# Commonwealth of Massachusetts

# Trial Court

# Guidelines for Judicial Practice

# Abuse Prevention Proceedings


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**Executive Office of the Trial Court**

**1 Pemberton Sq., Boston, MA 02108**

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# General

## 1:00 In General; Definitions

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

Please note the term "clerk magistrate" in these Guidelines, unless otherwise expressly provided, shall mean anyone serving in the position of Clerk Magistrate, Clerk of Courts, Assistant Clerk Magistrate, or Register. The terms "clerk" or "clerk's office" shall mean any staff person working in the office of the Clerk Magistrate, Clerk of Courts, or Register.

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

- **Emergency Orders**. General Laws c. 209A, § 5 provides for temporary relief when the court is closed for business. When relief is granted under § 5, a complaint shall be filed in court on the next business day. Orders issued pursuant to § 5 are described in these Guidelines as "emergency" orders. *See* Guideline 11:00 Procedure for Response to Complaints When Court is Not in Session: Judicial

Response System and Guideline 1:08 Plaintiff Unable to Appear in Court. Emergency orders expire at the end of the next available court business day when a judge is sitting.

- ***Ex Parte* Orders**. General Laws c. 209A, § 4 provides for the issuance of abuse prevention orders without notice to the defendant if the plaintiff "demonstrates a substantial likelihood of immediate danger of abuse…." Orders obtained pursuant to G.L. c. 209A, § 4 have a maximum duration of ten court business days and are described in these Guidelines as "*ex parte*" orders. *See* Guidelines 3:00, et. seq., *Ex Parte* Hearings and Guidelines 4:00, et. seq., *Ex Parte* Orders. These orders are initiated by the filing of a complaint. A hearing is held forthwith, but with no notice to the defendant.
- **Orders After Notice**. Abuse prevention orders issued under c. 209A that are not issued on an emergency or *ex parte* basis require the filing of a complaint, notice to the defendant, and an opportunity for the defendant to be heard. Such orders are described in these Guidelines as "orders after notice." These orders may be issued in four different contexts: (1) after a hearing held within ten court business days after the issuance of an *ex parte* order; (2) when no emergency or *ex parte* order has been issued, but the defendant is present for the hearing (e.g., at an arraignment); (3) on motion for modification by either party during the life of an order; and, (4) on the expiration date of an order that was issued after notice. There are differences between an "initial order" after notice and an "extension order" after notice:
    - **Initial Order After Notice**. This term refers to the first order that issues at the scheduled two-party hearing. An initial order after notice has a

maximum duration of one year. G.L. c. 209A, § 3. *See* Guideline 6:00, et. seq., Orders After Notice.

- **Extension Order After Notice**. This term refers to an order issued on the expiration date of an initial order after notice. An extension order may be issued for any additional time necessary to protect the plaintiff. This could include a permanent order. *See* Guideline 6:08 Further Extending an Order After Notice on Its Expiration Date.

As used in these Guidelines, the following terms shall have the following meanings:

- **Abuse Prevention Order**. Any emergency, *ex parte*, or order after notice issued pursuant to c. 209A, as well as orders issued by the Probate and Family Court pursuant to G.L. c. 208, §§ 18, 34B or 34C, G.L. c. 209, § 32, orders issued in paternity actions pursuant to G.L. c. 209C, §§ 15 or 20, and any protection order issued by another jurisdiction as defined by G.L. c. 209A, § 1. If a guideline or particular commentary is limited to abuse prevention orders issued only pursuant to c. 209A, such limitation will be expressly noted. Otherwise, the use of the term "abuse prevention order" is intended to encompass all such orders listed herein.
- **Domestic Abuse**. Abuse as defined by G.L. c. 209A, § 1: the occurrence of one or more of the following acts between family or household members: (i) attempting to cause or causing physical harm; (ii) causing another to engage involuntarily in sexual relations by force, threat, or duress; or, (iii) placing another in fear of imminent serious physical harm. Family or household members are defined as: persons who (i) are or were married to one another; (ii) are or were residing together in the same household; (iii) are or were related by blood or marriage; (iv) have a child in common, regardless of whether they have ever married or lived together; or, (v) are or have been in a substantive dating or engagement relationship.

- **Intimate Partner Abuse Education Program**. The education program that formerly was referred to as a "certified batterer intervention program." While many materials and resources that are still in circulation, as well as c. 209A, continue to utilize the old name, the Guidelines will update references herein to the new name.
- **Parenting Time Orders**. In the Probate and Family Court, "visitation orders" are now referred to as "parenting time orders." While c. 209A uses the term "visitation," these Guidelines will use the same term utilized by the Probate and Family Court.
- **Terminated Orders**. Previous versions of the Guidelines, certain forms, and case law have used the term "vacate" or "vacated order" to describe those orders that have been terminated upon motion of either party or because the plaintiff did not appear at a scheduled hearing. In contexts other than c. 209A, the word "vacate" carries the connotation that the order should not have been originally issued. In the instance of c. 209A orders, however, vacating an order merely terminates the order as of the date it was vacated, with the record of the order remaining in the Statewide Registry of Civil Restraining Orders. Therefore, to avoid confusion, both the Guidelines and forms will henceforth use the word "terminated" to describe those orders that have been terminated upon motion of either party or because the plaintiff did not appear at a scheduled hearing. Please note, however, "vacate" will still be used when referring to specific language in a statute or case. *See* Guideline 6:04 Modification of Orders; Terminating Orders.

## Commentary

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

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

Case law has referred to orders issued pursuant to c. 209A as both "abuse prevention orders" and "abuse protection orders," as well as "restraining orders." These Guidelines will use the term "abuse prevention order" where a guideline applies to orders issued pursuant to G.L. c. 209A, as well as Probate and Family Court orders pursuant to G.L. c. 208, §§ 18, 34B, or 34C, or G.L. c. 209, § 32, orders issued in a paternity action pursuant to G.L. c. 209C, §§ 15 or 20, and protection orders issued by another jurisdiction. While the term "abuse prevention order" or "restraining order" will typically mean orders issued pursuant to c. 209A, where a guideline is limited to c. 209A orders, such limitation will be noted by referring to "abuse prevention orders pursuant to c. 209A."

It should be noted that, in 2014, the Legislature enacted a new crime, G.L. c. 265, § 13M, which prohibits "assault or assault and battery on a family or household member," but defined "family or household member" differently than that term is defined by c. 209A. The definition under § 13M is limited to intimate partners, that is, persons who (a) are or were married to one another, (b) have a child in common regardless of whether they have ever married or lived together, or (c) are or have been in a substantive dating or engagement relationship.

Although these Guidelines were not intended to apply to c. 258E proceedings, where harassment orders pursuant to G.L. c. 258E were intended to protect individuals who could not legally seek protection under G.L. c. 209A, and the procedures under the two statutes are very similar, the Appeals Court has noted that the Guidelines should "apply equally in harassment order proceedings, absent some issue particular to harassment orders." *F.A.P. v. J.E.S.*, 87 Mass. App. Ct. 595, 601 n.14 (2015). One important difference is that c. 258E permits anyone "suffering from harassment" to seek and obtain a harassment prevention order regardless of the relationship between the parties. *See A.R. v. L.C.*, 93 Mass. App. Ct.758, 492 493 (2018) (defining legal standard for a c. 258E order and noting it is higher than a "colloquial meaning" of the term "harassment"). If, during the hearing, the facts do not establish a basis for relief pursuant to c. 209A, but do appear to meet the requirements for relief pursuant to c. 258E, the plaintiff must fill out a new complaint (but can utilize the same affidavit), and a new case must be opened for the court to be able to issue an order pursuant to the c. 258E standard. In other words, the court cannot issue a c. 258E order where the plaintiff only filed a complaint pursuant to c. 209A, but the plaintiff can refile under c. 258E.

## 1:00A Subject Matter Jurisdiction; Eligibility for Relief

The District Court, Boston Municipal Court, Probate and Family Court, and Superior Court have subject matter jurisdiction over claims filed pursuant to G.L. c. 209A. (Note: The Juvenile Court does not.)

To be eligible for relief, a plaintiff must establish that they are suffering from "abuse" by a "family or household member" as those terms are defined by G.L. c. 209A.

"Abuse" is defined as "the occurrence of one or more of the following acts between family or household members:

a) attempting to cause or causing physical harm;

b) placing another in fear of imminent serious physical harm;

c) causing another to engage involuntarily in sexual relations by force, threat or duress."

"Family or household member" is defined as persons who:

a) are or were married to each other;

b) are or were residing together in the same household;

c) are or were related by blood or marriage;

d) have a child together, regardless of whether they have ever married or lived together;

e) are or have been in a substantive dating or engagement relationship.

Eligibility for relief based on a substantive dating or engagement relationship, however, does not extend to the Superior Court. G.L. c. 209A, § 1.

A plaintiff who is not eligible for relief under c. 209A may qualify for a harassment order pursuant to G.L. c. 258E which can be sought in the District Court, Boston Municipal Court, Juvenile Court, and Superior Court departments. (Note: Probate and Family Court does not have jurisdiction, and Juvenile Court has exclusive jurisdiction in a c. 258E action where the defendant is a minor). Unlike c. 209A, c. 258E does not require the plaintiff to have a familial, household, or

substantive dating or engagement relationship with the defendant. Anyone "suffering from harassment" may seek to obtain a harassment prevention order under c. 258E.

## Commentary

Chapter 209A confers authority to the District Court, Boston Municipal Court, Probate and Family Court, and Superior Court departments to issue abuse prevention orders regarding interpersonal violence, but not to Juvenile Court.

Current or previous marriage between the parties is only one of the requisite relationships eligible for an abuse prevention order. Unmarried persons who currently live together, or who did so in the past, are also within the purview of c. 209A, regardless of whether the relationship between them is sexual in nature. In addition, a substantive dating relationship between the parties provides a basis for the District Court, Boston Municipal Court, and Probate and Family Court departments to issue an abuse prevention order, regardless of whether the parties ever lived together. *See V.M. v. R.B.*, 94 Mass. App. Ct. 522, 525 (2018) (requisite relationship is not a jurisdictional requirement, it is merely an element of a claim for an abuse prevention order under G.L. c. 209A). Note: The Superior Court Department does not have authority to issue a c. 209A order where the plaintiff seeks relief based on the statutory criterion of a substantive dating or engagement relationship. *See* G.L. c. 209A, § 1.

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

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

In these cases, the court should give broad meaning to the term "substantive dating relationship" to assure that the protective purposes of the statute are achieved. *See E.C.O. v. Compton*, 464 Mass. 558, 564 (2013) (three-month relationship involving regular, mutual electronic real time and face-to-face communication through instant messaging and Skype sufficient to constitute a substantive dating relationship under the statute). The existence of a "substantive dating relationship" is to be determined on a case by case basis applying the factors set forth in G.L. c. 209A, § 1(e)(1)-(4), while keeping in mind the statute's protective purposes. *C.O. v. M.M.*, 442 Mass. 648, 651 (2004). The plaintiff bears the burden of demonstrating, by a preponderance of the evidence, that such a relationship existed between the parties. *Id.* at 654. The court should make appropriate inquiry to ascertain that the relationship between the parties is one that is covered under the statute. However, the nature of the relationship beyond the statutory definition is not an appropriate subject for comment.

The court should also give broad meaning to the words "related by blood or marriage." In *Turner v. Lewis*, the Court held that the paternal grandparent of a non-marital child was "related by blood" to the child's mother through the child, and therefore the child's mother was able to invoke the protection of a c. 209A order. 434 Mass. 331, 334 (2001). In reaching this conclusion, the Supreme Judicial Court explicitly noted the "social reality that the concept of 'family' is varied and evolving and, that as a result, different types of 'family' members will be forced into potentially unwanted contact with one another." *Id*. at 334-335.

Some circumstances may qualify for relief under more than one of the definitions of family or household member. For example, an unadopted "stepdaughter," who had not lived in her "stepfather's" household for twenty years following her biological mother's divorce from him, was both related through marriage and had previously resided in the same household, and therefore was eligible for relief pursuant to c. 209A. *Sorgman v. Sorgman*, 49 Mass. App. Ct. 416, 417-18 (2000). The Court expressly rejected the defendant's argument that the statute did not apply to "'ex-stepchildren' . . . whose 'ex' status has persisted for so many years," on the basis of the "plain statutory language" of G.L. c. 209A, §§ 1 and 3. *Id*. at 418. Similarly, a defendant who had lived with his father, the plaintiff, and her two teenage children for approximately two years before moving to a new residence was a household member for purposes of c. 209A. *Aguilar v. Hernandez-Mendez*, 66 Mass. App. Ct. 367 (2006). The Appeals Court held that, in light of the broad interpretation of the statute, the defendant was a household member and the plaintiff could obtain an abuse prevention order under the statute. *Id*. at 370.

Co-residents in a residential program, however, do not qualify as "household members" for purposes of G.L. c. 209A, § 1. *Silva v. Carmel*, 468 Mass. 18, 22 (2014). Despite living in the same facility and sharing living spaces, there is no "socially interdependent relationship;" persons are assigned to the residence by a government agency, and thus lack the "'family-like connection' that falls under the protection of G.L. c. 209A." *Id*. The purpose of the statute is "to prevent violence in the family setting," not acquaintance or stranger violence, or the myriad of relationships that may exist. *Id*. at 23.

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

If, during the hearing, the facts do not establish a basis for relief pursuant to c. 209A, but do appear to meet the requirements for relief pursuant to c. 258E, the plaintiff must fill out a new complaint (but can utilize the same affidavit), and a new case will be opened for the court to be able to issue an order pursuant to the c. 258E standard. In other words, the court cannot issue a c. 258E order where the plaintiff only filed a complaint pursuant to c. 209A, but the plaintiff can refile under c. 258E.

## 1:01 Protective Purpose of c. 209A

The fundamental purpose of proceedings under c. 209A is to adjudicate the need for protection from abuse and, if that need is found to exist, to issue an appropriate abuse prevention order. "Abuse" is defined in § 1 of G.L. c. 209A as the occurrence of one or more of the following acts between family or household members: (i) attempting to cause or causing physical harm; (ii) placing another in fear of imminent serious physical harm; or, (iii) causing another to engage involuntarily in sexual relations by force, threat, or duress. It is not inappropriate for the court to explore the basis for the request beyond what is in the affidavit in determining whether there is a need for protection from abuse.

Given the protective purpose, it is inappropriate for the court in c. 209A proceedings to attempt to reconcile the parties or to mediate disputes. The court may provide information about domestic violence advocacy, counseling for substance use disorder, or intimate partner abuse education programs, but such services are not a substitute for protective relief in the form of specific orders.

In some circumstances, the plaintiff may not have had contact with the police or the district attorney's office prior to seeking an abuse prevention order. In appropriate cases, the plaintiff may be referred to the district attorney's office to obtain information about seeking a criminal complaint. G.L. c. 209A, § 3A. *See* Guideline 2:12 Referral for a Criminal Complaint.

Conditions of pretrial release in a related criminal proceeding, even if they encompass the same conditions as an abuse prevention order, are not a proper basis for denying a request for an extension of an ex parte G.L. c. 209A abuse prevention order as pretrial release conditions "are no substitute for an abuse prevention order." *Vera V. v. Seymour S.*, 98 Mass. App. Ct. 315, 319 (2020).

## Commentary

The protective purpose of proceedings under c. 209A can be jeopardized if the court attempts to resolve any perceived underlying conflict or problem in the relationship between the parties. While it might seem desirable for the court to play what it believes to be a helpful and constructive role, this is not the purpose of the proceedings. Indeed, c. 209A expressly prohibits the court from compelling the parties to mediate any aspect of their case. G.L. c. 209A, § 3. *S.T. v. E.M.*, 80 Mass. App. Ct. 423, 430 n.8 (2011) (finding judge's referral to mediation "particularly troubling in light of the statute's explicit directive that '[n]o court shall compel parties to mediate any aspect of their case'"). The plaintiff has a right to invoke the court's protective authority against abuse. More importantly, any attempt to explore the nature of the underlying relationship between the parties can inappropriately shift the focus of the proceedings away from the issue of whether the plaintiff requires the protection of the court in the form of an abuse prevention order under c. 209A. The issues before the court when considering a request for a c. 209A complaint are limited in scope: is protection under the law warranted and, if so, what form should that protection take?

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

The plaintiff, upon filing a complaint for a protection order, is to be given the main resource flyer entitled "Resources for Safety and Support," which includes statewide listings for domestic violence programs, sexual assault programs, child witness to violence programs, 24-hour Hotlines, and the local district attorney's offices. Supplemental regional flyers are also available and include county specific information. These resources are available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed.

*See also* Guideline 4:05 Reconciliation; Guideline 6:01 Referral for Treatment or Supportive Services; Guideline 10:00 Civil Commitment for Alcohol or Other Substance Use Disorder; and, Guideline 12:05 Proceedings in Probate and Family Court: Pre-Trial Conferences and Other Court Proceedings. For a list of IPAE programs go to Mass.gov, search for "Intimate Partner Abuse Education Program Services," and click on "Download a list of Massachusetts Certified Intimate Partner Abuse Education Programs."

## 1:02 Due Process Considerations

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

Particular care is warranted regarding the following:

(a) An order should not issue unless the court is satisfied that the parties meet the definition of "family or household members" as defined by G.L. c. 209A, § 1, and that the facts alleged constitute abuse as defined by G.L. c. 209A, § 1, or, in the context of an emergency or *ex parte* order, a substantial likelihood of immediate danger of abuse. *See* Guideline 1:00A Subject Matter Jurisdiction; Eligibility for Relief.

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

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

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

(e) In appropriate circumstances, the court may decline to issue an *ex parte* order but rather choose to delay action on the complaint until both parties have been given notice and an opportunity to be heard. However, because the plaintiff will not have the protection of a c. 209A order in the interim between the filing of the complaint and the two-party hearing, such practice

should only be used in situations in which it is clear that the delay will not present an elevated danger to the plaintiff.

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

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

## Commentary

The issue of domestic violence has become the focus of legitimate and increasing public concern. However, that concern must not be permitted to affect or diminish the court's responsibility to remain neutral, to protect the rights of the parties in each case, and to address each case individually on its own merits. "Whether a defendant's constitutional rights have been violated [in a c. 209A proceeding] will depend on the fairness of a particular proceeding." *Frizado v. Frizado*, 420 Mass. 592, 598 (1995). *See also*, *C.O. v. M.M.*, 442 Mass. 648, 656-659 (2004) (court found that defendant's right to due process had been denied where defendant was not given the opportunity to present or cross-examine witnesses during a hearing on the question of continuing a temporary order). Proceeding with a hearing on a c. 209A complaint without prior notice to the defendant and a right to be heard constitutes an exception to fundamental due process. This emergency exception, i.e., the right to proceed *ex parte*, is justified only when there is "a substantial likelihood of an immediate danger of abuse." G.L. c. 209A, § 4.

Massachusetts' courts may issue an abuse prevention order under c. 209A against an out-of-state defendant even in cases where the court does not have personal jurisdiction over the defendant. *Caplan v. Donovan*, 450 Mass. 463, 463-64, (2008), cert. denied, *Donovan v. Caplan*, 553 U.S. 1018 (2008). However, such orders "cannot impose any personal obligations on a defendant, and [are] limited to prohibiting actions of the defendant." *Id.* at 469-471. *See* Guideline 3:03A Personal Jurisdiction over a Non-Resident Defendant and Guideline 4:01A *Ex Parte* Orders and a Non-Resident Defendant.

## 1:03 Procedural Rules; Discovery

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

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

### Commentary

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

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

## 1:04 Court's Relationship With Local Advocacy Groups

Courts should be open to contact from advocacy groups concerned with the issues of domestic violence. Meeting to discuss appropriate matters with representatives of such groups can be constructive for judges and other court personnel, as well as for the members of the groups themselves.

### Commentary

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

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

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

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

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

## 1:05 Public Access to c. 209A Case Files; Confidentiality of Records and Address Information

Public access to documents and case files in c. 209A proceedings is governed by c. 209A itself and by the law and procedures for court impoundment of court documents generally. Pursuant to G.L. c. 209A, § 8, records of abuse prevention order proceedings where the plaintiff and/or defendant is a minor (person under the age of 18) are to be withheld from public inspection except by order of the court. Without a court order, access is limited to the minor, the minor's parent(s), guardian(s), attorney, and to the plaintiff and the plaintiff's attorney.

Records of abuse prevention order proceedings where the parties are adults are available for public inspection, except for the plaintiff's residential address, residential telephone number, workplace name, workplace address, and workplace telephone number absent an order of the court. The plaintiff's residential address and workplace address, however, are to appear on the order and be accessible to the defendant and the defendant's attorney unless the plaintiff specifically requests that that information be withheld. If the plaintiff so requests, that information should not be included on the order and should not be disclosed to the defendant. In such cases, stay away orders should be framed in terms of "wherever that may be," and the appropriate box(es) should be checked so that the addresses will not appear on the order. Because the address information will therefore not be entered on the order or entered into the Department of Criminal Justice Information System (DCJIS), the address information is not accessible to law enforcement except during the business hours of the court. The plaintiff should be advised of this as the plaintiff may choose to notify the police department of their address if concerned that the defendant may come to that location.

The plaintiff must provide the information they want to keep confidential on the Plaintiff Confidential Information Form. This form is kept by the court, but is not part of the public record. A substitute residential and/or workplace address, such as a post office box, may be utilized where safety reasons are present, such as when the plaintiff is residing in a confidential domestic violence shelter. Confidential information shall be accessible at all reasonable times to the plaintiff and plaintiff's attorney, to those specifically authorized by the plaintiff to obtain such information, and, if necessary in the performance of their duties, to prosecutors, victim witness advocates, domestic violence victim counselors, sexual assault counselors, and law enforcement officers. Before providing any confidential information to an authorized person, the clerk's office should request identification to verify that the requestor is an authorized person and may require a written request on a Request for Access to Plaintiff Confidential Information. The provisions of § 8 apply to any protection order issued by another jurisdiction that is filed with the court pursuant to G.L. c. 209A, § 5A. Confidential portions of the record are not deemed to be public records under the provisions of G.L. c. 4, § 7, clause 26. G.L. c. 209A, § 8.

The plaintiff may also request that other information be impounded, that is, kept confidential from the general public by court order. The plaintiff may use the Motion for Impoundment & Affidavit. *See* Trial Court Rule VIII: Uniform Rules on Impoundment Procedure.

## Commentary

Except as noted, judicial records of c. 209A proceedings are presumptively open to the public. *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 608 (2000). *See* Trial Court Rule XIV: Uniform Rules on Public Access to Court Records. This includes the audio recordings of c. 209A proceedings.

Before providing public access to a c. 209A file involving adult parties, the clerk should review the file and redact or remove the plaintiff's residential address, residential telephone number, workplace name, workplace address, and workplace telephone number wherever it may appear. This would include photocopies of a plaintiff's identification for those courts that may keep this information in the file when verifying the identity of a plaintiff who is seeking to terminate a restraining order or vacate one of its provisions, consistent with Guideline 5:08 Request by the

Plaintiff to Terminate Abuse Prevention Order. Plaintiff safety is the most important aspect of the confidentiality requirements in c. 209A proceedings.

Unless the plaintiff has requested address information to remain confidential, the addresses will be listed on the order. Before providing a copy of an order that lists the plaintiff's residential and/or workplace addresses, the clerk should request identification to confirm that the person is in fact the defendant (or the defendant's attorney). Similarly, before any confidential information is provided to a person authorized to receive it pursuant to G. L. c. 209A, § 8, the case file should be carefully reviewed to determine if the information has also been impounded by a separate court order.

The court should also be cautious about eliciting the plaintiff's address information on the record during the hearing as the "For the Record" recording system allows online access to the audio of courtroom proceedings. Plaintiffs should be advised not to give their address information during the *ex parte* hearing unless specifically asked to do so by the judge. Then, prior to eliciting any address information, a judge can direct the clerk to use the "seal" button on the recording system to impound that portion of the audio. If the clerk does not press the "seal" button prior to address information being disclosed on the record, then the clerk can send an email to mass.support@fortherecord.com, designating the date, court, courtroom, and start and stop time of the segment that should be impounded.

If a plaintiff is residing at a domestic violence shelter, the plaintiff should not disclose that address, but instead use the mailing address provided by the shelter or other address that can be used for notice to the plaintiff without divulging the plaintiff's location. *See* G.L. c. 209B, § 3. *See also* G.L. c. 9A (Address Confidentiality Program).

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

## 1:06 Minors as Plaintiffs in c. 209A Actions

Generally, if a minor (person under the age of eighteen) seeks an abuse prevention order, a parent or guardian should file the petition on behalf of the minor. In such circumstances, the minor need not appear in court. Whether to require the minor to appear is within the discretion of the court.

If a minor plaintiff appears in court seeking an abuse prevention order against someone who is not a family member or a caretaker, the judge should attempt to secure the presence of a parent or guardian before proceeding with the hearing. If that is not practical, the judge may consider obtaining some form of authorization for the minor to proceed without a parent or guardian present. If neither is practical, the judge should consider appointing a *guardian ad litem* (GAL) or counsel for the minor before proceeding with the hearing. However, particularly in the case of a mature minor (sixteen or seventeen), the court should not refuse to issue an abuse prevention order simply because no adult is present.

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

Although by statute all case records of cases involving minor plaintiffs must be withheld from public inspection except by order of the court, *see* G.L. c. 209A, § 8, the courtroom should not be closed during c. 209A proceedings involving minors unless the strict requirements for closing

the courtroom have been met. *See* Commentary to Guideline 3:04 Public Nature of *Ex Parte* Hearings.

## Commentary

The court should be conscious of the sensitive nature of a request for an abuse prevention order on behalf of a minor. Although proceedings in the Juvenile Court (or the Juvenile Sessions of the District Court in those courts that retain juvenile jurisdiction) are closed to the public, there is no similar provision allowing closure during proceedings under c. 209A involving minors. However, care should be taken to minimize, to the extent possible, disclosure of unnecessary identifying information about the minors involved in such proceedings. Cases involving minors may require involvement of other governmental agencies and the court should not hesitate to direct court personnel to notify the Department of Children and Families (DCF) or any other agency where such notifications are required or advisable. *See* Guideline 10:03 Care and Protection Proceedings.

A petition under c. 209A on behalf of a minor should generally be made by a parent or guardian and is not dependent on whether the minor wants the order; if the parent or guardian establishes the basis for the issuance of an abuse prevention order, the court should issue the order. *Cf. Sharon v. City of Newton*, 437 Mass. 99, 108 (2002) (the law presumes that fit parents act in furtherance of the welfare and best interests of their children, and, with respect to matters relating to their care, custody, and upbringing, have a fundamental right to make those decisions for them). In some situations, the court should confirm that the adult filing on behalf of the minor has legal custody such that they have the authority to act on behalf of the minor. For example, where DCF has legal custody of the child(ren), only DCF may file on behalf of the child(ren). If the issue is ambiguous, but there is a basis to issue an *ex parte* order, the court should consider scheduling the two-party hearing sooner than the maximum ten days.

Authorization from a parent or guardian in writing, over the phone, or by videoconference may, in appropriate circumstances, substitute for the presence of such a person. In some circumstances, however, the court can and should allow a minor to proceed without a parent or guardian. The court should not refuse to act solely because the court cannot contact a parent or guardian, particularly where the minor is mature (sixteen or seventeen), and where the defendant is an intimate partner or a family member who is not a parent or guardian or where there is an imminent threat of bodily injury. Authorization from a parent or guardian is not required of course for an emancipated minor (e.g., a married minor needs no parent or guardian to be a plaintiff in a c. 209A action against their own spouse).

The standard for issuance of an order under c. 209A is the same for minors as for adults. Abuse is defined as attempting to cause or causing physical harm, placing another in fear of imminent serious physical harm, or causing another to engage involuntarily in sexual relations by force, threat, or duress. G.L. c. 209A, § 1. Evidence of involuntarily sexual relations by force, threat or duress under the third statutory definition of abuse (G.L. c. 209A, § 1(c)) does not require proof

of a reasonable fear of imminent harm to obtain relief. *Yahna Y. v. Sylvester S.*, 97 Mass. App. Ct. 184, 186-87 (2020). Sexual contact with a plaintiff under the age of sixteen that is not accompanied by force, threat, or duress does not meet the definition of abuse, even though it may constitute a criminal offense. It may, however, be a basis for the issuance of a c. 258E order. G.L. c. 258E, § 1. (defining harassment to include a violation of G.L. c. 265, § 23). *See also F.A.P. v. J.E.S.*, 87 Mass. App. Ct. 595, 599 (2015). Note, however, that while the Juvenile Court has no authority to issue relief under c. 209A, Juvenile Court does have authority to issue relief under c. 258E and has exclusive jurisdiction over c. 258E orders where the defendant is a minor.

## 1:06A Minors as Defendants in c. 209A Actions

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

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

If the plaintiff seeks an abuse prevention order against a minor defendant who is a family member, the judge should consider informing the plaintiff that the Juvenile Court can provide information about possible related actions that may provide appropriate services to the minor,

such as child requiring assistance proceedings, mental health services, or delinquency proceedings. (Note, the Juvenile Court is not authorized to issue c. 209A orders). *See* Guideline 2:12 Referral for a Criminal Complaint; Guideline 10:05 Child Requiring Assistance (CRA) Actions; and, Guideline 10:06 Mental Health Actions. Providing this information should be in addition to, and not in lieu of, receiving, hearing, and ruling on the c. 209A complaint. In appropriate circumstances, the judge may also consider requesting that court personnel file a report with the Department of Children and Families pursuant to G.L. c. 119, § 51A. *See* Guideline 10:03 Care and Protection Proceedings.

