THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT
14 BEACON STREET SUITE 102
BOSTON, MASSACHUSETTS 02108
(617) 725-8050
FAX (617) 248-9938

PRESS RELEASE

CONTACT: BARBARA MORGAN FAUTH
EXECUTIVE DIRECTOR

FOR IMMEDIATE RELEASE
February 27, 2001

FORMAL CHARGES FILED AGAINST JUDGE MARIE E. LYONS
BY COMMISSION ON JUDICIAL CONDUCT

BOSTON, MA (February 27, 2001) - Formal Charges have today been filed with the Supreme Judicial Court against Judge Marie E. Lyons, Associate Justice of the Hampden Division of the Probate and Family Court Department, in Complaint Nos. 97-140, 97-143, 98-4, 98-66, 99-100, 99-103, 99-153 and 2000-78. A copy of the Formal Charges is attached, as is a copy of the judge's response thereto. The Commission has asked the Supreme Judicial Court to appoint a Hearing Officer to preside at the public hearing of this matter. The Commission will then schedule the hearing to take place in thirty to sixty days after that appointment, in accordance with G.L. c.211C and Commission Rule 8B. Copies of the Commission's statute and rules are attached.

BEFORE THE COMMISSION ON JUDICIAL CONDUCT

Complaint Nos. 97-140, 97-143, 98-4, 98-66, 99-100, 99-103, 99-153, and 2000-78

STATEMENT OF FORMAL CHARGES

Pursuant to M.G.L. c. 211C, § 5(14) and Commission Rule 7, the Commission on Judicial Conduct hereby gives notice to the Honorable Marie E. Lyons, Associate Justice of the Probate and Family Court Department, that it has found sufficient cause to issue formal charges in the above-captioned matters. Pursuant to M.G.L. c. 211C, § 5(14) and Commission Rule 7 (B)(4), the Commission hereby notifies Judge Lyons of her right to file, within ten (10) days after service of these Formal Charges, a response to the charges set forth below.

These Formal Charges incorporate allegations from Complaint Nos. 97-140, 97-143, 98-4, 98-66, 99-100, 99-103, 99-153 and 2000-78. The Commission served Judge Lyons with a Statement of Allegations on November 15, 1999 and an Amended Statement of Allegations on February 15, 2000. Judge Lyons served a written Response to Amended Statement of Allegations on March 10, 2000. The Commission served Judge Lyons with a Second Amended Statement of Allegations on September 22, 2000, to which Judge Lyons filed a Response on October 12, 2000. The Commission notified Judge Lyons of her right pursuant to M.G.L. c. 211C, § 5(7) and Commission Rule 6G to request a personal appearance before the Commission in addition to her written Response, but Judge Lyons made no request to appear personally before the Commission.

The Commission charges that, over a period of years, Judge Lyons has engaged in patterns of recurrent misconduct. These patterns of misconduct and the specific acts and omissions that make up such patterns as hereafter alleged are prejudicial to the administration of justice under M.G.L. c. 211C, § 2(5)(d), and further constitute violations of the Code of Judicial Conduct under M.G.L. c. 211C, § 2(5)(e) as follows:

(a) refusals and repeated avoidance of her duty to "accord every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law" [Canon 3(A)(4)];

(b) failures to "be faithful to the law and to maintain professional competence in it" [Canon 3(A)(1)]; and

(c) failures to conduct herself in a "patient, dignified and courteous manner to litigants, . . . lawyers and others . . . ." [Canon (3)(A)(3)].

All instances hereinafter mentioned took place in the Hampden Division of the Probate and Family Court Department, unless otherwise noted.

FIRST CHARGE

1. From 1995 until sometime in 1999, Judge Lyons failed to accord every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law.

2. The following cases are evidence of the above-described pattern of conduct and provide examples of the many cases in which Judge Lyons failed to accord a party, or his lawyer, full right to be heard according to law:

a. Slade v. Slade, Hampden Probate and Family Court No. 96-P-621.

After a conference in this divorce case, the Court issued a pretrial order limiting the issues to be determined at trial to the disposition of certain items of personal property. After trial, Judge Lyons issued an order dividing the personal property at issue and, in addition, awarding the wife $10,000.

The issue of the $10,000 payment was neither contested nor litigated by the parties. Judge Lyons did not notify the husband that she was considering ordering any monetary payment. Accordingly, he presented no evidence at trial relating to any issues other than the division of personal property that was the subject of the pretrial order. In fact, the portion of Judge Lyons' order relating to the $10,000 transfer was a complete surprise to the husband, who effectively was deprived of an opportunity to be heard.

b. Family Service Office on Behalf of Melissa M. Miller v. Carlos J. Matos, Franklin Probate and Family Court Nos. 97W 0059 - 61.

In 1997, the Massachusetts Department of Revenue Child Support Enforcement Division (DOR) brought an action in Franklin Probate and Family Court (Massachusetts Department of Revenue Child Support Enforcement Division on Behalf of Melissa M. Miller v. Carlos J. Matos, Franklin Probate and Family Court No. 97W0059 PA1) to have Carlos Matos adjudicated the father of Hayley Matos, then two years old. Mr. Matos, Hayley Matos' mother, Melissa Miller, and an attorney representing DOR appeared before Judge Lyons on June 10, 1997. Based on Mr. Matos' acknowledgment of paternity, Judge Lyons entered an order adjudicating Carlos Matos the father of Hayley Matos.

No other motions were pending at the time of hearing. Nevertheless, in addition to adjudicating Mr. Matos the father of Hayley Matos, Judge Lyons entered an order requiring Mr. Matos to actively seek employment and to report to the

Family Service Office weekly on his efforts to find a job. Judge Lyons entered this order without affording Mr. Matos an opportunity to be heard.

On March 16, 1998, the Family Service Office and DOR filed a complaint for civil contempt against Mr. Matos based on his failure to report on his efforts to find work (Family Service Office on Behalf of Melissa M. Miller v. Carlos J. Matos, Franklin Probate and Family Court Nos. 97W0059 - 61). Mr. Matos and Ms. Miller appeared at a hearing before Judge Lyons on April 1, 1998, at which time they explained that they lived together with their children, that Mr. Matos had been employed full-time since September of 1997, and that the family received a small amount of public assistance under a Transitional Assistance to Families With Dependent Children ("TAFDC") grant. After learning that Mr. Matos had been employed full-time since September of 1997, the DOR attorney assigned to the case, Maryann Audette, informed Judge Lyons that DOR was seeking no relief against Mr. Matos other than reimbursement for the cost of serving him with the summons and complaint.

Ms. Audette also explained that Mr. Matos lived with the family, was employed, and was part of a public assistance household. Ms. Audette specifically informed Judge Lyons that DOR was not moving for an order requiring Mr. Matos to pay child support. By way of explanation, Ms. Audette told Judge Lyons that DOR policy precluded her from seeking a child support order against a custodial parent receiving public assistance, which Mr. Matos was.

Without inquiring as to the basis for the DOR policy against seeking child support from a custodial parent receiving public assistance, without notice to Mr. Matos that she was considering entering a further order, and without affording Mr. Matos an opportunity to be heard in opposition to any such order, Judge Lyons entered an order on April 2, 1998 requiring Mr. Matos to pay child support and to "resign from the AFDC Program today."

c. Guardianship of Kiesha Lynn Flemmati, Hampden Probate and Family Court No. 97P1977-GM..

On October 22, 1997, Judge David G. Sacks appointed Ruth Kennedy temporary guardian of her granddaughter, Kiesha Lynn Flemmati, and issued emergency restraining orders preventing Kiesha Lynn Flemmati's father, Anthony Flemmati, from contacting Kiesha Lynn Flemmati or Ms. Kennedy. Six days later, on October 28, 1997, Judge Lyons held a hearing on Ms. Kennedy's petition to extend the two restraining orders issued by Judge Sacks.

There was no motion pending to vacate Judge Sacks' order appointing Ms. Kennedy temporary guardian of Kiesha Lynn Flemmati. Neither the parties nor Judge Lyons raised the issue of Ms. Kennedy's guardianship at the hearing.

Nevertheless, after hearing the parties on the restraining orders, Judge Lyons revoked Ms. Kennedy's guardianship over Kiesha Lynn Flemmati. Judge Lyons provided no notice to Ms. Kennedy that she was considering revoking the guardianship and did not provide Ms. Kennedy an opportunity to be heard in opposition to the revocation of the guardianship.

d. Badillo v. Badillo, Hampden Probate and Family Court No. 96P0960.

Marie Badillo filed a complaint for contempt against her ex-husband, who had failed to pay court-ordered child support in the amount of $11.55 per week. The arrearage at the time Ms. Badillo filed the complaint was $242.55. A hearing was scheduled for October 30, 1997.

At the time of the hearing, Ms. Badillo lived in Newport News, Virginia, where she worked in a 7-11 convenience store. She was represented by Massachusetts counsel, who attended the October 30 hearing. Ms. Badillo did not travel to Massachusetts for the hearing because the cost of travel, coupled with time lost from work, would have far exceeded the recovery she was seeking in the contempt action. When Judge Lyons learned that Ms. Badillo was not in court, she refused to hear the case. Judge Lyons did not allow Ms. Badillo's attorney an opportunity to be heard so that he might explain his client's absence or how he intended to proceed in his client's absence. Judge Lyons also did not state any legal basis for her decision not to conduct the hearing in Ms. Badillo's absence, nor did she ask Mr. Badillo if he objected to Ms. Badillo's absence.

e. Nieves v. Chacon, Hampden Probate and Family Court No. 94D0076 DV.

On August 4, 1997, Miriam Nieves was heard on her complaint for modification of a divorce decree to allow her to remove her minor children from the Commonwealth temporarily. Judge David G. Sacks scheduled an evidentiary hearing for September 2, 1997 and allotted thirty minutes for it. Judge Lyons later was assigned to preside at the hearing.

Judge Lyons refused to conduct the hearing scheduled by Judge Sacks even though the parties and the witnesses were present. Her stated reason for refusing to hear the case was that no pre-trial conference had been held, as required by the Probate Court rules. When Ms. Nieves' attorney asked Judge Lyons to hold the pre-trial conference during the time that had been allotted for the hearing, Judge Lyons refused that request without explanation. Judge Sacks conducted the evidentiary hearing approximately four weeks later without first holding a pre-trial conference.

f. Toce v. Albert, Hampden Probate and Family Court No. 97D2411 AB.

