, particularly in cases where the perpetrator appears: (a) obsessed with the victim parent, (b) paranoid or delusional, or (c) suicidal or homicidal.

The next pattern is one that escalates until the more aggressive partner asserts control during disputes, either by physical intimidation or assault. These incidents may arise from mutual provocation that escalates until the more aggressive partner causes injury. It is not associated with brutal beatings, marital rape, sadistic infliction of pain or a pervasive pattern of coercion and control over the victim. The prognosis for the cessation of the violence between these parties may be good once the partners are physically separated. However, some perpetrators will require a clear signal that violations of an abuse prevention order will result in an imposition of external sanctions. Children have probably been exposed to a number of violent incidents in the course of the relationship of the adults. Violence is often the primary method of dispute resolution within the family. Children are not ordinarily directly at risk except at points of potential contact of the parents, such as at visitation exchanges. Children may need visitations supervised for a time to feel safe and to overcome fearfulness resulting from witnessing earlier conflicts. Evaluation of the child's functioning should be considered.

When the aggressor is the primary care giver, the court is presented with a more difficult decision. Such patterns of violence are categorized by an ordinarily passive partner who responds with defensive violence to extreme provocation, or actual assault, perpetrated by the aggressor. The relationship between the partners is unstable due to the volatility and potential for provocation or assault by the aggressor. Cessation of violence sometimes occurs following

separation if there is no parental contact during visitation exchanges. Some perpetrators will need clear indications from the court that engaging in contact or provocative acts will receive sanctions from the court. In a significant number of such cases, the aggressor will continue the conflict through the children by actions such as the withholding of visitation. It is not uncommon for aggressors who initiate violence to possess underlying emotional problems that impact their parenting. In many such cases, the primary caretaker/aggressor and the child have an intense relationship that cannot be immediately severed without doing harm to the child. In addition to professional evaluation, the court should consider a gradual transition of custody to the passive parent unless the aggressor is able to contain his or her behavior. During the evaluation or transition process, orders should enter which restrict any contact between the parties.

In cases where the violence is restricted to isolated acts caused by separation, the onset and incidents of violence are substantially limited to periods of marital strain or transitions associated with the separation and divorce. This pattern is distinguished by uncharacteristic violent behavior. Violence tends to cease once the immediate strains associated with divorce and custody disputes settle.

These parents might benefit from a requirement that they complete an approved parent education program. Divorcing parents in Massachusetts are required to attend a mandatory parent education class pursuant to Probate and Family Court Standing Order 4-08 (effective April 7, 2008) (available at <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/standing-order-4-08-parent-education-attendance.pdf>). Where the court is considering waiver of the Parent Education requirement, an alternative option is available on a limited basis, whereby parents may participate in an educational DVD program in lieu of attending parenting classes.

With respect to actions involving never married parents filed in the Essex, Hampshire and Suffolk Divisions of the Probate and Family Court, parties to such actions are required to attend and participate in an educational pilot program designed to address parenting challenges unique to never married parents. (See Probate and Family Court Standing Order 6-08, effective November 1, 2008) (available at <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/standingorder608.pdf>). With respect to all cases involving children filed in the Hampshire Division of the Probate and Family Court, attorneys, parents, and caregivers involved in such cases are required to participate in a child-focused procedural model pilot program. (See Probate and Family Court Standing Order 1-10, effective May 5, 2010) (available at <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/standingorder1-10.pdf>).

See *Guideline 6:06, Visitation Orders and Other Courts*, regarding visitation orders and other Trial Court departments; *Guideline 12:02, Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children*; *Guideline 12:07, Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders*, and Commentaries thereto; and *Guideline 13:00, Assignment of Justices of the Probate and Family Court*

Department to Modify Inconsistent Orders, regarding assignment of justices of the Probate and Family Court Department to modify inconsistent orders.

12:02 Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children. Children respond to domestic violence with a range of symptoms. The court must demonstrate in its findings that the effects of the violence have been considered and that the custody and visitation orders advance the best interest of the child.

#### COMMENTARY

G.L. c. 208, § 31A, § 3 provides:

In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, ‘abuse’ shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. ‘Serious incident of abuse’ shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. . .

A probate and family court’s finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child.

Where “the record raises sufficient concerns regarding domestic violence”, the court is required to “make detailed and comprehensive findings of fact on the issues of domestic violence and its effect upon the child.” Care and Protection of Lillith, 61 Mass. App. Ct. 132, 139 (2004), quoting Custody of Vaughn, 422 Mass. 590, 599 (1996) (additional quotation omitted). When making an order for visitation, the court should consider the symptomatology of the child. Research indicates that the range of reactions experienced by children when exposed to domestic violence varies with the age and gender of the child, the intensity and frequency of the violence, and the proximity of the child to the event(s). Very disruptive symptoms related to trauma can be exhibited by children even when they have not been personally subjected to direct physical or sexual abuse. Assessing and evaluating the impact of the violence on the particular child is required where credible evidence of physical abuse to a household member is perpetrated by a person seeking custody of or visitation with the child in a divorce proceeding. G.L. c. 208, § 31.

To assess the impact of the violence on the child the court should consider the following factors: has the child ever tried to intervene in a violent episode; has the child ever called the police to stop the violence or intervene in a violent episode; has the child ever been threatened by the perpetrator; has the child ever been hit or physically hurt by inadvertent or intended violence; and has the child developed problems in school or with peer relationships? Other questions relating to the child's emotional, psychological and physical well-being should be asked to determine the need for further professional evaluation of the child. If there is credible evidence that the child exhibits troublesome symptoms, the court should consider ordering supervised visits or suspending visits until an evaluation can be completed.

*See Guideline 6:06, Visitation Orders and Other Courts, regarding visitation orders, and other Trial Court departments and Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders, regarding assignment of justices of the Probate and Family Court Department to modify inconsistent orders.*

12:03 Visitation Proceedings in Probate and Family Court: Safety Assessment and Terms of

Visitation. The court shall provide for the safety and well being of the child and the safety of the abused parent when visitation is awarded to the perpetrator of the violence.