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

## Commentary

The standard for issuance of an order under c. 209A is the same for minors as for adults. Abuse is defined as attempting to cause or causing physical harm, placing another in fear of imminent serious physical harm, or causing another to engage involuntarily in sexual relations by force, threat, or duress. G.L. c. 209A, § 1. The court departments with c. 209A authority are the appropriate forum for a c. 209A even where the defendant is a minor as the Juvenile Court does not have jurisdiction over c. 209A orders. (The Juvenile Court does have jurisdiction over c. 258E orders and has exclusive jurisdiction where the defendant is a minor).

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

Judges should be aware that orders that might otherwise be appropriate for adults might not be appropriate when dealing with minors. For example, an order for a minor defendant to vacate and remain away from the home might render a minor homeless. If the judge finds a basis to issue an abuse prevention order against a minor defendant at the request of a family member or caretaker that requires the defendant to vacate the defendant's residence, the parent or guardian remains responsible for providing a safe residence for the minor defendant. Often a family member

or close friend can provide such a residence, but if no such placement is identified during the hearing, the court should request that the Department of Children and Families (DCF) respond on an emergency basis to take custody of the minor defendant. The court should develop a working relationship with the DCF that will facilitate such requests when they are necessary.

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

Cases involving minor defendants will often require involvement of other governmental agencies and the court should not hesitate to direct court personnel to notify the DCF or other agencies where such notifications are required or advisable. Depending on the situation, care and protection, child in need of services, mental health, or delinquency proceedings may provide needed services to the minor defendant and the minor defendant's family. *See* Guideline 10:03 Care and Protection Proceedings; Guideline 10:05 Child Requiring Assistance (CRA) Actions; and, Guideline 10:06 Mental Health Actions. In the event parallel proceedings are pending or are subsequently initiated resulting in orders by the Juvenile Court that are inconsistent with orders issued pursuant to c. 209A, the parties must either return to the issuing court to resolve the inconsistent order or the Juvenile Court judge may seek authorization from the Chief Justice of the Trial Court, pursuant to G.L. c. 211B, § 9, to act as a judge of the appropriate Trial Court Department and Division that issued the order to resolve the inconsistency and amend any no contact or vacate provisions of a c. 209A order accordingly on behalf of the appropriate Department.

## 1:07 Limited and Non-English Speaking Parties in c. 209A Actions

Non-English speaking parties have a right to the assistance of a qualified interpreter in court proceedings. *See* G.L. c. 221C, § 2. All interpreters should be sworn and should give their names for the record.

The Office of Court Interpreter Services (OCIS) schedules and deploys spoken language interpreters to all departments of the Trial Court. Upon written request, OCIS will provide interpreters to appear in criminal or civil proceedings. In emergency situations, where it is not feasible to schedule interpreter services in advance, upon request from a court, OCIS will attempt to provide an interpreter, and, if none is available, will provide interpreter services via telephone. Courts may also utilize *LanguageLine* which provides interpreter services over the telephone.

The Massachusetts Commission for the Deaf and Hard of Hearing is statutorily responsible for providing interpreters for American, and other, sign language(s). *See* G.L. c. 6, §§ 194 and § 96. All requests for sign language interpreters, however, must be made through OCIS, which enters all requests directly into the Commission's scheduling database.

If no OCIS interpreter is available, either in person or via telephone, as a last resort, the court should determine whether any court personnel might be able to interpret for the parties. Courts should never allow minor children to serve as interpreters, even in emergency situations.

Courts should never permit the defendant in the c. 209A action, nor anyone accompanying the defendant to court, to interpret for the plaintiff. Similarly, the plaintiff should never be permitted to interpret for the defendant.

### Commentary

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

Interpreter services may be arranged by the court by contacting OCIS at (617) 878-0343. You can also access an interpreter over the phone directly from *LanguageLine* by calling (800) 874-9426. *LanguageLine* resources are posted on Courtyard, the Trial Court's Intranet.

If an interpreter is assisting a limited or non-English speaking plaintiff in completing an affidavit, the plaintiff should first write the affidavit in his or her language. The interpreter shall then provide a written translation. The interpreter may use the form entitled Translation of Affidavit. If the limited or non-English speaking person is not literate, that individual should dictate the information to the interpreter to record in the plaintiff's native language, and then the interpreter will subsequently complete a translation of the affidavit. If time constraints prevent written translation of the affidavit prior to the hearing, the affidavit should be translated orally for the hearing, and the written translation should be completed prior to the end of the court day so that the English translation of the affidavit can be scanned by the clerk's office. In any of the above circumstances, the individual assisting the plaintiff must accurately transcribe the plaintiff's statement, and must include their name, along with the role they had in drafting the affidavit.

## 1:08 Plaintiff Unable to Appear in Court

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

In such circumstances, any justice of the Superior Court, Probate and Family Court, District Court, or Boston Municipal Court may grant an *ex parte* order, provided that the information provided by the plaintiff's representative demonstrates a substantial likelihood of immediate danger of abuse.

The plaintiff's presence is required, however, at the hearing after notice. Where the plaintiff's physical condition is expected to prevent them from appearing at the courthouse, either permanently or within the ten court business days in which the hearing after notice will occur, the court, in its discretion, may conduct the hearing by speakerphone or video. In this circumstance, the court should conduct the hearing in the courtroom so that the hearing will be recorded.

### Commentary

General Laws c. 209A, § 5 provides that when "the plaintiff is unable to appear in court because of severe hardship due to the plaintiff's physical condition, any justice of the superior, probate and family, district or Boston municipal court departments may grant relief to the plaintiff as provided under § 4 if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse." The court must be satisfied as to the identity of the plaintiff's representative and the representative's authority to act on behalf of the plaintiff. The court should take the plaintiff's physical condition into consideration in scheduling the hearing after notice within ten court business days.

This situation should be distinguished from situations where the representative is authorized to act on behalf of the plaintiff. If the representative holds a power of attorney that authorizes the holder of the power of attorney to seek protection orders on behalf of the plaintiff, the plaintiff is not required to be present for the hearing. *Petriello v. Indresano*, 87 Mass. App. Ct.

438, 443-44 (2015) (terms of power of attorney authorized person holding power of attorney to seek protection order on behalf of plaintiff). Similarly, where a parent or guardian files on behalf of a minor, the minor is not required to appear at the hearing. *See* Guideline 1:06 Minors as Plaintiffs in c. 209A Actions.

In handling abuse prevention orders involving plaintiffs who cannot be physically present at the hearing after notice, and when the representative does not hold a power of attorney or other authorization to appear on behalf of the plaintiff at the hearing after notice, and the court conducts the hearing by telephone, it is essential that the court confirm the plaintiff's identity. In many cases, the local police may be able to assist the court in making these determinations.

## 1:09 Plaintiff in Court Without Venue

General Laws c. 209A, § 2, provides a choice of venue to the plaintiff, who may commence the action in the court with venue over the plaintiff's current residence or, if the plaintiff has left a previous residence or household to avoid abuse, the court having venue over the previous residence or household. Venue, which is distinct from jurisdiction, may be waived if an objection is not made in a timely manner.

Occasionally, a plaintiff may seek an abuse prevention order in a court that does not have venue over the plaintiff's prior or current residence. Because the purpose of the venue provision is to facilitate a plaintiff's application for an order and to encourage the prompt and timely resolution of the application, a plaintiff seeking an *ex parte* order should never be turned away for lack of venue. Similarly, where the statute provides for the confidentiality of a plaintiff's address as part of the protective aspects of the statute, the court should ordinarily not address venue absent an objection by the defendant. *See* Guideline 5:01A Venue: Objection.

### Commentary

"A defect in venue does not irrevocably strip a court of all authority to hear a case." *M.B. v. J.B.*, 86 Mass. App. Ct. 108, 115 (2014). If an objection to venue is not raised, it is waived. *Id. Cf. Commonwealth v. Robinson*, 48 Mass. App. Ct. 329, 336 (1999). Because venue is not an issue of jurisdiction, *M.B.*, 86 Mass. App. Ct. at 115, venue considerations do not affect a court's authority to issue an *ex parte* order.

If an objection to venue is made and venue is in another court of the Commonwealth, the remedy is not dismissal, but rather transfer to a court with venue. *Cormier v. Pezrow New England, Inc.*, 437 Mass. 302, 307 (2002). *See* G.L. c. 218, § 2A (transfer of civil actions brought in wrong court); G.L. c. 223, § 15 (erroneous venue; procedure). *Cf. Markelson v. Dir. of Div. of Employment Sec.*, 383 Mass. 516, 518–19 (1981) ("Venue being a procedural matter which in no way affects the inherent authority of the District Court to entertain unemployment compensation claims, dismissal on that single basis is not required as a matter of law.").

Absent an objection by the defendant, the judge ordinarily should not address venue. There are a variety of reasons why a plaintiff may have sought relief in a court other than the one with venue over their current or prior residence. For example, a plaintiff may choose to file a c. 209A

complaint in the court where a criminal case is currently pending against the defendant, or the person is in fear of the defendant learning of a new residence and the court with venue over the prior residence is neither convenient for the plaintiff or the defendant. As venue is based on the plaintiff's residence and not the defendant's, the court should not presume that a defendant would be unfairly burdened, and therefore object to, appearing in a court different from the one with venue over the plaintiff's current or former residence. However, if it is obvious that the court is without venue and the judge determines that the plaintiff may be intentionally choosing a court without venue in an effort to prevent the defendant from appearing at the hearing after notice or present a defense, the court can consider returning the order to a court with venue following the procedure set forth in Guideline 5:01A Venue: Objection. The Issuing Court must also immediately provide copies of the complaint and order to the appropriate police department for service on the defendant. Note: This transfer procedure in Guideline 5:01A Venue: Objection, is only available to cure a defect in venue. Transfer of a case for any other reason, such as the existence of a mutual order in another court, still requires transfer through the administrative office of the appropriate court department (the department Chief Justice if transferring to a division within the same court department, or, if the courts are in different departments, the Chief Justice of the Trial Court).

## 1:10 Plaintiff in a Court Where There is No Judge Sitting

When a plaintiff seeking an abuse prevention order under c. 209A appears in a court where no judge is presently sitting, the clerk's office should assist the plaintiff in obtaining a hearing by video conference or telephone with a judge from the same department sitting in another location. The plaintiff should not be sent to a different court or instructed to wait until the Judicial Response System goes into operation at 4:30 p.m.

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

### Commentary

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

The judge in Court B will, after reviewing the documents, telephone the clerk's office in Court A to hold the hearing by video conference or telephone. If possible, the judge should conduct the hearing with the plaintiff on speakerphone in a courtroom, thus ensuring that the hearing is preserved on the record.

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

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

Following the hearing, the clerk's office in Court B should transmit a copy of the issued order to Court A. It is the responsibility of the clerk's office in Court A to transmit the order to the

appropriate police department for service on the defendant and to the probation department in Court A for the immediate input of the order into the Statewide Registry of Civil Restraining Orders. The clerk's office in Court B should also send the signed original documents to Court A by mail.

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

## 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order

At the beginning of each hearing, the judge should ask the plaintiff whether there are any outstanding court orders involving the same parties in the same or a different court. When a non-Probate and Family Court judge issues an order regarding minor children that is inconsistent with a Probate and Family Court support or custody order, including parenting time orders (formerly referred to as visitation orders), c. 209A requires that the court immediately transmit a copy of the inconsistent order to the Probate and Family Court as the Probate and Family Court will ultimately have to address the inconsistency. Once the Probate and Family Court has acted, the Probate and Family Court shall thereafter retain final jurisdiction over any custody, contact, or support orders regarding minor children. The rest of the order remains the same. *See* Guideline 13:00: Amending c. 209A Orders to Make Consistent with Subsequent Probate and Family Court Orders Regarding Children. The statute provides that this provision "shall not be interpreted to mean that superior, district or Boston municipal court judges are prohibited or discouraged from ordering all other necessary relief or issuing the custody and support provisions of orders pursuant to [c. 209A] for the full duration permitted under subsection (c)." G.L. c. 209A, § 3.

When issuing orders regarding minor children, the factors set forth in Guideline 4:03A: Ex Parte Orders Involving Minor Children, should be considered.

### Commentary

Chapter 209A now expressly authorizes the Superior Court, District Court, and Boston Municipal Court departments of the Trial Court to issue orders regarding minor children despite the existence of an inconsistent order by the Probate and Family Court. G.L. c. 209A, § 3. Courts other than Probate and Family Court are still precluded from setting parenting time schedules or conditions, but are permitted to issue an inconsistent no contact or custody order on an emergency basis to allow the parties time to obtain a hearing before the Probate and Family Court. Often, the

inconsistent provision will be a no contact order that would affect an existing parenting time schedule ordered by the Probate and Family Court.

If issuing a c. 209A Order after a hearing after notice that contains provisions inconsistent with an active Probate and Family Court custody, parenting time or support order, the judge should inform the clerk who will enter a specific docket code in the c. 209A case that will trigger an email report to designated recipients of the Administrative Office of the Probate and Family Court. The Probate and Family Court will review the case information to identify the appropriate division of the Probate and Family Court to schedule a hearing on the inconsistent order. That hearing should be scheduled within thirty days as set forth in the statute. G.L. c. 209A, § 3. If the Probate and Family Court issues superseding orders, the Probate and Family Court judge must also amend the c. 209A Order in accordance with Trial Court Administrative Order 21-3. *See* Guideline 13:00: Amending c. 209A Orders to Make Consistent with Subsequent Probate and Family Court Orders Regarding Children.

# Filing of the Complaint

## 2:00 Designation of Staff

The clerk and the chief probation officer in each court should designate particular personnel to respond to plaintiffs seeking relief under c. 209A.

### Commentary

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

## 2:01 Assisting the Plaintiff

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

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

### Commentary

The role of the clerk's office in processing c. 209A cases is to provide assistance. No attempt should be made to "screen out" such cases. *See* Guideline 2:05 Processing the Complaint. Staff members should also be prepared to assist those seeking to file a certified copy of a protection order issued by other jurisdictions, as well as the requisite affidavit attesting to the validity and effectiveness of the other jurisdiction's order. *See* Guideline 14:00 Filing and Enforcement of Abuse Prevention and Other Protective Orders Issued by Other Jurisdictions. Courts should encourage the involvement of victim assistance personnel or advocates in assisting the plaintiff with the complaint form. *See* Guideline 2:08 Role of Advocates in Assisting Parties.

The plaintiff, upon filing a complaint for a protection order, is to be given the main resource flyer entitled "Resources for Safety and Support," which includes statewide listings for domestic violence programs, sexual assault programs, child witness to violence programs, 24-hour Hotlines, and the local district attorney's offices. Supplemental regional flyers are also available and include county specific information. These resources are available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed.

Finally, court personnel should provide, if available, information prepared by the appropriate district attorney's office, pursuant to G.L. c. 209A, § 3A, regarding the options available for criminal prosecution.

## 2:02 Ensuring Privacy

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

### Commentary

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

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

## 2:03 Completing the Complaint; Obtaining Required Information

Staff members designated to assist plaintiffs seeking to file c. 209A complaints should explain, as necessary, the various sections of the Complaint for Protection from Abuse that the plaintiff must fill out.

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

The plaintiff should enter the appropriate information on the Plaintiff Confidential Information Form. A substitute residential and/or workplace address, such as a post office box, may be utilized where safety reasons are present, such as residing in a confidential domestic violence shelter. The information provided on this form is accessible only by the plaintiff, those authorized by the plaintiff, those authorized by statute, and those authorized by court order. *See* Guideline 1:05 Public Access to c. 209A Case Files; Confidentiality of Records and Address Information.

Each plaintiff should also complete the Defendant Information Form, providing all of the available information about the defendant that is necessary for a check of the Statewide Registry of Civil Restraining Orders and for service of an order, should one be issued. If the case involves the care and custody of minor child(ren), the plaintiff should be assisted in completing the Affidavit Disclosing Care or Custody Proceedings that is required by Uniform Trial Court Rule IV, Uniform Rule Requiring Disclosure of Pending and Concluded Care or Custody Matters.

### Commentary

Court personnel who assist plaintiffs in completing the forms should be thoroughly familiar with those forms and with the instructions for their use which are printed on the back of the form.

It is important that the Plaintiff Confidential Information Form be completed in each case to ensure that "confidential" information is not provided to unauthorized persons.

If a plaintiff is residing at a domestic violence shelter, the plaintiff should not disclose that address, but instead use the mailing address provided by the shelter or other address that can be used for notice to the plaintiff without divulging the plaintiff's location. *See* G.L. c. 209B, § 3. *See also* G.L. c. 9A (Address Confidentiality Program).

This Guideline recommends the use of the Defendant Information Form to obtain information important for completing the record check and for locating the defendant for service, should an order issue. Court personnel should obtain as much identifying information as possible for the record check, including: the defendant's date of birth, Social Security number, mother's maiden name, father's name, and alias. It is essential to have the defendant's date of birth for effective use of the Statewide Registry of Civil Restraining Orders and the Warrant Management System. Information necessary for service of an order is equally important, including the location where the defendant can be found, the defendant's physical appearance, whether the defendant has access to weapons, etc. This inquiry must be conducted with sensitivity.

In some cases, the plaintiff may not be able to provide all of the information requested on the Defendant Information Form and plaintiffs should not be discouraged from filing a complaint because they may lack some of the information requested on the form. Even though the court might not have sufficient data to run a complete search of the Statewide Registry of Civil Restraining Orders or enter an order into the Registry, the case should proceed, as these steps are not prerequisites to issuing an order. Where critical information is missing, the plaintiff should be apprised that law enforcement efforts to protect them are considerably hampered if the defendant cannot be accurately identified or served with notice. Some plaintiffs may be able to obtain additional information from home or other sources. In such cases, the issuance of the order should not be delayed, but plaintiffs should be instructed to provide such information to the court or the police department as soon as reasonably possible if they can obtain the information in a safe manner.

## 2:04 Plaintiff's Affidavit

Plaintiffs should file a signed, sworn statement ("affidavit") describing the factual basis of the complaint. *See* Guideline 2:03 Completing the Complaint; Obtaining Required Information, regarding affidavits in *ex parte* cases in the Probate and Family Court Department. If the plaintiff is limited or non-English speaking, *see* Guideline 1:07 Limited and Non-English Speaking Parties in c. 209A Actions.

Plaintiffs should be encouraged to provide as much information as possible about the allegations of abuse, including specific information about the most recent incident of abuse and the most serious incident, even if the most serious incident occurred some time ago. The plaintiff should be informed that the defendant will have access to the affidavit. If the plaintiff seeks an order that the defendant have no contact with or must stay away from the defendant's minor child(ren), the grounds for that request should be set forth on Page 2 of the Complaint. The affidavit should also set forth the basis for such an order concerning the child(ren).

### Commentary

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

The plaintiff must establish a basis for requesting that the court order no contact with the defendant's minor child(ren). "If there is to be a G.L. c. 209A order that a defendant stay away from and have no contact with [their] minor children, there must be independent support for the order." *Smith v. Joyce*, 421 Mass. 520, 523 (1995). Appropriate reasons for issuing such an order may include, but are not limited to, a finding that the child(ren) has/have been abused; that the child(ren) witnessed the defendant's abuse of the plaintiff and are, therefore, afraid of the defendant and would be harmed by seeing the defendant; or that contact with the child(ren) in the plaintiff's custody cannot be arranged without endangering the plaintiff. *See Schecter v. Schecter*, 88 Mass. App. Ct. 239, 251-52 (2015) (proper for court to issue order prohibiting contact with minor child where child witnessed father's abusive behavior toward the mother). If the plaintiff's child(ren), or the child(ren) in the plaintiff's custody, are not the defendant's child(ren), there need

be no such showing. With respect to the effect of orders precluding contact between the defendant and the defendant's child(ren), *see* Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order; Guideline 2:07 Referral to and from Other Courts and Avoiding Inconsistent Orders; and, Guideline 12:00 Probate and Family Court: Parenting Time and c. 209A Proceedings.

When a plaintiff cannot complete an affidavit, due to limited or no proficiency in English, inability to read or write, or other language difficulties, an advocate or interpreter may assist the plaintiff by transcribing the plaintiff's statement in the affidavit. The plaintiff is to complete the affidavit in the plaintiff's native language, and the interpreter is to translate the statement in writing for the court. *See* Guideline 1:07 Limited and Non-English Speaking Parties in c. 209A Actions.

## 2:05 Processing the Complaint

Persons seeking to file complaints under c. 209A should not be denied the right to do so. To the extent that it is clear that the nature of the relationship is not a qualifying relationship, the clerk's office can provide information regarding the availability of orders of protection pursuant to G.L. c. 258E. Even in such cases, if the plaintiff continues to request a c. 209A order, the Complaint for Protection from Abuse should be completed and the matter brought before the court.

The plaintiff, upon filing a complaint for a protection order, is to be given the "Resources for Safety and Support" flyers, which include statewide and regional listings for a variety of resources and programs.

### Commentary

Courts should not authorize or permit a step in the abuse prevention procedure similar to the "screening out" process that can occur in the complaint application stage in criminal cases.

The "Resources for Safety and Support" main flyer and supplemental regional flyers are available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed.

## 2:06 Clerk's Response to the Filing of Repetitious Complaints

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

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

### Commentary

A plaintiff may initially seek relief, but then not appear at a subsequent hearing, request the order be terminated, or decide not to report violations of an order. Many complex dynamics contribute to this behavior. These can include the plaintiff's need for financial support, a desire to reconcile with the defendant, coercion or intimidation by the defendant, family pressures, children's issues, and a plaintiff's sense of heightened danger at the time of separation.

It is not uncommon, given these complex dynamics, that courts may see repetitious complaints. Instead of discouraging this behavior, judges and court staff should make sure that plaintiffs are aware that they are not precluded from returning to court to seek an order of protection and that relief is available through the Judicial Response System even if the court is closed.

## 2:07 Referral to and from Other Courts and Avoiding Inconsistent Orders

Plaintiffs seeking relief initially in the District Court, the Boston Municipal Court, or the Superior Court Department should not be referred to the Probate and Family Court Department for any relief that is within the initial court's jurisdiction (including a plaintiff's request for child support), regardless of marital status or the fact that the parties have one or more child(ren) in common.

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

### Commentary

If the court department in which a person initially seeks protection under c. 209A has jurisdiction to hear c. 209A complaints, the person should be heard as soon as possible in that court, and should not be sent to another court. Referring a plaintiff to another court may discourage the person from seeking the relief to which they are entitled under the law and may expose the person to additional danger. This is particularly so where the other court is at some distance and may be inaccessible to the plaintiff.

Similarly, fragmenting the relief available in the initial court, such as refusing to address child support requests as part of a c. 209A order even when the plaintiff demonstrates that such an order is necessary to protect the plaintiff from abuse, denies the plaintiff rights which the law provides, and may discourage a plaintiff from seeking any relief at all.

## 2:08 Role of Advocates in Assisting Parties

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

### Commentary

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

An advocate may also be aware of potential problems which can be solved before the hearing (e.g., identifying the address, or other identifying information, of a defendant who does not live with the plaintiff), or can identify other problems of which the judge should be aware (e.g., the presence of weapons in the home which have allegedly been used in an abuse incident). An advocate should never be asked to serve an order on a defendant, but may facilitate coordination between the plaintiff and the police regarding plaintiff's return to the home and how the defendant will remove belongings. Moreover, an advocate may be in a position to assist a plaintiff in developing a plan of action which will help to keep the plaintiff safe after the order is issued and in making referrals for other appropriate kinds of assistance, such as support groups, shelters, etc.

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

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

## 2:09 Guideline Intentionally Deleted

## 2:10 Check of Criminal History Information, Including the Statewide Registry of Civil Restraining Orders, and Other Probation Department Involvement

As soon as the complaint is filed, the court's probation department must check all available criminal history information, from both State and Federal sources, including the Statewide Registry of Civil Restraining Orders, and provide the judge with information on any criminal record pertaining to the defendant and the plaintiff and any previous or current abuse prevention orders.

If the court issues an abuse prevention order, the probation department must, on the same day, record that order in the Statewide Registry of Civil Restraining Orders. Similarly, once a person files a certified copy of a protection order issued by another jurisdiction, along with an affidavit, the probation department must also record that order in the Statewide Registry of Civil Restraining Orders on the same day.

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

### Commentary

General Laws c. 209A, § 7, states that the judge "shall cause a search to be made" of the Statewide Registry of Civil Restraining Orders and shall review the resulting data. The Statewide Registry of Civil Restraining Orders contains records of active, expired, and terminated c. 209A orders. Similarly, the 1994 Violence Against Women Act provides that all available criminal history information, whether from State or Federal sources, is to be made available to a judge issuing abuse prevention orders. The probation department is required to make this search. It must be completed as soon as possible after the complaint is received, so that the judge will have the results when the case proceeds in court. This search should be repeated before each subsequent hearing so that the judge has access to the most up-to-date information.

The purpose of the search is to provide the court with information that can be essential to providing protection for the plaintiff, either in terms of immediate court action (where the defendant is on default or probation status, *see* Guideline 3:05 Court Action on Defendant's Default, Probation, Parole, or Warrant Status at *Ex Parte* Hearings; Heightened Safety Concerns and Guideline 5:07 Court Action on Defendant's Warrant Status), or in terms of appropriately adjudicating or fashioning abuse prevention orders. If the court's decision whether to issue or deny an order relies on such information, the judge should note on the record the specific information that was considered.

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

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

## 2:11 Check of the Warrant Management System (WMS) and Court Files

When the complaint is filed, the probation department must check the defendant's criminal record and the clerk's office must check the Warrant Management System (WMS) to see if there exists an outstanding warrant for either the plaintiff or the defendant. If so, that information must be provided to the judge at the time of the c. 209A hearing. These checks must be made each time the case is before the court. The clerk's office should also provide the court with all active or recent prior related abuse prevention orders in that court involving the parties. If the court becomes aware of information about active or recent criminal cases involving crimes of abuse against either the plaintiff or defendant, the clerk's office should provide those case files as well.

### Commentary

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

If the court discovers any outstanding warrants, the judge should determine the appropriate action to take in view of all of the circumstances, including the seriousness of the case and the reason the party is before the court.

## 2:12 Referral for a Criminal Complaint

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

In all cases, particularly those involving allegations of serious injury, court personnel should provide information developed by the district attorney's office, pursuant to G.L. c. 209A, § 3A, if available, regarding the options available for criminal prosecution. A plaintiff who wishes to pursue criminal charges should be referred to the district attorney's office, the police, or advocates within the court to discuss that decision. Alternatively, a plaintiff may immediately file an application for a criminal complaint in the clerk's office in a District Court or Boston Municipal Court. Providing information regarding procedures for a criminal complaint should be in addition to, and not in lieu of, receiving and processing the c. 209A complaint.

### Commentary

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

In certain cases, the degree of harm, or threat of harm, is so great that protection under c. 209A alone may not be sufficient. Particularly in those cases, court personnel should inform the plaintiff about the availability of criminal prosecution and provide, if available, information developed by the appropriate district attorney's office, pursuant to G.L. c. 209A, § 3A, regarding the options available for criminal prosecution.

Referral to the police, an advocate, or to the district attorney's office may be appropriate because it permits the prosecutor to assess, and to discuss with the plaintiff, the strength of a prospective criminal action, the level of participation required of the plaintiff in such an action, and possible outcomes.

## 2:13 Guideline Intentionally Deleted

# *Ex Parte* Hearings

## 3:00 *Ex Parte* Hearings: General

A plaintiff applying for an abuse prevention order under c. 209A should be brought before the court for a possible *ex parte* hearing as soon as is practicable. Proceeding with a hearing on a c. 209A complaint without prior notice to the defendant and a right to be heard constitutes an exception to fundamental due process. This exception, i.e., the right to proceed *ex parte*, is justified when there is "a substantial likelihood of immediate danger of abuse." G.L. c. 209A, § 4.

Court personnel or others assisting the plaintiff in filing the complaint should not attempt to determine whether an *ex parte* hearing is appropriate. It is for the judge to decide whether the grounds are sufficient to issue an order on an *ex parte* basis. All complaints should be brought promptly before the court, and the clerk's office should notify the judge when a plaintiff seeking a c. 209A protection order has entered the courtroom. *See* Guideline 3:01 Prioritizing *Ex Parte* Hearings.

If a plaintiff is "unable to appear in court without severe hardship due to the plaintiff's physical condition," a representative of the plaintiff may, "appear in court on the plaintiff's behalf and file the requisite complaint with an affidavit setting forth the circumstances preventing the plaintiff from appearing personally." G.L. c. 209A, § 5. *See* Guideline 1:08 Plaintiff Unable to Appear in Court.

### Commentary

The court must be cognizant that when a matter is scheduled for a two-party hearing without the issuance of an *ex parte* order, the plaintiff will not have the protection of a c. 209A order in the interim between the filing of the complaint and the subsequent two-party hearing. For this reason, such practice should be used only in situations in which it is clear that the delay and notice will not present an elevated danger to the plaintiff.

## 3:01 Prioritizing *Ex Parte* Hearings

*Ex parte* hearings should be held as soon as practicable after the complaint has been accomplished, signed, and the appropriate record checks are completed. *See* Guideline 2:10 Check of Criminal History Information, Including the Statewide Registry of Civil Restraining Orders, and Other Probation Department Involvement and Guideline 2:11 Check of the Warrant Management System (WMS) and Court Files. Each court should hear c. 209A *ex parte* hearings expeditiously so as to minimize the time a plaintiff must wait.

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

### Commentary

No plaintiff should be turned away, asked to make another trip to the courthouse, or required to wait an unreasonable period of time to be heard. Such delay could discourage a plaintiff in need of protection from remaining at the court or from returning to obtain necessary relief.

In exceptional circumstances, where the presence of the defendant can be obtained easily for a hearing that day, the court may briefly delay the hearing until the defendant is present, provided that doing so does not compromise the plaintiff's safety. The court must be cognizant that when a matter is scheduled for a two-party hearing without the issuance of an *ex parte* order, the plaintiff will not have the protection of a c. 209A order in the interim between the filing of the complaint and the subsequent two-party hearing. For this reason, such practice should be used only in situations in which it is clear that the delay and notice will not present an elevated danger to the plaintiff. Two examples of such situations are: (1) when the defendant is at the court being arraigned for the same conduct which is the basis for the c. 209A complaint, and (2) where the defendant may be available (e.g., at work) a short distance from the courthouse and can be notified of the hearing by telephone. In light of the potential complications of such a practice, the court should employ it sparingly, and should consider other options for minimizing the delay between issuance of the order and the two-party hearing, including the issuance of an order with a return date of less than ten days.