On April 22, 1997, Deanna Toce obtained an ex parte restraining order under M.G.L. c. 209A in District Court against her ex-husband, Jeffrey Albert. The District Court entered an order on May 6, 1997 extending the initial restraining order. The May 6 order stated that the restraining order could be amended, rescinded, or extended by the Probate and Family Court, where custody and visitation motions already were pending. On August 8, 1997, the District Court extended the restraining order through August 13, 1997. The District Court noted in that order that all further relief was to be sought in Probate and Family Court. Mr. Albert's attorney indicated to Ms. Toce's attorney, Jennifer Dieringer, that his client would not oppose any extension of the existing restraining order.

Based on the District Court's instruction that further motions on the restraining order be brought in Probate and Family Court, Ms. Toce's attorney, Jennifer Dieringer, moved on August 13, 1997 to vacate the restraining order issued by the District Court and filed a petition for a new restraining order in Probate and Family Court. Based on Mr. Albert's attorney's representation to Ms. Dieringer that Mr. Albert would not oppose a new restraining order issued by the Probate and Family Court, Ms. Dieringer then appeared ex parte before Judge Lyons to request the new restraining order.

Judge Lyons asked Ms. Dieringer at the August 13 hearing if the petition was based on the same grounds as the restraining order issued and vacated by the District Court. Ms. Dieringer replied in the affirmative and attempted to explain that the District Court had vacated its order at her request so that she could petition for a new order in Probate and Family Court. Judge Lyons cut Ms. Dieringer off immediately, stating, "I don't think that's really true." Ms. Dieringer continued to attempt to explain why it was proper for her to request a new restraining order from the Probate and Family Court and why an order was necessary to protect her client. However, Judge Lyons again cut Ms. Dieringer off and refused to hear the motion, thus denying Ms. Toce's lawyer a full opportunity to be heard according to law.

g. Taylor v. Taylor, Hampden Probate and Family Court No. 94D2302

On August 5, 1997, after a hearing on a complaint for contempt against Julie Taylor, Judge Lyons transferred custody of Ms. Taylor's minor child to the child's father and ordered the father to pick up the child's belongings from the mother's residence between 4:00 and 4:30 p.m. that date. Judge Lyon's selection of the thirty minute period during which the father could pick up his child's belongings was arbitrary. When the father asked to be allowed to pick up his child's belongings at a time other than between 4:00 and 4:30 p.m., Judge Lyons refused his request without allowing the father to explain why he was requesting a different time to pick up the child's belongings.

h. Kustra v. Kustra, Hampden Probate and Family Court No. 98D3194.

On April 26, 1999, Judge Lyons refused to enter a divorce decree proposed jointly by the parties under which the husband, Thomas Kustra, would be awarded the couple's minimal marital asserts. Judge Lyons then strongly suggested to the parties that they retain an attorney to prepare another proposed decree. Judge Lyons told the parties that one of the reasons she was refusing to approve the proposed decree was because she could not find it "fair and reasonable." Judge Lyons apparently was unaware that Ms. Kustra had left Mr. Kustra and their two minor children in 1991 and that Mr. Kustra had raised the children since that time. Judge Lyons refused to allow Mr. Kustra the opportunity to explain why the agreed-upon provision in the proposed decree providing that he be awarded all of the marital assets was "fair and reasonable."

i. Bournigal v. Kho, Hampden Probate and Family Court Nos. 95W0043 and 99W1438.

On August 11, 1999, Judge Lyons refused to hear a motion to vacate a temporary custody order previously entered by Judge David G. Sacks based on her stated belief that only Judge Sacks could vacate the temporary order. Judge Lyons rejected a representation by the moving party's attorney, Nancy Gallman, that Judge Sacks had expressly stated at a previous hearing that did not go forward because no interpreter was available that the matter should be heard on the next motion day, regardless of whether he was sitting in the motion session. Judge Lyons rejected Ms. Gallman's assertion without making any inquiry as to whether it was accurate.

THEREFORE, the Commission charges that, by the foregoing pattern of conduct, Judge Lyons violated Supreme Judicial Court Rule 3:09, Canon 3(A)(4) of the Code of Judicial Conduct, which requires a judge to "accord every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law."

SECOND CHARGE

3. From 1996 until sometime in 1999, Judge Lyons failed to be faithful to the law or, alternatively, failed to maintain professional competence in it.

4. The following cases are evidence of the above-described pattern of conduct and provide examples of the many cases in which Judge Lyons failed to be faithful to the law or, alternatively, failed to maintain professional competence in it:

a. Family Service Office on Behalf of Melissa M. Miller v. Carlos J. Matos, Franklin Probate and Family Court Nos. 97W 0059 - 61.

As described more fully above, on April 1, 1998, Carlos Matos appeared before Judge Lyons as a defendant in a complaint for contempt filed by DOR based on Mr. Matos's failure to report weekly to the Family Service Office on his efforts to find full-time employment. DOR's attorney, Maryann Audette, told Judge Lyons at the hearing that DOR was not seeking a child support order against Mr. Matos. By way of explanation, Ms. Audette informed Judge Lyons that Mr. Matos, Melissa Miller, and their three children lived together as an intact family unit and received public assistance under the TAFDC grant, and that it was DOR's policy not to seek child support orders against a custodial parent in such circumstances. Judge Lyons was unaware of this DOR policy before being informed of it by Ms. Audette.

Despite the absence of a pending motion and Ms. Audette's representation that it was against DOR's policy to seek a child support order against a custodial parent receiving public assistance, Judge Lyons entered an order requiring Mr. Matos to pay child support to DOR in the amount of $80.60 per week and to "resign from the AFDC Program" that day. She entered the order without inquiring as to the rationale underlying DOR's policy, without informing Mr. Matos that she was considering entering such an order, and without affording Mr. Matos an opportunity to be heard in opposition to it.

Judge Lyons's order requiring Mr. Matos to pay child support and to resign from the AFDC grant was contrary to and undermined the statutes and state regulations under which Mr. Matos, Ms. Miller, and their children received public assistance. Specifically, under 106 C.M.R. §§ 204.220(A) and 204.230, the child support paid by Mr. Matos would be retained by the Massachusetts Department of Transitional Assistance ("DTA"), except for $50 per month which would be passed through to the family unit. Moreover, Mr. Matos' child support payments would not be deducted from the amount of family income considered by the DTA when calculating the amount of public assistance to which the family was entitled under 106 C.M.R. §§ 204.200 - 204.290. Therefore, Judge Lyons' order resulted in the family receiving reduced public assistance until Judge Lyons' order was stayed by another Probate and Family Court judge on May 21, 1998.

Judge Lyons knew, or should have known, that her April 2, 1998 order that Mr. Matos pay child support and "resign" from public assistance was contrary to and undermined the purpose of duly enacted legislation and regulations under which Mr. Matos and his family received public assistance. If Judge Lyons was not aware of such legislation and the effect her order would have on Mr. Matos' receipt of public assistance, she should have inquired of Ms. Audette as to the

purpose of DOR's policy not to seek child support orders against custodial parents receiving public assistance.

Also, Judge Lyons failed to protect Mr. Matos' fundamental right to due process according to law by entering an order against him without providing notice and without affording him an opportunity to be heard.

b. Guardianship of Tawanda T. Ward, Hampden Probate and Family Court No. 96P0420-GM.

On March 11, 1996, twelve year-old Tawanda Ward's two adult brothers filed an emergency petition to be appointed as her temporary guardians. The grounds for their petition were that Tawanda Ward suffered from epilepsy and that their mother had died four days earlier. Judge Lyons denied the petition on the grounds that the "emergency" required for the appointment of a temporary guardian was lacking. Judge Lyons informed the petitioners and their attorney that the relevant statute (M.G.L. c. 201, § 14) and Supreme Judicial Court decisions made it clear that she was not authorized to appoint a temporary guardian for Ms. Ward under the circumstances, and that the brothers would have to petition for permanent guardianship. However, M.G.L. c. 201, § 14 specifically authorizes the appointment of temporary guardians in cases where, as alleged by the proposed temporary guardians, the welfare of a minor so requires, and no cases suggest otherwise. Judge Lyons' unfounded reliance on and reference to a statute and cases to deny categorically the relief requested by the petitioners demonstrate her failure to be faithful to the law or, alternatively, her failure to maintain competence in it.

c. Morel v. Morel, Hampden Probate and Family Court No. 94D2374.

On August 2, 1999, Mark C. Morel appeared before Judge Lyons on an emergency motion for a temporary order transferring custody of his two minor children to him from his ex-wife. Ms. Morel and her attorney were present at the hearing.

Mr. Morel based his motion on the fact that his ex-wife had recently dropped off their two young children with him, stating that she was unable to provide a suitable environment for them because she had a substance abuse problem and was involved in an abusive relationship with her boyfriend, who also had a substance abuse problem. Ms. Morel had appeared bruised at the time and had told her mother and sister that her boyfriend had recently physically abused her. Judge Lyons denied Mr. Morel's motion on the ground that the "emergency" required for the issuance of such a temporary order was lacking, despite the compelling evidence to the contrary.

The Commission alleges that Judge Lyons' decisions in Guardianship of Tawanda T. Ward and Morel v. Morel demonstrate her refusal to enter temporary orders without considering the individual facts in each case before her. The Commission further alleges that Judge Lyons' refusal to consider the individual facts in these two cases constitutes a failure to follow the law.

d. Giard v. Giard, Hampden Probate and Family Court No. 97D0413.

On November 3, 1997, Judge Lyons presided over a divorce hearing brought by Karen Giard against George Giard on grounds of cruel and abusive treatment. At the hearing, Ms. Giard's attorney, Jennifer Dieringer, proffered a proposed Judgment of Divorce Nisi providing for custody of Ms. Giard's two minor children, the resumption of her former name, no visitation rights for Mr. Giard, and a permanent 209A restraining order to be issued against Mr. Giard. After Ms. Giard testified on the grounds for divorce, Judge Lyons cut her off before there was any testimony about the other requested relief and said that she was granting the divorce on grounds of cruel and abusive treatment. Having submitted the proposed Judgment, Attorney Dieringer did not elicit additional testimony from Ms. Giard.

Later that day, the Court entered a Judgment of Divorce Nisi signed by Judge Lyons which granted the divorce but provided none of the other requested relief. Believing that the Court had omitted the relief inadvertently, Attorney Peter Benjamin, who had succeeded Attorney Dieringer, filed a Motion to Amend Judgment of Divorce Nisi. At hearing on the motion, Judge Lyons expressed the view that, because the parties had last lived together in Florida, the Court lacked jurisdiction to grant the relief Ms. Giard requested. She maintained this position even though Ms. Giard and the children had resided in Massachusetts since 1995. She then asked Attorney Benjamin to file a brief addressing the issue of jurisdiction.