COMMENTARY

Although psychological research and clinical experience demonstrate that by and large children fare better if allowed an ongoing relationship with both parents, the risks of maintaining contact with an abusive parent must be weighed against the impact of disrupting the parent-child relationship. In any event, no contact should be allowed unless and until safety can be assured. If the court finds that visitation is appropriate under the circumstances, it must make “explicit findings” which demonstrate that it has considered “safety and well-being of the children” when ordering visitation. Maalouf v. Saliba, 54 Mass. App. Ct. 547, 551 (2002), citing G.L. c. 208, § 31A; Custody of Vaughn, 422 Mass. 590, 600. The court should order visitation that maximizes the safety and well-being of the child and the safety of the abused parent. When ordering visitation, the court should consider the following:

- (a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;
- (b) ordering visitation supervised by an appropriate third party, visitation center or agency;
- (c) ordering the abusive parent to attend and complete, to the satisfaction of the court, an appropriate certified batterer intervention program as a condition of visitation;
- (d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;
- (e) ordering the abusive parent to attend Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings as a condition of visitation;
- (f) ordering the abusive parent to pay the costs of supervised visitation;
- (g) prohibiting overnight visitation;
- (h) requiring a bond from the abusive parent for the return and safety of the child;
- (i) ordering an investigation, appointing a *guardian ad litem*, or attorney for the child; and
- (j) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

See G.L. c. 208, § 31A, which does not include (e) above, and Commentary to Guideline 12:02, Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children.

For a list of certified batterer intervention programs go to [www.mass.gov/dph/violence](http://www.mass.gov/dph/violence), click on Batterer Intervention Program Services, then click on Certified Batterer Intervention Programs and Services.

If supervised visitation is required, the visitation order should also delineate the reason for the supervision and the party or parties responsible for the cost of such supervision. The duties and obligations of an individual designated to supervise the visitation should also be clearly explained to the person. A probation officer or, if a *guardian ad litem* (GAL) has been involved in the case, the GAL should meet with the designated individual to explain the duties and obligations. A supervisor must have the authority and ability to stop a visit if inappropriate behavior occurs.

Although the facts of the c. 209A action may indicate a one year abuse prevention order between the parties would be appropriate, sometimes the court may need more information to determine an appropriate order relative to the child(ren). In such cases, the court should apply the conservative visitation principles generally applied to cases in which sexual abuse is alleged. Although a no-contact or supervised visitation order with the child(ren) may be appropriate at the outset, a review should be scheduled after an appropriate period of time.

*See Guideline 6:06, Visitation Orders and Other Courts, regarding visitation orders and other Trial Court departments; Guideline 12:01, Visitation Proceedings in Probate and Family Court: Safety Assessment Pertaining to Plaintiff in Abuse Prevention Proceedings; Guideline 12:02, Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children; Guideline 12:07, Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders, and Commentaries thereto, regarding other visitation matters; and Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders, regarding assignment of justices of the Probate and Family Court Department to modify inconsistent orders.*

12:04 Proceedings in Probate and Family Court. Prior to the filing of an abuse prevention complaint pursuant to G.L. c. 209A, all the indices shall be checked to cross-reference other cases between the same parties.

#### COMMENTARY

When entering c. 209A orders, a judge should be aware of any existing orders. For example, a judge should determine whether there are in place support, custody, or visitation orders, a guardianship or other order giving custody to a third party, or temporary orders entered in connection with a currently pending divorce, or other, complaint. If an order exists in another action within the Probate and Family Court and the terms of the c. 209A order alter the prior order, a modification of the prior order should enter on the original action. Moreover, the timing of a prior order, i.e., a temporary order, might shed light on the petition under consideration.

A support or custody order which exists only by virtue of the abuse prevention order will not remain in effect beyond the life of the abuse prevention order. Particular attention should be paid to the c. 209A support order enforced through income assignments. Although the c. 209A support order is no longer valid when it lapses or is terminated, until a Support Order Termination Form is signed and transmitted, the obligor's wages will continue to be subject to income withholding.

The c. 209A complaint and the related action, whether it is a complaint for divorce, custody, separate support, or paternity, or a petition for the appointment of a guardian, should be filed under separate docket numbers, however, all actions should be cross-referenced and electronically linked on MassCourts, and all files should be pulled and brought into the courtroom together.

12:05 Proceedings in Probate and Family Court: Pre-Trial Conferences and Other Court

Proceedings. Where a no-contact order is in effect, the parties shall not be required to meet face to face outside the courtroom regarding any Probate and Family Court proceeding.

COMMENTARY

When the court hears temporary orders or other pre-trial matters in a divorce, separate support, or paternity action and an abuse prevention order is in effect, the court must be made aware of the abuse prevention order to avoid sending the parties to face-to-face dispute intervention. The probation department may conduct dispute interventions provided the parties have the opportunity to remain separate and apart and the plaintiff in the restraining order is made aware that such dispute intervention is not mandatory. Probation officers should ask whether or not an abuse prevention order is in effect, including any out-of-state orders, at the outset of every dispute intervention.

Attorneys may satisfy the pre-trial order requirement of a meeting between parties and any attorneys by alternate means such as keeping their clients on telephone contact while the attorneys meet.

12:05A Custody Proceedings in Probate and Family Court: Custody Presumption Applicability.

In a custody proceeding brought in the Probate and Family Court pursuant to G.L. c. 208, G.L. c. 209, or G.L. c. 209C, if the court finds by a preponderance of the credible evidence that a pattern of or a serious incident of abuse has occurred toward a parent or child, a rebuttable presumption is created that it is not in the best interest of the child to be placed in sole or shared custody with the abusive parent. If after so finding the court issues a temporary or permanent custody order, the court must, within 90 days, enter written findings as to the effects of the abuse on the child. These findings must demonstrate that the order is in the best interests of the child and provides for the child's safety and well-being.

COMMENTARY

In a custody proceeding brought pursuant to G.L. c. 208, G.L. c. 209, or G.L. c. 209C, respectively, if the Probate and Family Court finds by a preponderance of evidence that credible evidence was presented that a pattern or serious incident of abuse toward a parent or child has occurred, a rebuttable presumption is created that it is not in the best interest of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. This presumption may be rebutted if the court finds that awarding custody to the abusive parent is in the best interests of the child.

“Abuse” as defined in G.L. c. 208, § 31A, occurs when the defendant has engaged in one or more of the following acts: attempted to cause bodily injury to the other parent or to the child; has caused bodily injury to the other parent or to the child; or placed the other parent or the child in reasonable fear of imminent bodily injury. Section 31A defines a “serious incident of abuse” as one that involves: attempting to cause serious bodily injury to the other parent or to the child; causing serious bodily injury to the other parent or to the child; placing the other parent or the child in reasonable fear of imminent serious bodily injury; or causing the other parent or the child to engage involuntarily in sexual relations by force, threat or duress.

“Bodily injury” and “serious bodily injury” are defined for purposes of G.L. c. 208, § 31A by G.L. c. 265, § 13K. “Bodily injury” is defined as “substantial impairment of the physical condition, including, but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any internal organ, or any injury which occurs as the result of repeated harm to any bodily function or organ, including human skin . . . .” “Serious bodily injury” is defined as “bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death.”

For the purpose of these sections, the issuance of one or more orders pursuant to c. 209A does not, in and of itself, constitute a pattern or serious incident of abuse. In addition, an *ex parte* order or orders will not be admissible to show whether a pattern or serious incident of abuse has occurred. *Ex parte* orders may, however, be admissible for other purposes as the court may determine. Finally, the underlying facts upon which an order or orders issued pursuant to c. 209A was based may form the basis for a finding by the Probate and Family Court that a pattern or serious incident of abuse has occurred.