## 3:02 Guideline Intentionally Deleted

### Commentary

Substantive content is now included in Guideline 1:00A Subject Matter Jurisdiction; Eligibility for Relief.

## 3:03 Venue for c. 209A Complaints

Proceedings under c. 209A shall be filed, heard, and determined in the court having venue over the plaintiff's residence. If the plaintiff has fled a residence or household to avoid abuse, the plaintiff may commence the action either in the court with venue over the prior residence or in the court with venue over the present residence. G.L. c. 209A, § 2. Venue is largely a matter of convenience to the parties and does not affect a court's authority to issue temporary orders to protect a plaintiff from abuse. As such, if a plaintiff establishes a substantial likelihood of immediate danger of abuse, the court may issue an *ex parte* order pursuant to G.L. c. 209A, § 4, even if there is a question as to whether venue is proper.

### Commentary

A defect in venue does not irrevocably strip a court of all authority to hear a case. *M.B. v. J.B.*, 86 Mass. App. Ct. 108, 115 (2014). Venue is waivable, and, if not timely raised, is waived. *Id*.

Venue ordinarily should not be addressed when considering an *ex parte* order. *See* Guideline 1:09 Plaintiff in Court Without Venue.

## 3:03A Personal Jurisdiction over a Non-Resident Defendant

Since personal jurisdiction is a defense that must be raised, it need not be addressed at the *ex parte* hearing and the judge should issue any and all orders necessary to protect the plaintiff from further abuse.

Even in the absence of personal jurisdiction over a non-resident defendant, a court may nevertheless issue an abuse prevention order, provided that the order does not impose any affirmative duties on the defendant. *See* Guideline 4:01A *Ex Parte* Orders and a Non-Resident Defendant.

### Commentary

Lack of personal jurisdiction is an affirmative defense which, if not raised, is waived. *Am. Int'l Ins. Co. v. Robert Seuffer GMBH & Co. KG*, 468 Mass. 109, 118 (2014) ("raising the absence of personal jurisdiction as a defense in a responsive pleading may not alone suffice to preserve that defense. If a party alleges a lack of personal jurisdiction in an answer and then fails to timely pursue the defense, a forfeiture of that defense may result."). *See also Lamarche v. Lussier*, 65 Mass. App. Ct. 887, 890 (2006) (defense of lack of personal jurisdiction must be brought to the attention of the court).

In *Caplan v. Donovan*, the Supreme Judicial Court held that "a court may issue . . . an order of prevention and protection even without personal jurisdiction over the defendant, but may not impose affirmative obligations on the defendant if there is no personal jurisdiction." *Caplan v. Donovan*, 450 Mass. 463, 463-464 (2008), *cert. denied*, *Donovan v. Caplan*, 553 U.S. 1018 (2008). The affirmative obligations that would be at issue are child support and gun surrender orders. If the defendant raises the defense of lack of personal jurisdiction, the issue will need to be litigated at the hearing after notice. *See* Guideline 5:01B Personal Jurisdiction: Objection.

## 3:04 Public Nature of *Ex Parte* Hearings

All *ex parte* hearings should be held in the courtroom and recorded. They should never be held in the judge's lobby or off the record.

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

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

### Commentary

Despite the emotional and volatile issues often involved in a c. 209A *ex parte* hearing, the matter should be treated like any other civil proceeding and heard in open court. "Generally, public access to judicial proceedings may not be abridged absent an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Boston Herald, Inc. v. Superior Court Dep't of the Trial Court*, 421 Mass. 502, 505 (1995). Closure of the courtroom may occur if the following four requirements are met: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the judge must consider reasonable alternatives to closing the proceeding, and [4] the judge must make findings adequate to support the closure. Further, the findings must be particularized and supported by the record." *Id*. at 506. While sensitive issues may arise that would be appropriate to address at sidebar, as a general rule, two-party hearings should not be conducted at sidebar for many reasons including the safety implications of having the parties in such close proximity to one another. In appropriate cases, the judge might consider moving the matter to a less crowded courtroom rather than bringing the parties to sidebar.

Like any other hearing, the proceedings in the courtroom should be recorded and the public has a right to access these recordings. The public does not, however, have the right to access the plaintiff's residential address, residential telephone number, workplace name, workplace address, and workplace telephone number. G.L. c. 209A, § 8. Such information "shall be confidential and withheld from public inspection." *Id*. If, during the *ex parte* hearing it is necessary to disclose this information, the judge should direct the clerk to seal that portion of the audio so that this information remains inaccessible to the public.

## 3:05 Court Action on Defendant's Default, Probation, Parole, or Warrant Status at *Ex Parte* Hearings; Heightened Safety Concerns

General Laws c. 209A, § 7 requires that the judge "shall review the defendant's criminal history and history of civil restraining orders." The clerk's office should also check the Warrant Management System (WMS).

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

In all cases, judges should be mindful of safety concerns that may arise when attempting to serve the order on the defendant. For example, a defendant who may have access to guns or an alcohol or substance use disorder, or a defendant who may be alone with young children would be the type of information the police should be aware of in order to safely serve the order. If the judge becomes aware of such safety concerns, that information may be communicated to the police. This information could be noted on the Defendant Information Form that is sent with the order to the police. If a judge determines, based on the information available to the judge, there is an imminent threat of bodily injury to the plaintiff, whether based on the nature of outstanding warrants alone, the nature of any outstanding warrants combined with the assertions of the party seeking the c. 209A order, or solely upon the assertions of the party, the judge should check the appropriate box on the Order and direct the clerk's office, the victim witness advocate, or the district attorney's

office to notify the appropriate law enforcement officials of the situation and the circumstances that give rise to the imminent threat of bodily injury. Those officials would include, at a minimum, the police department that is responsible for serving the c. 209A order so that they can take necessary precautions when serving the order.

Probation departments are notified each day about the court activity of their probationers during the previous day. Therefore, each supervising probation officer should learn on the next court day about any c. 209A abuse prevention orders issued against his or her probationer and subsequently entered in the Court Activity Record Information (CARI) system. In situations of particular danger or urgency, however, it may be appropriate for the judge to order that the probation officer supervising a c. 209A defendant be notified immediately.

## Commentary

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

The requirement that the judge notify the "appropriate law enforcement officials" about an outstanding warrant is triggered by the existence of any outstanding warrant. The "appropriate law enforcement officials" are, at a minimum, the police department to which the c. 209A order is sent for service. Officers from that department will be attempting to serve the defendant with the order; they should be notified about outstanding warrants so that they can arrest the defendant on the warrants if and when they find the defendant. In addition, such notice is important for the safety of the serving police officers. On the appropriate part of the Order, the judge is to indicate whether or not there are outstanding warrants at the time the Order issued, so that law enforcement officials can take all necessary actions to execute any such outstanding warrants as soon as practicable, as well as to safely serve the order. Advocates can be particularly helpful in coordinating a plan for service with the police and the plaintiff, especially in situations where the defendant is currently at the residence to which the plaintiff will be returning.

Notice of the order to the Probation Department serves two purposes. First, the actions that constitute the basis for the c. 209A order may be sufficient to constitute a violation of the terms of the defendant's probation. The supervising probation officer may wish to bring the allegations to the attention of the sentencing court, either by sending the defendant a notice of probation violation, or, in situations of particular danger, requesting an arrest warrant.

Second, the supervising probation department can sometimes assist the court in notifying a defendant of the issuance of the *ex parte* order by providing information regarding the most recent address or by notifying the court that the defendant will be in a particular court on a particular date. This is particularly useful in situations where the plaintiff does not know where the defendant can be served or when attempts at service have been unsuccessful.

It is important that an up-to-date copy of the defendant's criminal record be obtained for each hearing; an old copy of the record may give inaccurate or incomplete information. In the District Court, Boston Municipal Court, and Superior Court departments, the defendant's criminal record should be returned to the defendant's probation file. In the Probate and Family Court, in accordance with Probate and Family Court Standing Order 1-11, all Court Activity Record Information (CARI) and Warrant Management System (WMS) information must be shredded unless a party or the judge requests that it be kept in the probation file. The printed copy of the defendant's criminal record should not be placed in the case file.

## 3:05A Court Action on Plaintiff's Warrant Status

If the court becomes aware, by means of the required check of the Statewide Registry of Civil Restraining Orders or the Warrant Management System (WMS) or otherwise, that a warrant for the plaintiff's arrest is outstanding, the court should address the warrant before the end of the hearing. The District Court, Boston Municipal Court, or Superior Court may release the plaintiff on personal recognizance, bail the plaintiff under G.L. c. 276, §§ 29-30, or hold the plaintiff without bail and order the plaintiff transported to the court that issued the warrant under G.L. c. 37, § 24(a).

The Probate and Family Court may arrange to have the plaintiff transported to the nearest court with jurisdiction to address the warrant.

### Commentary

If the court discovers any outstanding warrants, the judge should determine the appropriate action to take in view of all of the circumstances, including the seriousness of the case and the reason the party is before the court.

## 3:06 Standard; Burden of Proof; Rules of Evidence

At the *ex parte* hearing, the plaintiff must prove, by a preponderance of the evidence, that there is a substantial likelihood of immediate danger of abuse. "Abuse" is the occurrence of one or more of the following acts between family or household members: (1) attempting to cause or causing physical harm, (2) placing another in fear of imminent serious physical harm, (3) causing another to engage involuntarily in sexual relations by force, threat, or duress. G.L. c. 209A, § 1.

The common law rules of evidence, e.g., those regarding hearsay, authentication, and best evidence, do not apply in c. 209A hearings, subject to considerations of fundamental fairness.

### Commentary

The regular civil standard of proof, preponderance of the evidence, should be applied. The plaintiff bears the burden of proof. *Jones v. Gallagher*, 54 Mass. App. Ct. 833, 890 (2002). *See* Guideline 5:04 Standard and Burden of Proof.

At the *ex parte* hearing, as at the hearing after notice in c. 209A proceedings, strict adherence to the common law rules of evidence is not expressly required by the statute. *M.B. v. J.B.*, 86 Mass. App. Ct. 108, 110 n.5 (2014). For example, the court can properly receive testimony that would otherwise be hearsay (e.g., "the doctor said that I had a concussion"). "The rules of evidence need not be followed, provided there is fairness in what evidence is admitted and relied on." *Frizado v. Frizado*, 420 Mass. 592, 597-98 (1995).

The plaintiff can establish abuse by proving the defendant attempted to cause or caused the plaintiff physical harm, *Corrado v. Hedrick*, 65 Mass. App. Ct. 477, 478, 483 (2006) (*ex parte* order properly issued where defendant hit plaintiff on two occasions and threw her into a refrigerator), or that the defendant caused the plaintiff to engage involuntarily in sexual relations by force, threat, or duress. Where the defendant caused the plaintiff to engage involuntarily in sexual relations by force, the plaintiff is not required to prove reasonable fear of imminent harm to obtain relief. *Yahna Y. v. Sylvester S.*, 97 Mass. App. Ct. 184, 186-87 (2020).

Abuse can also be established where the defendant placed the plaintiff in fear of imminent serious physical harm. G.L. c. 209A, § 1(b). For this definition of abuse, the focus is on whether the defendant's conduct placed the plaintiff in "reasonable apprehension that [the defendant] might physically abuse [the plaintiff]." *Commonwealth v. Gordon*, 407 Mass. 340, 350 (1990). "In determining whether an apprehension of anticipated physical force is reasonable, a court will look to the actions and words of the defendant in light of the attendant circumstances." *Ginsberg v. Blacker*, 67 Mass. App. Ct. at 143, quoting *Gordon*, 407 Mass. at 349. A specific incident of past violence is not required for fear of imminent serious harm to be reasonable. *Noelle N. v. Frasier F.,* 97 Mass. App. Ct. 660, 665 (2020) (defendant's erratic and unstable behavior, in the context of an

escalating and emotional argument over parenting time of minor children, created a reasonable fear of imminent serious physical harm). *See also Ginsberg v. Blacker*, 67 Mass. App. Ct. 139, 142 (2006) (standard met where plaintiff testified that defendant came right up into plaintiff's face, screaming and waving his hands about very close to her face, so close to her that she could feel his "spit" on her face, defendant followed her when she tried to leave shouting obscenities); *Smith v. Jones*, 75 Mass. App. Ct. 540, 545 (2009) (although the defendant never made an explicit threat of violence after the relationship ended, the compulsive contacts (thousands of calls, thirty-eight voicemails, following her on vacation, stating he would "force me into a conversation," despite plaintiff's request that the defendant refrain), was of sufficient intensity to permit the judge to conclude the plaintiff was in reasonable fear of physical harm); *Smith v. Jones*, 67 Mass. App. Ct. 129, 134 (2006) (plaintiff's testimony that boyfriend, after break-up, sent e-mail saying "he wished he could stab the plaintiff in the heart" and an ambiguous answer about whether she was afraid the defendant would "come after her" justified issuance of *ex parte* order).

Conditions of pretrial release in a related criminal proceeding, even if they encompass the same conditions as an abuse prevention order, are not a proper basis to deny a G.L. c. 209A abuse prevention order. *Vera V. v. Seymour S.*, 98 Mass. App. Ct. 315, 318 (2020).

## 3:07 Conduct of *Ex Parte* Hearings

The *ex parte* hearing itself should consist of testimony by the plaintiff under oath as to the factual grounds for the complaint and the need for the relief sought. The judge should determine whether there are any outstanding court orders involving the same parties in the same or a different court.

If the plaintiff has filed an affidavit that provides the court with substantive information supporting the complaint, the judge may rely on the affidavit to simplify the plaintiff's testimony. If the content of the affidavit alone does not provide sufficient evidence on the issue of abuse and the need for an abuse prevention order, the court may consider additional evidence, including further testimony, police reports or other documents, or observations of the plaintiff's visible physical injuries or physical state of being (e.g. behavior). The court should question the plaintiff as necessary in order to obtain relevant information and assess credibility. Since the plaintiff is unopposed at the *ex parte* hearing, it is essential that the court be satisfied that the evidence submitted is credible, and sufficient as a matter of law, to justify the issuance of an order. The court should also hear the sworn testimony of any available witnesses offered by the plaintiff. The court may also consider applicable police reports provided by a party or otherwise available to the court. Where credible facts relevant to this inquiry are elicited during the hearing, but are not included in the affidavit, the judge should add those additional facts on the affidavit in such a way to denote they were added, and credited, by the judge. This will allow future judges hearing the case to be better informed about the full context of the issuance of the order.

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

Where there is a statutory basis for relief, the court should review with the plaintiff the relief sought and should never refuse to consider particular types of relief available under c. 209A or send the plaintiff to a different court for relief that can be obtained in the court where the plaintiff chose to file the c. 209A complaint. A court is not precluded from issuing a temporary custody or support order that is inconsistent with an outstanding Probate and Family Court order for custody or support in appropriate cases. *See* Guideline 4:03A *Ex Parte* Orders Involving Minor Children. If the plaintiff is unable to appear in court for the *ex parte* hearing without severe hardship due to the plaintiff's physical condition, then a representative may appear in court on the plaintiff's behalf and file the requisite complaint with an affidavit setting forth the circumstances preventing the plaintiff from appearing personally. *See* Guideline 1:08 Plaintiff Unable to Appear in Court.

## Commentary

In 2014, the Legislature amended c. 209A to expressly authorize the Superior Court, District Court, and Boston Municipal Court departments to issue orders regarding minor children despite the existence of an inconsistent order by the Probate and Family Court. G.L. c. 209A, § 3. This amendment still precludes courts other than the Probate and Family Court from setting parenting time schedules or conditions, but recognized that a no contact or custody order could be entered on an emergency basis and for a period of time (up to thirty days) that would allow the parties time to obtain a hearing before the Probate and Family Court. That said, a judge should be very cautious of awarding custody to a plaintiff on an *ex parte* basis where a Probate and Family Court awarded sole custody to the defendant. More often, the inconsistent provision will be a no contact order that would affect an existing parenting time schedule ordered by the Probate and Family Court. *See* Guideline 4:03A *Ex Parte* Orders Involving Minor Children. A no contact order that would be inconsistent with a parenting time order may be appropriate in circumstances where there has been a material change in circumstances since the issuance of the Probate and Family Court order warranting a temporary suspension of a parenting time order. If the court finds there is not a basis to issue an inconsistent order, then the plaintiff should be advised to seek modification of the parenting time order in the Probate and Family Court.

Similarly, orders issued in the course of *ex parte* hearings should not ordinarily include terms of support or compensation for damages. Rather, claims for such relief should be considered at the hearing after notice. *See* Guideline 4:03 *Ex Parte* Support and Compensation Orders.

## 3:08 Repetitious Complaints

Each complaint must be evaluated on its own merits to determine whether evidence exists to support issuance of an abuse prevention order.

The fact that a plaintiff has unsuccessfully sought relief previously, or has previously obtained abuse prevention orders but not sought to extend them, is not relevant to the decision on the need for relief in response to the new complaint.

### Commentary

A plaintiff may initially seek relief, but then not appear at a subsequent hearing, request the order be terminated, or decide not to report violations of an order. Many complex dynamics contribute to this behavior. These can include, but are not limited to, the following: the plaintiff's need for financial support, the plaintiff's desire to reconcile with the defendant, coercion or intimidation by the defendant, family pressures, children's issues, and a plaintiff's sense of heightened danger at the time of separation.

It is not uncommon, given these complex dynamics, that courts may see repetitious complaints. Instead of discouraging this behavior, judges and court staff should make sure that plaintiffs are aware that they are not precluded from returning to court to seek an order of protection either during court hours or through the Judicial Response System even if the court is closed.

## 3:09 Role of Advocates at *Ex Parte* Hearings

Judges should permit advocates to stand with the plaintiff whom they are assisting throughout the proceedings and to aid and support the plaintiff during the hearing to the extent that the plaintiff wishes it and the court deems it helpful.

### Commentary

Trained advocates and friends or relatives of the plaintiff can play an important role in supporting the plaintiff through what may be a difficult process and in reminding the plaintiff to provide the court with all relevant information. *See* Guideline 2:08 Role of Advocates in Assisting Parties.

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

The advocate can also assist in safety planning, including safety planning for service of the abuse prevention order. The advocate can also be asked to notify the Department of Children and Families (DCF) or the Executive Office of Elder Affairs (EOEA) to seek protective services for a child or elder where appropriate.

# Ex Parte Orders

## 4:00 Duration of *Ex Parte* Orders

Any order entered after an *ex parte* hearing must have a duration of no more than ten court business days. (The day the order is issued does not count toward that ten-day period, but the return day does count; weekends and holidays are not included.) The order should be effective through 4:00 p.m. on the date set for the hearing after notice.

### Commentary

Proceeding with a hearing on a c. 209A complaint without prior notice to the defendant and a right to be heard constitutes an exception to fundamental due process. This exception, i.e., the right to proceed *ex parte*, is justified when there is "a substantial likelihood of immediate danger of abuse." G.L. c. 209A, § 4. *See* Guideline 3:00 *Ex Parte* Hearings: General. This exception to the defendant's due process rights can last only until the defendant can be notified and a hearing can be scheduled and conducted. Accordingly, the *ex parte* orders should last only until the hearing after notice can be held, and that hearing should be scheduled for a date as soon as possible, consistent with service on the defendant, and, in any event, no more than "ten court business days" after the *ex parte* hearing. G.L. c. 209A, § 4, second par.

## 4:01 Content of *Ex Parte* Orders

If the plaintiff demonstrates, by a preponderance of the evidence, a "substantial likelihood of immediate danger of abuse," as required by statute, the court should issue an *ex parte* order. *See* Guideline 3:00 *Ex Parte* Hearings: General. The court may enter any order that it deems necessary to protect a plaintiff from further abuse, including, but not limited to, any of the orders expressly authorized by G.L. c. 209A, § 3:

(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, workplace, or school;

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

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

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

(i) ordering the possession, care, and control of any domesticated animal owned, possessed, leased, kept, or held by either party or any minor child(ren) residing in the household to the plaintiff or petitioner.

(j) ordering the defendant to refrain from abusing, threatening, taking, interfering with, transferring, encumbering, concealing, harming, or otherwise disposing of a domesticated animal;

(k) authorizing the defendant to pick up any personal belongings in the company of the police at a time agreed to by the plaintiff;

(l) ordering the surrender or continued surrender of a defendant's license to carry firearms and firearms identification card, and the surrender of all firearms, rifles, shotguns, machine guns, and ammunition upon a finding that failure to do so would present a likelihood of abuse to the plaintiff; and,

(m) recommending (as opposed to ordering) that the defendant attend a Department of Public Health certified intimate partner abuse education (IPAE) program.

An *ex parte* order must include the surrender of guns, ammunition, and gun licenses. *See* Guideline 1:05 Public Access to c. 209A Case Files; Confidentiality of Records and Address Information.

The plaintiff's residential and workplace addresses are to be entered on the order and accessible to the defendant unless the plaintiff requests that this information be withheld from the order. G.L. c. 209A, § 8. *See* Guideline 1:05 Public Access to c. 209A Case Files; Confidentiality of Records and Address Information. In circumstances where the court issues a stay away order and the plaintiff has requested address information be withheld from the defendant, the order should be entered as "wherever that may be," and the appropriate box(es) should be checked so that the addresses will not appear on the order.

If a plaintiff is requesting support or compensation orders, *see* Guideline 4:03 *Ex Parte* Support and Compensation Orders.

## Commentary

The authority granted to the court under c. 209A is not limited to any specific type of relief. G.L. c. 209A, § 3. Nor is the court limited to the forms of relief originally requested by the plaintiff on the complaint form. The court should fashion its relief order in response to the need for protection shown by the facts presented at the hearing. (This is in contrast to c. 258E relief which is limited to the relief listed in G.L. c. 258E, § 3(a). *J.C. v. J.H.*, 92 Mass. App. Ct. 224, 230 (2017)).

The protective purpose of *ex parte* orders may be interpreted broadly. For example, under appropriate circumstances, an *ex parte* order requiring the defendant to provide the keys to the family car to the plaintiff (e.g., by leaving them with police) might be deemed "protective," in the

sense that it eliminates one reason for the plaintiff to contact the defendant during the duration of the *ex parte* order. When justified by the facts, the court has authority to order a defendant to stay away from a particular school or job site, even if the defendant attends the school or works at the same location. In such cases, the plaintiff should be provided with an additional copy of the order for the school or employer, so that responsible parties in those places will be notified of the court order, as well as of the possibility of danger to the plaintiff.

When a plaintiff requests that the address information be withheld from the order, it will not be transmitted to the police; rather, police would only be able to access this information directly from the court during court business hours. The judge should alert the plaintiff to this as the plaintiff may choose to notify the police department with jurisdiction over his or her residential and workplace addresses so that the police can access this information at any time.

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

The terms of the orders must be reasonable. They must be clear in their language, so that the parties as well as the police know what has been ordered and what conduct would violate the order. Plain language should be used (e.g., "100 yards," not "the length of a football field"). Conditional language should not be used (e.g., contact with the child(ren) should not be conditioned on the defendant's sobriety). In particular, an order which requires the defendant to stay a great distance, such as 1,000 yards, or even 500 or 200 yards, away from the plaintiff is difficult to enforce because it is almost impossible for such a defendant to know when he or she is in violation. Similarly, a District Court order that requires a defendant to stay more than 100 yards away from the plaintiff may make it difficult for the Probate and Family Court to craft an appropriate parenting time order without amending the District Court order. *See* Guideline 12:07 Custody and Parenting Time Orders in Probate and Family Court: Amending Inconsistent c. 209A Orders. Orders that require a defendant to stay from 20 to 100 yards away from the plaintiff are usually sufficient. An order requiring the defendant to stay "at least one hundred yards away" from the plaintiff and her job has been interpreted to require the defendant to stay one hundred yards away from "all of the property on which the workplace is located including the adjacent parking lot." *Commonwealth v. O'Shea*, 41 Mass. App. Ct. 115, 118 (1996), overruled on other grounds, *Commonwealth v. Delaney*, 425 Mass. 587 (1997). A defendant may be found guilty of a violation of an order to stay away from the protected person's workplace when he or she visits the plaintiff's workplace, even if the plaintiff is not at work at the time of the visit. *See Commonwealth v. Habenstreit*, 57 Mass. App. Ct. 785, 787 (2003), rev. denied, *Commonwealth v. Habenstreit*, 439 Mass. 785 (2003) (since the purpose of the abuse prevention order is to provide a safe haven for the victim and to lessen the chances for

contact between the victim and the defendant, to interpret the order to apply only when the victim was physically present would "encourage a defendant to keep himself or herself informed about a protected person's schedule, a result that would be contrary to the intent of the order itself.").

When a "stay away" order from a particular location does not specify a distance, a defendant is prohibited from (1) entering the boundary line of the property identified in the order, (2) taking actions that directly intrude on the property identified in the order, or (3) being in a position sufficiently proximate to the property identified in the order such that the defendant would be able to abuse or contact the plaintiff, in the event that the plaintiff were on the property, or entering or leaving it, even if the plaintiff is not present. *Commonwealth v. Watson*, 94 Mass. App. Ct. 244, 248-49 (2018) (defendant violated stay away order where defendant was immediately outside the property boundary long enough to be observed by a person who called the police and for the police to arrive five minutes later); *Commonwealth v. Telcinord*, 94 Mass. App. Ct. 232, 241 (2018) (defendant violated order to stay away from victim's residence where defendant parked on the victim's street in clear sight of the victim's residence). In setting out this standard, the Appeals Court noted that there certainly would be circumstances when a judge may consider it more appropriate to set a specific distance to stay away from a fixed location rather than issuing a general stay away order, but made clear that whether to do so was left to the "broad discretion" of the judge issuing the order "who is in the best position to determine what the circumstances require to create a safe haven for the protected party." *Telcinord*, 94 Mass. App. Ct. at 240-41.

No-contact orders can be violated through use of Facebook, Twitter, texting, or other social media.

As noted in Guideline 4:03A Ex Parte Orders Involving Minor Children, a judge issuing an *ex parte* order has the authority to issue temporary custody, support, and no contact orders which may be inconsistent with existing probate court orders involving the same parties. *See* Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order; Guideline 4:03 *Ex Parte* Support and Compensation Orders; and, Guideline 4:03A *Ex Parte* Orders Involving Minor Children for a further discussion and cautions regarding such orders.

Reading the terms of the order to the plaintiff before signing it allows the judge to make sure that the order is complete and understandable, and allows a plaintiff to bring to the judge's attention any requested relief that may have been forgotten or overlooked.

## 4:01A *Ex Parte* Orders and a Non-Resident Defendant

The fact that a defendant is a non-resident is not dispositive on the issue of personal jurisdiction. In any event, because personal jurisdiction is a defense that must be raised, it need not be addressed at the *ex parte* hearing and the judge should issue any and all orders necessary to protect the plaintiff from further abuse.

Even in the absence of personal jurisdiction over a non-resident defendant, a court may issue prohibitory orders (e.g., no contact, no abuse), but cannot impose any affirmative duties on the defendant (e.g., surrender guns, pay child support). While a gun surrender order is an affirmative order, all *ex parte* orders issued under c. 209A must include an order that the defendant surrender any firearms, rifles, shotguns, and/or ammunition, as well as firearm licenses. G.L. c. 209A, § 3B. *See* Guideline 4:04 *Ex Parte* Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC). The defendant then has the right to challenge the court's personal jurisdiction and to contest the court's authority to issue this affirmative order. *See* Guideline 5:01B Personal Jurisdiction: Objection. If personal jurisdiction is questionable, the court can also order the defendant not to possess any firearms in the Commonwealth.

### Commentary

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

All *ex parte* orders issued under c. 209A, however, must include an order that the defendant surrender any firearms, rifles, shotguns, and/or ammunition as well as firearms licenses. G.L. c. 209A, § 3B. *See* Guideline 4:04 *Ex Parte* Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC).

Because lack of personal jurisdiction is a defense that must be raised, the judge should issue whatever *ex parte* orders are necessary to protect the plaintiff from further abuse, including affirmative orders such as surrender of guns, ammunition, and firearms licenses (FID; LTC), even if the defendant is a non-resident. *See Lamarche v. Lussier*, 65 Mass. App. Ct. 887, 890 (2006) (defense of lack of personal jurisdiction must be brought to the attention of the court).

## 4:02 *Ex Parte* Orders to Vacate

The court's decision to issue an *ex parte* order to the defendant to vacate the household residence should be based solely upon the plaintiff's need for such an order as a means of protection from abuse. The defendant's property interest in the household residence is irrelevant to the question of whether an order to vacate the residence is necessary to protect the plaintiff from abuse.

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

### Commentary

A vacate order requires a defendant "to leave and remain away from a premises." G.L. c. 209A, § 1. For an *ex parte* order to vacate, the only relevant issues are (1) whether the plaintiff shows, by a preponderance of the evidence, that there is "a substantial likelihood of immediate danger of abuse," and (2) whether an order to vacate is needed to protect the plaintiff from that abuse.

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

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

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

Unless the parties meet the statutory requirements to be eligible for an abuse prevention order, c. 209A does not apply to landlord-tenant situations. *See* Guideline 1:00A Subject Matter Jurisdiction; Eligibility for Relief. Chapter 209A should not be used as a substitute for the procedural requirements of summary process. *Cf. C.E.R. v. P.C.*, 91 Mass. App. Ct. 124, 132 (2017) (a judge must carefully evaluate the evidence to ensure that a protection order is not being used "as a short-cut for evicting tenants without following summary process procedures, or for preventing purely economic harm").