After Attorney Benjamin filed a brief supporting the Court's jurisdiction to award the relief requested by Ms. Giard, Judge Lyons denied the Motion to Amend Judgment of Divorce Nisi, this time "for the reason that there was no testimony offered at the time of the hearing of divorce with regard to the requeste (sic) amendment."

e. White v. White, Hampden Probate and Family Court No. 99D1254-AB.

On August 6, 1999, Michelle White appeared before Judge Lyons to request that a restraining order against her husband, Michael White, be extended for one year. The order had been in effect for three months at the time of the hearing. Michael White, who met with Ms. White's attorney in the courthouse prior to the hearing, did not oppose the extension requested by Ms. White and left the courthouse

before the hearing. Ms. White's attorney informed Judge Lyons that Mr. White had told her that he did not object to the restraining order being extended for one year.

After briefly reviewing an affidavit submitted by Ms. White in support of the requested extension, Judge Lyons informed Ms. White and her attorney that she could not consider evidence about incidents of abuse that occurred prior to the issuance of the existing order three months earlier, but was constrained by law to considering only what had happened during the pendency of the existing restraining order. That statement is contrary to M.G.L. c. 209A, § 3. Eventually, Judge Lyons agreed to extend the restraining order for a period of three months. She provided no reason for denying Ms. White's request that the restraining order be extended for a full year.

f. Reports of Possible Physical or Emotional Abuse.

In cases in which a parent petitions to vacate or modify a c. 209A restraining order obtained as a result of abuse that occurred in front of a minor child, Judge Lyons has adopted the informal policy of informing the petitioner, in substance, that she intends to cause the filing of a report with the Massachusetts Department of Social Services alleging possible child abuse or failure to provide a safe or suitable environment for the child. Judge Lyons informs the petitioner that she intends to file such a report without regard to any prior involvement by the Department of Social Services with the family unit. The result of this policy is that persons who wish to have a restraining order vacated or modified for legitimate reasons are discouraged from seeking aid from the court for fear of being subjected to an investigation by the Department of Social Services.

The following cases illustrate this practice:

> Ward v. Ringer, Hampden Probate and Family Court No. 99D0352. On April 27, 1999, Sherry Ward filed a petition to vacate the "no contact" provision of an existing restraining order against her boyfriend, Kevin Ringer. At hearing, Ms. Ward requested that the entire order be vacated. Judge Lyons informed Ms. Ward that she would notify the Department of Social Services of Ms. Ward's petition to vacate.
>
> White v. White, Hampden Probate and Family Court No. 99D1254. On June 11, 1999, Michelle White petitioned to vacate the "no contact' and "stay away" provisions of a restraining order previously issued against her husband, Michael White. Judge Lyons told Ms. White that she would notify the Department of Social Services if she went through with her request to have the restraining order vacated. Ms. White then withdrew her petition to vacate.

Russell v. Russell, Hampden Probate and Family Court No. 99D2559. On September 13, 1999, the petitioner, Carolyn Russell, petitioned for a restraining order against abuse only, allowing Ms. Russell's husband, Charles Russell, to continue to contact her. Judge Lyons granted the petition but informed Ms. Russell that she intended to have a report filed with the Department of Social Services because she did not petition for a restraining order preventing the defendant from contacting her.

Karwowski v. Karwowski, Hampden Probate and Family Court No. 99D0622. On June 9, 1999, Diane Karwowski petitioned to vacate a restraining order previously issued against her husband, John Karwowski. Judge Lyons told Ms. Karwowski that she would file a report with the Department of Social Services if she went through with her request to have the restraining order vacated.

Anne E. LaPierre v. Richard R. LaPierre, Hampden Probate and Family Court No.99-D-1982 and Richard R. LaPierre v. Anne E. LaPierre, Hampden Probate and Family Court No. 99-D-2188-AB. On August 11, 1999, Anne E. LaPierre petitioned to vacate a restraining order previously issued against her husband, Richard R. LaPierre. Judge Lyons told Ms. LaPierre that she would notify the Department of Social Services if she went through with her petition to have the restraining order vacated.

5. The Commission charges that by adopting the above-described policy, Judge Lyons has violated Canon 3(A)(1) because she has not been faithful to the law.

THEREFORE, the Commission charges that Judge Lyons violated Canon 3(A)(1) of the Code of Judicial Conduct by failing to be faithful to the law or, alternatively, failing to maintain professional competence in it.

THIRD CHARGE

6. In 1997, Judge Lyons failed to conduct herself in a patient, dignified and courteous manner.

The following cases are evidence of the above-described pattern of conduct and provide examples of the many cases in which Judge Lyons failed to conduct herself in a patient, dignified and courteous manner to litigants, lawyers, and others with whom she deals in her official capacity.

a. Fernandez v. Fernandez, Hampden Probate and Family Court No. 96D2235 AB.

This case involved a complaint for modification regarding child visitation. An evidentiary hearing was scheduled for March 11, 1997 before Judge Lyons. The

parties settled their dispute on March 10. The mother's attorney, Jennifer Dieringer, immediately called the clerk and asked that the hearing be removed from the list. The clerk refused that request.

Ms. Dieringer and the father's attorney, John Jerzyk, then prepared a written visitation agreement to present to Judge Lyons the following day. Ms. Dieringer and Mr. Jerzyk also agreed that there was no need for Ms. Fernandez, who lived in a battered women's shelter an hour's drive from the courthouse and had no car or child care available to her, to be present in court. Ms. Fernandez also did not want to attend the hearing because she did not want to be near her ex-husband, whom she alleged had physically abused her previously.

When Judge Lyons learned at the hearing that Ms. Fernandez was not present in court, she ordered Ms. Dieringer to call Ms. Fernandez and instruct her to come to court immediately. Judge Lyons then berated Ms. Dieringer for informing her client that she need not appear at the hearing.

Ms. Dieringer's instruction to her client not to attend the March 11 hearing appeared to have been, at worst, a good faith error arising out of an agreement with opposing counsel. Ms. Dieringer apologized to Judge Lyons at least five times and attempted to explain the reason for her client's absence, but Judge Lyons cut Ms. Dieringer off repeatedly and continued to berate her long after the judge had made her point.

b. Toce v. Albert, Hampden Probate and Family Court No. 97D2411 AB.

As described more fully above, Ms. Toce's attorney, Jennifer Dieringer, appeared before Judge Lyons ex parte to petition for an emergency restraining order. Ms. Dieringer informed Judge Lyons at the hearing that the District Court had vacated an identical restraining order at her request so that she could petition for a new restraining order in Probate and Family Court, where related matters were pending. Without having any basis to believe that Ms. Dieringer's representation was untrue, and without inquiring of the District Court whether or not Ms. Dieringer's representation was untrue, Judge Lyons responded, "I don't think that's really true," and refused to hear Ms. Dieringer on the petition. Judge Lyons' statement was reasonably perceived by Ms. Dieringer as an accusation that she was lying. Judge Lyons had no basis upon which to make such an accusation.

THEREFORE, the Commission charges that Judge Lyons failed to conduct herself in a patient, dignified and courteous manner to litigants, lawyers, and others with whom she deals in her official capacity.

The conduct alleged above, if true, constitutes conduct that is prejudicial to the administration of justice, that is unbecoming a judicial officer, that brings the judicial office into disrepute, and that violates M.G.L. c. 211C, § 2(5)(d) and (e), and Canon 3 of the Code of Judicial Conduct.

For the Commission

Margot Botsford

Margot Botsford
Chairman

Date: January 23, 2001

NOTICE OF DISCOVERY RIGHTS PURSUANT TO FORMAL CHARGES

Complaint Nos. 97-140, 97-143, 98-4, 98-66, 99-100, 99-103, 99-153 and 2000-78

The Commission on Judicial Conduct hereby notifies Judge Marie E. Lyons that, pursuant to Commission Rule 9A, the Commission shall, within a reasonable time, make available for inspection upon written request of the judge all books, papers, records, documents, electronic recordings, and other tangible things within the custody and control of the Commission which are relevant to the issues of the disciplinary hearing, and any written or electronically recorded statements within the custody and control of the Commission which are relevant to the issues of the disciplinary proceeding.

As specified in Commission Rule 9C, nothing in this Notice of Discovery Rights shall be construed to require the discovery of any report made to the Commission by its staff or Special Counsel. Furthermore, in granting discovery the Commission shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of its staff, Special Counsel, or other representative.

For the Commission,

Margot Botsford

Margot Botsford
Chairman

Date: January 23, 2001

BEFORE THE COMMISSION ON JUDICIAL CONDUCT

Complaint Nos. 97-140,97-143, 98-4, 98-66, 99-100, 99-103, 99-153 and 2000-78

RESPONSE TO STATEMENT OF FORMAL CHARGES

FIRST CHARGE

Judge Lyons denies the allegation that she failed to accord every person who is legally interested in a proceeding, or his lawyer, the full right to be heard according to law.

Specifically, Judge Lyons responds as follows to the following cases which the Commission on Judicial Conduct sets forth as examples of the allegations in the First Charge.

(a) Slade v. Slade, Hampden County Probate and Family Court No. 96-P-621

Although M.G.L. Chapter 211C § 2(3) allows the Commission on Judicial Conduct to consider all acts or omissions related to a pattern of conduct more than one year prior to the date proceedings are initiated, it should be noted that the allegations set forth against Judge Marie E. Lyons occurred at a divorce hearing held in September 1995 and decided by the Appeals Court of Massachusetts in August 1997.

Given the broad discretion of the Probate Court granted under M.G.L. Chapter 208 § 34 and the language of the Massachusetts Rules of Domestic Relations Procedure Rule 16, a Pre-Trial Order may be modified by the court to prevent manifest injustice. In this case, Judge Lyons, by the language in her findings of fact and Judgment indicated her concerns regarding the issue of distribution of assets, even though such issue was not specifically set forth in the Pre-Trial Order. The findings of fact were based on the evidence introduced by the parties during the divorce hearing and set forth in the parties financial statements. Upon review of the transcript of the hearing, it is evident that the parties were in fact given a full right to be heard, even in spite of the Pre-Trial Order and

did in fact present evidence regarding the division of marital assets addressing issues other than those set forth in the order.