When issuing any temporary or permanent custody order where there has been a pattern, or serious incident, of abuse, the court must, within 90 days thereafter, enter findings indicating: the effects of the abuse on the child; that the order is in the best interest of the child; and that the order provides for the child's safety and well-being.

Regardless of who is granted custody—the non-abusive or abusive parent—the court is required to make findings as to the effects of the abuse on the child. Effects of abuse on the child which might be noted include such things as: the child is afraid of the abusive parent; the child is having problems with his or her performance at school; the child has exhibited regressive behavior; the child has problems with peer or family relationships; the child has been experiencing nightmares and sleep disturbances; the child has frightening memories from witnessing the abuse; the child exhibited extreme distress at the time of the incident from witnessing the abuse; or, the child has exhibited hostile or aggressive behavior toward others.

There will be instances, however, when the child has been impacted by the pattern or serious incident of abuse, but notwithstanding these effects, the best interest and the safety and well being of the child necessitate that the court grant custody to the abusive parent. Some of these instances include: the child poses a threat to the safety of the non-abusive parent or the other children in the household of the non-abusive parent; the non-abusive parent's parenting ability is compromised such that the child is presently at risk of danger in his or her care; the child demonstrates a substantial emotional connection to the abusive parent; or custody to the non-abusive parent currently poses a serious risk to the child's psychological development.

If the court finds during a contested trial that a pattern or serious incident of abuse has occurred, findings in support of the judgment should be entered in specific detail. *See Custody of Vaughn*, 422 Mass. 590 (1996); *see also Care and Protection of Lillith*, 61 Mass. App. Ct. 132, 139 (2004) (where the record reveals "sufficient concerns" about abuse, the court must "make detailed and comprehensive findings of fact on the issues of domestic violence and its effect upon the child."), quoting *Custody of Vaughn*, 422 Mass. 590, 599 (1996) (additional quotation omitted).

12:06 Custody Proceedings in Probate and Family Court: Related Custody Issues in Domestic Relations Matters. Shared legal or physical custody cannot be ordered absent an agreement, and without written findings pursuant to G.L. c. 208, §§ 31 and 31A, and G.L. c. 209C, § 10(a) when a c. 209A order is or has been issued. *See Custody of Vaughn*, 422 Mass. 590 (1996).

#### COMMENTARY

Shared legal or physical custody must be supported by written findings if there is a c. 209A order in effect, or if there had been a prior order. G.L. c. 208, § 31 provides that:

If, despite the prior or current issuance of an abuse prevention order against one parent pursuant to chapter two hundred and nine A, the court orders shared legal or physical custody either as a temporary order or at a trial on the merits, the court shall provide written findings to support such shared custody order.

Section 31A further provides, in part, that “[i]n issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child.” G.L. c. 208, § 31A. There shall be no presumption either in favor of or against shared legal or physical custody at the time of the trial on the merits, except as provided for in § 31A.

The findings required by G.L. c. 208, § 31 must indicate that the court has evaluated the effects of domestic violence on the child and how such a custody order advances the best interest of the child. In *Custody of Vaughn*, 422 Mass. 590 (1996), the Supreme Judicial Court affirmed the Appeals Court’s decision to reverse and remand the trial court’s supplemental judgment, which granted primary physical custody to the father, for further consideration of evidence regarding domestic violence perpetrated by the father against the mother and the effect of the family violence on the child. *Id.* The Supreme Judicial Court found that, “the Probate Court had failed to give sufficient weight to the effects of domestic violence on women and their children.” *Id.* at 596. In remanding the case, the Supreme Judicial Court stated that the Probate and Family Court shall make “explicit findings” in this regard. *Id.* at 600. *e also Adoption of Imelda*, 72 Mass. App. Ct. 354, 364-365 (2008), *rev. denied*, *Adoption of Imelda*, 452 Mass. 1105 (2008); *Care and Protection of Lillith*, 61 Mass. App. Ct. 132, 139-143 (2004).

The Appeals Court has held that that “in order for joint custody or shared responsibility to work, both parents must be able mutually ‘to agree on the basic issues in child rearing and want to cooperate in making decisions for [their] children’.” *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404 (1981). The essence of shared custody is the ability to effectively communicate and to engage in joint decision-making. As such, if the parties are precluded from talking to each other or have a demonstrated history of an inability to communicate safely, then an award of joint custody would be inappropriate. Indeed, the express language of G.L. c. 209C provides that joint custody can be awarded “only if the parents have entered into an agreement pursuant to section

eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of the proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interest." G.L. c. 209C, § 10(a) (emphasis added); *see also Custody of Odette*, 61 Mass. App. Ct. 904, 905 (2004) (award of joint custody, in the absence of positive findings entered by trial judge as to parents' demonstrated ability to communicate, constitutes reversible error). If such an award of custody is inconsistent with the no-contact provisions of a c. 209A order. *See Guideline 12:07, Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders.*

Where the parties have reached an agreement on the issue of custody, the court should scrutinize the agreement to ensure that the best interest of the child has been promoted by the agreement, and that the agreement provides for the safety and well being of the child and the safety of the abused parent. The best interest of the child must be advanced in any award of custody or visitation to a perpetrator of domestic violence. If the court determines that the agreement of the parties is not in the best interest of the child, the court must make a specific finding to that effect. *See* G.L. c. 208, § 31 ("Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, unless specific findings are made by the court indicating that such an order would not be in the best interest of the children").

Custody determinations may also have other consequences, such as the ability of the non-custodial parent to access his or her child's school records. A statute pertaining to availability of school information to non-custodial parents, G.L. c. 71, § 34H, as amended by St. 2006, c. 62, § 1, provides:

- (a) . . . For purposes of this section, any parent who does not have physical custody of a child shall be eligible for the receipt of information unless: (1) the parent's access to the child is currently prohibited by a temporary or permanent protective order, except where the protective order, or any subsequent order which modifies the protective order, specifically allows access to the information described in this section; or (2) the parent is denied visitation, or, based on a threat to the safety of the child, is currently denied legal custody of the child or is currently ordered to supervised visitation, and the threat is specifically noted in the order pertaining to custody or supervised visitation. All such documents limiting or restricting parental access to a student's records or information which have been provided to the school or school district shall be placed in the student's record.

Orders issued by the Probate and Family Court involving parents should indicate whether the non-custodial parent has sought and been denied shared legal custody based on a threat to the safety of the child or custodial parent and is entitled to unsupervised visitation with his child. *Id.* A non-custodial parent is not eligible for the receipt of school records if his or her access to the child or to the custodial parent has been restricted by a temporary or permanent abuse prevention order unless the abuse prevention order, or any subsequent order which modifies the abuse

prevention order, specifically allows the non-custodial parent's access to the school records. G.L. c. 71, § 34H(a).