## 4:03 *Ex Parte* Support and Compensation Orders

Orders issued in the course of *ex parte* hearings should not ordinarily include terms of support or compensation for damages. Claims for such relief should be considered at the hearing after notice. The fact that the plaintiff is requesting such relief should be indicated on the complaint and also on the *ex parte* order so as to provide notice to the defendant that the issue will be addressed at the hearing after notice. The court should check the appropriate box on the Order which notifies the defendant that, at the next scheduled hearing, testimony will be heard and evidence considered on the issue of support for the plaintiff and/or minor child(ren) and that the defendant is ordered to bring to that hearing any financial records that provide evidence of the defendant's current income.

### Commentary

There are several significant difficulties with ordering support and compensation on the *ex parte* order. First, it is unlikely that the court will obtain adequate information in an *ex parte* hearing to make an informed decision in these matters, which can require substantial fact finding and testimony from both sides. The hearing after notice provides a more appropriate forum for such fact finding. Second, even if an order for support or compensation were issued, it is not likely to be enforced prior to the expiration of the *ex parte* order. In fact, attempts by the plaintiff to demand payment from the defendant before the hearing after notice could be the occasion of further danger of abuse.

The plaintiff should never be discouraged from seeking support or compensation, but should be told that the court will consider these issues at the hearing after notice, when the defendant has an opportunity to be heard. *See* Guideline 6:00 Initial Orders After Notice: General and Guideline 6:05B Support Orders.

In determining the support amount, the judge will need to obtain from the parties the weekly amounts of gross income, childcare costs, health insurance costs, dental and/or vision insurance costs, and other support obligations. The plaintiff should be told to bring this information to the hearing after notice and can be provided with the Plaintiff's Affidavit in Support of a Request for a Child Support Order to fill out and bring to the next hearing. Further information about how to calculate support amounts can be found on Mass.gov by searching "Child Support Guidelines."

## 4:03A *Ex Parte* Orders Involving Minor Children

At the hearing, the judge should determine if there are any existing Probate and Family Court support or custody orders, including parenting time orders, presently in effect involving the parties, and, if so, what those orders entail. A judge hearing an *ex parte* order, upon a finding of a substantial likelihood of immediate danger of abuse, may grant any permitted relief as warranted by the facts, including orders that are inconsistent with an existing Probate and Family Court order regarding custody, parenting time, or support, *but see* Commentary to Guideline 4:03 *Ex Parte* Support and Compensation Orders.

Although courts other than the Probate and Family Court do not have the authority to establish parenting time schedules or set conditions for parenting time, courts other than the Probate and Family Court do have the authority to issue custody and no contact orders on a temporary basis, even if those orders would suspend an existing parenting time order.

If a non-Probate and Family Court judge issues an *ex parte* order that is inconsistent with an existing Probate and Family Court support or custody order (including parenting time orders), the statute requires that the court immediately transmit a copy of the order to the Probate and Family Court which issued the existing order as the Probate and Family Court will ultimately have to address the issue. Once the Probate and Family Court has acted, the Probate and Family Court shall thereafter retain final jurisdiction over any custody, contact, or support order it issues. *See* Guideline 6:06 Parenting Time Orders Exclusive to Probate and Family Court.

If a court issues an order that suspends contact between the defendant and any minor child(ren) or increases burdens on the defendant, notice must be provided to the defendant and a two-party hearing scheduled within ten days (as opposed to an order that lessens burdens on the defendant which would not require a two-party hearing). If, at a hearing after notice, the court continues an order that is inconsistent with an existing Probate and Family Court order, the

procedure for issuing an inconsistent order must be followed. *See* Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.

The statute specifically provides that the fact that a Probate and Family Court order relating to any minor child(ren) will ultimately supersede an order of another court does not mean that Superior Court, District Court, or Boston Municipal Court judges "are prohibited or discouraged from ordering all other necessary relief or issuing the custody and support provisions of orders pursuant to c. 209A for the full duration permitted under subsection (c)." G.L. c. 209A, § 3.

Note: A plaintiff cannot be awarded custody pursuant to c. 209A when a third party has custody of the minor child(ren).

## Commentary

The plaintiff must establish a basis for requesting that the court order no contact with the defendant's minor child(ren). If the plaintiff's child(ren), or the child(ren) in the plaintiff's custody, are not the defendant's child(ren), there need be no such showing. "If there is to be a G.L. c. 209A order that a defendant stay away from and have no contact with his or her minor child(ren), there must be independent support for the order." *Smith v. Joyce*, 421 Mass. 520, 523 (1995). Appropriate reasons for issuing such an order may include, but are not limited to, the following: a finding that the child(ren) has/have been abused; that they have witnessed the defendant's abuse of the plaintiff and are, therefore, afraid of the defendant and would be harmed by seeing the defendant; or that no parenting time can be arranged with the child(ren) in the plaintiff's custody without endangering the plaintiff. *See Schecter v. Schecter*, 88 Mass. App. Ct. 239, 251-52 (2015).

The following factors can be considered when determining whether to issue a custody or no contact order.

**General Factors to Consider:**

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

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

- What is the most severe incident?

**2. About the child(ren)**

- Has/have the child(ren) witnessed, heard, seen, or been exposed to the violence or its aftermath?
- Has/have the child(ren) been used to exert control over the plaintiff?
- Has/have the child(ren) been hurt or neglected?
- Is the Department of Children and Families (DCF) involved with the family? If so, for what reason? Was a report of abuse and/or neglect supported? Abuse and/or neglect by which parent?

**3. About the parent who has been abusive**

- Is that parent claiming to be the victim?
- Is that parent misusing systems like DCF, the police, or the courts to control or have contact with the parent who has been abused?
- Does that parent have a history of abuse prevention orders, criminal charges or convictions that suggest violent behavior?
- Is there evidence that that parent has not been compliant with court orders?

**4. About the parent who has been abused**

- Is that parent currently safe?
- Has that parent sustained injuries?
- Can that parent separate their needs from those of the child(ren)?
- Is there a history of prior victimization, mental illness, substance use disorder?
- What is that parent's expressed level of fear?

For a more comprehensive discussion of these factors, *see* Guideline 12:01 Parenting Time in Probate and Family Court: Safety Assessment Pertaining to the Plaintiff in Abuse Prevention Proceedings. Please note, however, that only the Probate and Family Court has the authority to establish a parenting time schedule, and these factors should only be considered by non-Probate and Family Court departments in the context of issuing custody and no-contact orders.

Prior to 2014, these Guidelines allowed courts other than the Probate and Family Court to issue custody and support orders that were inconsistent with Probate and Family Court orders only for a brief period of time (seventy-two hours). In 2014, the Legislature amended c. 209A to expressly authorize the Superior Court, District Court, and Boston Municipal Court departments of the Trial Court to issue orders regarding any minor child(ren) despite the existence of an inconsistent order by the Probate and Family Court. G.L. c. 209A, § 3. This amendment still precludes courts other than the Probate and Family Court from setting parenting time schedules or

conditions, but recognized that a no contact or custody order could be entered on an emergency basis and for a period of time (up to thirty days) that would allow the parties time to obtain a hearing before the Probate and Family Court. However, a judge should be very cautious of awarding custody to a plaintiff on an *ex parte* basis where a Probate and Family Court awarded sole custody to the defendant. More often, the inconsistent provision will be a no contact order that would affect an existing parenting time schedule ordered by the Probate and Family Court. If the court finds that there is not a basis to issue an inconsistent order, then the plaintiff should be advised to seek modification of the parenting time order in the Probate and Family Court.

If an inconsistent order issues, follow the procedure set forth in Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.

Note: Be aware that the information learned during the *ex parte* hearing could trigger the requirement to make a report to the Department of Children and Families (DCF) pursuant to G.L. c. 119, § 51A. In such instances, the court should direct court personnel to file a report with the DCF.

## 4:04 *Ex Parte* Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC)

All *ex parte* orders must include (1) an order for the "immediate suspension and surrender of any license to carry firearms, and/or firearm identification card which the defendant may hold" and (2) an order that the defendant surrender to the police "all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses." G.L. c. 209A, § 3B. Stun guns are included in the definition of "firearms." G.L. c. 140, § 121. This provision must be included in any *ex parte* order regardless of whether there is any evidence presented that the defendant has a firearm identification card or license to carry or possesses any firearms, rifles, shotguns, or ammunition. Upon service of an *ex parte* order issued under c. 209A, law enforcement officials must immediately take possession of all firearms, rifles, shotguns, machine guns, stun guns, ammunition, any license to carry firearms, and any firearm identification card. G.L. c. 209A, § 3B.

### Commentary

Since all *ex parte* orders issued under c. 209A must include an order that the defendant surrender any firearms, rifles, shotguns, ammunition, or firearms licenses (FID; LTC), the box ordering surrender must be checked on all *ex parte* orders. The law further requires that whenever an abuse prevention order includes a firearm surrender order, the court must transmit a report containing the defendant's name and identifying information and a statement describing the defendant's alleged conduct and relationship to the plaintiff to the Department of Criminal Justice Information System (DCJIS). *See* G.L. c. 209A, § 3D. Upon expiration of any such order, the court must notify DCJIS of the expiration, which is then required to notify the US Attorney General of the change. *See Id*. This notification is accomplished through a MassCourts docket entry by the clerk.

State law requires revocation of firearms licenses and precludes issuance of firearms licenses to persons subject to c. 209A orders. G.L. c. 140, §§ 129 and 131. This means, as a practical matter, that individuals subject to c. 209A orders are prohibited by state law from possessing firearms. Federal law also prohibits possession of firearms, rifles, shotguns, ammunition, firearm identification cards, and licenses to carry firearms by individuals subject to c. 209A orders except in certain limited situations. Upon the issuance of a c. 209A order, any license to carry firearms must be revoked or suspended by the licensing authority, (G.L. c. 140, § 131 (d)(vi); G.L. c. 140, § 131 (f)), and any firearm identification card must be revoked or suspended by the licensing authority. G.L. c. 140, §§ 129B (1) (viii) and (4).

When the judge learns from the plaintiff in the course of a hearing that the defendant possesses firearms, rifles, shotguns, stun guns, or ammunition, any information regarding the number and type of firearms and the location where they are kept should be memorialized on the order itself and conveyed to the law enforcement officials responsible for serving the order on the defendant. This notation will assist police officers in implementing the requirements of the order safely and effectively.

Each time an order issued under c. 209A is extended or modified the judge must determine if returning the defendant's firearms or firearm identification card would present a likelihood of abuse to the plaintiff and must indicate that determination on the Order. *See* Guideline 6:05 Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC). While Massachusetts law prohibits possession of firearms, rifles, shotguns, and ammunition by individuals subject to a c. 209A order, enforcement of this provision in another state may be dependent upon whether the order contains such a finding.

Judges should also keep in mind that returning a firearm to a defendant subject to an existing c. 209A order may place the defendant in violation of Federal law. Federal law prohibits possession of a firearm, rifle, shotgun, or ammunition by any person who is subject to a qualifying domestic violence protective order. 18 U.S.C. § 922 (g)(8). A protective order must meet certain requirements in order to qualify under that statute. The order must: (1) have been issued after a hearing of which the defendant received actual notice and had an opportunity to participate; (2) must restrain the defendant from harassing, stalking, or threatening an intimate partner or that partner's child(ren) or placing those individuals in reasonable fear of bodily injury; (3) must include a finding that the defendant represents a credible threat to the physical safety of the intimate partner or the partner's child(ren); and, (4) must prohibit the use, attempted use, or threatened use of physical force against the partner or child(ren). There is a limited exception that permits law enforcement officers and military personnel in certain situations to possess an officially issued firearm while on duty even if they are currently subject to a qualifying protective order. 18 U.S.C. § 925 (a)(1).

Federal law also prohibits possession of a firearm, rifle, shotgun, or ammunition by any person who has a misdemeanor conviction for domestic violence. 18 U.S.C. § 922 (g) (9). Qualifying misdemeanors must have as an element the "use or attempted use of physical force, or the threatened use of a deadly weapon" and the named victim of the crime must be the current or former spouse of the defendant, a person with whom the defendant shared a child in common, a person who was cohabitating with or who had cohabitated with the defendant as a spouse, parent or guardian or a person who was similarly situated to a spouse, parent, or guardian of the defendant. *See Voisine v. United States*, 136 S. Ct. 2272, 2282 (2016).

## 4:05 Reconciliation

The court should not attempt to compel or even suggest to the plaintiff that reconciliation be attempted. The sole issue at the hearing is the alleged need for protection on an immediate basis. If that need is found to exist, an appropriate order should issue. If not, the complaint should be denied, or the matter deferred to the hearing after notice.

### Commentary

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

## 4:06 Information for the Plaintiff

If an *ex parte* order issues, the plaintiff should be told:

1) the order is effective immediately;
2) the contents of the order;
3) that the police will serve the order on the defendant as soon as possible;
4) the date and time of the hearing after notice;
5) the expiration date and time of the order;
6) what will happen if either or both parties fail or choose not to appear at that hearing; and,
7) that the plaintiff should keep a copy of the order on their person and, in the event the defendant violates the order, the plaintiff should contact the police immediately.

The Regional Administrative Justices of the Superior Court and the First Justices of the divisions of the Boston Municipal Court, District Court, and the Probate and Family Court departments should coordinate with their staff to ensure that either court personnel or an advocate effectively communicates this information to the plaintiff. The plaintiff should also be given the "Notice to Plaintiff Regarding Abuse Prevention (Restraining) Order" which provides additional information in writing to help the plaintiff understand the terms of the order. The plaintiff also is to be given the main resource flyer entitled "Resources for Safety and Support," which includes statewide listings for domestic violence programs, sexual assault programs, child witness to violence programs, 24-hour Hotlines, and the local district attorney's offices. Supplemental regional flyers are also available and include county specific information. These resources are available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed.

### Commentary

For an *ex parte* order to be fully effective, its contents and meaning should be explained fully and completely to the plaintiff. The plaintiff should be told that the police will attempt to serve

the defendant with a copy of the order as issued. The plaintiff should contact the police immediately if the defendant violates the order.

If the plaintiff has requested that their residence and/or workplace addresses be confidential and not included on the order, the plaintiff should be advised that although the order and complaint are transmitted to the police, the addresses of the plaintiff's residence or workplace are not. The address is not entered into Department of Criminal Justice Information System (DCJIS), and the information is not accessible to law enforcement except during the business hours of the court. The plaintiff should be advised that they should consider notifying the police department of their address if concerned that the defendant may come to the address.

The plaintiff should also be told that the order remains in effect until its termination date and time unless a judge changes or terminates the order before then. Any action by the defendant contrary to its terms may subject the defendant to immediate, warrantless arrest and possible criminal prosecution. *See* Guideline 8:03 Plaintiff's Acquiescence or Consent to the Violation Does Not Bar Criminal Prosecution.

Finally, the plaintiff should be told that certain violations of c. 209A orders are criminal offenses: (1) to refrain from abuse, (2) to vacate the household, and (3) to have no contact with and/or stay away from the plaintiff. *See Commonwealth v. Finase*, 435 Mass. 310, 313-314 (2001). In addition, G.L. c. 209A, § 3B makes a violation of an order to surrender guns, ammunition, and firearms licenses a criminal offense.

## 4:07 Transmission of *Ex Parte* Orders to the Police for Service on the Defendant

When an order under G.L. c. 209A is issued, the clerk's office must immediately transmit two copies of the order and one copy of the complaint to "the appropriate law enforcement agency." G.L. c. 209A, § 7. The Defendant Information Form should accompany these forms. The appropriate law enforcement agency should be the police department of the municipality wherein the defendant can be found. In addition, the clerk's office should transmit these documents to the police department of the city or town wherein the plaintiff resides.

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

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

The police must serve a copy of the order and a copy of the complaint on the defendant. Service is to be made in-hand. Where in-hand service cannot be made because of lack of knowledge of the defendant's whereabouts, evidence that the defendant is avoiding service, or for any other reason, a judge, upon finding that the appropriate law enforcement agency has made a conscientious and reasonable effort to effect service, but has nevertheless failed, can authorize service by alternative means (including service at last and usual address, leaving at defendant's

work address or an address the defendant is known to frequent (e.g., parents' home), by e-mail, etc.). In such circumstances, the judge must make the finding on the order. Notice by publication should not be utilized as it is ineffective and may violate the plaintiff's privacy interests. *See* G.L. c. 41, § 97D. The police are required to make a return of service to the court.

If the court has reason to know that the defendant is incarcerated and will be incarcerated at the time scheduled for the hearing after notice, the court can utilize the video conference system for the two-party hearing or issue a writ of habeas corpus *sua sponte*. Alternatively, a notice should accompany the order informing the defendant of the right to be present at the hearing and, upon the defendant's request, the court should timely issue a writ of habeas corpus to bring the defendant to court for the scheduled hearing.

## Commentary

"Forthwith" transmission of two copies of the order and one copy of the complaint and summons to the police is specifically required by law. G.L. c. 209A, § 7, second par. The statute does not require the affidavit to be served on the defendant. *Flynn v. Warner*, 421 Mass. 1002, 1002 (1995) (rescript). The clerk's office is in the best position to determine the most expedient method of transmitting the documents to the appropriate police department for service on the defendant. Whatever method is selected the court should retain documentation that the transmission was made, when it was made, and to whom it was made. The police department is then required to serve one copy of the order on the defendant in-hand, together with a copy of the complaint.

In-hand service of the order should be made on the defendant if at all possible. Failure to make in-hand service may render the *ex parte* order ineffective. Further abuse will not be deterred if the defendant does not know that the order exists. Leaving the order and complaint at the "last and usual place of abode" may be ineffective if this is the address that the defendant was ordered to vacate in the emergency order. Alternative service should only be authorized by the court upon a finding that conscientious and reasonable efforts have been made to serve the defendant in-hand. *Zullo v. Goguen*, 423 Mass. 679, 681 (1996). *See* Guideline 5:05 Failure of the Defendant to Appear and Guideline 6:03 Service of Initial Orders After Notice on the Defendant.

If it is unclear what the address of the defendant is, then the court should question the plaintiff about possible residential or work addresses. For example, when a defendant previously has been ordered to vacate the household by means of an emergency order, a plaintiff who does not know the location of the defendant's current residence may know where he or she works. All of the information which the plaintiff possesses about the defendant's whereabouts should be contained on the Defendant Information Form described in Guideline 2:03 Completing the Complaint;

Obtaining Required Information. The court can also inquire with probation as to any information it may have regarding an address for the defendant, either from probation's file or by accessing the data available through the Registry of Motor Vehicles (RMV), as well as whether the defendant has any upcoming court dates.

Where the issuing judge is aware of any information that raises safety concerns for a police officer serving the order (e.g., outstanding warrants, firearms, suicidality, etc.) that information should be included on the Order (or otherwise conveyed to the serving police department).

Additionally, in cases where a judge finds that the plaintiff may be subject to an imminent threat of bodily injury prior to service being effected, the judge should check the appropriate box indicating this and direct the clerk's office or the victim witness advocate or the district attorney's office to notify the appropriate law enforcement officials of the situation and the circumstances that give rise to the imminent threat of bodily injury.

The police are required to "promptly" make a return of service. If the return is not made prior to the date of the hearing after notice, and there is no other evidence of notice to the defendant, an order after notice may not be issued at that time. *See* Guideline 5:05 Failure of the Defendant to Appear. Furthermore, successful prosecution for violation of an order of which the defendant is unaware may be impossible. *See* Commentary to Guideline 5:05 Failure of the Defendant to Appear and Guideline 6:03 Service of Initial Orders After Notice on the Defendant. If the case must be continued because there is no evidence that the defendant received notice, the same ten-day time limit as for *ex parte* orders must be observed. If alternative service has been authorized and made, however, the judge can issue an initial order for up to one year even if unable to verify such service actually notified the defendant. It should be noted that service without actual notice may preclude enforcement of the order were it to be violated. As such, the plaintiff should be alerted to the limits of service without actual notice.

Incarcerated defendants have the right to be heard on a requested extension of the *ex parte* order at a hearing after notice. The court should take steps to inform incarcerated defendants of their right to be heard and how to request that a writ of habeas corpus issue. *M.M. v. Doucette*, 92 Mass. App. Ct. 32, 36 (2017). The court has an obligation to honor a defendant's request to be heard at the two-party hearing. However, the mere fact of the defendant's incarceration at the time of the hearing would not prevent a judge from extending the abuse prevention order in the absence of some indication that the defendant wished to attend and be heard, so long as the defendant had knowledge that the hearing was to be held. *Id*. While the court is under no obligation to issue a writ of habeas corpus absent a request by the defendant, *Commonwealth v. Henderson*, 434 Mass. 155, 163, n. 12 (2001), obtaining the defendant's presence for the two-party hearing is the preferred practice so that notice is clear in the event the defendant is subsequently charged with violating the abuse prevention order. This can be done by either issuing a writ of habeas corpus *sua sponte* or utilizing the video conferencing system.

In a prosecution for a violation of a c. 209A order, actual service of the order is unnecessary if the Commonwealth can prove beyond a reasonable doubt that the defendant had actual or

constructive knowledge of the terms of the order. *Commonwealth v. Gonsalves*, 99 Mass. App. Ct. 638, 641 (2021), citing *Commonwealth v. Delaney*, 425 Mass. 587, 589-593 (1997), *cert denied*, *Delaney v. Commonwealth*, 522 U.S. 1058 (1998). *Contrast Commonwealth v. Welch*, 58 Mass. App. Ct. 408, 410 (2003).

## 4:07A Service of *Ex Parte* Orders on Non-Resident Defendants

When an order under G.L. c. 209A is issued against a non-resident defendant, the c. 209A order and complaint is to be immediately transmitted to "the appropriate law enforcement agency" as service on the defendant must still be made in-hand. G.L. c. 209A, § 7. The Defendant Information Form should be transmitted as well. Service by alternative means should only be authorized after finding that there has been a conscientious and reasonable effort to effect in-hand service.

The "appropriate law enforcement agency" is, in most cases, the police or sheriff's department with jurisdiction over the defendant's residence. The clerk should contact the local police or sheriff's department directly or, if unsure which police or sheriff's department to call, can call that state's state police to assist in identifying the proper contact to effect service.

Whether service is completed by a police officer, sheriff, or state marshal, the clerk should direct that the defendant be served with a copy of the order and a copy of the complaint, and that a return of service be made to the court.

### Commentary

There should not be a requirement to pay for service as grants provided by the Violence Against Women's Act prohibit imposing fees for the issuance, service, and enforcement of protection orders. It has been the case that all states and territories receive this funding, and many states have their own laws prohibiting collection of fees for serving protection orders. Despite this, there have been occasions where the court is told payment is required. If unable to resolve, courts can accept invoices received and submit them to the Trial Court Domestic Violence Coordinator to coordinate with finance to determine if payment is actually required. If the serving state refuses to serve without payment, contact the Trial Court Domestic Violence Coordinator who may be able to assist in communications with the serving state.

## 4:08 Guideline Intentionally Deleted

### Commentary

Substantive content is now included in Guideline 1:05 Public Access to c. 209A Case Files; Confidentiality of Records and Address Information.

# Hearings After Notice

## 5:00 Scheduling Hearings After Notice

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

However, hearings after notice may be held at any time within ten business days when both parties are present, including at the initial appearance or during the course of an arraignment on related criminal charges. *See* Guideline 8:09 Procedures Where Defendant is Being Arraigned and Plaintiff is Requesting an Abuse Prevention Order.

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

### Commentary

Scheduling of the c. 209A hearing after notice should be expedited to the extent possible. If an *ex parte* order is issued, the hearing after notice must be held within "ten court business days" after the date of issuance. "Ten court business days" should be interpreted to mean ten days during which the court is open. The day the order is issued does not count toward the ten-day period, but the return date does. Saturdays, Sundays, and holidays are excluded. Courts should attempt to schedule hearings after notice sooner than the ten-day maximum if effective service of notice on the defendant and return of service can be made.

Nothing in the law requires two hearings, or a "cooling off period," between the *ex parte* hearing and the hearing after notice. If both parties are present in court at the time of the plaintiff's initial contact with the court, or if the defendant's presence can be promptly obtained, there is no justification for proceeding *ex parte*. If the judge is satisfied that the emergency order issued through the Judicial Response System was served on the defendant and that the notice informed the defendant of the date, time, and place of the hearing, the court may hold the hearing after notice on that date; there is no need to issue a further *ex parte* order. *See* Guideline 11:00 Procedure for Response to Complaints When Court is Not in Session: Judicial Response System. Conducting the two-party hearing, without a prior *ex parte* order or order issued through the Judicial Response System, is particularly appropriate when the plaintiff is present and the defendant is before the court for arraignment following arrest for an abuse related crime. *See* Guideline 8:09 Procedures Where Defendant is Being Arraigned and Plaintiff is Requesting an Abuse Prevention Order.

## 5:00A Public Nature of Hearings After Notice

Like *ex parte* hearings, hearings after notice should be held in the courtroom and recorded. They should never be held in the judge's lobby or off the record.

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

### Commentary

Despite the emotional and volatile issues often involved in a c. 209A hearing, the matter should be treated like any other civil proceeding and heard in open court. "Generally, public access to judicial proceedings may not be abridged absent an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Boston Herald, Inc. v. Superior Court Dep't of the Trial Court*, 421 Mass. 502, 505 (1995). Closure of the courtroom may occur if the following four requirements are met: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the judge must consider reasonable alternatives to closing the proceeding, and [4] the judge must make findings adequate to support the closure." *Id*. at 506, quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Two-party hearings should not be conducted at sidebar. If particularly sensitive issues may arise during the course of the hearing, the judge should consider moving the matter to a less crowded courtroom rather than bringing the parties to sidebar.

Like any other hearing, the proceedings should be recorded and the public has a right to access these recordings. The public does not, however, have the right to access the plaintiff's residential address, residential telephone number and workplace name, workplace address, and workplace telephone number. G.L. c. 209A, § 8. Such information "shall be confidential and withheld from public inspection." *Id*. If, during the hearing, it is necessary to disclose this information, the judge should direct the clerk to seal that portion of the audio so that this information remains inaccessible to the public. If the clerk does not press the "seal" button prior to address information being disclosed on the record, then the clerk can send an email to mass.support@fortherecord.com, designating the date, court, courtroom, and start and stop time of the segment that should be impounded.

## 5:01 Conduct of Hearings After Notice When Both Parties Appear: General

The hearing after notice in a c. 209A action at which both parties appear is an adversarial proceeding in which both parties must be allowed to present evidence. The plaintiff bears the burden of establishing abuse by a preponderance of the credible evidence. *See* Guideline 5:04 Standard and Burden of Proof.

The court should ensure an orderly proceeding and should be cognizant of safety issues. The court should address placement of participants in the courtroom with this in mind. For example, a court officer should stand between the parties. In circumstances where sensitive issues may arise, the judge should consider moving the matter to a less crowded courtroom rather than bringing the parties to sidebar. All parties and witnesses should testify under oath.

Before the hearing begins, the clerk's office should examine the Warrant Management System (WMS) to see if there are any outstanding warrants against the parties and should provide that information to the court. The clerk's office should also provide the court with all active or recent prior related abuse prevention orders in that court involving the parties. The probation department should provide the court with the Criminal Activity Record Information (CARI) for both parties and the affidavits from any prior c. 209A orders as well as dangerousness findings that issued after August of 2014, the date when this information was required to be made available electronically. The judge should also ask both parties whether there are any outstanding orders from any court involving the same parties. *See* Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order. If the court becomes aware of information about active or recent criminal cases involving crimes of abuse against either the plaintiff or defendant, the judge may request that those cases be brought into the courtroom.

Both parties have a general right to cross-examine witnesses, but the judge should not permit cross-examination to be used for harassment or intimidation or for discovery purposes.

Each side must be given a meaningful opportunity to challenge the other's evidence. In some circumstances, it is appropriate for the judge to remind the parties of their rights under the Fifth Amendment. Neither the plaintiff nor the defendant should be compelled to provide incriminating information against themselves.

Both parties should be told that the defendant must comply with the terms of the order unless and until any specific orders are terminated in writing by the court. The plaintiff has no authority to "waive" the orders without going to court to ask to have them terminated, and the defendant is subject to mandatory, warrantless arrest for violating these orders, notwithstanding the plaintiff's "consent."

## Commentary

In many ways, a two-party hearing in a c. 209A matter is like any other contested civil proceeding. The plaintiff presents evidence, the defendant presents evidence, and the court decides if the plaintiff has established abuse by a preponderance of the credible evidence. Many of these cases will involve *pro se* litigants, there are relaxed rules of evidence, and these cases are often heard in the midst of busy court sessions. However, minimum standards of fairness must always be observed. "First, absent serious court congestion or some other emergency, judges should hear and decide scheduled matters if the parties are ready and wish to have a hearing. Second, judges should not issue, or vacate, any part of an abuse prevention order, over objection, without hearing the evidence and giving the parties an opportunity to respond. Third, G.L. c. 209A gives a choice of forum to the plaintiff. *See* G.L. c. 209A, § 2. A judge should not, *sua sponte* and over objection, discontinue an abuse prevention proceeding because [the judge] believes it should be moved to another forum – whether that forum is mediation, a criminal court, or another Trial Court department. Fourth, each party should be given a fair opportunity to present his case. While a judge surely may exclude irrelevant or inadmissible evidence, or even interrupt an argument or a witness examination that has become repetitious, [the judge] should not terminate a hearing without ensuring that he [or she] has heard all of the relevant and admissible evidence once." *S.T. v. E.M.*, 80 Mass. App. Ct. 423, 429-31 (2011).

There are unique aspects to hearings under c. 209A. Most obvious are the interpersonal nature of these cases and the emotional and volatile issues involved. The court must control the hearing and address any hostility or safety issues that may emerge. Two-party hearings should not be conducted at sidebar. The court must always exercise appropriate control. Orderly procedure requires, for example, that each participant, including the parties, witnesses, and counsel, address remarks only to the court. In cases where serious abuse has taken place, a plaintiff may be intimidated merely by the defendant's presence. Where sensitive issues may arise, the judge may

consider moving the hearing to a less crowded courtroom. Many courts position court officers and advocates between the parties during the hearing.