A review of the record appendix sets forth that in Plaintiff's Motion to Amend the Courts Findings of Fact and for a New Trial, plaintiff's counsel states that should a new trial be granted his client would present evidence regarding the issue of the possession of certain items of personal property failed to mention that evidence regarding the issue of the amount of $10,000 to be paid to the defendant as set forth in the court's Judgment would be introduced.

In its decision the Massachusetts Appeals Court set forth the proposition that the interpretation of the Massachusetts Rules of Domestic Relations Procedure Rule 16, in the context of the issues alluded to in the appeal presented an issue of first impression in Massachusetts. A matter of first impression is generally defined as one without precedent, presenting a new statement of facts and involving a question never before determined.

Although Massachusetts favors a flexible approach in the resolution of the financial matters of the parties to a divorce action, litigants, especially those involved in domestic disputes, continuously challenge the integrity of the Probate and Family Courts. Judges whose decisions do not agree with the position taken by the litigants are subject to challenge on the grounds that the rulings made and the Judgment entered in particular cases do not comport with their expectations. Judges must be free to decide cases on the merits as they see them, without fear of retribution.

An independent judiciary is the hallmark of our system of justice. Even when reasonable people disagree as to the correctness of a judicial decision, without an independent judiciary, litigation practice would degenerate to the level of influence peddling. Judges must make hard decisions based on their interpretation of facts presented and the applicable laws as they interpret them. Such decisions should not be attacked by the whim of litigants.

Based on the foregoing, this formal charge specifically referring to the Slade v. Slade case should be dismissed.

(b) Family Service Office on Behalf of Melissa M. Miller v. Carlos J. Matos Franklin Probate and Family Court Nos. 97W0059-61

The record in this matter establishes that Carlos Matos failed to pay child support to the Department of Revenue even though he was adjudicated the father of the minor children, was employed, and Melissa Miller had assigned her rights to collect child support to the Department of Revenue. Although Carlos Matos secured employment in September of 1997, he did not inform the Department of Revenue until April 1, 1998, that he in fact was employed.

From the financial statements filed on the day of the contempt hearing, the court was able to ascertain the approximate monthly income of the parties and their monthly expenses. The Court concluded that the Matos/Miller household had a surplus of money at the end of each month.

Based on the facts, the prior history of Carlos Matos and her interpretation of the public policy expressed in M.G.L. Chapter 119A §1, 42 USCS 601 and the language set

forth in the case of Brady v. Brady, 380 Mass. 480 (1980) Judge Lyons entered findings and made her decision.

In the case of Virginia L. Brady vs. James P. Brady, 380 Mass. 480 (1980) the Supreme Judicial Court stated that the subrogation rights of a state agency, in this case the Department of Public Welfare, can be taken into account when a Probate Judge enters support and maintenance orders even though the department is not a party to the proceedings. The Court's action was taken in order to comply with the general purpose clause of U.S.C.A. Title 42 §601 which sets forth that one of the purposes of such legislation is to end the dependence of needy parents on government benefits by promoting job preparation, work and marriage.

The fact that a response to the Commission on Judicial Conduct was necessary as to the interpretation of a statute, appellate case rulings and government regulation seems only to foster the position that such matters were issues to be addressed on appeal and which in fact were so addressed by the Supreme Judicial Court in its decision in the case of Department of Revenue vs. CMJ, SJC-08095 (2000).

A matter of interpretation of law does not signify ignorance or intentional nonconformance to legal mandates nor does it violate the Code of Judicial Conduct as alleged.

Since the matter was appealed on the legal issues presented it appears that the complaint regarding this matter was an attempt to either circumvent or taint the appeal process.

(c) **Guardianship of Kiesha Lynn Flemmati**
Hampden Probate and Family Court No. 97P1977-GM

With reference to the charge based on this allegation it should be noted that once a matter is before the Probate Court, the court may take any such action it deems necessary in order to protect a child and to preserve the rights of the natural parents.

The Appellate Courts have held that a Protective Order under M.G.L. c. 209A may be issued if it is established that there was an attempt to cause or actually cause physical harm; that there is fear of imminent physical harm; or that there has been an engagement of involuntary sexual relations by force, threat or duress. Generally, apprehension, nervousness, aggravation, psychological distress where there is no threat of imminent serious physical harm does not warrant the issuance of a 209A Order. Denise E. Wooldridge v. Steven C. Hickey, 45 Mass. App. Ct. 637 (1998). A judge should not issue an order simply because it will not cause a defendant any real inconvenience.

If there is to be a restraining order to be issued such as in this matter that a defendant stay away from and have no contact with his minor child there must be independent support for such order. Smith v. Joyce, 421 Mass. 520, 523 (1995).

Further, a Probate and Family Court may issue and modify orders although there is no indication that a plaintiff directly sought any modification. Smith v. Joyce, 421 Mass. 520, 523 (1995).

Since the presentation made by Ms. Kennedy at the hearing and a review of the affidavit filed in support of a temporary guardianship set forth no evidence of an emergency which necessitated the continuation of a temporary guardianship the court's decision based on the best interests of the child and the protection of the father's rights to visitation dictated its resolution as set forth in the court's order.

The record indicates that Ms. Kennedy was not only heard but had submitted an affidavit setting forth the facts on which the temporary guardianship issue was based.

(d) **Badillo v. Badillo**
Hampden Probate and Family Court No. 96P0960

The orderly management of the trial list is a legitimate concern of a judge and, while not necessarily a determinative consideration, ought not to be belittled. See Castellucci v. United States Fidelity and Guaranty Company, 372 Mass 288, 292 (1977) Cf. Beit v. Probate and Family Court Department, 385 Mass. 854, 858-860 (1982).

Whether a case shall be continued or proceed to trial is within the sound discretion of the judge. Noble v. Mead-Morrison Mfg. Co., 237 Mass. at 16. (1921) Commonwealth v. Festo, 251 Mass. 275, 277-278 (1925). Leonard v. Strong, 2 Mass. App. Ct. 467, 469 (1974). Dennis v. Austin, 4 Mass. App. Ct. 856 (1976). Contrast Ackyroyd's Case, 340 Mass. 214, 218-219 (1960). A trial judge's ruling on a continuance, whether positive or negative, is not to be disturbed except for an abuse of discretion. Hunnewell v. Hunnewell, 15 Mass. App 358.

Since in the practice of family law there is no provision for a default judgment the Probate and Family Court Judges have usually maintained the position that when possible both parties must be present in order to hear a contested matter. The fact that costs would have been incurred by Mrs. Badillo in appearing before the court is not a legitimate issue, since had she been present at her hearing and prevailed in her action for contempt, counsel fees and costs could have been requested and assessed. Further, there is no requirement that under the circumstances before the court, the court must base a decision of whether to proceed with the hearing on any assent by the only party present, nor state any legal basis for such continuance.

(e) Nieves v. Chacoun
Hampden Probate and Family Court No. 94D0076DV

Probate and Family Court Standing Order 1-88 provides that all contested matters regardless of the anticipated length of trial must be scheduled for Pre-Trial Conference. No trial date is to be assigned until after the Pre-Trial Conference is held.

Prior to the scheduled date of the Pre-Trial Conference, a four way meeting is to be held to identify and attempt to resolve the contested issues. Each side must prepare a written memorandum for submission to the Pre-Trial Judge at the conference.

During such conference a judge should make an effort to resolve issues, however, such attempt must be tempered to convey a real and perceived sense of the fair administration of justice. If the issues in dispute are not resolved at the conference an order should issue placing time limits on discovery and the approximate time of trial. A judge cannot deviate from the express terms of the Pre-Trial Order, and issues not contested nor litigated by the parties cannot become the subject or the court's decision. Slade v. Slade, 43 Mass. App. 376 (1997).

The General purpose of a Pre-Trial Conference is to simplify the issues, to amend pleadings if necessary, stipulate as to facts and the admissibility of documents, avoiding unnecessary proof, and set a limitation on the number of expert witnesses. It has been Judge Lyons' practice not to hold a hearing prior to or instantly after a Pre-Trial Conference when, in her opinion, there is sufficient reason to schedule the case to a future trial date.

In its report rendered on February 7, 2000 the Domestic Relations Committee of the Probate and Family Law of the Hampden County Bar Association set forth issues of concern to the Family and Probate Bar, one of which was that "Before a hearing the

parties should stipulate whether it is an evidentiary hearing or a hearing on representations of counsel. Evidentiary hearings must be scheduled, thereby avoiding the practice of having an evidentiary hearing evolve from a hearing at which counsel are arguing "on their own representations", which inevitably causes disruption in the scheduled court calendar. (Exhibit 1)

The committee has further found that although many cases settle at the Pre-Trial Conference, less than half are actually ready for trial. Many parties cannot even frame the issues until they are forced to Pre-Trial. Often cases will settle at a Pre-Trial Conference when they would not settle earlier. For that reason the committee was unwilling to endorse a procedure that would deny parties the opportunity to have a Pre-Trial Conference. (Exhibit 2)

Judges "have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake." Crocker v. Superior Court, 208 Mass. 162, 179 (1911). "Simply stated, implicit in the constitutional grant of judicial power is 'authority necessary to the exercise of . . .[that] power.'" O'Coins, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510 (1972), quoting from Opinion of the Justices, 279 Mass. 607, 609 (1932). Further, "every judge must exercise his inherent powers as necessary to secure the full and effective administration of justice."

Similarly, the rules of civil procedure are to be construed so as to "secure the just, speedy and inexpensive determination of every action." See Mass. Rules Civil Procedure, Rule.1.

It is of interest to note that when the hearing of this matter was finally held before another judge, Mr. Chacoun had no legal representation, evidence was introduced that was based totally on hearsay, including opinion evidence of the children and expert testimony was allowed without the appearance of a qualified expert. All such evidentiary issues should have been addressed at a Pre-Trial Conference and either resolved or if not resolved would probably have prompted the defendant to get the advice of counsel in order to protect his interests.

(f) **Toce v. Albert**
Hampden Probate and Family Court No. 97D2411AB

This complaint is based on an inexperienced attorney's perception that a judge accused her of lying as opposed to perceiving that the judge's statement was meant to challenge the accuracy of her representation with reference to M.G.L. 209A procedures. Further, there was no evidence to warrant the issuance of an emergency order.

The evidence presented by counsel's representation states that since the incident leading to the District Court Restraining Order there had been no further problems between the parties, that the ex-husband was not aware of the petitioner's address which was impounded and that her ex-husband had indicated there would be no opposition to an extension of the Order. Further, the District Court had already decided to issue a 209A Order on the same facts and, later, not further extend the order. Counsel also admitted that she understood that generally you cannot refer a restraining order from one court to another based on the same incident of abuse.