*See Guideline 6:06, Visitation Orders and Other Courts, regarding visitation orders and other court departments; Guideline 12:01, Visitation Proceedings in Probate and Family Court: Safety Assessment Pertaining to the Plaintiff in Abuse Prevention Proceedings; Guideline 12:02, Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children; Guideline 12:03, Visitation Proceedings in Probate and Family Court: Safety Assessment in Terms of Visitation; Guideline 12:07, Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders, regarding visitation matters; and Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders, regarding assignment of justices of the Probate and Family Court Department to modify inconsistent orders.*

12:07 Custody and Visitation Proceedings in Probate and Family Court: Modifications of

c. 209A Orders. All orders must be consistent. Accordingly, a c. 209A order entered by the Probate and Family Court, or other court of competent jurisdiction, must be modified when the Probate and Family Court subsequently enters a custody or visitation order that conflicts with the c. 209A order.

COMMENTARY

A c. 209A no-contact order entered by the Probate and Family Court should be amended to reflect a subsequently entered visitation order in a divorce, paternity, or other custody proceeding. If the original c. 209A order is in a different Probate and Family Court division, the court entering the subsequent visitation order may telephone the Administrative Office of the Probate and Family Court to request a special assignment to amend the original c. 209A order. If the conflicting no-contact order was issued by a court in a different Department, it should be subject to interdepartmental assignment pursuant to Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders. Although only a Probate and Family Court can issue a visitation order, such an order does not override the no-contact or stay-away provision of the order entered by a court of another department, unless the Probate and Family Court modifies such provisions pursuant to an interdepartmental judicial assignment, under Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders, thereby eliminating inconsistencies between the no-contact/stay-away provision of the order issued by the court of another department and the decision issued by the Probate and Family Court. (See Trial Court Administrative Order 96-1, effective October 16, 1996). Therefore, a Probate and Family Court judge should either amend the c. 209A order, sitting as a judge of the department that issued the c. 209A order, so that it is not inconsistent with the Probate and Family Court visitation order or issue a visitation order that conforms to and is not inconsistent with the existing c. 209A order.

To the extent possible, the Probate and Family Court Judge should specifically and clearly identify the modified provisions on the face of the c. 209A order. The modified order should not simply refer to an attached order or agreement, particularly with respect to modification of the provisions regarding the contact and stay-away orders between the parties and/or children.

In accordance with Administrative Order 96-1, the probation department in the modifying court will immediately transmit a copy of the order, including all additional pages of the order if there was inadequate space on the original order to include complete details of the modification, by facsimile to the issuing court. The issuing court must then enter the order into the Statewide Registry of Civil Restraining orders, notify the appropriate police department of the modified order, and update its case file. *See Guideline 13:00, Assignment of Justices of the Probate and Family Court Department to Modify Inconsistent Orders*.

See Guideline, Custody Proceedings in Probate and Family Court: Related Custody Issues in Domestic Relations Matters, regarding shared legal or physical custody; Guidelines 12:01, Visitation Proceedings in Probate and Family Court: Safety Assessment Pertaining to the Plaintiff in Abuse Prevention Proceedings; Guideline 12:02, Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children; and Guideline 12:03, Visitation Proceedings in Probate and Family Court: Safety Assessment and Terms of Visitation, regarding visitation matters; and Guideline 12:02, Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children; Guideline 12:06, Custody Proceedings in Probate and Family Court: Related Custody Issues in Domestic Relations Matters; Guideline 12:08, Custody Proceedings in Probate and Family Court: Interstate Custody Issues; and Guideline 12:09, Custody Proceedings in Probate and Family Court: Non-Parent Custody and No-Contact Orders, regarding custody.

12:08 Custody Proceedings in Probate and Family Court: Interstate Custody Issues. General

Laws c. 209B authorizes Massachusetts to enter emergency orders to protect the plaintiff and child from harm, notwithstanding the pendency of a custody proceeding in another state.

COMMENTARY

If there is a prior or pending action or an existing custody order from another state and that state continues to have jurisdiction under its own law(s), Massachusetts must defer to the jurisdiction of the other state unless that state relinquishes jurisdiction to Massachusetts. Even if a parent has fled from another jurisdiction to Massachusetts to avoid abuse, the state from which that parent fled will remain the child's home state for six months.

If a petition for protection from abuse is properly filed in Massachusetts, however, and another state has prior custody jurisdiction, G.L. c. 209B, § 2(a)(3)(ii) allows a Massachusetts court to enter a custody or visitation order on an emergency basis only. The issuance of a c. 209A order is a sufficient finding of an emergency to justify a temporary custody order. Any custody order is subject to the initial jurisdictional requirements of the Massachusetts Child Custody Jurisdiction Act (M.C.C.J.A.), pursuant to G.L. c. 209B, and the continuing jurisdiction of Parental Kidnapping Protection Act (P.K.P.A.), pursuant to 28 U.S.C. § 1738A (1988). *See Umina v. Malbica*, 27 Mass. App. Ct. 351, 358 (1989); *Delk v. Gonzalez*, 421 Mass. 525, 529 (1995).

If custody jurisdiction is contested, the judge should make specific findings relative to abuse and risk to the child that should be communicated to the court with primary custody jurisdiction, either through telephone communication or by providing a copy of the findings or both. If returning the child would create an undue risk of harm, the court may request that the other state consider bifurcating the proceeding with the Massachusetts court conducting a hearing or investigation for the benefit and use of the court with primary custody jurisdiction.

Child support awards in c. 209A orders may not conflict with awards in existence from another state. If there is a child support amount ordered by an out-of-state entity, the Uniform Interstate Family Support Act (U.I.F.S.A.) is applicable. *See* G.L. c. 209D.

*See Guideline 12:02, Visitation and Custody Proceedings in Probate and Family Court: Assessment of Impact on Children; Guideline 12:06, Custody Proceedings in Probate and Family Court: Related Custody Issues in Domestic Relations Matters; Guideline 12:07, Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders; and Guideline 12:09, Custody Proceedings in Probate and Family Court: Non-Parent Custody and No-Contact Orders*, regarding other custody matters.

12:09 Custody Proceedings in Probate and Family Court: Non-Parent Custody and No-Contact Orders. The court may enter a no-contact order relative to a child of the abuser who is not also a child of the victim, provided that they are all members of the same household. However, a guardianship petition should be filed if the court enters an order allowing a child of the abuser to remain with the victim.