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

In many cases an *ex parte* hearing will have been held, and an *ex parte* order issued against the defendant. Nevertheless, the plaintiff still bears the burden of proof at the hearing after notice. *See*, *e.g.*, *S.T. v. E.M.*, 90 Mass. App. Ct. 423, 429 (2011); *Jones v. Gallagher*, 54 Mass. App. Ct. 883, 890 (2002). Fairness requires that the plaintiff's case be restated so that the defendant will know what has been alleged. This restatement may take the form of permitting the defendant to read the plaintiff's affidavit if one is contained within the file, and if the defendant is able to read English. *Frizado v. Frizado*, 420 Mass 592, 597 (1995). "A defendant or his counsel should be given adequate opportunity to consider any affidavit filed in the proceeding on which the judge intends to rely before being required to elect whether to cross-examine the complainant or any other witness." *Id*.

The defendant must then be given an opportunity to respond to the allegations bearing in mind that the defendant does not bear the burden of disproving the allegations or of proving that the *ex parte* order should not continue. As in any civil proceeding, the plaintiff has the right to call the defendant as a witness. *S.T. v. E.M.*, 80 Mass. App. Ct. 423, 429 (2011). "An inference adverse to a defendant may properly be drawn, however, from his or her failure to testify in a civil matter such as this even if criminal proceedings are pending or might be brought against the defendant." *Frizado v. Frizado*, 420 Mass. at 596 (1995). "While the decision whether to draw an adverse inference based upon [the defendant's] failure to testify was ultimately one for the judge as fact finder, the judge was obliged to consider whether such an inference was fair and reasonable based on all the circumstances and evidence before him." *Singh v. Capuano*, 468 Mass. 328, 334 (2014). The plaintiff may then, in the court's discretion, be given an opportunity to supplement the allegations in the affidavit and respond to the defendant's statements.

"'Each side must be given a meaningful opportunity to challenge each other's evidence.' *Frizado v. Frizado*, (420 Mass. 592) at 598, n.5." *S.T. v. E.M.*, 80 Mass. App. Ct. 423, 431 (2011). "A defendant has a general right to cross-examine witnesses against him. There may be circumstances in which the judge may deny that right in a G.L. c. 209A hearing, and certainly a judge may limit cross-examination for good cause in an exercise of discretion." *Frizado v. Frizado*, 420 Mass. at 597. In a footnote, the Supreme Judicial Court agreed that cross-examination should not be permitted for harassment or discovery purposes in c. 209A actions, but also observed that the "judge's discretion in restricting cross-examination may not be unlimited in particular situations." *Id*. at 598, n.5. "While a judge surely may exclude irrelevant or inadmissible evidence or even interrupt an argument or a witness examination that has become repetitious, he should not terminate a hearing without ensuring that he has heard all the relevant and admissible evidence once." *S.T. v. E.M.*, 80 Mass. App. Ct. 423, 431 (2011). *See C.O. v. M.M.*, 442 Mass. 648, 659-659 (2004) (court found that, absent grounds that would justify a limitation on the defendant's right to present evidence and

cross-examine witnesses, the defendant's right to due process was denied him where the defendant was not given the opportunity to present and cross-examine witnesses).

## 5:01A Venue: Objection

A defendant must raise an objection to venue in a timely manner, usually at the outset, prior to addressing the merits alleged in the plaintiff's application. Otherwise, any defect in venue is waived. If the judge finds, upon the defendant's timely objection, that the court does not have venue over the plaintiff's current or prior residence as provided by G.L. c. 209A, § 2, the case can be transferred to a court with venue for the hearing. A defect in venue does not require dismissal of the action. In determining which court would have proper venue, the judge should take care, to the extent practicable, not to divulge the plaintiff's address to the defendant if the plaintiff's address does not appear on the order.

Prior to transferring the case, the judge should consider whether the plaintiff is suffering from abuse and issue any interim orders deemed necessary to protect the plaintiff from further abuse pending the transfer. The judge should allow the defendant an opportunity to be heard on the issuance of such interim orders and inform the defendant that doing so will not constitute a waiver of venue. If the judge determines, by a preponderance of the evidence, that the plaintiff is suffering from abuse, the judge may issue an interim order, including, but not limited to, any of the orders expressly provided by G.L. c. 209A, § 3. Any interim orders should be effective through 4:00 p.m. on the date set for the two-party hearing in the court receiving the transfer.

Alternatively, the judge can give the defendant the option of holding the two-party hearing on an initial order in the court with a defect in venue and, in the event an initial order is granted, make the order returnable to a court with venue. The option of holding the two-party hearing in the court with a defect in venue should be explored where the location of the hearing would not impact the defendant's opportunity to be heard on the question of granting relief as requested by the plaintiff, e.g., the defendant has a related criminal charge pending in the court and the defendant does not intend to call any witnesses who are not present or offer any exhibits that are unavailable.

## Commentary

"Venue in its modern and municipal sense relates to and defines the particular county or territorial area within the state or district in which the cause or prosecution must be brought or tried. It commonly has to do with geographical subdivisions, relates to practice or procedure, may be waived, and does not refer to jurisdiction at all." *Paige v. Sinclair*, 237 Mass. 482, 484 (1921). An objection to venue must be raised in a timely manner, usually at the outset, or it is waived. *Id.* at 484. *See* Mass. R. Civ. P. 12(h). *Cf. Lemarche v. Lussier*, 65 Mass. App. Ct. 887, 891 (2006). Objecting to venue after addressing the merits of the plaintiff's allegations is ordinarily too late. *See Hastings v. Inhabitants of Bolton*, 83 Mass. 529, 530 (1861). Because a challenge to venue must be raised, venue need not be addressed if the defendant does not appear. If the defendant does not appear, and, if there is evidence that the defendant had notice of the hearing and no reason excusing the defendant's absence, the court should consider the defendant to have forfeited their opportunity to be heard on the issue of venue as well as on the merits. *See* Guideline 5:05 Failure of the Defendant to Appear.

Should a defendant appear prior to the two-party hearing date with an objection to venue, the Court should schedule the matter to be heard at the same time the two-party hearing is scheduled. At the two-party hearing, the court should give the plaintiff an opportunity to be heard on the issue of venue and determine if there is venue over the plaintiff's current or prior residence as provided by G.L. c. 209A, § 2. *See Commonwealth v. Wright*, 88 Mass. App. Ct. 82, 83 n. 1 (2015) (proper to consider evidence offered at hearing to resolve question of venue, not simply consideration of facts contained within the complaint). The court should take care, however, that, in deciding issues of venue and determining where to transfer a case, the court, to the extent practicable, does not disclose to the defendant the plaintiff's address if the plaintiff has requested that this information be withheld from the defendant. In other words, the court should identify the court that has venue over the plaintiff's residence, but not identify the specific city or town in which the plaintiff lives.

If the judge concludes that the court does not have venue over the plaintiff's current or prior residence as set forth in G.L. c. 209A, § 2, the case can be transferred to a court with venue as the remedy for improper venue is to transfer the case to a court with venue. *Cormier v. Pezrow New England, Inc.*, 437 Mass. 302, 307 (2002). *See* G.L. c. 218, § 2A (Transfer of civil actions brought in wrong court); G.L. c. 223, § 15 (Erroneous venue; procedure). Lack of venue does not preclude the court from issuing interim orders pending the transfer. *See M.B. v. J.B.*, 86 Mass. App. Ct. 108, 115 (2014) (unlike a lack of subject matter jurisdiction, a defect in venue does not irrevocably strip a court of all authority to hear a case). Consistent with the protective purposes of c. 209A, the judge should determine whether the plaintiff is suffering from abuse and enter any order necessary to protect the plaintiff from further abuse pending the transfer. G.L. c. 209A, § 3. The issuance of such orders pending the transfer of the case upon a finding by the court that the preponderance of the evidence establishes that the plaintiff is suffering from abuse "furthers the Commonwealth's important public policy goal of securing 'the fundamental human right to be protected from the

devastating impact of family violence.'" *Id.* at 469, quoting *Champagne v. Champagne*, 429 Mass. 324, 327 (1999).

Upon transfer, the case shall be treated "as if it had been originally commenced therein, and all prior proceedings otherwise regularly taken shall thereafter be valid." G.L. c. 218, § 2A.

When a case is to be transferred, the clerk in the issuing court should, prior to the parties leaving, contact the clerk's office of the court to which the case will be transferred to determine when the two-party hearing can be scheduled. Specifically, the below-listed procedures set forth should be followed:

**Issuing Court:**

1) The clerk's office in the Issuing Court should contact the clerk's office in the Return Court to determine an acceptable return date within the time required by statute, and must notify the clerk's office in the Return Court of the return date and time ordered by the judge in the Issuing Court.
2) The clerk's office in the Issuing Court shall immediately provide copies of the Order to the appropriate police department.
3) If the defendant was not served with the Order in court, the clerk's office in the Issuing Court should clearly specify on all transmittals or copies provided to the police that the return of service must be delivered to the Return Court. Should the return of service be delivered in error to the Issuing Court, the Issuing Court shall immediately provide electronically or by facsimile the return of service to the Return Court and mail the original return of service to the Return Court, retaining a copy in the Issuing Court's file and noting on the docket that service was made and that the original return of service was sent to the Return Court.
4) The probation department in the Issuing Court shall promptly enter any Order issued into the CARI system for transmittal to the Statewide Registry of Civil Restraining Orders. The entry should also indicate that the case is being transferred.
5) The Issuing Court will enter on the docket the location of the court recording of the hearing conducted in the Issuing Court and that the matter is being transferred to the Return Court. The Issuing Court should also scan the affidavit and Order.
6) The clerk's office in the Issuing Court must immediately transmit electronically or by facsimile a copy of the case file and docket to the Return Court.
7) The Issuing Court will close its case, retain a copy of the case file and docket, and note on the case file that the case has been transferred by marking the case file "Transfer to [insert court]."

**Return Court:**

1) The Return Court shall open a case with its own docket number no later than the end of the next business day after an Order issues, and the matter shall proceed in the Return Court as if originally commenced therein.

2) The docket in the Return Court shall indicate that the matter has been transferred from the Issuing Court and note the Issuing Court's docket number. The Return Court should also scan the affidavit and Order.

3) All further proceedings in the Return Court shall take place as if the matter had been originally commenced in that court (e.g., modifications or extensions must be served on the defendant and provided to the appropriate police department by the Return Court; the probation department in the Return Court is responsible for entry of the modified or extended Order into the Court Activity Record Information (CARI) system for transmittal to the Statewide Registry of Civil Restraining Orders).

This ability to transfer to cure a defect in venue is pursuant to statutory authority. Transfer of a case for any other reason, such as a conflict of interest or mutual orders with an upcoming hearing date in a different court, still requires transfer through the administrative office of the appropriate court department. In those circumstances, approval to transfer the case from the department Chief Justice (or, if the courts are in different departments, the Chief Justice of the Trial Court), is required in order to return the case to another court for a joint hearing. *See* Guideline 6:07 Mutual Abuse Prevention Orders.

## 5:01B Personal Jurisdiction: Objection

When personal jurisdiction is contested, the plaintiff bears the burden of demonstrating that jurisdiction over the defendant is proper. Exercise of personal jurisdiction over a non-resident defendant is proper when he or she acts directly, or by an agent, and causes tortious injury in this Commonwealth by either (1) an act or omission in this Commonwealth, or (2) an act or omission outside this Commonwealth if the defendant engages in any persistent course of conduct in this Commonwealth. G.L. c. 223A, §3. Examples of such circumstances would include a non-resident who commits an act of abuse while in the Commonwealth, or a non-resident who repeatedly targets a person who is in the Commonwealth, by telephone and/or through social media, with harassing or threatening conduct from outside the Commonwealth. A plaintiff may also obtain personal jurisdiction over a non-resident defendant by serving the defendant with process while the defendant is physically within the territorial boundary of Massachusetts (a/k/a "tagging"). Additionally, a non-resident defendant is deemed to have consented to personal jurisdiction by actively participating in hearings without bringing the issue of personal jurisdiction to the attention of the court.

Even in the absence of personal jurisdiction over a non-resident defendant, a court may nevertheless issue an abuse prevention order, provided that it is limited to prohibitory, as opposed to affirmative, orders. An affirmative order is one that imposes a personal obligation on a defendant, such as an order to surrender firearms or to pay child support. A prohibitory order is an order that is limited to prohibiting actions of the defendant, such as ordering the defendant not to abuse the plaintiff, not to contact the plaintiff, to stay away from the plaintiff, or prohibiting the possession of firearms in the Commonwealth. Such prohibitory orders are enforceable even without personal jurisdiction over the defendant.

## Commentary

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

In evaluating whether a *pro se* defendant has waived personal jurisdiction, "our courts have recognized that self-represented litigants must be provided the opportunity to meaningfully present claims and defenses" and submissions should be liberally construed. *I.S.H. v. M.D.B.*, 83 Mass. App. Ct. 553, 560-61 (2013). In *I.S.H.*, a paternity judgment entered when the *pro se* defendant, who lived in Florida, failed to appear. Subsequently, he communicated with the court by facsimile transmission, filed a complaint for modification, and participated in a telephonic hearing; at each point, the defendant stated his belief that his rights would or should have been determined by the Florida courts. "Although the father, acting *pro se*, did not use the words 'personal jurisdiction,' it was sufficiently clear from the father's reluctance to come to Massachusetts, his statements about proceedings in Florida, and his undisputed nonresident status that he was not having the case heard in Massachusetts voluntarily." *Id.* at 561. As such, there was no waiver of personal jurisdiction. *Id.*

For additional discussion of obtaining personal jurisdiction by "tagging," *see Roch v. Mollica*, 481 Mass. 164 (2019).

## 5:02 Role of Advocates at Hearings After Notice

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

### Commentary

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

## 5:03 Rules of Evidence

The common law rules of evidence, e.g., those regarding hearsay, authentication, and best evidence, do not apply, subject to considerations of fundamental fairness.

### Commentary

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

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

For a more detailed discussion of evidentiary issues, *see* Massachusetts Guide to Evidence, § 1106 (Supreme Judicial Court, 2020).

## 5:04 Standard and Burden of Proof

The standard of proof in c. 209A hearings is the civil standard of preponderance of the evidence. The plaintiff has the burden of proof at both the *ex parte* hearing and any subsequent hearing to further extend the order. Both sides have the right to introduce evidence.

The appropriate inquiry when considering an initial order after notice is whether the plaintiff can show, by a preponderance of the evidence, that they are suffering from abuse. The plaintiff may meet this burden by demonstrating that the defendant (1) caused physical harm, attempted to cause physical harm; (2) forced the plaintiff to engage in sexual conduct by force, threats, or coercion; or (3) placed the plaintiff in reasonable fear of imminent serious physical harm. Where credible facts relevant to this inquiry are elicited during the hearing, but not included in the affidavit, the judge should add those additional facts on the affidavit in such a way to denote they were added, and credited, by the judge. This will allow future judges hearing the case to be better informed about the full context of the issuance of the order.

### Commentary

Proceedings under c. 209A are not criminal. The usual civil standard of preponderance of the credible evidence should be applied in c. 209A actions, *Frizado v. Frizado*, 420 Mass. 592, 597 (1995), and the plaintiff bears the burden of proof. *Jones v. Gallagher*, 54 Mass. App. Ct. 883, 890 (2002).

The second definition of abuse, "placing [the plaintiff] in fear of imminent serious physical harm "closely approximates the common-law description of assault." *Ginsberg v. Blacker*, 67 Mass. App. Ct. 139, 142 (2006) (standard met where plaintiff testified that defendant came right up into plaintiff's face, screaming and waving his hands about very close to her face, so close to her that she could feel his "spit" on her face, defendant followed her when she tried to leave shouting obscenities). The focus is on whether the defendant's conduct placed the plaintiff in "reasonable apprehension that [the defendant] might physically abuse [the plaintiff]." *Commonwealth v. Gordon*, 407 Mass. 340, 350 (1990). "In determining whether an apprehension of anticipated physical force is reasonable, a court will look to the actions and words of the defendant in light of the attendant circumstances." *Ginsberg v. Blacker*, 67 Mass. App. Ct. at 143, quoting *Gordon*, 407 Mass. at 349. A specific incident of past violence is not required for fear of imminent serious harm to be reasonable. *Noelle N. v. Frasier F.,* 97 Mass. App. Ct. 660, 665 (2020) (defendant's erratic and unstable behavior, in the context of an escalating and emotional argument over parenting time of minor children,

created a reasonable fear of imminent serious physical harm). *See also Ginsberg v. Blacker*, *supra* at 67 Mass. App. Ct. 139, 142 (2006); *Smith v. Jones*, 75 Mass. App. Ct. 540, 545 (2009) (although the defendant never made an explicit threat of violence after the relationship ended, the compulsive contacts (thousands of calls, thirty-eight voicemails, following her on vacation, stating he would "force me into a conversation," despite plaintiff's request that the defendant refrain), was of sufficient intensity to permit the judge to conclude the plaintiff was in reasonable fear of physical harm); *Smith v. Jones*, 67 Mass. App. Ct. 129, 134 (2006) (plaintiff's testimony that boyfriend, after break-up, sent e-mail saying "he wished he could stab the plaintiff in the heart" and an ambiguous answer about whether she was afraid the defendant would "come after her" justified issuance of *ex parte* order).

Conditions of pretrial release in a related criminal proceeding, even if they encompass the same conditions as an abuse prevention order, are not a proper basis to deny a G.L. c. 209A abuse prevention order. *Vera V. v. Seymour S.*, 98 Mass. App. Ct. 315, 318 (2020).

The court may not issue an initial order after notice because of a subjective concern that, because an *ex parte* order has issued, allowing further contact between the parties would lead to violence where the plaintiff is unable to establish by a preponderance of the evidence at the hearing after notice that "abuse" within the definition of the statute occurred. *Corrado v. Hedrick*, 65 Mass. App. Ct. 477, 483-85 (2006). *See also Banna v. Banna*, 78 Mass. App. Ct. 34, 35-36 (2010) (merely asking the plaintiff if she wanted to extend the *ex parte* order was insufficient to issue an initial order after notice where the only evidence at the hearing after notice was the original affidavit, and, despite both parties being present, the judge did not hold an evidentiary hearing).

## 5:05 Failure of the Defendant to Appear

If the defendant fails to appear at the hearing after notice, and the plaintiff does appear, and if there is evidence of notice of the hearing to the defendant and no reason for excusing the defendant's absence, the court should consider the defendant to have forfeited their opportunity to be heard. In such cases the order after notice may issue as the court deems appropriate, and the existing terms of the *ex parte* order may be modified. The defendant must be served with any order that issues, whether there has been a modification or not, and whether the defendant has appeared or not.

If there is no return of service to the court, and no other acceptable evidence that the defendant has received notice of the hearing, or if the court is given an acceptable reason for the defendant's absence, the hearing should be rescheduled to a date within the next ten court business days. The *ex parte* order may be extended during that time. New notice of the rescheduled hearing should be provided to the defendant. *See* Guideline 4:07 Transmission of *Ex Parte* Orders to the Police for Service on the Defendant.

If the defendant is incarcerated at the time of the hearing after notice, the court is under no obligation to issue a writ of habeas corpus absent a request by the defendant. But the court should ensure that proper notice had been given upon service of the *ex parte* order if the order was served while the defendant was incarcerated. As noted in Guideline 4:07 Transmission of *Ex Parte* Orders to the Police for Service on the Defendant, the preferred practice is to obtain the defendant's presence for a two-party hearing so that notice is clear in the event the defendant is subsequently charged with violating the order. This can be done either by utilizing the video conferencing system or issuing a writ of habeas corpus *sua sponte*, although this may require scheduling a new date for the hearing.

## Commentary

Due process requires that no order after notice be issued against a person without actual notice and the opportunity to be heard. If the defendant fails to appear, the court must have some basis on which to conclude that the defendant received notice, but, by ignoring the proceedings, waived the right to be heard. *See Commonwealth v. Henderson*, 434 Mass. 155, 163 (2001) (defendant waived opportunity to be heard by receiving actual notice of scheduled hearing date and failing to appear at hearing without good cause). *Compare M.M. v. Doucette*, 92 Mass. App. Ct. 32, 36 (2017) (incarcerated defendant entitled to be heard where evidence did not establish he received notice of the hearing and he subsequently requested to be heard upon being served with the extended order).

The best evidence that the defendant received notice is the return of service that the police are required to make. Alternatively, the court can take testimony from the plaintiff and/or from a police officer that they have verbally advised the defendant of the existence of the abuse prevention order and the date of the hearing. The court should consider asking the clerk's office to contact the police to determine if service was made before rescheduling the hearing. If the court finds such testimony credible, the court can make a finding that the defendant had notice and proceed with the hearing after notice. If the case must be continued because there is no available evidence that the defendant received notice, the same ten-day time limit as for *ex parte* orders should be observed.

To prevent a long series of extended *ex parte* orders where service of notice cannot be made despite the appropriate law enforcement agency making a conscientious and reasonable effort to serve the defendant, the court can authorize service by alternative means (e.g., service at last and usual address; leaving at defendant's work address or an address the defendant is known to frequent, such as a parent's home; or by e-mail). *Zullo v. Gaguen*, 423 Mass. 679, 681 (1996). *See* Commentary to Guideline 4:07 Transmission of *Ex Parte* Orders to the Police for Service on the Defendant; and, Guideline 6:03 Service of Initial Orders After Notice on the Defendant. Law enforcement should indicate on the Return of Service a request to make alternative service, and, upon finding that there was a conscientious and reasonable effort to serve the defendant, the judge should check the appropriate box on the Order and specify how alternative service is to be made. Alternative service may be to the last known address or another address, including an email address, most likely to result in actual notice to the defendant. Once the alternative service has been made, the hearing after notice may take place. If, during the hearing, the court becomes aware of better information regarding service, the court should consider whether to reschedule the hearing after notice to attempt this better service. If, however, there is no new information regarding service and an initial order after notice issues, service must be made of that order. In such circumstances, serving the initial order after notice can be made by the same alternative service that was authorized for the *ex parte* order. When alternative service is used, the plaintiff should be informed that the alternative service may not provide the necessary notice of the order that would be required for successful criminal enforcement of the order if the order were to be violated. *See* Commentary to Guideline 8:01 Enforcing Violations of Abuse Prevention Orders.

General Laws c. 209A, § 4, last par., provides that, "[i]f the defendant does not appear at such subsequent hearing [i.e. the hearing after notice], the temporary order shall continue in effect without further order of the court." However, case law is clear that the burden is always on the plaintiff to establish, by a preponderance of the evidence, facts justifying the issuance of an order. *See Iamele v. Asselin*, 444 Mass. 734, 736 (2005). *See also* Guideline 5:04 Standard and Burden of Proof. Thus, even when the defendant does not appear, and there is evidence of notice, the court must be satisfied that sufficient grounds exist for issuing the order.

## 5:06 Failure of the Plaintiff to Appear

If the plaintiff fails to appear at the hearing after notice, and the defendant does appear, or, if neither party appears, the order expires by its terms at 4:00 p.m. The court should not terminate the order if the plaintiff is not present, but rather let it expire by its terms as there may be a compelling reason why the plaintiff was not present when the case was called. If the plaintiff appears late and gives the court an acceptable reason, the hearing should be continued, and the *ex parte* order extended. However, the new hearing date should be as soon as possible and no later than ten court business days from the original hearing date. The defendant must be provided with notice of the new hearing date, regardless of whether or not the defendant appeared.

### Commentary

General Laws c. 209A, § 4, last paragraph, provides that, "[i]f the defendant does not appear at such subsequent hearing [i.e. the hearing after notice], the temporary order shall continue in effect without further order of the court."

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

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

## 5:07 Court Action on Defendant's Warrant Status

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

The Probate and Family Court should arrange to have the defendant transported to the nearest court with jurisdiction to address the warrant.

### Commentary

Courts should not allow a defendant against whom a criminal default warrant is outstanding to leave the courthouse without addressing the warrant. The judge should determine the appropriate action to take in view of all of the circumstances, including the seriousness of the case and the reason the party is before the court. If the defendant is not present, the court must note the existence of the warrant on the abuse prevention order.

## 5:08 Request by the Plaintiff to Terminate Abuse Prevention Order

If the plaintiff appears on the date scheduled for the hearing after notice and requests that the abuse prevention order be terminated, the judge does not need to take any action and can let the order expire by its own terms at the end of the day as it would if the plaintiff had not appeared, or the judge may terminate the order effective immediately.[1]

Prior to terminating the order, the court may inquire whether any different or lesser order or component of the existing order (e.g., a refrain from abuse order and restriction on firearms) should be left in effect to accomplish the plaintiff's purpose.

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

### Commentary

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

It is appropriate to refer plaintiffs who wish to terminate an abuse prevention order to an advocate who can review information about supportive services that might assist them. This information might include referrals to shelters and/or support groups for individuals who have experienced intimate partner abuse, information about applying for public assistance or for obtaining support from the defendant through the court and the Department of Revenue (DOR), *see* Guideline 6:05B Support Orders. For a listing of supportive resources organized geographically, the

[1] *See* Guideline 1:00 In General; Definitions for discussion of the current use of the term "terminated" instead of "vacated."

"Resources for Safety and Support" flyer and supplemental regional flyers can be found on Mass.gov.

A plaintiff may also be interested in intimate partner abuse education (IPAE) programs. For a list of IPAE programs go to Mass.gov, search for "Intimate Partner Abuse Education Program Services," and click on "Download a list of Massachusetts Certified Intimate Partner Abuse Education Programs."

There are several instances in which a different order would serve the plaintiff's purpose as effectively as terminating the original order. For example, a plaintiff might wish to attend some function with the defendant, or to see the defendant outside the home. In that case, it would be appropriate to terminate the "no contact" part of the order, but to leave the "stay away from the residence" and "no abuse" orders in effect. It should be noted, however, that if a no contact order has been imposed on a criminal case, contact remains prohibited despite the termination of the abuse prevention order unless and until the no contact order has been terminated by the criminal court.

If the judge has reason to believe that terminating the abuse prevention order will place any minor child(ren) in danger of physical harm or other abuse, the judge should advise the plaintiff that a report pursuant to G.L. c. 119, § 51A will be filed immediately. *See* Guideline 10:03 Care and Protection Proceedings.

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

# Orders After Notice

## 6:00 Initial Orders After Notice: General

At a hearing where the defendant has notice, whether or not preceded by an *ex parte* order, the court may issue orders protecting the plaintiff from abuse upon a finding, by a preponderance of the evidence, that the plaintiff is suffering from abuse. These orders may include, but are 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 any minor child(ren);

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

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

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

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

(i) ordering the possession, care, and control of any domesticated animal owned, possessed, leased, kept, or held by either party or any minor child(ren) residing in the household to the plaintiff or petitioner, and/or prohibiting abusing, taking, or disposing of such animal.

(j) ordering the defendant to refrain from abusing, threatening, taking, interfering with, transferring, encumbering, concealing, harming, or otherwise disposing of a domesticated animal;

(k) authorizing the defendant to pick up any personal belongings in the company of the police at a time agreed to by the plaintiff;

(l) ordering the surrender or continued surrender of a defendant's license to carry firearms, and firearms identification card, and the surrender of all firearms, rifles, shotguns, machine guns, and ammunition;

(m) recommending, as opposed to ordering, that the defendant attend a Department of Public Health (DPH) certified intimate partner abuse education (IPAE) program; and,

(n) any other order necessary to protect the plaintiff from abuse.

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

The court may issue mutual abuse prevention orders only if the court has made specific written findings of fact. *See* Guideline 6:07 Mutual Abuse Prevention Orders. Absent a mutual order, a judge cannot order any affirmative relief to the defendant.

If it is not obvious from the affidavit why a judge is restricting contact with the defendant's minor child(ren), or if the order conflicts with an existing order from the Probate and Family Court, the judge should consider making additional findings that support the judge's decision. This can be done by writing on the affidavit itself, making clear that these are findings credited by the judge.

Probate and Family Court judges have superseding jurisdiction over custody and support and exclusive jurisdiction over parenting time of any minor child(ren). If an order issued by a court other than a Probate and Family Court restricts a defendant's contact with their minor child(ren), the parties should be told that the Probate and Family Court can amend the terms of the order with regard to custody and contact with any minor child(ren). *See* Guideline 12:00, et. seq., Related Probate and Family Court Matters and Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.

## Commentary

Unlike *ex parte* orders, which require the court to find a substantial likelihood of immediate danger of abuse, orders after notice only require that the court find that the plaintiff is suffering from abuse. Both findings are made using the preponderance of the evidence standard. "Suffering from abuse" is determined by the definition of abuse as set forth in G.L. c. 209A, § 1 as follows: (1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; or (3) causing another to engage involuntarily in sexual relations by force, threat, or duress.

Upon such a finding, G.L. c. 209A, § 3 lists the orders that are expressly authorized by law, and G.L. c. 209A, § 11 expressly authorizes the issuance of orders regarding domesticated animals. The court, however, is not limited to the options listed in c. 209A, as a judge is authorized to order relief to the plaintiff "including, but not limited to" the relief listed in c. 209A. G.L. c. 209A, § 3. *See* Commentary to Guideline 4:01 Content of *Ex Parte* Orders ("[w]hen justified by the facts, the court has authority to order a defendant to stay away from a particular school or job site, even if the defendant attends the school or works at the same job"); *see also Commonwealth v. Habenstreit*, 57 Mass. App. Ct. 785 (2003), *rev. denied*, *Commonwealth v. Habenstreit*, 439 Mass. 1106 (2003).