Generally the only occasion in which the Probate and Family Court should modify an abuse prevention order issued by the District Court, Boston Municipal Court

or Superior Court is solely to eliminate inconsistencies between said order and a decision issued by the Probate and Family Court.

No "stipulation" of the parties in the Probate and Family Court will, in and of itself, serve to modify any outstanding order of another court, or require the original, issuing court to modify its order.

Administrative Order 96-1 (Exhibit 3), however, allows a judge in one court to act on an order issued by another court under certain conditions. Administrative Order 96-1 makes it clear however, that in such circumstance such action by a judge is subject to interdepartmental judicial assignment procedure, and also to the terms of these guidelines

The Guidelines for Judicial Practice Abuse Prevention Proceedings (Exhibit 4) are promulgated in order to promote the safety of those who seek abuse prevention orders and to ensure the due process rights of those against whom these orders are sought.

Generally, plaintiffs seeking relief initially in the District Court, The Boston Municipal Court or the Superior Court should not be referred to the Probate and Family Court for any relief that is within the initial court's jurisdiction, regardless of marital status or the involvement of children. Guidelines For Judicial Practice; Abuse Prevention Proceeding, Guideline 2:07.

In all cases, the question of whether to refer a Plaintiff to another court should be made by a judge. Plaintiffs who are entitled to relief orders should not usually be referred to the Probate and Family Court unless those issues are already the subject of a prior or pending order in the court.

If parties are 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 said order and a decision of the Probate and Family Court.

In an emergency situation, where a plaintiff has come to a court other than the Probate and Family Court, and there is an existing Probate and Family Court custody and/or visitation order, there is an allegation or threat of serious harm to the children who are the subject of that order, and it is so late in the day that the plaintiff does not have sufficient time to reach the Probate and Family Court, the judge in the other court has at least two options. The first is to speak with a member of the Probate and Family Court to amend the existing order over the telephone. In such instance the substance of any such conversation should be supplied to the parties on the record, either through a memorandum to the file or in open court. In the alternative, the judge 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.

Although ADMINISTRATIVE ORDER 96-1 permits a Probate and Family Court judge to modify, extend or vacate an order entered by another Department, it is unlikely that the vacate option will be utilized frequently as the Probate and Family Court is not acting as the Appeals Court regarding orders entered by the issuing court. Justices Bulletin 96-19. (Exhibit 2)

No order shall be modified by the Probate and Family Court without notice and an opportunity to be heard being given to the parties to the order of the issuing court. On the

facts presented and the procedures set forth Judge Lyons acted properly in not hearing the motion.

(g) **Taylor v. Taylor**
Hampden County Probate and Family Court No. 94D2302

The decision in this case to retrieve the child's personal belongings as soon as possible was to prevent Julie Taylor from destroying or selling the child's property in order to pay bills, as the record indicated was previously done, and protect the child's belongings. It should be noted that the complaint to the Commission on Judicial Conduct in this case was not made by the former husband but by Mrs. Taylor. Based on the facts and allegations then before the court to second guess the judge's decision would be highly improper.

(h) **Kustra v. Kustra**
Hampden Probate and Family Court No. 98D3194

This was a divorce in which neither party was represented by counsel. The agreement entered into by the parties was a form boilerplate type divorce agreement that called for shared custody and called for what appeared to be an unfair and unreasonable distribution of assets. The fact that Mr. Kustra had physical custody of the children since 1991 does not in and of itself deny Mrs. Kustra an interest in the marital assets. The action taken by the court was to protect the parties from entering such an agreement without the benefit of counsel as to the reasonableness of the distribution of assets, and as to what effect shared custody would have on the minor children.

In making a determination of fairness and reasonableness in circumstances such as here presented, a judge should consider at least the following: (1) the financial and property division provisions of the agreement as a whole; (2) the context in which the

negotiations took place; (3) the background and knowledge of the parties; (4) the need to assist the parties and' (5) the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in G.L. c. 208 §34.

A court may refuse to accept or enforce an agreement which is unfair and unreasonable. Dominick v. Dominick, 18 Mass. App. Ct. 85 (1984).

The court also has broad discretion in ordering the trial of divorce actions, overseeing the presentation of evidence and generally controlling the litigation. Beninati v. Beninati, 18 Mass. App. Ct. 529 (1984).

In passing on the fairness of the agreement, the judge is not required to hold an evidentiary hearing, though the court may do so in its discretion.

(i) **Bournigal v. Kho**
Hampden Probate and Family Court No.s. 95W0043 and 99W1438

When this matter came before Judge Lyons the Court file indicated that Judge Sacks' Ex Parte Temporary Order of July 21, 1999 merely stated that this matter may be reheard on motion of the defendant. The file did not state the facts as recited by Attorney Nancy Gallman. Therefore, Judge Lyons, in her discretion, refused to vacate the temporary order made by another judge in conformity with the usual procedure followed by the Judges in the Hampden County Probate and Family Court.

Based on the court records and the facts presented to the court the action taken by Judge Lyons in the matters set forth in the First Charge did not violate Supreme Judicial Court Rule 3:09, and Canon 3(A)(4) of the Code of Judicial Conduct, nor do such actions set forth recurrent misconduct prejudicial to the administration of justice under M.G.L. Chapter 211C §2(5)(d) nor violate the Code of Judicial Conduct under M.G.L. Chapter 211C §2(5)(e).

SECOND CHARGE

Judge Lyons denies the allegation that she failed to be faithful to the law or alternately , failed to maintain professional competence in it. Specifically, Judge Lyons responds as follows to the following cases which the Commission of Judicial Conduct sets forth as examples of the allegations in the Second Charge.

a. Miller v. Matos
Franklin Probate and Family Court Numbers 97W0059-61

Judge Lyons incorporates by reference her response to the allegations set forth in the First Charge paragraph (b) as her response to this allegation.

b. Guardianship of Tawanda T. Ward
Hampden Probate and Family Court no. 96P420-GM

GL 201 §14 requires that the court find that the welfare of a minor requires the immediate appointment of a temporary guardian and set forth the nature of the emergency requiring such appointment and the particular harm sought to be avoided. See Fazio v. Fazio, 375 Mass. 394 (1978); Guardianship of Doe, 391 Mass. 614 (1984).

Whether on a petition for appointment of a guardian there shall be an immediate appointment or whether such appointment should be delayed and temporary appointment made rests in the discretion of the judge. Morrison v. Jackman, 297 Mass. 161 (1937).

The case file in this matter sets forth that the emergency petition filed was based on the petitioner wishing to pursue a claim for social security and insurance benefits. Since whether a Petition for Temporary Guardianship shall be allowed rests in the discretion of the judge, in making such decision it is within the judge's discretion to decide whether the welfare of the ward requires an immediate temporary guardian. In the petition filed in this matter there was no tenable evidence indicating any emergency or that any particular harm sought to be avoided that would require such appointment.

(c) **Morel v. Morel**
Hampden Probate and Family Court No. 94D2374

The facts set forth by the presentation of counsel for the parties and the Court's prior review of the case file establish no factual information, let alone compelling evidence, to establish an emergency. A review of the history of the problems experienced by the parties indicates that the facts set forth in the motion presented to the Court on August 2, 1999 had been ongoing for a five year period prior to August 2, 1999. No action was taken by DSS, even though the matter had been reported. The case file further indicates that in 1995 there was a 209A Order issued against Mark C. Morel. As a result of the long standing problem, counsel for Mrs. Morel suggested to Mr. Morel's counsel that they meet with the children about what was occurring in order to resolve any outstanding problems . The request was denied and the emergency motion filed. It should be noted that at the time of the motion the children were with Mr. Morel, thus vitiating any reason to act on the basis of an emergency.

(d) **Giard v. Giard**
Hampden Probate and Family Court No. 97D0413

This was a case in which Plaintiff's attorney failed to address or introduce evidence of requested relief. It is the usual procedure for a judge to grant the divorce after hearing the nature of the complaint and establishing the grounds for divorce. It is then incumbent on one of the attorneys representing the parties to address the issues raised and agreed upon in the proposed judgment. This procedure was not followed in this matter. In fact the Appeals Court in its decision recognized, but did not decide, whether the issues in the proposed judgment were properly raised or preserved.

(e) White v. White
Hampden Probate and Family Court No. 99D1254-AB

There are two distinct complaints stemming from the White matter. The first complaint stems from the fact that the judge provided no reason for a three month extension of an order rather a one year extension. The second complaint alleges that Judge Lyons was unfaithful to the law in her policy of reporting to the DSS incidents that have occurred which in part resulted in a 209A "no contact" and "stay away provision" when such order is vacated.

With reference to the first complaint, Findings of Fact and Conclusion Of Law are unnecessary on decisions on motion requests except as provided in Mass. Domestic Relations Procedure Rules, Rule 52. In reference to the second complaint Judge Lyons sets forth that she acted in accordance with M.G.L. Chapter 119 §51A, 51B and the Guidelines For Judicial Practice Abuse Prevention more specifically set forth in her reply to the allegation set forth in the LaPierre v. LaPierre case, paragraph (e) of the Second Charge.

It should also be noted that the extension of three months given by Judge Lyons was in fact for the same length of time as in the May 7, 1999 Restraining Order granted by another judge, after a full evidentiary hearing.

The facts further establish that in a subsequent complaint the affidavit signed by Mrs. White stated that she realized that the court was correct in reporting the situation to DSS had her restraining order been vacated. In essence, she agreed that Judge Lyons' action on June 11, 1999 was proper. This was the same court proceeding in which Judge Lyons action in threatening to report the situation to the DSS was raised and resulted in a complaint being filed.

(f) **Ward v. Ringer**
Hampden Probate and Family Court No. 99D0352

In this action Sherry Ward was attending a Batterer's Intervention Program and there was evidence in the case file that her boyfriend had a habit of driving with her son while drinking, thereby exposing the minor child to physical or emotional injury.

White v. White
Hampden Probate and Family Court No. 99D1254-AB

Judge Lyons sets forth and incorporates her reply to paragraph (e) of the Second Charge as her reply to the allegation in paragraph (f).