#### COMMENTARY

When a child of the abuser is a member of the victim's household, or if an action is brought on behalf of that child, the court does not have authority pursuant to c. 209A to award custody to a third party. However, if the safety of the child necessitates allowing the child to remain with the non-parent plaintiff, a temporary custody order may be entered pursuant to a separate guardianship of a minor petition. Under c. 209A, there must be "independent support" for an order barring contact between the abuser and his or her child who is a member of the household. *See Smith v. Joyce*, 421 Mass. 520, 523 (1995).

12:10 Issuance of Protective Orders: Divorce Proceedings. Protective orders may be entered pursuant to G.L. c. 208, § 18 during the pendency of a divorce to prohibit one spouse from imposing restraint on the personal liberty of the other spouse.

#### COMMENTARY

A request may be filed pursuant to G.L. c. 208, § 18 in the Probate and Family Court in which a divorce action is pending seeking that the other spouse be prohibited from imposing any restraint on her or his personal liberty.<sup>27</sup> Either spouse or his or her guardian may request additional orders to protect herself or himself, a ward, or their children, including an order to vacate the marital home. In some instances, parties may be required to seek protective orders pursuant to G.L. c. 208 because of the venue provisions of c. 209A.

Protective orders entered pursuant to § 18 are considered temporary orders and will be revoked by operation of law upon the entry of a final judgment of divorce unless incorporated in the judgment. If the court intends the order to be revoked, it must be vacated on the existing order, sent to the police, and entered in the Statewide Registry of Civil Restraining Orders. If the court intends to extend protection, after incorporating the temporary order in the final judgment, the order should be examined and extended for an appropriate duration. All changes must be served on the defendant and the police and entered in the Statewide Registry of Civil Restraining Orders.

The Supreme Judicial Court has ruled that the Probate and Family Court is authorized to issue permanent protective orders and incorporate them into judgments of divorce nisi, pursuant to the second sentence of G.L. c. 208, § 18. Champagne v. Champagne, 429 Mass. 324 (1999). *Cf.* Commonwealth v. Blessing, 43 Mass. App. Ct. 447 (1997). In Crenshaw v. Macklin, 430 Mass. 633, 635 (2000), the SJC affirmed a court's authority to issue a permanent order following a "renewal hearing."

When requesting an extension of a protective order, the plaintiff need not make a showing of new abuse. *See* Rauseo v. Rauseo, 50 Mass. App. Ct. 911, 913 (2001), *rev. denied*, Rauseo v. Rauseo, 434 Mass. 1103 (2001) ("At a hearing on the plaintiff's request for an extension of an order . . . the plaintiff is not required to re-establish facts sufficient to support

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<sup>27</sup> General Laws c. 208, § 18 "has come to serve two, somewhat different, purposes," as it not only authorizes judges to issue protective orders designed to prevent abuse, it also allows entry of protective orders designed to prevent harassing behaviors which do not rise to the level of abuse but nevertheless require temporary intervention during the pendency of the divorce proceedings. Hennessey v. Sarkis, 54 Mass. App. Ct. 152, 155 (2002). When G.L. c. 208, § 18 is "utilized for abuse prevention purposes akin to those of [G.L. c. 209A] . . . the serious consequences of such an order require that procedural formalities like those employed in 209A proceedings be observed." *Id.* at 155-156 (internal citations omitted). A protective order issued pursuant to G.L. c. 208, § 18 is considered akin to an order entered pursuant to G.L. c. 209A when violation thereof carries criminal penalties. *See* Sertel v. Kravitz, 54 Mass. App. Ct. 913, 914 (2002).

that initial grant of an abuse prevention order.”); *See also* G.L. c. 209A, § 3; Mitchell v. Mitchell, 62 Mass. App. Ct. 769, 773-774 (2005) (“[T]he fact abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient grounds for allowing an order to be vacated.”); Doe v. Keller, 57 Mass. App. Ct. 776, 778 (2003). However, the threat of abuse which formed the basis for entry of the original protective order must continue to exist. *See* Pike v. Maguire, 47 Mass. App. Ct. 929 (1999) (rescript) (“The only criterion for extending the original [protective] order is a showing of continued need for the order.”).

*See* Guideline 6:02, Duration and Commentaries thereto; Guideline 6:08, Further Extending an Order After Notice on Its Expiration Date; Guideline 6:08, Further Extending an Order After Notice on Its Expiration Date; and Guideline 12:12, Issuance of Protective Orders: Separate Support, regarding duration of orders. *See* Guideline 6:05B, Support Orders, regarding actions for divorce or separate support.

12:11 Issuance of Orders to Vacate Marital Residence: Divorce, Separate Support or

Maintenance. An order to vacate a marital residence may be entered pursuant to G.L. c. 208, § 34B.

COMMENTARY

Orders to vacate the marital home may be entered during the pendency of divorce, separate support or maintenance actions. At the commencement, or during the pendency, of an action, the court may enter an order requiring the husband or wife to vacate the marital home for an initial period not to exceed 90 days, and an additional period upon further motion. Each order is predicated upon a showing of danger to the health, safety, or welfare of the moving party or any minor child(ren) residing with the parties. There is no requirement that the child(ren) be born of the marriage.

It should be noted that the standard for an order to vacate after notice to the alleged abuser is that “the health, safety, or welfare of the moving party or any minor child(ren) living with the parties would be endangered or substantially impaired.” In a highly contested custody case, the court should consider the extent to which the conflict endangers the child(ren). Upon a showing of a substantial likelihood of immediate danger to the moving party or the child(ren) residing with them, the court may allow *ex parte* relief. In such case, the court shall schedule a second hearing no later than five days after the temporary order to vacate is entered. The time frames for the second hearing in this section differ from c. 209A. All other motions to vacate the marital home must be marked for hearing in compliance with the Massachusetts Rules of Domestic Relations Procedure, Rule 6(c) (seven days notice to the opposing party). An order to vacate may enter even if the opposing party is not residing in the marital home or if the moving party has vacated to protect her or his safety or the safety of any minor child(ren).

The court must be mindful that the order to vacate the marital residence must be properly extended prior to the expiration of its initial 90-day period, as a defendant could otherwise avoid a conviction for violating the order that has expired. *See, e.g., Commonwealth v. Blessing*, 43 Mass. App. Ct. 447, 449-450 (1997). Additionally, a temporary order in a divorce action does not survive the judgment nisi and therefore there is no order in existence that the defendant could properly be convicted of violating. *Id.* *See* Commentary to Guideline 12:10, Issuance of Protective Orders: Divorce Proceedings, regarding duration of orders issued pursuant to G.L. c. 208, § 18; Guideline 6:02, Duration and Commentaries thereto; Guideline 6:08, Further Extending an Order After Notice on Its Expiration Date; Guideline 12:10, Issuance of Protective Orders: Separate Support, regarding duration of orders issued pursuant to c. 209A; and Guideline 6:05B, Support Orders, regarding actions for divorce or separate support. Protective orders may enter when a spouse is entitled to a decree of separate support pursuant to G.L. c. 209, § 32.