Judges should be aware that such handwritten orders may not appear in the electronic database used by the police when enforcing such orders. Judges should advise the parties to keep a copy of the order with them to show police should questions arise about what is contained in the handwritten part of the order. Similarly, the police will not have access to other court orders such as Probate and Family Court orders. Therefore, ordering compliance with such orders through an abuse prevention order will be difficult for the police to interpret and enforce. *See Caplan v. Donovan*, 450 Mass. 463, 463-464 (2008), *cert. denied*, *Donovan v. Caplan*, 553 U.S. 1018 (2008).

Each time an order issued under c. 209A is extended or modified the judge must determine if returning the defendant's firearms or firearm identification card would present a likelihood of abuse to the plaintiff, and, if so, must indicate that determination by checking the box that continues the order of surrender. *See* Guideline 6:05 Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC). While Massachusetts law prohibits possession of firearms, rifles, shotguns,

ammunition, firearm identification cards, and licenses to carry firearms by individuals subject to c. 209A orders, enforcement of this provision in another state may be dependent upon whether the order contains such a finding. If the defendant did not appear at the two-party hearing and the defendant may be a non-resident, it is advised that in addition to ordering surrender pursuant to G.L. c. 209A, § 3C, the court should also prohibit the defendant from having a gun in the Commonwealth as this is a prohibitory order that does not require personal jurisdiction over the defendant. *See* Guideline 5:01B Personal Jurisdiction: Objection.

Whenever an abuse prevention order includes a firearm surrender order, the court must transmit a report containing the defendant's name and identifying information and a statement describing the defendant's alleged conduct and relationship to the plaintiff to the Department of Criminal Justice Information System (DCJIS). *See* G.L. c. 209A, § 3D. Upon expiration of any such order, the court must notify DCJIS of the expiration, which is then required to notify the US Attorney General of the change. *See Id*.

Ordering a defendant to stay away from and to have no contact with their minor child(ren) is tantamount to extinguishing parental rights, at least for the duration of the order. Before issuing such an order, the judge should assess the danger of abuse to the child(ren) independently from the danger of abuse to the plaintiff. It is important that the plaintiff provide the court with a reason for ordering the defendant to have no contact with the defendant's minor child(ren). "If there is to be a G.L. c. 209A order that a defendant stay from and have no contact with [their] minor children, there must be independent support for the order." *Smith v. Joyce*, 421 Mass. 520, 523 (1995). However, a defendant who abuses their child(ren)'s other parent in the child(ren)'s presence may be placing the child(ren) in fear of imminent serious physical harm and/or by causing emotional and psychological harm to the child(ren). *Schecter v. Schechter*, 88 Mass. App. Ct. 239, 251-52 (2015). *See* Guideline 2:04 Plaintiff's Affidavit.

In certain cases (e.g., where it is not obvious from the affidavit the basis for issuing an order inconsistent with the Probate and Family Court), the judge should make written findings to explain the reasons for the no contact order. *See, e.g., Care and Protection of Lillith*, 61 Mass. App. Ct. 132, 139-142 (2004), citing *Custody of Vaughn*, 422 Mass. 590, 599 (1996) (requirement of findings in custody cases when there has been evidence of domestic violence). Such findings will offer guidance to the Probate and Family Court in any later proceeding relating to custody of or parenting time with the minor child(ren). *Cf. Smith v. Joyce*, 421 Mass. 520, 523 (1995). Appropriate reasons may include, but are not limited to, a finding that the child(ren) has/have been abused; that the child(ren) has/have witnessed the defendant's abuse of the plaintiff and are therefore afraid of the defendant, and would be harmed by seeing the defendant; or, that no parenting time can be arranged with child(ren) in the plaintiff's custody without endangering the plaintiff.

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

## 6:01 Referral for Treatment or Supportive Services

In addition to including in the order terms necessary to ensure the safety of the plaintiff, the judge may recommend that the defendant attend an intimate partner abuse education (IPAE) program (formerly known as a certified batterer intervention program). A pamphlet entitled "Alternatives to Abuse" is available for use by the Trial Court to provide to defendants, and includes a statewide and regional listing for IPAE programs, as well as offices of the Department of Transitional Assistance (DTA), career centers, and legal assistance support. This flyer is available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed. A list of IPAE programs can be found on Mass.gov, search for "Intimate Partner Abuse Education Program Services," and click on "Download a list of Massachusetts Certified Intimate Partner Abuse Education Programs." The court should not recommend or suggest joint counseling or mediation. *See* G.L. c. 209A, § 3.

The Probate and Family Court may issue orders contingent on the defendant's efforts to participate in and benefit from such services. In addition, the Probate and Family Court may order a mental health evaluation or counseling for a substance use disorder and can make parenting time (formerly known as visitation) contingent on compliance with such counseling. G.L. c. 209A, § 3.

The court should not order the plaintiff to participate in any such services. The court should, however, provide the plaintiff with the main resource flyer entitled "Resources for Safety and Support," which includes statewide listings for domestic violence programs, sexual assault programs, child witness to violence programs, 24-hour Hotlines, and the local district attorney's offices. Supplemental regional flyers are also available and include county specific information. These resources are available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed.

## Commentary

In a case where social services can address some of the factors relating to abuse, such as alcohol or other substance use disorder, the court may properly recommend or make referrals to such services, although these do not replace intervention(s) to address the abuse.

However, as discussed in Guideline 1:01 Protective Purpose of c. 209A, the purpose of c. 209A actions is to provide protection, when such is found to be warranted, and not to encourage reconciliation or joint counseling for the parties. Attempts by the court to require or even to promote reconciliation or joint counseling are inconsistent with the protective purpose of c. 209A. Such procedures can expose a plaintiff to further abuse and can provide a person who has been abusive with an opportunity for continued contact and ability to exert control over the plaintiff. At the very least, such matters should be left to the plaintiff to decide. Moreover, the fear of being placed in such a situation may discourage or prevent a plaintiff from seeking the court's protection at all. Chapter 209A, § 3 provides specifically that:

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

## 6:02 Duration of Initial Order After Notice

An initial order issued after notice should be for one year, unless the plaintiff requests a lesser period. The parties should be informed that the plaintiff must appear before the court on the date set for expiration of the order if the plaintiff wishes the order extended, and that, if neither party appears on the expiration date, the order will expire by its own terms.

### Commentary

An initial order after notice "shall be for a fixed period of time not to exceed one year." G.L. c. 209A, § 3. An order for a period longer than one year or a permanent order is only available after an initial order after notice has been issued (sometimes referred to as the extension hearing). *Vittone v. Clairmont*, 64 Mass. App. Ct. 479, 486 (2005). *See* Guideline 6:08 Further Extending an Order After Notice on Its Expiration Date.

The court should not, as a matter of policy, issue initial orders after notice for less than a one-year period. Also, there is usually no reason for the order to track the schedule of a related criminal and/or probate case. "[N]either a defendant's visitation rights nor the pendency of criminal proceedings is an appropriate consideration in establishing the duration of a restraining order. The exclusive focus must be on the applicant's need for protection." *Singh v. Capuano*, 468 Mass. 328, 334 (2014). *See also Moreno v. Naranjo*, 465 Mass. 1001, 1003-1003 (2013). Nor is it appropriate to "see how the relationship goes" if the law and the facts support the issuance of an abuse prevention order and the plaintiff wishes it to be effective for a full year. If the defendant feels at some future point that an order should be terminated or its duration or terms limited, the defendant may move to modify or vacate the order. *See* Guideline 6:04 Modification of Orders; Terminating Orders. However, if the plaintiff requests a lesser period, the judge may do so.

## 6:03 Service of Initial Orders After Notice on the Defendant

The order after notice should be provided in-hand to the defendant by court personnel when the defendant is before the court for the hearing after notice or for any other purpose. This should be recorded on the Order. A copy of the order must also be sent to the appropriate police department.

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

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

### Commentary

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

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

If the defendant is not before the court when an order after notice is issued, in-hand service is required. *See Commonwealth v. Griffen*, 444 Mass. 1004 (2005) (service is to be made in-hand unless alternative service has been authorized by the judge). Failure to properly serve the defendant does not, however, invalidate the order. *Commonwealth v. Delaney*, 425 Mass. 587 (1997), *cert denied*, *Delaney v. Commonwealth*, 522 U.S. 1958 (1998). *See also Commonwealth v.*

*Henderson*, 434 Mass. 155 (2001). As long as the defendant has notice of the terms of the order, the order is enforceable. *See* Guideline 8:01 Enforcing Violations of Abuse Prevention Orders.

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

## 6:04 Modification of Orders; Terminating Orders

Either party can move to modify or terminate an existing order. Such motions must be in writing noting the requested actions and stating the reasons therefore. The clerk's office should request identification from all individuals seeking to modify or terminate an order and bring the motion before the court.

Where a plaintiff seeks to terminate an order, either in part or in its entirety, the court may hear that motion without advance notice to the defendant, since allowing the motion would reduce or eliminate the restrictions on the defendant. *See* Guideline 5:08 Request by the Plaintiff to Terminate Abuse Prevention Order. However, if the plaintiff seeks to modify an order to add additional restrictions on the defendant, the defendant must have an opportunity to be heard. Of course, if the court finds a substantial likelihood of an immediate danger of abuse, the modification can be ordered on an *ex parte* basis, with notice provided to the defendant and a hearing within ten days on the requested modification. Notice to the defendant must be made by serving the defendant in-hand by the police. *See* Guideline 4:07 Transmission of *Ex Parte* Orders to the Police for Service on the Defendant. The judge should make clear on the *ex parte* order that the two-party hearing is just on the motion for modification. At the hearing after notice, the plaintiff has the burden of establishing, by a preponderance of the evidence, that the modification is necessary to protect the plaintiff from abuse. *Cordelia C. v. Steven S.*, 95 Mass. App. Ct. 635, 639 (2019). If the motion for modification is denied, the remaining terms of the order still remain in full force and effect.

A defendant who seeks to modify or terminate an order must establish, at a hearing after notice, by clear and convincing evidence, that there has been a significant change in circumstances since the entry of the order and that the provision(s) at issue is no longer necessary to protect the plaintiff from abuse. *Id.*, *citing Caruso*. A judge can deny a defendant's request for termination or

modification without holding a hearing after notice. The judge should consider whether the defendant has made a preliminary showing warranting a hearing after notice, and should be alert to defendants using motions to modify or terminate to further harass or abuse the plaintiff; opportunities for increased contact with the defendant may increase the risk of harm to the plaintiff. If, however, the court finds that there is a basis to hold a hearing after notice, the motion must be served on the plaintiff and a two-party hearing scheduled for no sooner than seven days after the motion was filed in court, unless the court permits otherwise. The clerk's office should notify the plaintiff of the hearing; notice should not be made by the defendant.[2]

The basis on which the order was initially issued is not subject to review or attack. The significant change in circumstances must involve more than the mere passage of time; similarly, compliance by the defendant with the order is also not sufficient alone to constitute a significant change in circumstances. Challenging the issuance of an order is by appeal. *See* Guideline 7:00 Appeal. However, if there is a significant change in circumstances not foreseen when the last order was issued, the passage of time and compliance with the order may be considered in determining whether, in the totality of the circumstances, there is no longer a need for the order.

While a judge should certainly give serious consideration to the plaintiff's position regarding a defendant's motion to terminate or modify an existing order, the judge should not give meaning to a plaintiff's silence or failure to appear, because a judge cannot know whether silence reflects acquiescence in the termination/modification request or continued fear of the defendant. The plaintiff shoulders no burden at a termination hearing and is entitled to rest on the finality of the order. Regardless of whether the motion is allowed or denied, the judge must make findings of

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[2] Any motion to modify or terminate order by the Probate and Family Court must be filed with the court and served on the opposing party in compliance with Rule 6(c) of the Massachusetts Rules of Domestic Relations Procedures. *See* Guideline 1:03 Procedural Rules; Discovery, regarding application of rules of procedure.

fact on the record and indicate who appeared at the termination/modification hearing. *MacDonald v. Caruso*, 467 Mass. 382, 387-94 (2014).

Whenever a c. 209A order is modified or extended, the judge must determine if returning the license or guns or ammunition of the defendant would present "a likelihood of abuse to the plaintiff." G.L. c. 209A, § 3C. If the judge makes such a determination, the court shall continue the firearm surrender order by checking the appropriate box on the Order. *See* Guideline 6:05 Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC). Unless considering modification of the firearm surrender provision, it is unlikely that the court would find a surrender order was no longer necessary to protect the plaintiff.

If the court modifies or terminates an order, it should transmit a copy of the modified or terminated order to the police department where the order is on file. If an order is terminated, the police are to destroy all records of the terminated order. G.L. c. 209A, § 7.[3] If the order is modified, the police must serve a copy of any modified order on the defendant, unless the defendant appeared in court at the hearing and was given a copy of the modified order at that time. If the plaintiff was not present at the hearing, the court should provide notice to the plaintiff of the outcome of the hearing. All changes should be entered promptly in the Statewide Registry of Civil Restraining Orders.

Records of orders, even orders that are terminated, are not to be expunged from this record keeping system. The expungement statutes, G.L. c. 276, §§ 100E-100U do not apply to abuse prevention orders. Expungement is only available in the rare case when the defendant can show by clear and convincing evidence that the order was obtained through the commission of fraud on the court. *Comm'r of Probation v. Adams*, 65 Mass. App. Ct. 725, 728-737 (2006). *See also*

[3] Please note that G.L. c. 209A, § 7 uses the term "vacated."

*Commonwealth v. Boe*, 456 Mass. 337, 347, n. 14 (2010). A "fraud on the court" occurs where "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Smith v. Jones*, 67 Mass. App. Ct. 129, 137–38 (2006). That a plaintiff presents a claim that fails does not mean that the plaintiff has perpetrated a fraud on the court. *Id.* at 138. If this standard is met and the court orders expungement, the court records should be destroyed following the same process that is in place for destroying records under the expungement statutes, sealing the case until final expungement on the sixtieth day.

## Commentary

Both parties have the right to ask the court to modify an existing order, by either increasing or decreasing the severity of the terms, or by terminating the order. A pending appeal of an abuse prevention order does not deprive the Trial Court of its ability to modify (or terminate) the order. *Quinn v. Gjoni*, 89 Mass. App. Ct. 408, 411 (2016). The court should, however, be alert to repeated requests by a defendant to modify or terminate an order as unwarranted requests may themselves be a form of abuse and create a burden on the court as well as the opposing party. *See Champagne v. Champagne*, 429 Mass. 324, 327 n.2 (1999) (opportunities for increased contact with the party who utilizes abuse may increase the risk of harm to the party experiencing abuse).

When a plaintiff seeks to terminate an order, the plaintiff's decision to terminate the order must be respected. Prior to terminating the order, however, the court may inquire whether any different or lesser order or component of an existing order (e.g., a refrain from abuse order and restriction on firearms) should be left in effect to accomplish the plaintiff's purpose. *See* Guideline 5:08 Request by the Plaintiff to Terminate Abuse Prevention Order. It should be noted that if a no contact order has been imposed on a criminal case, contact remains prohibited despite the termination of the abuse prevention order unless and until the no contact order has been vacated by the criminal court. Additionally, if the judge has reason to believe that terminating the abuse prevention order will place any minor child(ren) in danger of physical harm or other abuse, the judge should advise the plaintiff that a report pursuant to G.L. c. 119, § 51A will be filed immediately. *See* Guideline 10:03 Care and Protection Proceedings.

When requesting identification from individuals seeking to modify or terminate an order, rather than photocopying the identification of the plaintiff, courts should consider employing a practice that will prevent confidential address information, or personal identifying information such as date of birth, from being available to the public. For example, the clerk's office can note on the file that the identification was checked.

The Trial Court has promulgated a form that a plaintiff may use when seeking to modify or terminate an order; Plaintiff's Motion to Modify or Terminate Abuse Prevention Order. Similarly, there is a form that can be used by a defendant; Defendant's Motion to Modify or Terminate Abuse Prevention Order Restraining Order.

The clerk's office should bring into the courtroom any related matters between the parties, including prior abuse prevention orders, complaints for abuse prevention orders, and any related criminal matters.

## 6:05 Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC)

If an emergency or *ex parte* order has not previously issued, the judge must consider whether ordering the defendant to surrender a firearms identification card and/or a license to carry a firearm, guns, ammunition, and stun guns is necessary to protect the plaintiff from abuse. If an emergency or *ex parte* order previously issued, which requires surrender of firearms, the judge must, in any hearing after notice, consider whether returning the items surrendered would present "a likelihood of abuse to the plaintiff." G.L. c. 209A, § 3C. If the court makes such a finding, the firearm surrender order must continue.

### Commentary

Each time an order issued under c. 209A is extended or modified the judge must determine if returning the defendant's firearms license or firearm identification card would present a likelihood of abuse to the plaintiff. If the judge makes such a determination, the court shall continue the firearm surrender order and must check the appropriate box on the Order. This determination must be made irrespective of whether the plaintiff requests it and the box indicating that the required finding has been made must be checked. Enforcement of this provision in another state may be dependent upon whether the order contains such a finding.

The items required to be surrendered are licenses to carry firearms, firearm identification cards, firearms, rifles, shotguns, machine guns, and ammunition that the defendant controls, owns, or possesses. G.L. c. 209A, § 3C. Stun guns are also required to be surrendered as the definition of firearm includes stun guns. G.L. c. 140, § 121.

Whenever an abuse prevention order includes a firearm surrender order, the law requires that the court "transmit a report containing the defendant's name and identifying information and a statement describing the defendant's alleged conduct and relationship to the plaintiff to the Department of Criminal Justice Information System [DCJIS]." G.L. c. 209A, § 3D. This is accomplished by a MassCourts docket entry by the clerk.

Returning firearms while an abuse prevention order is in effect may place the defendant in violation of state and federal law. Subject to certain exceptions, possession of a firearm and/or ammunition while subject to a qualifying abuse prevention order is a federal crime. *See* 18 U.S.C. § 922 (g)(8). Moreover, no firearms identification card may be issued to any person who is subject to a permanent or temporary protection order issued pursuant to c. 209A. *See* G.L. c. 140, § 129B(1)(viii)(b). Similarly, no license to carry firearms may be issued to any person who is subject to a permanent or temporary protection order issued pursuant to c. 209A. G.L. c. 140, § 131(d)(vi)(B). *See* Commentary to Guideline 4:04 *Ex Parte* Orders to Surrender Guns, Ammunition, and Firearms Licenses (FID; LTC). In the event the court decides to discontinue the firearms

surrender order, the judge must memorialize this order in writing so that the information can be provided to DCJIS.

In instances where the court does not have personal jurisdiction over the defendant, *see* Guideline 5:01B Personal Jurisdiction: Objection, the court can only issue prohibitory orders, which would include prohibiting the defendant from possessing firearms and ammunition in Massachusetts. *Caplan v. Donovan*, 450 Mass. 463, 463-64 (2008), *cert. denied*, *Donovan v. Caplan*, 553 U.S. 1018 (2008). Such an order can be memorialized on the Order.

## 6:05A Custody Orders

The District Court, Boston Municipal Court, and Superior Court are authorized to award the plaintiff temporary custody of a minor child pursuant to c. 209A. A plaintiff cannot be awarded custody pursuant to c. 209A when a third party has custody of the minor child(ren).

If issuing a custody order that is inconsistent with an existing custody order by the Probate and Family Court, the court issuing the conflicting order must provide a copy of the order to the Probate and Family Court Department that issued the prior or pending custody order. Such order may be superseded by a subsequent custody order issued by the Probate and Family Court Department, which shall retain final jurisdiction over any custody order. *See* Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.

More often, the inconsistent order will not be a conflicting custody order, but rather a no contact order that would affect parenting time rights. *See* Guideline 6:06 Parenting Time Orders Exclusive to Probate and Family Court.

### Commentary

Upon the issuance of a custody order that is inconsistent with an existing order issued by the Probate and Family Court, follow the procedure set forth in Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.

## 6:05B Support Orders

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

The Trial Court Child Support Guidelines should be applied in determining the presumptive amount of child support. G.L. c. 209A, § 3(e). To determine an appropriate amount of child support based upon the Trial Court Child Support Guidelines, the judge should consider proof of income and expenses from both parties. Judges sitting in District Court, Boston Municipal Court, and Superior Court can obtain this information by requiring the parties to complete the Plaintiff's Affidavit in Support of a Request for a Child Support Order and Defendant's Affidavit in Connection with Plaintiff's Request for a Child Support Order. Deviation from the presumptive amount of child support provided by the Guidelines may be appropriate in certain circumstances. *See* Trial Court Child Support Guidelines. Helpful resources in calculating the amount are a pdf fillable 2018 Child Support Guidelines Worksheet and a child support calculator tool. Alternatively, the judge can order an amount that the plaintiff requests if the defendant does not object to that amount.

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

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

To order the defendant to pay child support by income withholding, judges should check the appropriate box on the Order, which orders the defendant to pay monthly or weekly payments of support to the child(ren) through the DOR. This also orders the defendant to send payments directly to DOR at P.O. Box 55144, Boston, Massachusetts, 02205, during the period of time (often several weeks) that DOR is setting up income withholding with the defendant's employer, if any. This type of order allows for child support to be collected with no contact between the parties. It should be noted, however, that this order will only be in effect while the abuse prevention order is in effect; a plaintiff seeking an order for beyond the length of the abuse prevention order must seek such an order in the Probate and Family Court.

General Laws c. 119A, § 12(c) allows a judge to "suspend" the income withholding and order child support to be paid directly to the plaintiff. Income withholding can be suspended if the parties agree in writing that the payment shall be made directly or if the judge finds good cause exists to order that the income withholding be suspended and makes written findings in support of suspension. "Such written findings shall include a determination by the court that immediate income withholding would not be in the best interests of the child and the reasons therefore and, in the case of a modification of a support order, shall include proof of timely payments made in compliance with the existing order." G.L. c. 119A, § 12(c).[4] If payment is to be made directly to the

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

plaintiff, the judge must reconcile this order with any no contact provision in the c. 209A order. For example, if the judge orders that the defendant have no contact with the plaintiff, and that support payments be mailed to the plaintiff, the order should state this as an exception to the no contact provision for the limited purpose of mailing of support payments. *See* Guideline 4:01 Content of *Ex Parte* Orders.

## Commentary

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

If the resources referenced in this Guideline are, for some reason, unavailable, a judge can arrive at a reasonably estimated child support order by determining the parties' combined gross weekly income (if the parties do not have a weekly figure available, then the weekly income may be determined by dividing the monthly figure by 4.313). If possible, determine the percentage each parent contributes to the available gross weekly income. If the non-custodial parent provides health and dental care, subtract that amount from the available gross. If the custodial parent pays these costs, add the amount to the available gross. Using that figure, reference the Child Support Obligation Schedule, set forth in Table A of the 2018 Child Support Guidelines Worksheet, which provides a range for a child support order based on that amount.

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

The court may order support payments even if the plaintiff is currently receiving cash benefits through Transitional Aid to Families with Dependent Children (TAFDC).

Plaintiffs must fill out the necessary DOR forms for enforcement of the child support order. This can be done online at Mass.gov by searching "How to Apply for Child Support Services "or the court can provide the plaintiff with a paper copy of the application to be sent in by mail. While enforcing the c. 209A support order, DOR will typically pursue a child support order in the Probate and Family Court that will extend support until the minor children are emancipated. Thus, the DOR

support process is one that may provide more long-term security for a plaintiff with one or more minor children, along with the immediate relief that a c. 209A support order can bring. Upon request, DOR will provide any court with copies of the DOR forms.

Violations of c. 209A support orders are punishable only by contempt actions and not as criminal violations of the c. 209A order. *See* Guideline 8:00 Criminal Prosecution of Violations of Abuse Prevention Orders; Venue; Guideline 8:02 Criminal Contempt; and, Guideline 8:02A Civil Contempt.

## 6:06 Parenting Time Orders Exclusive to Probate and Family Court

The District Court, Boston Municipal Court, and Superior Court do not have jurisdiction to issue parenting time orders in a c. 209A action. Where either party seeks a court ordered parenting time plan, the parties should be told that only the Probate and Family Court can issue such an order. Similarly, if the plaintiff asks that the defendant be permitted to contact the child(ren) only if the defendant complies with certain conditions (e.g., counseling, substance use disorder treatment, random drug and/or alcohol screens), the plaintiff should be told that such an order can only be issued by the Probate and Family Court.

In some cases, where the plaintiff requests a no contact order and/or a stay away order, and the court finds a basis to issue such an order, but the plaintiff wants the defendant to have contact with the minor child(ren), the order may be drafted in a way that facilitates contact with the child(ren). For example, the court can order no contact with the plaintiff with the exception that the defendant can contact the plaintiff electronically or indirectly through specified third parties, or, if appropriate, by telephone in order to facilitate contact with the minor child(ren). Alternatively, the distance restriction may be drafted to permit curbside pick-up and drop-off of the minor child(ren). Any such orders should be crafted in a way that does not expose the plaintiff, or the minor child(ren), to harm or risk of harm.

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

Both parties should be told that the Probate and Family Court has superseding jurisdiction regarding custody, support, and contact with minor children, as well as exclusive jurisdiction regarding parenting time. *See* Guideline 12:00, et. seq., Related Probate and Family Court Matters.

If there is an existing parenting time order issued by the Probate and Family Court, and another court department prohibits contact with the defendant's minor child(ren), the court must follow the procedures for issuing an inconsistent order. *See* Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.

The fact that a Probate and Family Court order relating to minor children will ultimately supersede an order of another court does not mean that Superior Court, District Court, or Boston Municipal Court judges "are prohibited or discouraged from ordering all other necessary relief or issuing the custody and support provisions of orders pursuant to c. 209A for the full duration permitted under subsection (c)." G.L. c. 209A, § 3.

## Commentary

District Court, Boston Municipal Court, and Superior Court have no authority to order parenting time for a defendant in a c. 209A action. Defendants seeking such orders must go to the Probate and Family Court.

Chapter 209A now expressly authorizes the Superior Court, District Court, and Boston Municipal Court departments of the Trial Court to issue orders regarding minor children despite the existence of an inconsistent order by the Probate and Family Court. G.L. c. 209A, § 3. Courts other than Probate and Family Court are still precluded from setting parenting time schedules or conditions, but are permitted to issue an inconsistent no contact or custody order on an emergency basis to allow the parties time to obtain a hearing before the Probate and Family Court. Often, the inconsistent provision will be a no contact order that would affect an existing parenting time schedule ordered by the Probate and Family Court.

If an inconsistent order issues, follow the procedure set forth in Guideline 1:11 Plaintiff's Requested Order Will Contradict Existing Probate and Family Court Order.

## 6:07 Mutual Abuse Prevention Orders

Where the parties seek abuse prevention orders against one another, the court has a responsibility to decide who is in danger from whom, who needs the court's protection and whether one party is the primary aggressor. A mutual abuse prevention order should only be issued in the rare circumstance when both parties are suffering from abuse, having each proved that circumstance by a preponderance of the evidence, and both are genuinely in need of protection from such abuse. "A court may issue a mutual restraining order or a mutual no contact order pursuant to any abuse prevention action only if the court has made specific written findings of fact." G.L. c. 209A, § 3. These findings must precede or accompany the order. *Nelson N. v. Patsy P.*, 98 Mass. App. Ct. 78, 81 (2020). The purpose is to ensure close scrutiny of "the often conflicting evidence presented in order to determine if a mutual order is warranted." *Id*. The findings of fact should provide the basis for the court's conclusion that each party has proved, by a preponderance of the evidence, that he or she is suffering abuse by the other party and that the resulting abuse prevention orders are warranted and should indicate the critical facts found by the judge "regarding key disputed issues, typically including what "abuse" the defendant has committed, and why an order to prevent further abuse by that defendant is warranted. *Id*. "The court shall then provide a detailed order, sufficiently specific to apprise any law officer as to which party has violated the order, if the parties are in or appear to be in violation of the order." G.L. c. 209A, § 3. All mutual orders must include a reference to the other order by court department, division, and case number.

Consecutive orders, where the same parties reverse roles are, also, mutual orders. *Sommi v. Ayer*, 51 Mass. App. Ct. 207, 209-210 (2001). If the second order is sought in the same court that issued the first, the court has three options, depending upon the court's findings: 1) if the standard for issuance of an order has not been met, decline to issue an order; 2) if the court finds a

substantial likelihood of immediate danger and the hearing after notice on the first order has not yet been held, issue the order and either make it returnable on the date scheduled for the hearing in the first case or on a different date; or, 3) if the standard for an *ex parte* hearing is not met, defer to the hearing on the second order until a hearing with all parties is held. *See* Guideline 6:04 Modification of Orders; Terminating Orders. If, at the hearing, relief to both parties is warranted, mutual orders may be issued.

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

## Commentary

Mutual abuse prevention orders should be issued sparingly. *See Uttaro v. Uttaro*, 54 Mass. App. Ct. 871, 875 (2002). The law requires that the court issue case specific written findings before issuing mutual abuse prevention orders. *Nelson N. v. Patsy P.*, 98 Mass. App. Ct. 78, 81 (2020). The purpose of requiring specific written findings to support the issuance of mutual orders is "to ensure that the judge will carefully consider the evidence presented to determine who is the real victim and aggressor in an abusive relationship and if a mutual order is warranted." *Id*. quoting *Sommi v. Ayer*, 51 Mass. App. Ct. 207, 211 (2001). These findings should explain the basis for concluding that each party has abused the other and that the protective terms imposed against each party are warranted. *Sommi*, 51 Mass. App. Ct. at 211. ("In issuing a mutual order, a judge is required to set forth the bases for concluding that mutual abuse occurred and, thus, a reciprocal order is warranted. The judge's failure to do so. . . requires the order to be vacated.").

If such an order is issued, the police must have clear instructions about how it is to be enforced. For example, an order requiring party A to stay away from party B's address and party B to stay away from party A's address can be enforced. However, an order which orders both party A

and party B to stay fifty yards away from one another cannot be enforced readily, because the responding officer often will not be able to say who approached whom.