Russell v. Russell
Hampden Probate and Family Court No. 99D2559

Karwowski v. Karwowski
Hampden Probate and Family Court No. 99D0622

In response to the complaints based on the Russell v. Russell and Karwowski v. Karwowski cases Judge Lyons states that she acted in accordance with M.G.L. Chapter 119 §51A, 51B and the Guidelines For Judicial Practice, Abuse Prevention more specifically set forth in her reply to the allegations in the LaPierre v. LaPierre case paragraph (f) of the Second Charge. In both of these matters Judge Lyons took whatever action was necessary in an attempt to protect the minor children of the marriage. It should be noted that another judge also took similar action in the Russell matter.

LaPierre v. LaPierre
Hampden Probate and Family Court Nos. 99-D-1982, 99D-2188-AB

The case file in this matter sets forth that Mr. LaPierre had previously complained that Mrs. LaPierre threatened to kill him before his fourteen year old daughter punched him and tore his clothes, threw objects and called his daughter "a bitch"; smashed the car window and tore the phone out of the wall. Mrs. LaPierre then called the police and Mr.

LaPierre was arrested. The file also disclosed that Mrs. LaPierre was a cocaine user, and had been treated at a hospital for psychiatric problems. On July 21, 1999 Judge Lyons ordered an evaluation of both parties for substance abuse and requested the DSS make a treatment recommendation. The file also indicated that DSS advised that a Restraining Order under M.G.L. 209A be requested

In deciding on the complaints made against Judge Lyons with reference to her position to report a matter to DSS when a restraining order is vacated, one must review the statutory authority given to a Judge as well as the procedure to be used in 209A Orders.

M.G.L. Chapter 119 §51A sets forth that in addition to those persons required to report, any other person may make such a report if such person has cause to believe that a child may be suffering from abuse or neglect. To argue that a Judge of the Probate Court cannot report incidents of emotional abuse or neglect under such provisions is untenable.

In such matters, where the evidence presented and the affidavits filed indicate that a minor child may be, or is, or has been subjected to such emotional abuse or neglect makes it incumbent on a judge to file such a report.

If the Plaintiff appears before the court and requests that the case be dismissed or the 209A Order be vacated the court should determine whether vacating the order will place any children living in the home at risk.

Although no new incident of abuse is required to extend an existing order there must be a showing of continued need for the order.

If, in the course of proceedings under G.L. c. 209A, court personnel or the judge learns that harm may have occurred to a child in the household, that information should

be reviewed by the justice, clerk-magistrate, register or probation officer to determine if a report should be made to the Department of Social Services for an investigation under G.L. c. 119, ss. 51A, 51B. Guidelines For Judicial Practice; Abuse Prevention Proceedings, Guideline 10:03

If there is reason to believe that vacating the protective 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, ss. 51A and 51B would be filed immediately. – Guidelines For Judicial Practice; Abuse Prevention Proceedings, Guideline 5:08.

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 hard and/or by causing emotional and psychological harm to the child. Commentary, Guidelines For Judicial Practice; Abuse Prevention, Guideline 6:00.

Often DSS takes no further action on a matter after a 209A Order issues and is in effect. Also, when a 209A Order is vacated or is no longer in effect DSS is often not made aware of the lack of an order and on occasion fails to take any further action or investigate further.

Based on the court records and the facts presented to the court, the action taken by Judge Lyons in the matters set forth in the Second Charge were taken in accordance with M.G.L. Chapter 209A, M.G.L. Chapter 119 §51A, 51B and the Guidelines For Judicial Practice, Abuse Prevention Proceedings Guidelines and therefore did not violate Canon 3(A)(1).

THIRD CHARGE

Judge Lyons denies that she failed to conduct herself in a patient, dignified and courteous manner. Specifically, Judge Lyons responds as follows to the cases

which the Commission on Judicial Conduct sets forth as examples of the allegations in the Third Charge.

(a) Fernandez v. Fernandez
Hampden Probate and Family Court No. 96D2235AB

It is customary and prudent for a Judge, not only to have both parties present in entering an agreement, but also to have each party sign the agreement.

Even though Attorney Dieringer's instruction to her client not to attend a Court hearing may have been a good faith error, such action cannot be tolerated since counsel for the parties should not unilaterally decide to avoid a court's procedural requirements.

A lawyer shall not disregard or advise a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling". S.J.C. Rule 3:07, DR 7-106 @ (5) (6) (7) Appearing in his professional capacity before a tribunal, a lawyer shall not: . . . (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

Therefore, any experienced and able family law practitioner would not have advised a client not to appear before the court without prior court approval especially since it has been a recognized practice in the Hampden County Probate and Family Court to request by motion permission for a party not to appear at a scheduled hearing. Further the manner in which the Court informed Attorney Dieringer of her error should not be considered a scolding or chiding in an attempt to berate her.

(b) Toce v. Albert
Hampden County Probate and Family Court Number 97D2411AB

Judge Lyons adopts and incorporates her response to the First Charge paragraph (f) as her reply to the Third Charge paragraph (b).

Based on the foregoing, Judge Lyons actions did not constitute conduct that is prejudicial to the administration of justice, unbecoming a Judicial Officer, nor did she bring the Judicial office disrepute nor violate M.G.L.C. 211C §2(5)(d) and (e) and Canon 3 of the Code of Judicial Conduct as alleged.

Further responding, Judge Lyons sets forth the following: "Contrary to the perceptions of some, a judge is not a mere functionary to preserve order and lend ceremonial dignity to the proceedings" but rather "the directing and controlling mind at the trial." Whitney v. Wellesley & Boston Street Railway, 197 Mass. 495, 502 (1908). A judge is expected to be more than a referee, Commonwealth v. Hanscomb, 367 Mass. 726, 732 (1975) (Hennessey, J., concurring). He or she "need take no vow of silence", Commonwealth v. Haley, 363 Mass. 513, 519 (1973). When judges are expected to be docket managers, the interests of efficiency often impel them to become more openly involved than in more leisurely times.

Although she has not been motivated to be verbally abusive and regrets any perception of such occurrences as may exist, random comments such as have been the subject of some of the complaints against Judge Lyons while better unspoken, at most reflect initial impressions. "The essentials of sound judicial character lie far deeper than superficial deportment." Harrington v. Boston Elevated Railway, 229 Mass. 421, 433 (1918).

Although "a show of evanescent irritation – a modicum of quick temper . . . must be allowed even judges," Offutt v. United States, 348 U.S. 11, 17 (1954), even though it is

the duty of a judge to "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity . . . . " Canon 3(A)(3) of the Code of Judicial Conduct, S.J.C. Rule 3:09, a judge does not abuse his or her discretion when he or she does not act arbitrarily or whimsically.

Judicial discretion implies the "absence of arbitrary determination, capricious disposition, or whimsical thinking." Davis v. Boston Elevated Railway, 235 Mass. 482, 496 (1920). The phrase imports "the exercise of discriminating judgment within the bounds of reason."

In all matters in which complaints have been filed, a review of the Probate files and audio tapes in issue certainly do not establish an utter disregard of the law and established rules of practice and orders of the Probate Court. To conduct an investigation or a disciplinary proceeding as a substitute for appellate review is dangerous to the independence of the judiciary.

Judges should not be second-guessed nor subjected to undue harassment in the fair exercise of their discretion. Nor should they succumb to pressures created by what has occurred in the community.

If you familiarize yourself with all of the complaints filed against the Probate and Family Law Judges in Hampden County you will find that the most active and competent practitioners in Probate and Family Law have few complaints, if any.

In neither of the complaints filed against Judge Lyons did she violate Canon 3(A)(4) by failing to accord a party, or his lawyer, full right to be heard according to law. In all the matters regarding such complaints there was sufficient evidence presented either through court records or representations of counsel to allow the court to render

decisions. Any issues as to errors of law have been or should have been the subject of an appeal.

With reference to any allegation that Judge Lyons violated Canon 3(A)(1) of the Code of Judicial Conduct by failing to be faithful to the law, or alternatively failing to maintain professional competence in it, it is suggested that in making her rulings she complied with the mandates set forth by statute, case rulings and Guidelines For Judicial Practice.

The final alleged allegation, that of failing to conduct herself in a patient, dignified and courteous manner in violation of Canon 3(A)(3) the audio tape and court records of the Fernandez proceeding and the Toce proceedings verify that such complaints are based on a relatively inexperienced attorney's perception of what occurred, as opposed to said attorney not having an understanding of M.G.L. 209A court procedure and the court's procedure with reference to the required appearance of parties in a matter before the court, all as previously set forth in this reply.

As set forth in The Matter of Brown, 427 Mass 146 (1998) "it is quite possible for a judge to uphold the highest standards of integrity and impartiality, and yet violate the Canons of Judicial Conduct which require a judge to conduct himself in a manner that promotes public confidence in the judiciary, and to be patient, dignified and courteous to those with whom he deals in his official capacity."

It is therefore requested that all allegations set forth in the Statement of Formal Charges against Judge Marie E. Lyons be dismissed.

Samuel A. Marsella, as Attorney for
The Honorable Marie E. Lyons, Justice
of the Probate and Family Court

Dated: February 2, 2001

Law Offices Of
Egan, Flanagan and Cohen, P.C.

67 Market Street
P.O. Box 9035
Springfield, Massachusetts 01102-9035

Telephone (413) 737-0260
Telefax (413) 737-0121

February 7, 2000

TO: Family Law Bar

RE: Report on Domestic Relations Subcommittee of the Probate and Family Court

I sent out 75 letters to judges, members of the family law bar, assistant registers, DOR attorneys and others regarding Domestic Relations practice in Springfield. The following issues were raised by respondents:

1. Bolster the Lawyer for a Day program so that there is a lawyer available from 10 a.m. until 4 p.m. whenever the court is in session. Dick Davio runs the program and, unfortunately, there have been no available Lawyers for a Day at various times. Many lawyers would probably be willing to participate if they were asked.

2. Clarify the responsibilities and limitations of the volunteer lawyers in the Lawyer for A Day and Mediation Programs. Can they prepare agreements? If not, how can a mediated case be heard that day by the Court?

3. Institute a specific standard sanction for parties and attorneys who do not show up for a voluntary mediation without first notifying the court. Every volunteer mediator lawyer has had the experience of coming at 2:00 p.m. with the expectation of hearing six or eight cases and, in fact, hearing one or two, or sometimes none.

4. Prior to mediation in the family service office, parties should be told that they have the right to elect to have the recommendation of the family service officer withheld from the judge without prejudice.

5. It would be helpful if attorneys would exchange exhibits and memos the day before a hearing. If the Court is willing to make this a requirement, as it has for pre-trial memos, that would encourage compliance.