12:12 Issuance of Protective Orders: Separate Support. Protective orders may enter as part of an action for separate support pursuant to G.L. c. 209, § 32.

#### COMMENTARY

Orders prohibiting interference with the personal liberty of the other spouse may enter in a separate support action. A separate support judgment may issue when the court finds that a spouse failed without justifiable cause to provide suitable support, deserted the other spouse, or has justifiable cause for living apart. According to G.L. c. 209, § 32, the orders are governed by the Rules of Civil Procedure, notwithstanding Rule 1 of the Massachusetts Rules of Domestic Relations Procedure.

If the protective order is entered as a temporary order, it shall be revoked by operation of law upon entry of final judgment of separate support. Although revoked by operation of law, the temporary order must be vacated in the Statewide Registry of Civil Restraining Orders so that the law enforcement community will not still consider the order legally valid and enforceable. The final order may be prescribed for a time certain or until further order of the court.

*Ex parte* relief should be granted only upon a finding of a substantial likelihood of harm. If *ex parte* relief is granted, a further hearing, after notice, should be held within 10 days. Mitchell v. Mitchell, 62 Mass. App. Ct. 769 (2005). The service requirements are the same as those applicable to an order issued pursuant to c. 209A. If the order is subsequently modified, the defendant must be served again, and provided with the modified order. Failure to properly serve the abuser may hamper criminal prosecution. See Commentary to *Guideline 8:01, Issuance of Criminal Complaint*, regarding proper notice.

12:13 Issuance of Protective Orders: Paternity Actions. Protective orders may be entered as part of a paternity action pursuant to G.L. c. 209C, §§ 15 and 20.

#### COMMENTARY

General Laws c. 209C was enacted more recently than the protective provisions of G.L. c. 208 and G.L. c. 209 and it includes comprehensive language which most closely mirrors the protections of c. 209A. Because the Appellate Courts have held that all parties, regardless of their marital status, and their children should be accorded equal protection of the law, the comprehensive rights under this section shall be accorded to all parties seeking protection pursuant to a divorce or separate support action. *See Doe v. Roe*, 32 Mass. App. Ct. 63, 65 (1992), *rev. denied*, *Doe v. Roe*, 412 Mass. 1103 (1992).

Pursuant to G.L. c. 209C, § 11(a), as amended by St. 2008, c. 176, § 113, a voluntary, written acknowledgment of parentage executed jointly by the mother and putative father of a child, whether a minor or not, and filed with the registrar of vital records and statistics or with the court shall be recognized as a sufficient basis for seeking an order of support, visitation or custody with respect to the child without further proceedings to establish paternity. G.L. c. 209C, § 11(a). Parties have 60 days during which to rescind such an acknowledgment by filing a petition with the Probate and Family Court, which then must order a genetic marker test for the purpose of determining parentage, although the rescission “shall constitute the proper showing required for an order to submit to such testing.” *Id.* Further, following such a challenge to paternity, if the child is receiving public assistance, the court must provide notice of the rescission to the IV-D agency if that agency is not already a party to the matter. *Id.* *See also* G.L. c. 46, §§ 3A-3D.

The court may enter either temporary orders or a final judgment which includes a vacate, no-contact, or restraining provision. If the order is temporary, the statute provides that unless modified or revoked (pursuant to G.L. c. 209C, § 20) it shall continue in force and be incorporated in the final judgment. Notwithstanding the statute, a more prudent action would be that the court incorporate the order into the final judgment in order for the order to remain effective. If the court intends to revoke the order, it must be vacated, sent to the police, and entered in the Statewide Registry of Civil Restraining Orders. If the court intends to extend protection, after incorporating the temporary order in the final judgment, the order should be examined to determine the appropriateness of its duration. Any changes must be served on the defendant and the police and entered in the Statewide Registry of Civil Restraining Orders. Failure to properly serve the abuser may hamper criminal prosecution.

12:14 Service of Domestic Relations Protective Orders. Protective orders issued pursuant to G.L. c. 208, §§ 18 and 34B; G.L. c. 209, § 32; or G.L. c. 209C, §§ 15 and 20 shall be served on the defendant by the appropriate law enforcement officials and shall otherwise be treated in a manner similar to c. 209A orders.

#### COMMENTARY

Protective orders may be requested by a party to a divorce, separate support or paternity action or anyone acting legally on his or her behalf, within the pending proceeding. Additionally, if the court becomes aware of the need for protective orders in the course of hearing a divorce, separate support or paternity, it may, on its own, enter such orders as it deems necessary to protect a party and/or any minor child(ren). A party needing protection shall be informed that any order will be civil in nature and that criminal proceedings may also be available. Although the Probate and Family Court Department cannot enforce its order by criminal process, all orders may be enforced in the Probate and Family Court through contempt proceedings, either civil or criminal. Protective orders are usually enforced, however, by criminal process in the District Court or Boston Municipal Court.

A search of the Statewide Registry of Civil Restraining Orders must be made before the matter can be heard. A judge shall review the alleged abuser's criminal record prior to the hearing to determine the existence of a history of domestic or other violence. If an outstanding warrant exists against the alleged abuser, the judge must make a finding as to whether or not an imminent threat of bodily injury exists to the victim. If such threat exists and the defendant is not present, the judge shall notify the appropriate law enforcement officials who are required to execute the warrant as soon as is practicable. In any event, the appropriate law enforcement officials shall be notified of any outstanding warrant. In cases where the defendant is present, courts are referred to *Guideline 5:07, Court Action on Defendant's Warrant Status*.

Page two of the c. 209A order has a place to record information as to the existence of an outstanding warrant (section A.16, FA-2A) and a line for the judge to make a finding whether or not there is an imminent threat of bodily harm to the victim (section A.17, FA-2A). To assist the judge, it is preferable that the person who checks the record or a member of the probation department highlight any violent or domestic offenses and any outstanding warrants prior to the judge's review of the record.

Any protective order issued pursuant to G.L. c. 208, G.L. c. 209, or G.L. c. 209C shall be entered into the Statewide Registry of Civil Restraining Orders and shall be served in the same manner as orders entered pursuant to c. 209A. See Guideline 4:07, Transmission of Ex Parte Orders to the Police for Service on the Defendant; and Guideline 6:03, Service of Orders on the Defendant, regarding methods of service. Failure to properly serve the abuser may hamper criminal prosecution. See Commentary to Guideline 8:01, Issuance of Criminal Complaint, regarding proper notice.