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

Consecutive orders from different courts involving the same parties in reverse roles are considered "mutual orders." The second court, considering a complaint filed by a party who is already the subject of a previous order, cannot amend or supersede the first order. The second court's order, if any, will run only in favor of the new plaintiff. Finally, the second court cannot change the first order.

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

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

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

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

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

## 6:08 Further Extending an Order After Notice on Its Expiration Date

If the plaintiff appears in court seeking to extend an order after notice "at the date and time the order is to expire," G.L. c. 209A, § 3, and the defendant was served with notice of that scheduled hearing in the order, no new notice need be sent, and the same order may be extended upon the court finding a continued need for the order. The order can be extended for "any time reasonably necessary" to protect the plaintiff, G.L. c. 209A, § 3(e), or the court can make the order permanent.

If the defendant is not present, and the court cannot confirm that the defendant was served with the initial order after notice, then the court should schedule a new hearing on the issue of further extending the order so that the defendant can receive notice of the hearing. The abuse prevention order should be extended pending the new hearing and the order, with notice of the hearing, should be transmitted to the police department for in-hand service on the defendant. *See M.M. v. Doucette*, 92 Mass. App. Ct. 32, 38 (2017).

The inquiry at an extension hearing is whether the plaintiff has shown by a preponderance of the evidence that an extension of the order is necessary to protect the plaintiff from the likelihood of abuse. No new incident of abuse is required for extending the order. G.L. c. 209A, § 3 ("The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order, or allowing an order to expire or be vacated, or for refusing to issue a new order"). Where the initial order was issued on the basis that the plaintiff has a reasonable fear of imminent serious physical harm, the inquiry is whether the plaintiff continues to have a reasonable fear of imminent physical harm. *Callahan v. Callahan*, 85 Mass. App. Ct. 369, 374 (2014). However, if there was attempted or actual physical abuse or involuntary sexual relations, "the abuse is the physical harm caused, and a judge may reasonably conclude that there is a continued need for the order because the damage resulting from that physical harm affects the victim even when further physical attack is not reasonably imminent."

*Callahan*, 85 Mass. App. Ct. at 374. In fact, "abuse occasioned by physical harm may cause wounds that produce long-lasting fear in the victim without new incitements." *Id.* at 377. *See also McIsaac v. Porter*, 90 Mass. App. Ct. 730, 733-35 (2016) ("the infliction of some wounds may be so traumatic that the passage of time alone does not mitigate the victim's fear of the perpetrator").

While the judge is to consider the basis for the initial order in evaluating the risk of future abuse should the existing order expire, "this does not mean that the restrained party may challenge the evidence underlying the initial order." *Id.*, *quoting Iamele v. Asselin*, 444 Mass. 734, 740 (2005).

In evaluating whether the plaintiff has met the burden of establishing a continued need for the order, a judge must consider the totality of the circumstances of the parties' relationship. In considering the risk of future abuse should the existing order expire, the factors that the judge should examine include, but are not limited to: "the defendant's violations of protective orders, ongoing child custody or other litigation that engenders or is likely to engender hostility, the parties' demeanor in court, the likelihood that the parties will encounter one another in the course of their usual activities (e.g., residential or workplace proximity, attendance at the same place of worship), and significant changes in the circumstances of the parties." *Iamele*, 444 Mass. at 740. *See also Vittone v. Clairmont*, 64 Mass. App. Ct. 479, 486-489 (2005), *rev. denied*, *Vittone v. Clairmont*, 445 Mass. 1106 (2005) (discussing factors for a judge to consider when deciding whether there was a continued need for an abuse prevention order where parties have not been in contact for eight years).

If the order is extended, the defendant must be served with a copy. Any such order should immediately be entered in the Statewide Registry of Civil Restraining Orders.

## Commentary

In some cases, at the expiration date of an initial order after notice it may be appropriate to issue an order for a period of time that is longer than an additional year, but less than a permanent order. *See Crenshaw v. Macklin*, 430 Mass. 633, 635 (2000) (upholding court's authority to issue a permanent order following a "renewal hearing"). *See also Commonwealth v. Leger*, 52 Mass. App. Ct.

232, 239-241 (2001) (one-year time limitation for c. 209A orders applies only to initial hearing; judge may permanently extend order at subsequent hearing). In determining whether to issue a permanent order or an order for a particular period of years, the court may consider the severity and frequency of the violence involved, threats to do harm in the future and the ages of minor children, and any other relevant facts. For example, the court may determine that it is appropriate to extend an order until the youngest child of the parties reaches the age of eighteen.

No new application or complaint is required. However, the plaintiff should file a supplemental affidavit that explains the continued need for the order. The fact that the plaintiff may have moved is not a reason for denying the extension or requiring the plaintiff to reapply in the court with venue over the plaintiff's current residence.

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

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

The extended order must be served upon the defendant in the same manner as the prior order. If the defendant is not present, the court should ask if the plaintiff knows of any new address for the defendant.

At the hearing, both parties should be informed that, as with all types of orders, the defendant must comply with a no-contact or vacate order unless and until those specific orders are terminated in writing by the court. The plaintiff has no authority to "waive" such orders, without going to court to ask to have them terminated, and the defendant who violates those orders is subject to mandatory, warrantless arrest, regardless of the plaintiff's "consent."

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

## 6:09 Guideline Intentionally Deleted

### Commentary

Substantive content is now included in Guideline 6:08 Further Extending an Order After Notice on Its Expiration Date.

# Appeal

7:00 Appeal

## 7:00 Appeal

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

A pending appeal does not deprive the Trial Court of its ability to modify or terminate an order.

### Commentary

Judicial review of decisions regarding G.L. c. 209A orders is an appeal in the Appeals Court. *Zullo v. Goguen*, 423 Mass. 679, 681 (1996). *See also Watson v. Walker*, 447 Mass. 1014, 1015 (2006). "As a rule, a defendant who is the subject of an abuse prevention order issued *ex parte* at the commencement of an action brought under G.L. c. 209A may challenge the order at the ensuing hearing after notice – not by an appeal to an appellate court." *V.M. v. R.B.*, 94 Mass. app. Ct. 522, 522 (2018).

A defendant may appeal an order even if the order has expired. *Wooldridge v. Hickey*, 45 Mass. App. Ct. 637, 638 (1998). This is to be distinguished from an order that has been terminated from which there is no right of appeal. *Quinn v. Gjoni*, 89 Mass. App. Ct. 408, 414 (2016). When an order is terminated, the court is to notify the police in writing and direct the department to destroy all records of the terminated order. G.L. c. 209A, § 7.[5] In such circumstances, appellate review is moot because the defendant has obtained all the relief to which he or she could be entitled. This is because, even if successful on appeal, the defendant would not be entitled to have the order expunged from the Statewide Registry of Civil Restraining Orders. *Quinn*, 89 Mass. App. Ct. at 414 n.14. *See also Allen v. Allen*, 89 Mass. App. Ct. 403, 406 (2016) (same).

Despite any limitation on a party's right to appeal, if either party seeks to pursue an appeal, the clerk's office should be prompt in complying with Massachusetts Rules of Appellate Procedure 8 and 9 when assembling the record on appeal. *See Allen v. Allen*, 89 Mass. App. Ct. 403, 403 (2016) (motion to dismiss appeal resolved by the Appeals Court).

The Trial Court need not seek leave from the appellate court to modify or terminate a pending order. *Quinn v. Gjoni*, 89 Mass. App. Ct. 408, 411 (2016). "Of course, litigants should keep appellate courts apprised of any relevant ongoing proceedings." *Id*.

[5] Please note that G.L. c. 209A, § 7 uses the term "vacated."

# Enforcement of Orders; Criminal Proceedings; Criminal and Civil Contempt

## 8:00 Criminal Prosecution of Violations of Abuse Prevention Orders; Venue

Violating a no contact, stay away, no abuse, vacate, or gun surrender order of an active abuse prevention order is a criminal offense. G.L. c. 209A, § 7; G.L. c. 276, § 28. This crime may be prosecuted in the criminal court (or juvenile court if the defendant is under the age of eighteen) within whose territorial jurisdiction the act allegedly occurred, or in a criminal court that issued the order. G.L. c. 119, § 54; G.L. c. 218, § 26; G.L. c. 277, § 62A. A violation of an abuse prevention order may also be prosecuted as criminal or civil contempt in the court that issued the order. *See* Guideline 8:02 Criminal Contempt and Guideline 8:02A Civil Contempt.

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

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

### Commentary

General Laws c. 209A, § 7 provides that, while abuse prevention orders are civil in nature, violations of such orders are criminal. However, case law has interpreted this language to mean that only violations of orders (1) to refrain from abuse, (2) to vacate the household, (3) to have no contact with, or (4) to stay away from the plaintiff, are criminal violations. *See Commonwealth v. Finase*, 435 Mass. 310, 313-314 (2001). In addition, G.L. c. 209A, § 3B makes a violation of an order to surrender guns, ammunition, and firearms licenses (FID; LTC) a criminal offense. Violations of other provisions of the order, such as orders for support, custody, or compensation are punishable through contempt proceedings. G.L. c. 209A, § 7. *See* Guideline 8:02 Criminal Contempt and Guideline 8:02A Civil Contempt. Abuse prevention orders issued by other jurisdictions are to be enforced as though they were issued in the Commonwealth. *See* G.L. c. 209A, §§ 5A and 7; and,

Guideline 14:00 Filing and Enforcement of Abuse Prevention and Other Protective Orders Issued by Other Jurisdictions. Consequently, violations of orders issued by other states may be prosecuted in Massachusetts, and Massachusetts law governs the violation of such abuse prevention orders. *Commonwealth v. Shea*, 467 Mass. 788, 789 (2014).

## 8:01 Enforcing Violations of Abuse Prevention Orders

The law provides that when the police are provided with probable cause to believe that a no abuse, no contact, stay away, or vacate order has been violated, an immediate, warrantless arrest is required. G.L. c. 209A, § 6(7). The failure to surrender all guns, ammunition, licenses to carry firearms, and firearms identification cards under G.L. c. 209A, §§ 3B and 3C also gives rise to mandatory, warrantless arrest, pursuant to G.L. c. 209A, § 6(7).

When the police confront a situation of alleged domestic abuse with no active c. 209A order, they are instructed that, if they have probable cause to believe that a person either committed a felony, committed a misdemeanor involving abuse as defined G.L. c. 209A, § 1, or has committed an assault and battery in violation of G.L. c. 265, § 13A, arrest is the preferred response. G.L. c. 209A, § 6(7). Under this law, they are authorized to make a warrantless arrest, even though they did not observe the misdemeanor, if it involves domestic abuse. (Note, however, that this does not apply to the crime of threatening to commit a crime, G.L. c. 275, § 2, even though the threat involves domestic abuse unless it would amount to an assault, because G.L. c. 275, § 3 contains specific requirements for issuing a warrant for "threats.")

In circumstances where no arrest has been made and the issuance of a criminal complaint is sought, G.L. c. 218, § 35A requires a show cause hearing before a complaint may issue on a misdemeanor offense (e.g., violating a c. 209A order) against a defendant, unless there is a sufficient showing that any of the three statutory exceptions to the show cause hearing requirement applies (imminent threat of: bodily injury, the commission of a crime, or flight from the Commonwealth by the person who is the subject of the complaint), or unless a felony is also alleged and the police do not request a hearing. "The decision to issue a warrant may be based upon the representation of a prosecutor made to the court that the defendant may not appear unless arrested." Mass. R. Crim. P. 6(a)(2). In determining whether an imminent threat of bodily injury exists, the named defendant's

criminal record and the records contained within the statewide domestic violence record keeping system should be considered. G.L. c. 218, § 35A. If one of the three exceptions apply, the magistrate should make the probable cause determination without notice to the accused, and the magistrate should note on the application form the statutory exception to the show cause hearing requirement.

If a statutory exception does not apply and a felony is not also alleged, the show cause hearing should be scheduled with reasonable promptness. Notice to the accused should be sent by regular mail on the standard form promulgated by the Administrative Office of the District Court. The accused should generally be given at least seven days' notice. In exceptional cases, when a show cause hearing is scheduled on short notice, the magistrate may request that the police serve the notice. The named victim should also be given notice of the show cause hearing. A show-cause hearing, however, should never be used to refer the parties to mediation in cases involving alleged violations of abuse prevention orders or incidents of domestic abuse. *See* G.L. c. 209A, § 3 ("No court shall compel parties to mediate any aspect of their case").

## Commentary

Violation of a vacate, refrain from no abuse, no contact, or stay away order issued under G.L. c. 209A, § 3, 4, or 5, G.L. c. 209, § 32, G.L. c. 209C, §§ 15 or 20, and G.L. c. 208, §§ 18, 34B, or 34C is a criminal offense punishable under G.L. c. 209A, § 7 by a fine of not more than $5,000.00 or by imprisonment for not more than 2 ½ years in a House of Correction, or both fine and imprisonment. G.L. c. 209A, §§ 5A and 7. *Commonwealth v. Finase*, 435 Mass. 310, 313-315 (2001). Violation of an order to surrender firearms, rifles, shotguns, machine guns, ammunition, licenses to carry firearms, and firearms identification cards is a criminal offense, punishable under G.L. c. 209A, §§ 3B and 3C, by a fine of not more than $5,000.00, or by imprisonment for not more than 2 ½ years in the House of Correction, or both fine and imprisonment. Failure to surrender a firearm owned by the defendant, even if the defendant no longer exercises dominion and control over the firearm, is sufficient to support a conviction for violating a gun surrender order. *Commonwealth v. Lovering*, 89 Mass. App. Ct. 76, 79 (2016).

Abuse prevention orders issued by other jurisdictions are to be enforced as though they were issued in the Commonwealth. *See* G.L. c. 209A, §§ 5A and 7; and, Guideline 14:00 Filing and Enforcement of Abuse Prevention and Other Protective Orders Issued by Other Jurisdictions. Consequently, violations of orders issued by other states may be prosecuted in Massachusetts, and

Massachusetts law governs the violation of such abuse prevention orders. *Commonwealth v. Shea*, 467 Mass. 788, 789 (2014).

Despite the authority for police to make mandatory arrests, victims of domestic abuse are occasionally referred to court to file a complaint application. Rather than refer a complainant back to the police for further action, the court should promptly process the complaint application and make a determination as to whether a warrant should issue or a hearing should be scheduled.

It is important to note that the act that constituted the violation of the order may also itself be a separate crime (e.g., assault and battery). Charging both is not duplicative. *See e.g.*, *Commonwealth v. Kulesa*, 455 Mass. 447, 452 (2009) (violation of a c. 209A order is not a lesser included offense of criminal harassment, G.L. c. 265, § 43A); and, *Commonwealth v. Torres*, 468 Mass. 286, 287 (2014) (violation of an abuse prevention order that contains a mandate to refrain from abuse is not a lesser included offense of assault and battery on a person protected by an abuse prevention order, G.L. c. 265, § 13A(b)(iii)). Violation of an abuse prevention order is, however, a lesser included offense of G.L. c. 265, § 43(b), which punishes stalking in violation of an abuse prevention order as violating the abuse prevention order is an element of that offense. *Edge v. Commonwealth*, 451 Mass. 74, 76-77 (2008).

Violations of provisions of the order other than the vacate, refrain from abuse, no contact, stay away, and gun surrender provisions, (e.g., failure to pay support or restitution, etc.), can only be punished by contempt. *See* Guideline 8:02 Criminal Contempt and Guideline 8:02A Civil Contempt. Where the behavior constituting the violation also gives rise to a separate criminal offense (e.g., kidnapping, rape, etc.), punishing the defendant for criminal contempt may preclude criminal prosecution. *See Mahoney v. Commonwealth*, 415 Mass. 278, 283-287 (1993), and cases cited therein.

Violating a stay away order that results in contact with more than one individual protected by the order justifies multiple counts of violating the order. *Commonwealth v. Housen*, 83 Mass. App. Ct. 174, 177 (2013) (noting that the "so-called zone of protection is a mechanism created for the protection of one or more individuals, not for the protection of a residence or job site"). In *Housen*, the defendant was ordered to stay away from the residence and to have no contact with the plaintiff or the three minor children. The defendant entered the residence in violation of the order. While there, each child arrived home separately. *Id*. at 175-76. Because the defendant had an affirmative duty to leave the residence on each occasion that one of the three minor children arrived home, the defendant committed additional and distinct violations of the order. *Id*. at 177. This duty was not diminished or eliminated because he was already in the house or because other individuals whom the order sought to protect were already present. *Id*.

To obtain a conviction pursuant to G.L. c. 209A, § 7, the Commonwealth must prove, beyond a reasonable doubt, that a valid abuse prevention order was in effect on the date of the alleged violation, that the defendant violated the order, and that the defendant had knowledge of the order. *Commonwealth v. Griffen*, 444 Mass. 1004, 1005 (2005).

In-hand service is often the best proof of the defendant's knowledge. The return of service indicating in-hand service on the defendant is admissible even without the testimony of the officer who completed it. *Commonwealth v. Shangkuan*, 78 Mass. App. Ct. 827, 828 (2011) (holding that a completed return of service is admissible under the public records exception to the hearsay rule and is nontestimonial for purposes of the confrontation clause).

Proof of service of the order is unnecessary if the Commonwealth can prove beyond a reasonable doubt that the defendant had actual knowledge of the terms of the order. *Commonwealth v. Delaney*, 425 Mass. 587. 589-93 (1997), *cert denied*, *Delaney v. Commonwealth*, 522 U.S. 1048 (1998). *Contrast Commonwealth v. Welch*, 58 Mass. App. Ct. 408 (2003). In Delaney, the defendant was initially served with a ten-day abuse prevention order issued *ex parte* under c. 209A, which was left at his last and usual address and which warned him, in pertinent part, that if he failed to appear on the hearing date" an extended or expanded [o]rder may remain in effect for up to one year." *Delaney*, 425 Mass. at 588. The defendant failed to appear at the hearing, a one-year order was issued, but was not served, although there was evidence that the defendant had verbally acknowledged its existence. *Delaney*, 425 Mass. at 589. The court stated that "[i]n these circumstances the service of the extended order on the defendant was not a prerequisite to his prosecution for violating the terms of the order" since "the jury could have found that the defendant had actual and constructive notice of the order and that it continued in effect after the hearing date." *Delaney*, 425 Mass. at 591. *See also Commonwealth v. Munafo*, 45 Mass. App. Ct. 597, 601-602 (1998), *rev. denied*, *Commonwealth v. Munafo*, 428 Mass. 428 Mass. 1110 (1998) (concurring with *Delaney* that failure to serve an extended order was not fatal error). Failure to serve the order is, however, "relevant to a determination as to whether the defendant possessed the knowledge required" for a conviction. *Delaney*, 425 Mass. at 593. Thus, where the victim testified that "once or twice maybe" she had spoken to the defendant about the existence of the abuse prevention order, there was insufficient evidence that the defendant knew of the order, and he could not be found guilty of a criminal violation. *Commonwealth v. Welch*, 58 Mass. App. Ct. 408, 410-411 (2003). *Compare Commonwealth v. Henderson*, 434 Mass. 155, 161-164 (2001) (although the defendant was unaware that the protective order had been extended, he was given constructive notice thereof due to the inclusion of the scheduled hearing date on the *ex parte* order.); *Commonwealth v. Melton*, 77 Mass. App. Ct. 552, 555-556 (2010), *rev. denied*, *Commonwealth v. Melton*, 458 Mass. 1109 (2010) (court found that defendant was on notice of an order prohibiting telephone contact where plaintiff, in response to a previous phone call initiated by the defendant, asked him why he was calling her and said "there's a restraining order"). *Contrast Commonwealth v. Molloy*, 44 Mass. App. Ct. 306, 309 (1998) (Commonwealth failed to prove defendant on notice that the annual order had been extended).

While admission of the abuse prevention order itself is often required to establish the terms of the order that were in effect at the time of the alleged violation, unnecessary and unfairly prejudicial language must be redacted from the order prior to its admission into evidence. *Commonwealth v. Reddy*, 85 Mass. App. Ct. 104, 108-109 (2014). For example, the "likelihood of abuse" language relative to an order to surrender guns, as well as the *ex parte* standard language of

"a substantial likelihood of immediate danger of abuse" would be considered unnecessary and unfairly prejudicial and should be redacted.

## 8:02 Criminal Contempt

Violation of provisions of abuse prevention orders, other than orders for no abuse, no-contact, to vacate and/or stay-away from a household, multiple family dwelling or workplace, or to surrender guns, ammunition, and firearms licenses (FID; LTC), may not be prosecuted as criminal violations, but may be addressed through contempt proceedings.

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

In many circumstances, civil rather than criminal contempt proceedings are preferred. The basic distinction lies, not in the contemnor's actions, but in the court's goal:

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

### Commentary

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

There is no statute prescribing the venue for criminal prosecutions for contempt. A complaint for criminal contempt for violating a court order should ordinarily be brought and tried in the court that issued the order. *Commonwealth v. Brogan*, 415 Mass. 169, 173 (1993). While the Probate and Family Court does not have jurisdiction over criminal violations of abuse prevention orders it issues, it does have the authority to enforce such orders by criminal contempt procedures. *Furtado v. Furtado*, 380 Mass. 137, 141 (1980). Actions for criminal contempt in the Probate and Family Court should be on the pre-printed Complaint for Contempt form (CJ-D 103). General Laws c. 209A, § 5A provides that "any protection order issued by another jurisdiction as defined in section one, shall be given full faith and credit throughout the commonwealth and enforced as if it were issued in the commonwealth for as long as the order is in effect in the issuing jurisdiction."

*See* Guideline 14:00 Filing and Enforcement of Abuse Prevention and Other Protective Orders Issued by Other Jurisdictions. This may include enforcement through criminal contempt proceedings.

Conduct that constitutes criminal contempt may be referred to the police or district attorney, or the victim should apply for a civilian complaint. Suggested charging language to be set forth on a complaint charging criminal contempt is as follows:

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

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

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

Under certain circumstances, it may be preferable to initiate civil rather than criminal contempt proceedings, the key distinction being that criminal contempt must be used to punish the alleged contemnor, whereas civil contempt proceedings must be used where the object is to compel compliance to benefit the party in whose favor the order was issued. *See* Guideline 8:02A Civil Contempt. A judgment of civil contempt presents no double jeopardy bar to a later prosecution for criminal contempt. *Vizcaino v. Commonwealth*, 462 Mass. 266, 268 n.1 (2012).

For an extensive analysis of contempt procedure, *see* A Guide to Contempt Procedures in the District Court (2009), available on Courtyard, the Trial Court's Intranet.

## 8:02A Civil Contempt

The plaintiff can pursue civil contempt remedies in the court that issued the abuse prevention order in addition to, or in lieu of, criminal proceedings. The purpose of civil contempt is to coerce compliance with a court order, not to punish the defendant for violating an order. Such proceedings should involve a civil complaint filed by the plaintiff, specifying the alleged violation, notice to the defendant, and a hearing on the complaint.

### Commentary

Civil contempt proceedings are expressly authorized by G.L. c. 209A, § 7. Since, by definition, civil contempt proceedings must be brought to coerce compliance with a court order for the benefit of the other party rather than to punish, they are appropriately used when the defendant has failed or refused to do something he or she has been ordered to do, rather than where the defendant has done something that has been forbidden. The most appropriate use of civil contempt (at least where the defendant is not before the court) is where some particular act, such as return of property, has been ordered but not accomplished by the defendant. In addition, civil contempt can be used for non-payment of child support and is particularly appropriate when standard methods of collection (e.g., income assignment) are unsuccessful. *See* G.L. c. 119A, § 12. Violations involving danger to the plaintiff will usually involve criminal charges or criminal contempt and prompt arrest with or without a warrant. A judgment of civil contempt, however, presents no double jeopardy bar to a later prosecution for criminal contempt. Vizcaino v. Commonwealth, 462 Mass. 266, 268 n.1 (2012).

The violation of a c. 209A order beyond the borders of Massachusetts can be subject to civil contempt by a Massachusetts court. L.F. v. L.J., 71 Mass. App. Ct. 813, 820 (2008).

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

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

A written complaint should be required from the plaintiff, but may be informal. Actions for civil contempt filed in the Probate and Family Court should be on the pre-printed Complaint for

Contempt form (CJ-D 103) and are governed by the Rules of Domestic Relations Procedure. Reasonable notice and the opportunity to be heard must be provided to the defendant. There is no right to a jury trial in such proceedings. Presumably, appeal on issues of law would be available.

If the defendant in a civil contempt proceeding is not before the court when charged, he or she should be served with a complaint in-hand, together with an order to show cause and notice of the date of the hearing. If the defendant fails to appear for the hearing, a capias should issue for the arrest of the defendant. The hearing would then proceed when the defendant is before the court. Service of process in civil contempt cases will require the plaintiff to pay the constable or deputy sheriff. If the plaintiff is indigent, the court can order the commonwealth to pay for service of process pursuant to the provisions of G.L. c. 261, §§ 27A *et seq*. *See Adjartey v. Central Div. of the Housing Court Dep't*, 481 Mass. 830 (2019).

For an extensive analysis of contempt procedure, *see* A Guide to Contempt Procedures in the District Court (2009), available on Courtyard, the Trial Court's Intranet.

## 8:03 Plaintiff's Acquiescence or Consent to the Violation Does Not Bar Criminal Prosecution

The court should instruct the parties that once a c. 209A order is issued, violation of certain of its terms constitutes a criminal offense. The court should further instruct the parties that the terms of the order remain in effect until the order is terminated by court order, expires by its own terms, or until it is modified by the court. Any action by the defendant contrary to its terms will subject the defendant to immediate, warrantless arrest and possible criminal prosecution.

### Commentary

Abuse prevention orders under c. 209A can be terminated only by action of the court. Parties who appear before the court seeking an abuse prevention order should be informed that the order remains in full force and effect until the order expires under its own terms or is modified or terminated by the court on motion of either party. This information, with other frequently asked questions about the terms of an abuse prevention order, is available for both the plaintiff ("Resources for Safety and Support") and the defendant ("Alternatives to Abuse") in separate handouts and should be routinely provided upon the issuance of an abuse prevention order. *See* Guideline 6:04 Modification of Orders; Terminating Orders.

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

## 8:04 Bail Procedures: Out of Court

The law prohibits setting an out of court bail where a person is arrested for violating an abuse prevention order or for a crime involving domestic abuse while a c. 209A abuse prevention order is in effect against the defendant. G.L. c. 276, § 57. The named victim of the new offense need not be the plaintiff of the active c. 209A abuse prevention order.

Where a person eighteen years of age or older is arrested for any other act that would constitute domestic abuse or strangulation in violation of G.L. c. 265, § 15D, the law permits the setting of out of court bail, but only after six hours from the time of arrest. G.L. c. 276, §§ 57 and 58. Upon the expiration of this six hour time frame, a clerk magistrate or bail commissioner may admit the person to bail upon determining that "such release will reasonably assure the appearance of the person before the court and will not endanger the safety of any other person or the community." G.L. c. 276, § 57. Whether or not a cash bail is set, the clerk magistrate or bail commissioner should also consider whether to impose conditions of release "in order to ensure the appearance of the person before the court and the safety of the named victim, any other individual, or the community." G. L. c. 276, §§ 57 and 58. A condition of release that must always be imposed is that the person commit no new offenses. G.L. c. 276, § 58. The person is to be told that failure to comply with any of the conditions of release could result in bail revocation and detention without bail.

In deciding whether to admit the person to bail or set conditions of release, the clerk magistrate or bail commissioner shall, to the extent practicable, have immediate access to all Criminal Offender Record Information (CORI) (including out of state records), board of probation records, and pending and prior police incident reports related to the person detained. This includes immediate access to sealed records. G.L. c. 276, § 100D. The clerk magistrate or bail commissioner should request police assistance in accessing these records if unable to do so on their own.

If the person is released, the arresting police department is to make a reasonable attempt to notify the named victim of the person's release.

The law also requires that when admitting to bail a person who has been arrested for a criminal act constituting domestic abuse, the person is to be provided with informational resources regarding domestic violence, including a list of nearby intimate partner abuse education (IPAE) programs.

## Commentary

Out of court bail is not to be addressed by judges on the Judicial Response System. *See* "Judicial Response System – Release of Persons on Bail or Recognizance" policy dated February 21, 1995.

The factors to be considered when determining whether to set a cash bail are: (1) the nature and circumstances of the offense charged, (2) the potential penalty the person faces, (3) the person's family ties, (4) financial resources, (5) employment record (6) history of mental illness (7) reputation (8) length of residence in the community, (9) record of convictions, if any, (10) any illegal drug distribution or present drug dependency, (11) any flight to avoid prosecution (12) fraudulent use of an alias or false identification, (13) any failure to appear at any court proceeding to answer to an offense, (14) whether the person is on bail pending adjudication of a prior charge, (15) whether the acts alleged involve domestic abuse, or violation of an abuse prevention order, (16) whether the person has any history of abuse prevention orders issued against them, (17) whether he is on probation, parole, or other release pending completion of sentence for any conviction, and (18) whether he is on release pending sentence or appeal for any conviction. Rule 3 of the Rules of the Superior Court Governing Persons Authorized to Take Bail, *citing* G.L. c. 276, § 58.

Those same factors should be considered when deciding whether to impose conditions of release, in addition to considering whether there is a risk that the arrested person will: (1) obstruct or attempt to obstruct justice; or (2) threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror. G.L. c. 276, § 57.

If a person arrested for domestic abuse or strangulation in violation of G.L. c. 265, § 15D is to be released, the law requires that reasonable efforts be made to inform the named victim of such release prior to, or at the time of, said release. G.L. c. 209A, § 6; G.L. c. 276, § 57. While c. 209A assigns this duty to the clerk magistrate or bail commissioner, G.L. c. 276, § 57 provides that when release is from a place of detention, the arresting police department is to make reasonable attempts to notify the named victim. It is appropriate for the clerk magistrate or bail commissioner to instruct the police to comply with this notification requirement. *See* Guideline 8:08 Bail Procedures: Notifying the Named Victim.