6. Before a hearing the parties should stipulate whether it is an evidentiary hearing or a hearing on representation of counsel. Evidentiary hearings must be scheduled, and we should avoid the practice of having an evidentiary hearing evolve from a hearing at which counsel are arguing on their own representations.

7. Clients with paid attorneys sometimes find themselves waiting while pro se litigants are taken ahead of them, particularly in motion sessions. This encourages clients to go pro se. Several lawyers addressed this problem and requested that clients with lawyers be taken before pro se's.

8. Group the pre-trials so that the court does not have to be fully cleared for a pre-trial that occurs in the middle of a motion session.

9. Institute a 10:00 a.m. call of the list. If the judge makes a call of the list at 10:00, it will let the judge know where the cases are and will allow clerk and judge to get organized. This may take some lawyers a while to get used to, but it is a way to move cases through the system more smoothly.

10. The impact of Rule 410 on Family Law practice – is it helpful, is it a satisfactory substitute for Requests for Production of Documents? Are attorneys complying, or is it being honored in the breach?

11. The location of the sign-up sheet for motions, which causes a jam up in the morning and tends to be somewhat chaotic. Can anyone think of a better way to sign up, remembering that sign-in also serves to trigger mediation in most cases.

The Bench/Bar Committee of the Probate and Family Court meets the first Monday of every month. In the future, I will report to you on the meetings and on suggestions made by recipients of this mailing.

I would appreciate receiving feedback from you on the issues above, or any of one or two of them that particularly concern you. The goal is to make practice in Domestic Relations smoother, more efficient and more pleasant for all of us.

Sincerely yours,

Eileen Z. Sorrentino

EZS:dbh

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MEMORANDUM

TO: Family Law Bar, Hampden County

FROM: Eileen Sorrentino

RE: Meeting of the Bench/Bar Committee, February 7, 2000

DATE: February 22, 2000

Resources

A folder on guidelines for visitation is available through David Ricard's office. It includes Judge Arline Rotman's guidelines and others that attorneys have submitted from other sources.

A calendar of holidays not commonly observed is available in David Ricard's office as part of the court's effort to make the court and attorneys more sensitive to cultural issues. The calendar includes Jewish holidays, Muslin holidays, Vietnamese holidays and others.

Marking Up a Case for PreTrial Conference

Many cases settle at pretrial; but of those that do not settle, less than half are actually ready for trial. The question was put to the group whether requests for a pretrial conference should be kicked back if the box certifying discovery as complete is not checked off. Among the comments from those attending the meeting:

- The party who did not mark up the case should be able to have it removed from the pretrial list by motion on the ground that discovery is not complete.
- If discovery is not complete, but the case is not moving along, one attorney can mark it up for a case management conference. There is a form for requesting a case management conference, but few attorneys are familiar with it.
- Brennan could automatically assign a case for a case management conference when he receives a request for a pretrial conference that is not certified as "discovery complete."
- Brennan could be asked to send back any requests that do not have "discovery completed" checked off.
- Many parties cannot even frame the issues until they are forced to pretrial. The pretrial

date forces the attorneys into action and compels a four-way conference. Notice of a case management conference does not have the same urgency as notice of a pretrial conference.

- Consensus: Often cases will settle at pretrial when they would not settle earlier. For that reason the group was unwilling to endorse a procedure that would deny parties the opportunity to have a pretrial conference when that might lead to a settlement.

Any comments?

Compelling Discovery

Judge Fuller suggested that if there is no answer at all to a discovery request, there is no need for the requesting party to have a conference with the other attorney prior to filing a motion to compel.

On the other hand, if the motion to compel addresses responses that have been provided but are thought to be insufficient, the attorneys need to confer before the requesting attorney files a motion to compel.

Do the other judges agree?

Child Support

For several years employers have been lobbying for a central address to which all child support checks would be sent, rather than having employers pay obligees directly. The long-term lobbying effort has paid off, and, effective March 1st, DOR will collect all child support that is paid by wage assignment, and DOR will send support checks to the obligees. The DOR spokesperson felt that the delay would be no more than a week. They are already doing this in most other Massachusetts counties. Hampden is one of the last.

Effective March 1st the present wage assignment form will be replaced with a new form that will apply to all support orders going forward, even those on old cases. As they do now, people who are paying by suspended wage assignment will also have to complete the form and check off "suspended wage assignment."

The DOR will not integrate these forms into the case files but keep them in a separate location, like the financial statements are kept.

Lawyer Volunteers

Family lawyers volunteer in the court system as (1) Lawyer for a Day, and (2) voluntary mediators.

Lawyer for a Day

- We need a Lawyer for the Day ("Lawyer")every day that court is in session, from 9:00 to 3:00, to manage the *pro se*'s. I spoke with Dick Davio, who schedules the Lawyer; Judy Potter, ED HCBA; and Dan Bruso, Chair, New Lawyers Committee. Dick is looking to expand the list by adding people admitted in the last two years. I've asked Dan for a list.

- We need a written job description for the Lawyer for a Day. What are the expectations and limitations? If two pro se's come in with a verbal agreement, can the Lawyer put it into acceptable form for them so they can go into court? Can the Lawyer take a *pro se* client on as a paying client if he/she is so inclined? If we encounter a *pro se* litigant who does not meet the financial eligibility requirements, should we decline to provide free legal services for this person? Is the Lawyer expected to explain the law to the parties?

- Some people who can afford private attorneys are slipping through and using the Lawyer for a Day. Mary Keeler checks eligibility. Are people signing the list without going through her?

Voluntary Mediation

- No-shows are the biggest problem. We are suggesting that the Court impose a standard uniform sanction against a party who does not notify the court that he or she will not participate.

- Same questions as above: Are mediators allowed or expected to draft agreements for parties who successfully mediate? And if not, how do they get their case heard on the day of mediation?

- How does the voluntary mediation program intersect with the new ADR program? Has the voluntary mediation program reached the end of its usefulness?

Rule 410

This Rule is causing a great deal of confusion and widespread non-compliance. Many family lawyers are still relying on Requests for Production of Documents and ignoring Rule 410. This issue will be discussed at the next Bench/Bar Meeting, which is the first Monday of March. If you have thoughts or comments, please forward them to me, and I will bring them to the meeting. Or come yourself–everyone is welcome.

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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT
OFFICE OF THE CHIEF JUSTICE
THREE CENTER PLAZA
BOSTON, MA 02108

MARY C. FITZPATRICK
CHIEF JUSTICE

TEL (617) 742-9743
FAX (617) 720-4122

TO: ALL JUSTICES, PROBATE AND FAMILY COURT DEPARTMENT

FROM: MARY C. FITZPATRICK, CHIEF JUSTICE M.C.F.

DATE: NOVEMBER 25, 1996

RE: ADMINISTRATIVE ORDER 96-1

ADMINISTRATIVE ORDER 96-1 permits automatic Interdepartmental Assignment of a Probate and Family Court judge to sit as a judge of the District, Superior or Boston Municipal Court to address inconsistencies in 209A orders issued by other Departments of the Trial Court with orders or judgments entered by the Probate and Family Court.

The following three pages specify procedures, requirements of contact between Departments, and the paperwork involved in implementing this Administrative Order.

As questions arise, please contact Attorney Jocelynne D. Welsh in this office.

Pursuant to ADMINISTRATIVE ORDER 96-1, sec. II entitled "Interdepartmental Judicial Assignment", a Probate and Family Court judge may act as a judge of the District/Superior/Boston Municipal Court to modify, extend, or vacate a 209A order entered by another Department having concurrent 209A jurisdiction.

The purpose of ADMINISTRATIVE ORDER 96-1 is to eliminate conflict between the terms of the District/Superior/Boston Municipal Court 209A order and the terms of any orders or decisions issued by the Probate and Family Court.

ADMINISTRATIVE ORDER 96-1 precludes the necessity of a Probate and Family Court judge seeking an assignment as a judge of a different Department when presented with matters involving 209As issued by another Department and orders or judgments entered by the Probate and Family Court which address custody and/or visitation.

The ORDER eliminates the burden on, and inconvenience to, the parties of having to appear in two different Court Departments, and, should assist the police by eliminating conflicting orders.

◇ ◇ ◇

The following directives are intended to give guidance as to how the Probate and Family Court can best eliminate potential conflicts.

A party seeking resolution of a conflict between a Probate and Family Court order or judgment and a 209A order issued by another Department shall file a motion in the Probate and Family Court seeking resolution of the conflict.

When the Probate and Family Court is requested to modify, extend or vacate an order issued by another Department, the Family Service Office will request that the 209A issuing court (District/Superior/Boston Municipal Court) FAX a copy of the 209A complaint, affidavit, and order to the Probate and Family Court before the Probate and Family Court conducts a hearing.

The parties to the original order must be given notice and an opportunity to be heard.

If the address of the plaintiff in the complaint brought in the other Department has been impounded, notice of the hearing shall be given by the Probate and Family Court Registry to prevent disclosure of the impounded address.

After the hearing, if appropriate, the Probate and Family Court judge, sitting as a District/Superior/Boston Municipal Court judge pursuant to this automatic interdepartmental judicial assignment, may modify, extend or vacate the 209A order issued by the other Department in order to resolve the problem of conflicting or inconsistent orders.

To modify a 209A order entered by another Department, a Probate and Family Court judge sitting as a District/Superior/Boston Municipal Court judge should check the "modified" box (#E) on page two of the copy of the other Department's 209A Abuse Prevention Order.

If the new 209A Abuse Prevention Order has previously been modified, a new 209A Abuse Prevention Order must be completed as Box E on page two will have already been used. In this situation, the caption at the top of page one must be filled out exactly as on the original 209A order showing the name and address of the District/Superior/Boston Municipal Court, etc. Box E should be filled in by the Probate and Family Court judge sitting as a District/Superior/Boston Municipal Court judge, reflecting the terms of the modification.

The judge should indicate on the 209A form whether or not both parties have been served in-hand by the court's designee with a copy of the modified order.

The 209A statute requires the filing of a motion to modify a 209A order. In a situation where no motion has been filed, for example, where the conflict is brought to the attention of the Probate and Family Court judge while the parties are before the court on the Probate and Family Court matter, the Probate and Family Court judge may decide to act as a judge of the District/Superior/Boston Municipal Court to address inconsistencies in a 209A order issued by another Department. The judge should indicate at Box E "The court on its' own motion...".

The terms of the modification should be written in the space available. If this space is inadequate, write "See modified order of even date". A new 209A order should then be completed with the caption reflecting the name and address of the original issuing court, the docket number of the issuing court's case, etc. The new order will modify only those portions of the original 209A order that conflict with the orders of the Probate and Family Court.