**INTERDEPARTMENTAL JUDICIAL ASSIGNMENTS**

13:00      Assignment of Justices of the Probate and Family Court Department to  
Modify Inconsistent Orders

13:00 Assignment of Justices of the Probate and Family Court Department to Modify

Inconsistent Orders. Upon the appearance before a justice of the Probate and Family Court of a party or parties to an abuse prevention order issued by the District Court, Boston Municipal Court, or Superior Court, said justice shall be assigned to sit in the court department which issued the order to modify, extend or vacate the order so as to eliminate any conflict between said order and the terms of decisions issued by the Probate and Family Court in accordance with Trial Court Administrative Order 96-1.<sup>28</sup> These Guidelines apply to abuse prevention orders subject to Interdepartmental Judicial Assignment.

COMMENTARY

General Laws c. 209A, § 1 provides jurisdiction for issuing abuse prevention orders in the Probate and Family Court, District Court, Boston Municipal Court, or Superior Court. Parties who obtain relief in the District Court, Boston Municipal Court, or Superior Court may, for example, seek subsequent relief on family matters that affect the parties in the Probate and Family Court. To eliminate inconsistencies between orders issued by the District Court, the Boston Municipal Court, or the Superior Court and judgments issued by the Probate and Family Court in a timely manner, this Guideline refers to Trial Court Administrative Order 96-1, Procedure for Interdepartmental Determinations in Abuse Prevention Proceedings. The following memoranda were issued to implement Administrative Order 96-1: District Court Transmittal No. 623, December 4, 1996, “Procedures Regarding Probate and Family Court Action on District Court Domestic Abuse Orders” <http://www.mass.gov/courts/209a/docs/districtcourt-trans623-admin-order-96-1.pdf>, and a memorandum from Probate and Family Court Chief Justice Mary Fitzpatrick, November 25, 1996, “Administrative Order 96-1.” <http://www.mass.gov/courts/209a/docs/probateandfamilycourt-admin-order-96-1-memo.pdf> The Boston Municipal Court has adopted the policy issued by the District Court.

Judges and court personnel should extend their cooperative efforts in order to implement interdepartmental judicial assignments under this Guideline and pursuant to Administrative Order 96-1 in a prompt and expeditious manner.

This Guideline makes it clear that orders subject to interdepartmental judicial assignment are also subject to the terms of these Guidelines. Application of appropriate provisions of Guideline 6:04, Modification of Orders; Terminating Orders, regarding modification of orders,

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<sup>28</sup> Please note that Administrative Order 96-1 uses the term “vacate.”

and *Guideline 6:07, Mutual Abuse Prevention Orders*, regarding mutual orders, in particular, will help ensure consistent adjudication of related matters involving the same parties.

*See* Commentary to *Guidelines 3:07, Conduct of Ex Parte Hearings*, and *Guideline 5:01, Conduct of Hearings After Notice When Both Parties Appear: General*, regarding orders issued by different court departments and Commentary to *Guideline 6:04, Modification of Orders; Terminating Orders*, regarding gun license and gun surrender orders in modification proceedings. *See also* *Guideline 2:07, Referrals To and From Other Courts: Avoiding Inconsistent Orders; Guideline 3:07, Conduct of Ex Parte Hearings; Guideline 4:01, Content of Ex Parte Orders; Guideline 6:00, Orders After Notice: General; Guideline 6:06, Visitation Orders and Other Courts; Guideline 6:07, Mutual Abuse Prevention Orders; Guideline 10:02, Actions for Divorce or Separate Support*; and *Guideline 12:07, Custody and Visitation Proceedings in Probate and Family Court: Modifications of c. 209A Orders*.

Administrative Order 96-1

**COMMONWEALTH OF MASSACHUSETTS**

**THE TRIAL COURT**

**ADMINISTRATIVE ORDER 96-1**

**PROCEDURE FOR**  
**INTERDEPARTMENTAL DETERMINATIONS IN**  
**ABUSE PREVENTION PROCEEDINGS**

In order to coordinate the response of the Departments of the Trial Court in proceedings under G.L. c. 209A, involving the same parties, the following procedure is hereby established pursuant to the superintendence power of the Chief Justice of Administration and Management under G.L. c. 211B, § 9.

- Definitions. In this Administrative Order the following words and phrases shall have the following meanings:
- “Order” means an abuse prevention order issued by either the Boston Municipal Court Department, a Division of the District Court Department or a Division of the Superior Court Department pursuant to G.L. c. 209A.
- “Issuing Court” means the Boston Municipal Court Department, a Division of the District Court Department or a Division of the Superior Court Department that has issued an abuse prevention order pursuant to G.L. c. 209A.
- “Modifying Court” means a Division of the Probate and Family Court Department in which a justice of that court has modified, extended or vacated an abuse prevention order issued by the Boston Municipal Court Department, a Division of the District Court Department or a Division of the Superior Court Department, pursuant to G.L. c. 209A.
- “Modified Order” means an order issued by a justice of the Division of the Probate and Family Court Department pursuant to G.L. c. 209A which modifies, extends or vacates an order issued pursuant to the same statute by a justice of the Boston Municipal Court

Department, a Division of the District Court Department or a Division of the Superior Court Department.

- “Registry” means the Domestic Violence Record Keeping System established pursuant to St. 1992, Chapter 188 and maintained by the Commissioner of Probation.
- Interdepartmental Judicial Assignment. The justices of the Probate and Family Court Department are hereby assigned to sit in the Boston Municipal Court Department, the District Court Department or the Superior Court Department whenever a party to an order issued by the Boston Municipal Court Department or a Division of the District Court Department or a Division of the Superior Court Department appears before a justice of the Probate and Family Court Department and the justice determines it is appropriate to modify, extend or vacate said order to eliminate any conflict between said order and the terms of decisions issued by the Probate and Family Court Department. No order shall be modified by the Probate and Family Court, pursuant to this Administrative Order, without notice and an opportunity to be heard being given to the parties to the order of the issuing court. A justice of the Probate and Family Court Department who so modifies, extends or vacates an order issued by the Boston Municipal Court Department or a Division of the District Court Department or a Division of the Superior Court Department shall advise the party or parties appearing before said justice of the effects of the modified order and explain that the modified order shall be immediately returned to the issuing Court, subject to further modification, extension or vacating when a party to the order appears before the issuing court or the modifying court in future proceedings. An assignment shall expire immediately following the issuance of a modified order by a justice of the Probate and Family Court.
- Transmittal of Modified Order. The Probation department in the modifying court shall cause the modified order to be transmitted by facsimile to the Probation department of the issuing court promptly to enable the Probation staff of the issuing court to enter the order into the Registry on the day on which the modified order is issued. Upon receipt of the modified order, the Probation department in the issuing court shall promptly provide a copy of the modified order to the staff or the Clerk or Clerk-Magistrate of the issuing court, who shall promptly docket and file the modified order. The Register of Probate in the modifying court shall cause the modified order to be mailed to the Clerk or Clerk-Magistrate of the issuing court no later than three days after the modified order is issued.
- Docketing of Order. The Clerk or Clerk-Magistrate of the issuing court shall cause the modified order to be docketed in the appropriate case file of the issuing court in a timely manner.
- Entry of Order into Registry. The Probation department of the issuing court shall enter the modified order into the Registry on the day that the modified order is issued and follow the requirements of the Standard to Establish and Maintain a Domestic Violence Record Keeping System, Including a Registry of All Civil Vacate, Restraining, Protective

and Abuse Prevention Orders established by the Commissioner of Probation with regard to entry of orders into the Registry.

**John J. Irwin, Jr.**  
**Chief Justice for**  
**Administration and Management**

**Date: October 16, 1996**

**ORDERS FROM OTHER JURISDICTIONS**

14:00 Filing and Enforcement of Abuse Prevention Orders Issued by Other Jurisdictions

14:00 Filing and Enforcement of Abuse Prevention and other Protective Orders Issued by Other Jurisdictions. Abuse prevention and other protective orders issued by other jurisdictions outside of Massachusetts for the purpose of preventing violent or threatening acts against, or contact or communication with or physical proximity to another person, including *ex parte* and orders after notice issued by civil and criminal courts filed by or on behalf of a person seeking protection, shall be given full faith and credit throughout the Commonwealth and enforced as if they were issued in the Commonwealth for as long as they are in effect in the issuing jurisdiction.

A person entitled to protection under a protection order issued by another jurisdiction may file such order in the District Court, the Boston Municipal Court, the Probate and Family Court, or the Superior Court by filing with the court a certified copy of such order which shall be entered into the Statewide Registry of Civil Restraining Orders. Such person shall swear under oath in an affidavit that to the best of such person's knowledge such order is currently in effect as written. The Affidavit for Fling Out-Of-State Protective Order (FA/HA-9) may be used for this purpose. The clerk shall provide a certified copy of the protection order issued by the other jurisdiction to a law enforcement agency upon request.

Statutory provisions pertaining to Massachusetts abuse prevention orders also apply to protection orders issued by other jurisdictions. Violations of orders from other jurisdictions shall be afforded the same treatment as violations of Massachusetts abuse prevention orders with respect to penalties and orders to pay damages. The exception to the rule of spousal disqualification (which bars a husband and wife from testifying about their private conversations), which applies, *inter alia*, to criminal proceedings in which one spouse is a defendant alleged to have committed a crime against the other spouse or to have violated a

Massachusetts order, also applies to criminal proceedings in which one spouse is a defendant alleged to have violated a protection order issued by another jurisdiction. Persons who commit the crime of stalking in violation of an order issued by another jurisdiction are subject to the same penalty as those who commit the same crime in violation of a Massachusetts abuse prevention order.

### COMMENTARY

General Laws c. 209A, § 5A provides that protection orders issued by another jurisdiction shall be given full faith and credit throughout the Commonwealth. General Laws c. 209A, § 1 describes another jurisdiction as another state, territory or possession of the United States, the Commonwealth of Puerto Rico, the District of Columbia or a tribal court. The statute apparently is intended to work in conjunction with the full faith and credit provisions of 18 U.S.C. § 2265.

Section 5A appears to include protection orders involving persons who may or may not be family or household members or who are in a substantive dating or engagement relationship, as provided by Massachusetts law. It is also worded to encompass orders restricting a broad variety of activities, including protection orders, the purpose of which is to prevent, in the alternative, violent or threatening acts, harassment, contact or communication with or physical proximity to another person. Such orders may be temporary or final and may have been issued by “civil and criminal courts.” Court personnel should accept for filing any orders which fall into these categories in a manner reflecting the broad scope of the statute. The statute does not appear to include orders which contain other provisions, such as vacating the household, staying away from a multiple family dwelling and the workplace, awarding the plaintiff temporary custody of a minor child, and ordering the defendant to pay temporary support.

General Laws c. 265, §43(b) provides that a person who commits the crime of stalking in violation of a protection order issued by another jurisdiction shall be punished the same as a person who committed the same crime in violation of a Massachusetts order. The crime of stalking may be “prosecuted and punished” in any jurisdiction of the Commonwealth where “an act constituting an element of the crime was committed.” G.L. c. 277, § 62B.

Violations of orders issued by other jurisdictions are to be treated the same as violations of orders issued by Massachusetts courts. G.L. c. 209A, §§ 5A and 7. Law enforcement authorities are required to enforce foreign protection orders as they do Massachusetts orders. Specifically, police “may presume the validity of, and enforce . . . a copy of a protection order issued by another jurisdiction which has been provided to the law enforcement officer *by any source*; provided, however, that the officer is also provided with a statement by the person protected by the order that such order remains in effect. Law enforcement officers may rely on such statement by the person protected by such order.” G.L. c. 209A, § 5A (emphasis added).

These provisions appear to indicate that the filing of an order from another jurisdiction is not a prerequisite to enforcement in the Commonwealth. Protection orders from other jurisdictions are included among the types of orders the violation of which requires a police officer to make an arrest. G.L. c. 209A, § 6. Section 6 also authorizes police to make warrantless arrests if they have probable cause to believe that a firearms suspension and surrender provision of an order has been violated.

Memoranda and forms have been issued to facilitate filing of orders issued by other jurisdictions in the courts of the Commonwealth and logged onto the Registry of Civil Restraining Orders: a memorandum from Chief Justice for Administration and Management John Irwin, October 30, 1996, “Out-of-State Domestic Violence Restraining Orders,” including a memorandum from Commissioner of Probation Donald Cochran, October 30, 1996, “Chapter 209A, Section 5A: Out-of-State Protective/Restraining Orders”; <http://www.mass.gov/courts/209a/docs/aotc-out-of-state-orders-memo.pdf> District Court Transmittal No. 622, November 6, 1996, “Out-of-State Domestic Violence Restraining Orders;” <http://www.mass.gov/courts/209a/docs/districtcourt-trans622-out-of-state-orders.pdf> and a memorandum from Probate and Family Court Chief Justice Mary Fitzpatrick, November 5, 1996, “Registration of Foreign Protection Orders.” <http://www.mass.gov/courts/209a/docs/probateandfamilycourt-foreign-orders-memo.pdf>

Persons who are protected by an order issued by another jurisdiction and who want to file a certified copy of it in a Massachusetts court with jurisdiction are required to file an affidavit stating that the out of state order is currently in effect as written. The Affidavit for Fling Out-Of-State Protective Order (FA/HA-9) may be used for this purpose. See G.L. c. 209A, § 5A. See also *Guideline 1:08, Plaintiff Unable to Appear in Court*; and *Guideline 2:03, Completing the Complaint; Obtaining Required Information*.