It should be noted that a Probate and Family Court judge sitting as a District/Superior/Boston Municipal Court judge cannot modify a 209A order by completing Section 8 regarding visitation.

When modifying the order of another Department, the Probate and Family Court judge sitting as a District/Superior/Boston Municipal Court judge must use the same dates for further hearing and expiration as appear in the original order.

At the space for signature, the Probate and Family Court judge should sign his/her name and add the appropriate designation: " District/Superior/Boston Municipal Court judge".

Although ADMINISTRATIVE ORDER 96-1 permits a Probate and Family Court judge to modify, extend or vacate an order entered by another Department, it is unlikely that the vacate option will be utilized frequently as the Probate and Family Court is not acting as the Appeals Court regarding orders entered by the issuing court.

To vacate a 209A order entered by another Department, a Probate and Family Court judge sitting as a District/Superior/Boston Municipal Court judge should check the "vacate" box (#F) on page two of the copy of the other Department's 209A Abuse Prevention Order.

At the space for signature, the Probate and Family Court judge should sign his/her name and add the appropriate designation: "District/Superior/Boston Municipal Court judge".

Please note that a judge who vacates a 209A order entered by another Department cannot then "reissue" a 209A order incorporating the information contained in the vacated order UNLESS the parties are before the Probate and Family Court with a new 209A complaint and affidavit.

When another Department's 209A is modified or vacated as described above, the Family Service Office will immediately transmit a copy of the order (and the accompanying order if space on the original 209A was inadequate for the complete details of the modification) and a copy of the motion and return of service, by FAX, to the issuing court for entry by that court into the Domestic Violence Record Keeping System; for notification by that court to the police department; and, to update their case file.

The Family Service Office will then return the papers to the Registry which will send a copy of all relevant papers to the issuing court as soon as possible, and in any event no later than three days after the order has been changed, by first class mail.

A Probate and Family Court judge sitting as a District/Superior/Boston Municipal Court judge who modifies, extends, or vacates a 209A order issued by another Department shall advise the party/parties appearing of the effects of the changed order, and that the changed order is subject to further modification, extension or vacating in future proceedings.

Specifically, the judge should explain, for example, that permitting pick-up for visitation does not mean that the 209A defendant may in any other circumstances violate the stay-away provisions of the order, or, that the defendant can telephone the plaintiff regarding a missed visitation if telephone contact is prohibited.

If the 209A order has been changed to accommodate visitation, the judge should advise the noncustodial parent to take a copy of the modified order with him/her when picking the children up or bringing them back to avoid any misunderstandings with the police.

The interdepartmental assignment shall expire immediately following issuance of a modified, extended, or vacated order.

Re: Notice to Police Departments

The original issuing court will notify the police that an order dated _____ entered by the District/Superior/Boston Municipal Court has been modified, extended, or vacated.

ADMINISTRATIVE ORDER 96-1 becomes effective December 1, 1996.

THE COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE OFFICE OF THE TRIAL COURT
Two Center Plaza
Boston, Massachusetts 02108

JOHN J. IRWIN, JR.
Chief Justice for
Administration and Management

Tel: (617) 7
Fax: (617)

MEMORANDUM

TO: Chief Justices of the Trial Court
First Justices of the Trial Court
Justices of the Trial Court
Clerk Magistrates of the Trial Court
Registers of Probate of the Trial Court
Recorder of the Land Court
Court Administrators of the Trial Court
Commissioner of Probation
Other Interested Parties

FROM: John J. Irwin, Jr.
Chief Justice for Administration and Management

RE: Guidelines for Judicial Practice: Abuse Prevention Proceedings

DATE: June 30, 1997

Enclosed for your information is a copy of the most recent edition of the *Guidelines for Judicial Practice: Abuse Prevention Proceedings.*

This edition updates the text of the Guidelines issued in October, 1996 to reflect changes in related statutory and case law on subjects discussed in the Guidelines. This includes changes or additions to Guidelines pertaining to filing and enforcement of foreign protection orders, the stalking law, the Constitutionality and applicability of preventive detention hearings to cases involving adults and juveniles, arrest for violation of gun surrender provisions of protective orders, service of orders, appeals, complaints for temporary relief filed on behalf of persons who are unable to appear in court without severe hardship due to a physical condition, and related memoranda issued by this office, certain Trial Court Administrative Offices and the Commissioner of Probation.

Please replace the October, 1996 version of the Guidelines with this edition. I commend this important information to your attention in the Trial Court's continuing effort to achieve our goals: 1) to promote the safety of those who seek abuse prevention orders and 2) to ensure the due process rights of those against whom these orders are sought.

Enclosure

2:07 Referral To and From Other Courts: Avoiding Inconsistent Orders. IF THE COURT HAS JURISDICTION BASED ON THE FACTS ALLEGED, 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. AT TEE BEGINNING OF EACH HEARING, WHETHER AN EX PARTE OR A FULL HEARING, 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.

PLAINTIFFS SEEKING RELIEF INITIALLY IN TEE DISTRICT COURT, THE BOSTON MUNICIPAL COURT OR THE SUPERIOR COURT SHOULD NOT BE REFERRED TO THE PROBATE AND FAMILY COURT FOR ANY RELIEF THAT IS WITHIN THE INITIAL COURT'S JURISDICTION, REGARDLESS OF MARITAL STATUS OR THE INVOLVEMENT OF CHILDREN, EXCEPT AS PROVIDED IN THE COMMENTARY TO GUIDELINE 3:07. SEE ALSO GUIDELINES 4:01, 5:01 AND 6:00.

WHILE PLAINTIFFS SEEKING RELIEF UNDER c. 209A GENERALLY SHOULD NOT BE REFERRED FROM ONE COURT TO ANOTHER COURT WITH JURISDICTION, A PLAINTIFF WHO HAS BEEN 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.

IN ALL CASES, THE QUESTION OF WHETHER TO REFER A PLAINTIFF TO ANOTHER COURT SHOULD BE MADE BY A JUDGE.

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 relief to which he or she is entitled under the law, and may expose the person to additional danger. This is particularly apparent 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, s. 3, par. 8. Although this requirement appears to relate only to Massachusetts orders, the parties should also 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. The response will govern 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 the District Court, the Boston Municipal Court and the Superior Court from issuing custody or support orders, since the Probate and Family Court has superseding authority in those areas and exclusive authority over visitation. If parties are 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 said order and a decision of the Probate and Family Court. See Guideline 13:00. For emergency situations, where the plaintiff alleges the likelihood of immediate harm to the children, see Guideline 3:07, and related commentary.

If there is an outstanding c. 209A restraining order in the same court between the same parties the court should be notified because the order sought might constitute a mutual order, requiring the judge to make written findings. See Guideline 6:06.

5:08 Request by the Plaintiff to Dismiss the Case. IF THE PLAINTIFF APPEARS ON THE DATE SCHEDULED FOR THE FULL HEARING, OR AT ANY OTHER TIME, AND REQUESTS THAT THE CASE BE DISMISSED, THE JUDGE SHOULD ASK CERTAIN QUESTIONS BEFORE DOING SO. FIRST, THE COURT SHOULD ASK ABOUT THE REASONS FOR THE DISMISSAL 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. 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.

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 VACATING 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.

COMMENTARY

The courts alone cannot protect a victim of family 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

Appendix J. The signature on the form provides a record of the plaintiff's action and some means of assuring the plaintiff's identity. However, the process should not be made burdensome and care should be taken to assure the plaintiff that dismissing the instant case does not prevent returning to court to seek protection in the future. The suggested form specifically informs the plaintiff that he or she may return to the court at any time to seek a new restraining order or criminal charges, if appropriate.

time, a restraining order might exacerbate the plaintiff's danger. Thus, the plaintiff's decision to vacate an order must be respected. Similarly, a plaintiff may feel compelled for economic or family reasons to seek to vacate a protective order. There can be no guarantee of adequate support for families in all situations, and the court cannot ensure that children or others will not suffer if the protective order is maintained.

It is appropriate to provide plaintiffs who wish to vacate protective orders with information about supportive services which 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 10:01) and information about batterers' treatment programs and any other appropriate services of which court personnel are aware.

There are several instances in which a different order would serve the plaintiff's purpose as effectively as dismissing 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 vacate the "no-contact" part of the order, but to leave the "stay away from the residence" order in effect. In another case, the plaintiff might wish for the defendant to come home, but still welcome a "refrain from abuse" order that did not interfere with that.

If the judge has reason to believe that vacating the protective 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, ss. 51A and 51B would be filed immediately. See Guideline 10:03.

Once a plaintiff has appeared before the court to vacate an order, it may be difficult to return no matter how great the danger. The judge should anticipate this by assuring the plaintiff that he or she may always return to the court to seek a new order or to bring criminal complaints for criminal activity.

Some courts ask the plaintiff to sign a form motion asking the court to dismiss the case. A District Court sample is provided at

6:00 "Permanent" Relief Orders: General. UPON A FINDING OF ABUSE, 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 PERSON ABUSED 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 THE PLAINTIFF'S ADDRESS TO BE IMPOUNDED; AND

(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.

THE COURT MAY ISSUE MUTUAL RESTRAINING ORDERS ONLY IF THE COURT HAS MADE SPECIFIC WRITTEN FINDINGS OF FACT. SEE GUIDELINE 6:07.

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 10:01.

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 HEARS THE CASE AT A LATER TIME WHO MAY AMEND THE ORDER TO ELIMINATE INCONSISTENT PROVISIONS PURSUANT TO GUIDELINE 13:00, AND WHO WILL HAVE SUPERSEDING JURISDICTION OVER CUSTODY AND SUPPORT AND EXCLUSIVE JURISDICTION OVER VISITATION OF MINOR CHILDREN.

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 MAY HAVE OCCURRED TO A CHILD IN THE HOUSEHOLD, THAT INFORMATION SHOULD BE REVIEWED BY THE JUSTICE, CLERK-MAGISTRATE, REGISTER OR PROBATION OFFICER TO DETERMINE IF A REPORT SHOULD BE MADE TO THE DEPARTMENT OF SOCIAL SERVICES FOR AN INVESTIGATION UNDER G.L. c. 119, ss. 51A, 51B. SEE GUIDELINE 1:06.

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-Magistrate, Register or 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, s. 51A. Depending on the outcome of its investigation in response to the report, the Department of Social Services may initiate a care and protection proceeding.