Upon admission to bail, informational resources regarding domestic violence, including a list of nearby intimate partner abuse education (IPAE) programs, is to be provided to the arrested person. A pamphlet entitled "Alternatives to Abuse" is available for use by the Trial Court to provide to defendants, and includes a statewide and regional listing for IPAE programs, as well as offices of the Department of Transitional Assistance (DTA), career centers, and legal assistance support. This flyer is available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed.

If a defendant violates conditions of release set by a clerk magistrate or bail commissioner before appearing in court, a clerk magistrate (but not a bail commissioner) can issue an arrest warrant revoking the defendant's bail. Bail conditions set by a clerk magistrate or bail commissioner stand in the same position as bail conditions set by a judge. There is no constitutional right to release on bail prior to trial; that right is solely a creation of statute. *Querubin v. Commonwealth*, 440 Mass. 108, 113-14 (2003). Where the bail statutes permit a clerk magistrate or bail commissioner to make bail dependent on compliance with stated conditions, "the liberty interest of a person admitted to bail is condition; if the person violates the explicit condition of his release, then his liberty can be curtailed." *Paquette v. Commonwealth*, 440 Mass. 121, 126 (2003). A "court has inherent power to revoke a defendant's bail for breach of any condition of release." *Id.* at 128. Accordingly, a clerk magistrate has the inherent authority to order the arrest of a defendant upon the receipt of credible information that the defendant has violated the conditions. *See* G.L. c. 218, §§ 32 and 33. *See also Paquette*, 440 Mass. at 129 ("A defendant cannot be heard to complain that his constitutional right to liberty has been violated when continued freedom was entirely within his own control, and the deprivation thereof was an inevitable consequence of his alleged failure to conform his conduct to the laws of this Commonwealth and to the explicit condition of his earlier release."). A police department that learns of an alleged violation of the conditions of release should contact the on-call clerk magistrate. If the clerk magistrate decides to issue a warrant, and the clerk magistrate does not have access to MassCourts, a temporary paper warrant should be issued.

## 8:05 Bail Procedures: In Court

Where a defendant is charged with violating an abuse prevention order, assault and battery on a household member in violation of G.L. c. 265, § 13M, or strangulation in violation of G.L. c. 265, § 15D, only the Commonwealth can move for arraignment within three hours of the complaint being signed by the magistrate.

General Laws c. 276, § 56A requires that the judge, at arraignment of any person arrested and charged with a crime against the person or property of another, inquire of the prosecutor whether domestic abuse is alleged to have occurred immediately prior to, or in conjunction with, the crime for which the person was arrested and charged. If so, the prosecutor is required to file a preliminary written statement to that effect and the judge, upon finding that there is an adequate factual basis for the allegation of domestic abuse made by the prosecutor, is to make a written ruling that domestic abuse is alleged.[6]

At arraignment, a judge can set a cash bail if necessary to ensure the appearance of the defendant, and the judge must also consider setting conditions of release necessary to "insure the safety of the person allegedly suffering the physical abuse or threat thereof, and [to] prevent its recurrence. . . . Such terms and conditions shall include reasonable restrictions on the travel, association or place of abode of the defendant as will prevent such person from contact with the person abused." G.L. c. 276, § 42A. Additionally, conditions of release "to ensure the appearance of the person before the court and the safety of the named victim, any other individual, or the community" may be imposed pursuant to §§ 42A, 57, and/or 58. Finally, G.L. c. 276, § 58 continues to authorize, in all cases regardless of the crime charged, the imposition of restrictions on personal associations or conduct including, but not limited to, avoiding all contact with a named victim and

[6] The Juvenile Court has taken the position that this provision does not apply to Juvenile Court.

any potential witnesses who may testify. A condition of release that must always be imposed in every case is that the person commit no new offenses, and the defendant is to be told that failure to comply with any of the conditions of release could result in bail revocation and detention without bail. G.L. c. 276, § 58.

The issuance of a separate no contact order as a condition of pre-trial release is also authorized by G.L. c. 209A, § 6, last par. "When any person charged with or arrested for a crime involving abuse . . . is released from custody," whether on personal recognizance or bail pursuant to G.L. c. 276, § 58 or on conditions after a detention or dangerousness hearing pursuant to G.L. c. 276, § 58A, the court must issue a no contact order if the named victim requests it. G.L. c. 209A, § 6, last par.

The law mandates that, when making a determination about bail or conditions of release, the judge shall have, "to the extent practicable," immediate access to all criminal offender record information (CORI), board of probation records, and pending and prior police incident reports related to the defendant. G.L. c. 276, §§ 42A, 57, and 58. This includes access to sealed records, out of state records, scanned abuse prevention order affidavits, § 58A findings, and information contained in the Statewide Registry of Civil Restraining Orders.

If the defendant is released on bail by order of the court, the district attorney's office is required to make a reasonable attempt to notify the named victim of the defendant's release. Additionally, the person admitting the defendant to bail must provide the defendant with informational resources regarding domestic violence, including a list of nearby intimate partner abuse education (IPAE) programs.

## Commentary

Since only the Commonwealth can move for arraignment within three hours of the complaint being signed by the magistrate for these specific offenses, clerk magistrates issuing complaints in such cases should note the time that the complaint is signed so that the three-hour window can be calculated.

Regarding the requirement to make a finding regarding an allegation of abuse pursuant to G.L. c. 276, § 56A, *see Commonwealth v. Dossantos*, 472 Mass. 74, 80-81 (2015). The 56A determination is required in any case involving an allegation of domestic abuse whether or not the relationship between the parties is an element of the crime. For example, a 56A determination should be made where the facts in support of a complaint for malicious destruction of property indicate that the named victim and the defendant have a child in common or reside in the same household. The Trial Court has promulgated an Allegation of Domestic Abuse and Written Finding form, which can be found on Courtyard, the Trial Court's Intranet. This finding will be used only for entry into the Statewide Registry of Civil Restraining Orders; it is not admissible in the case or available to the public. The law also requires that this finding be removed by the court from the Statewide Registry of Civil Restraining Orders upon an acquittal, no bill, or finding of no probable cause. A dismissal for any other reason (e.g., dismissal for want of prosecution, assertion of a privilege, etc.) does not result in the removal of the finding. G.L. c. 276, § 56A. Note that the finding relates to the entire case, which means that if there is another qualifying charge that does not qualify for removal, then the finding cannot be removed. An Order For Removal Of Allegation Of Domestic Abuse From Domestic Violence Record Keeping System form is also available on Courtyard, the Trial Court's Intranet.

The factors to be considered when determining whether to set a cash bail are: (1) the nature and circumstances of the offense charged; (2) the potential penalty the person faces; (3) the person's family ties; (4) financial resources; (5) employment record; (6) history of mental illness; (7) reputation; (8) length of residence in the community; (9) record of convictions, if any; (10) any illegal drug distribution or present drug dependency; (11) any flight to avoid prosecution; (12) fraudulent use of an alias or false identification; (13) any failure to appear at any court proceeding to answer to an offense; (14) whether the person is on bail pending adjudication of a prior charge; (15) whether the acts alleged involve domestic abuse, or violation of an abuse prevention order; (16) whether the person has any history of abuse prevention orders issued against them; (17) whether the person is on probation, parole, or other release pending completion of sentence for any conviction; and, (18) whether the person is on release pending sentence or appeal for any conviction. G.L. c. 276, §§ 42A, 57, and 58.

The judge's authority to set conditions does not require a motion by the Commonwealth. G.L. c. 276, §§ 42A, 57, and 58. It is the court's responsibility to determine whether the defendant is in default or already on recognizance on a previous charge and to review all available information relevant to the issue of the defendant's likelihood of appearing for trial and conditions of release necessary to protect the named victim, irrespective of the prosecution's recommendations on the question of bail.

The Court Activity Records Information (CARI) system now identifies any adult case containing § 56A findings and any case where § 58A findings have been made. The CARI system also identifies abuse prevention orders issued against the defendant. This information is found in the Domestic Violence Link Group at the top of the CARI report. The court should also review the

court case file on any c. 209A order that the defendant is accused of violating as well as any other c. 209A orders concerning the defendant that can be accessed by the court.

- **Dangerousness (D58A) Link Group.** The Link Group contains criminal dockets after August 8, 2014 in which any findings and order pursuant to G.L. c. 276, § 58A were made. A case appears in the D58A Link Group, whether or not detention was ordered. Therefore, if a docket number appears in the D58A Link Group, the reader is informed that the Commonwealth filed a motion for detention pursuant to G.L. c. 276, § 58A, and the judge made findings pursuant to the motion under G.L. c. 276, § 58A. If a docket number appears in the D58A Link Group, the G.L. c. 276, § 58A order should be available as a scanned document in MassCourts. The scanned order will be accessed by probation, who now have view-only access to this MassCourts information, regardless of the court department and division where the G.L. c. 276, § 58A findings were made. When a case appears in the D58A Link Group, probation has been directed to obtain the scanned order and provide a printed copy to the judge and parties in the courtroom. Dangerousness findings issued prior to August 8, 2014 will not be captured in the D58A Link Group.
- **Domestic Violence (DVRS) Link Group**. The DVRS Link Group contains criminal dockets after August 8, 2014 in which an allegation of domestic abuse pursuant to G.L. c. 276, § 56A was filed by the prosecution. This Link Group also contains docket numbers of abuse prevention order petitions filed after August 8, 2014, in which an affidavit was scanned, whether or not the order was ultimately issued. If the abuse prevention order issued, and the affidavit was properly scanned, the probation department will have access to the affidavit in MassCourts and has been directed to provide a printed version to the judge and parties in the courtroom. Abuse prevention orders will also appear on the CARI report, but please note that, with the exception of Probate and Family Court, abuse prevention order affidavits were not scanned prior to August 8, 2014.
- **Docket Numbers that Appear in Both Link Groups**. When a docket number appears in both Link Groups, this signifies that the criminal case contained both an allegation of domestic abuse pursuant to G.L. c. 276, § 56A, and a dangerousness detention finding was made pursuant to G.L. c. 276, § 58A.

If the defendant is admitted to bail, reasonable efforts must be made to inform the named victim of such release prior to or at the time of release. G.L. 209A, § 6. This is to be done either by the person admitting the defendant to bail, G.L. c. 209A, § 6, or by the prosecutor, G.L. c. 276, §§ 42A, 57, and 58. It is appropriate for the judge to delegate this duty to the prosecutor. *See* Guideline 8:08 Bail Procedures: Notifying the Named Victim.

A defendant, who has been charged with violation of an abuse prevention order or a criminal act constituting domestic abuse and has been admitted to bail, must be provided with informational resources regarding domestic violence, including a list of nearby intimate partner abuse education (IPAE) programs. G.L. c. 276, §§ 42A, 57, and 58. A pamphlet entitled "Alternatives to Abuse" is available for use by the Trial Court to provide to defendants, and includes a statewide

and regional listing for IPAE programs, as well as offices of the Department of Transitional Assistance (DTA), career centers, and legal assistance support. This flyer is available on the Trial Court's public website on Mass.gov and can be downloaded and printed as needed

## 8:06 Bail Procedures: Dangerousness Hearings

When a defendant has been arrested or is the subject of an arrest warrant for an offense enumerated in G.L. c. 276, § 58A, and the Commonwealth moves for pre-trial detention, the court must hold a hearing pursuant to § 58A(4). Among the offenses designated by the statute are felony offenses that have, "as an element of the offense the use, attempted use, or threatened use of physical force against the person of another," violations of abuse prevention orders, misdemeanor or felony offenses involving domestic abuse, or misdemeanor or felony offenses alleged to have been committed while a c. 209A abuse prevention order was in effect. G.L. c. 276, § 58A(1).

The statute provides that the hearing shall be held immediately upon the person's first appearance before the court unless the Commonwealth or the defendant is granted a continuance. A continuance, not to exceed three business days, may be granted to the Commonwealth upon a finding of good cause. A continuance may be granted to the defendant, but for no more than seven days absent good cause. G.L. c. 276, § 58A(4). The defendant must be detained pending the hearing upon a finding of probable cause for one or more eligible offenses.

At the hearing, the rules of evidence do not apply, and § 58A provides that the judge "shall consider hearsay contained in a police report or the statement of a named victim or witness." Prior to the defendant summonsing a named victim, or a member of the named victim's family, to appear as a witness at the hearing, the defendant must demonstrate to the court a good faith basis for the reasonable belief that the testimony would be material and relevant to support a conclusion that there are conditions of release that would reasonably assure the safety of any other person or the community. G.L. c. 276, § 58A(4).

If, after holding the hearing, the court determines that personal recognizance "will endanger the safety of any other person or the community," the court may impose the least restrictive conditions that will reasonably assure the appearance of the defendant and the safety of any other

person and the community. G.L. c. 276, § 58A(2). Such conditions must always include the requirement that the person not commit a federal, state, or local crime during the period of release. In domestic abuse cases, conditions of release should always include an order not to abuse the named victim, and to have no contact with the named victim, if the named victim requests such an order. If, however, the judge finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, a judge must order the defendant detained for a period not to exceed 120 days if heard in the District Court or Boston Municipal Court, and not to exceed 180 days if heard in the Superior Court, excluding any period of delay as defined by Mass. R. Crim. P. 36(b)(2) or continuance granted for good cause. G.L c. 276, § 58A(3). An order of detention pursuant to § 58A requires written findings of fact and a written statement of the reasons for the detention. G.L c. 276, § 58A(4). In cases involving violations of abuse prevention orders or domestic abuse, the judge must make a written determination regarding the factors listed in G.L c. 276, § 58A(5), regardless of whether detention or conditions are ordered. These findings are to be entered in the domestic violence record keeping system.

The hearing may be reopened at any time before trial upon a finding that: (1) information exists that was not known at the time of the hearing, or there has been a change in circumstances; and, (2) that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community. G.L. c. 276, § 58A(4).

If a defendant is ordered released on conditions after a hearing on dangerousness under § 58A, that order may be revoked if any of the conditions are violated. The procedure for revocation and for custody during any continuance of the revocation hearing is provided in G.L. c. 276, § 58B. *See* Guideline 8:07 Bail Warnings: Revocation.

## Commentary

Where a criminal defendant has been arrested, or is subject to an outstanding arrest warrant, for violating an abuse prevention order or a misdemeanor or felony offense that involves domestic abuse, the defendant may be subject to pre-trial detention under G.L. c. 276, § 58A, even if the defendant is not held in custody following the arrest. *Commonwealth v. Diggs*, 475 Mass. 79, 85 (2016) (the phrase "held under arrest" within the meaning of G.L. c. 276, § 58A(4) refers to any person who has been arrested or for whom an arrest warrant has issued in connection with one of the enumerated offenses, even if the defendant is not being held under arrest at the time of his first appearance before the court). The intent of the Legislature is to protect the public from the potential harm posed by persons who have been arrested or are subject to arrest, and G.L. c. 276, § 58A applies equally to individuals who have been released on bail by a magistrate or for whom an arrest warrant has issued but has not been executed, as it does to individuals who remain in custody after being arrested. *Diggs*, 475 Mass. at 84.

The court must first make a determination that there is probable cause to believe that this defendant has committed a qualifying crime: either (1) one of the listed crimes in 1), (2) a "felony offense that has an element of the offense the use, attempted use, or threatened use of physical force" against another person, (the "force clause"); or (3) "arrested and charged with a misdemeanor or felony involving abuse as defined by [G.L. c.] 209A or while an [G.L. c. 209A) order of protection was in effect . . . against such person" (the "abuse clause"). G.L c. 276, c. 58A (1).

In determining whether a crime is eligible under the force clause, the analysis focuses on the elements of the offense. *Scione v. Commonwealth*, 481 Mass. 225, 228 (2019) (analysis is "a categorical approach, that is, we look at the elements of the offense, rather than the facts of or circumstances surrounding the alleged conduct"). In *Commonwealth v. Vieira*, the Supreme Judicial Court held that indecent assault and battery on a child under fourteen, in violation of G.L. c. 265, § 13B, does not qualify under the force clause. 483 Mass. 417, 427 (2019). Rape of a child under the age of 16 in violation of G.L. c. 265, § 23A does not qualify as a predicate offense under the force clause. *Scione v. Commonwealth*, 481 Mass. 225, 231 (2019) ("'the use, attempted use or threatened use of physical force' is not an element of § 23A). The facts may, however, qualify under the abuse clause.

In determining whether a crime is eligible under the abuse clause, "a judge may look beyond the elements of a crime to the surrounding circumstances of the alleged offense to determine whether it is a 'misdemeanor or felony involving abuse.'" *Scione v. Commonwealth*, 481 Mass. 225, 237 (2019) (applying a noncategorical approach to the abuse clause to allow for the examination of the underlying facts giving rise to the charge in question consistent with the intent of the Legislature's intent to "reduce, if not eliminate" the release of "dangerous arrestees" who pose a risk to domestic violence victims).

Note: the "residual clause" of § 58A – any felony offense that, by its nature, involves a substantial risk that physical force against the person of another may result" has been declared unconstitutional. *Scione v. Commonwealth*, 481 Mass. 225, 232 (2019).

A continuance of the hearing of up to three business days may be granted to the Commonwealth, but only upon a showing of good cause. *Mendonza v. Commonwealth* and *Commonwealth v. Callender*, 423 Mass. 771, 773 (1996). A judge granting a continuance to the Commonwealth "should then make a specific finding that such cause has been shown and what such cause is." *Id*. at 792. The statute requires that the defendant be detained during a continuance, "upon a showing that there existed probable cause to arrest the person." G.L. 276, § 58A(4). Both the *Mendonza* and *Callender* cases involve violation of an abuse prevention order (*Mendonza* included other criminal charges as well). In *Mendonza*, the Court rejected the defendant's numerous arguments and found that the challenged provisions of the preventive detention statute (G.L. c. 276, § 58A) pass constitutional muster on their face and as applied to the defendant. The statute has also been held to apply to juveniles. *See Victor V. v. Commonwealth*, 423 Mass. 793 (1996).

While the Court's language in *Diggs* suggests that a dangerousness hearing could not be held where a defendant was summonsed for an enumerated offense, that issue was not directly addressed. *Compare Finn v. Commonwealth*, 482 Mass. 817, 817 (2019) (the language of §58A permits a Superior Court judge to conduct a dangerousness hearing upon a defendant's first appearance in that court, regardless of whether that appearance is pursuant to a summons or to an arrest warrant). Potentially, the mandatory nature of the statute – the Court shall hold a hearing where the defendant is charged with an eligible offense and the Commonwealth moves for detention – does not preclude the Court's discretion to hold such a hearing where the defendant otherwise qualifies under subsection (1) of the statute. *See U.S. v. Megahed*, 519 F.Supp.2d 1236, 1248 (M.D. Fla. 2007). Should the court decide to hold a dangerousness hearing in such circumstances, the hearing should be held on the defendant's first appearance before the court as it is unlikely that there would be good cause to justify a continuance of the hearing where the Commonwealth receives prior notice of summons arraignments.

The rules concerning admissibility of evidence in a criminal case do not apply, and G.L. c. 276, § 58A(4) mandates that the judge shall consider hearsay in police reports and statements of a named victim or witness. At the hearing, the defendant has the right to counsel, to testify, to present witnesses, to cross-examine witnesses who appear, and to present information. In order to summons the named victim or a member of the named victim's family, however, the defendant must demonstrate to the court a good faith basis for the reasonable belief that the testimony would be material and relevant to support a conclusion that there are conditions of release that would reasonably assure the safety of any other person or the community. G.L. c. 276, § 58A(4).

A finding that no conditions of release will reasonably assure the safety of any other individual or the community must be supported by clear and convincing evidence. G.L. c. 276, § 58A(4). Factors to consider are: the nature and seriousness of the danger posed to any person or the community that would result by the person's release; the nature and circumstances of the offense charged; the potential penalty the person faces; the person's family ties, employment record and history of mental illness; the person's reputation; the risk that the person will obstruct, or attempt to obstruct, justice or threaten, injure, or intimidate, or attempt to threaten, injure, or

intimidate, a prospective witness or juror; the person's record of convictions, if any; any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge; whether the acts alleged involve domestic abuse, or violation of a temporary or permanent abuse prevention order; whether the person has any history of abuse prevention orders issued against them; whether the person is on probation, parole, or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction. G.L. c. 276, § 58A(5).

If either detention or pre-trial release subject to conditions is ordered pursuant to § 58A, then the clerk shall immediately notify the probation officer of the order, and the order shall be recorded in the defendant's criminal record as well as in the domestic violence record keeping system. G.L. c. 276, § 58A(8). With respect to defendants eighteen years of age or older who have been arrested or subject to an outstanding arrest warrant for violating an abuse prevention order, assault or assault and battery on an intimate partner (G.L. c. 265, § 13M), or strangulation (G.L. c. 265, § 15D), the judge must make a written determination regarding these factors even if the judge finds that the Commonwealth has not met its burden in proving the defendant's dangerousness. The judge's findings will be placed in the statewide domestic violence record keeping system, but not in the defendant's Criminal Offender Record Information (CORI) record. In either event, the clerk should ensure that a probation officer is provided with a copy of the judge's written findings pursuant to G.L. c. 276, § 58A. Criminal cases containing dangerousness findings pursuant to G.L. c. 276, § 58A, filed since August 8, 2014, are identified in the Court Activity Record Information (CARI) report in the "Linked Cases" field.

## 8:07 Bail Warnings: Revocation

In all criminal cases, the court shall provide, as an explicit condition of release that, should the defendant be charged with any crime during the period of release, or violate any other condition of release, the defendant's bail may be revoked, and the defendant can be held without bail until trial. The clerk must record on the court docket that this bail warning was given.

A defendant who is charged with a new offense while on release pending the adjudication of a prior charge may have his bail revoked pursuant to either G.L. c. 276, § 58 or G.L. c. 276, § 58B where there is probable cause to believe the defendant committed a crime while released on bail. Formal criminal charges need not be charged in order to revoke a defendant's bail for committing a new crime. In such circumstances, the Commonwealth may seek to revoke bail under either § 58 or § 58B. The judge must then determine whether the Commonwealth satisfied the requirements of the particular statute, either § 58 or § 58B, under which it sought to revoke bail.

There is a slight difference in the standards applicable to a § 58 revocation order and a § 58B revocation order. Upon finding probable cause to believe the defendant committed a new crime, revocation under § 58 requires an additional finding, by a preponderance of the evidence, that "the release of said person will seriously endanger any person or the community and that the detention of the person is necessary to reasonably assure the safety of any person or the community." Revocation under § 58B requires an additional finding, by a preponderance of the evidence, either "that there are no conditions of release that will reasonably assure the person will not pose a danger to the safety of any other person or the community" or "the person is unlikely to abide any condition or combination of conditions of release." In comparing these standards, the Supreme Judicial Court concluded that the standard under § 58B is a significantly weightier showing to revoke bail than under § 58.

A § 58 revocation order, once entered, shall be valid for a period of sixty days. The judge shall designate in the order of revocation the sixtieth day, specifically, the day of the week, the date of the month, and the year on which the sixtieth day falls, to avoid any misunderstanding. If the sixtieth day falls on a weekend or holiday, the preceding business day shall constitute the "sixtieth" day. A person so held shall be brought to trial as soon as reasonably possible. On the sixtieth day, if the case has not been adjudicated, the defendant must be brought before the court with jurisdiction over that offense for a new bail hearing.

If detained pursuant to a § 58B revocation order, the person detained "shall be brought to trial as soon as reasonably possible, but in the absence of good cause, a person so held shall not be detained for a period exceeding ninety days excluding any period of delay as defined in Mass. R. Crim. P. 36(b)(2)." G.L. c. 276, § 58B.

If, however, the judge finds that the detention standard is not met, the judge may amend the conditions of release accordingly.

Revocation and detention pursuant to § 58B can also be ordered upon a finding by clear and convincing evidence that the person has violated any other condition of release, and the judge finds that there are no conditions of release that will reasonably assure that the defendant will not pose a danger to the safety of any other person or the community, or that the defendant is unlikely to abide by any condition or combination of conditions of release. G.L. c. 276, § 58B.

When the charges against the defendant have not been dismissed or resulted in acquittal, and where no manifest injustice exists, a judge may not vacate a § 58 bail revocation order once it has entered. A judge's authority to vacate a § 58B revocation order once it has entered has not been similarly addressed and, unlike § 58, § 58B does not contain any language regarding the authority to review or terminate a § 58B revocation order. Clearly a showing of "manifest injustice" would allow the judge who imposed the § 58B revocation order to reconsider the order. Beyond that, it is

not clear what other circumstances, if any, would allow a Trial Court judge to review or reconsider a § 58B revocation order.

## Commentary

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

As this Guideline notes, where there is probable cause to believe a defendant committed a new crime while on release, the court may revoke the defendant's bail pursuant to either G.L. c. 276, § 58 or G.L. c. 276, § 58B. *See Delaney v. Commonwealth*, 415 Mass. 490, 494 (1993) (formal criminal charges need not be charged in order to revoke a defendant's bail for committing a new crime). For a comparison of these revocation statutes, *see Josh J. v. Commonwealth*, 478 Mass. 716 (2018). For procedural guidance on a revocation order pursuant to § 58, *see Commonwealth v. Pagan*, 445 Mass. 315, 322 (2005).

In *Josh J.*, the Supreme Judicial Court noted that the rebuttable presumption contained in § 58B that "no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community" where the new crime is a federal felony or an offense described in clause (1) of G.L. c. 276, § 58A, "may be difficult to reconcile with the presumption recognized in § 58 that an individual will be released on bail or personal recognizance." *Josh J.*, 478 Mass. at 723 n.7. There is no similar rebuttable presumption under § 58.

While revocation under G.L. c. 276, § 58 is limited to circumstances where there is probable cause to believe a defendant committed a new offense, G.L. c. 276, § 58B makes explicit that a defendant's bail can be revoked for failing to comply with conditions imposed pursuant to G.L. c. 276, §§ 42A, 58, 58A, or 87. This codifies the decision in *Jake J. v. Commonwealth*, 433 Mass. 70, 77-78 (2000), which determined that the court had the inherent authority to revoke bail where conditions of release were violated despite the absence of an explicit statutory enforcement mechanism and held that § 58B applied to such revocations. The period of revocation is not to exceed ninety days unless good cause or excludable periods apply which can allow for a longer period of detention. G.L. c. 276, § 58B.

## 8:08 Bail Procedures: Notifying the Named Victim

In criminal cases involving violations of abuse prevention orders or domestic abuse, reasonable efforts must be made to notify the named victim when the defendant is released from custody. G.L. c. 209A, § 6; G.L. c. 276, §§ 42A, 57, and 58. While G.L. c. 209A, § 6 provides that notification be made by the judge or other person authorized to take bail who releases the defendant, the bail statutes assign this responsibility to the police department when a defendant is bailed from the place of detention, and to the district attorney when the defendant is released on bail by order of a court. G.L. c. 276, §§ 42A, 57, and 58.

### Commentary

The judge's responsibility pursuant to G.L. c. 209A, § 6, to see that a reasonable effort is made to inform the named victim of a defendant's in court release, does not depend on whether the named victim is in court or not. It is appropriate for a judge to instruct the police, prosecutor, or victim witness advocate to attempt to contact the named victim. In the alternative, the judge can request a probation officer or a staff member of the clerk's office to make such contact. In either case, such request should be made on the record. When a defendant posts bail with the clerk during court hours, the clerk should instruct the police, prosecutor, or a victim witness advocate to attempt to contact the named victim to inform the named victim of such release prior to or at the time of said release. G.L. c. 209A, § 6; G.L. c. 276, § 57. Individual courts should develop a procedure, appropriate to the size and resources of the court, to ensure this requirement is met.

## 8:09 Procedures Where Defendant is Being Arraigned and Plaintiff is Requesting an Abuse Prevention Order

If a defendant is arraigned for a crime involving domestic abuse, and there is no existing c. 209A order, and the named victim is present in court seeking an abuse prevention order, the court should hold a hearing on the abuse prevention order at the same time as the arraignment. If the court decides to issue an abuse prevention order, since both parties are present, the order may be issued for up to one year. If such order is issued, it should be served immediately on the defendant.

If the named victim is not present at arraignment, the defendant should be served with any abuse prevention order recently issued by the court and still in effect at that time that has not been served, and such in-hand service recorded on the docket of the c. 209A action. While court officers would most commonly serve the order, any member of the court staff may serve the order.

Whenever notice is accomplished in court, the notice should be noted on the Order and the police should be notified that notice has been accomplished. The order should still be provided to the police to effectuate the gun surrender order.

### Commentary

If both parties are present in court, and the named victim in the criminal case involving abuse also seeks civil relief as a plaintiff in a c. 209A action, there is no reason to require either the plaintiff or the defendant to return in ten days for another hearing. If both parties are present, the court should hold a two-party hearing and issue any appropriate order for a full year or, at the plaintiff's request, for a lesser time.

The pending criminal matter is not a basis to continue the c. 209A hearing, and the judge may, but is not required to, draw an inference adverse from the defendant's failure to testify. *Singh v. Capuano*, 468 Mass. 328, 333 (2014) (defendant's refusal to testify on the ground of self-incrimination does not bar the taking of an adverse inference). The assertion of the privilege against self-incrimination is to be considered and weighed as part of the evidence in the case and a judge is "required to carefully consider all the circumstances of the case when making the decision whether to draw an adverse inference." *Id*. at 333-34 (improper to categorically refuse to consider (or always consider) adverse inference against non-testifying defendants).

If an attorney has been appointed in the criminal case, it is appropriate for the attorney to inform the defendant of the defendant's Fifth Amendment rights, but further participation should

be limited unless the attorney files a notice of appearance. A notice of appearance must be filed for the attorney to cross-examine the plaintiff or any witnesses as the defendant, like the plaintiff, is not entitled to appointed counsel. *See S.T. v. E.M.*, 80 Mass. App. Ct. 423, 429 (2011) (despite informality of c. 209A proceedings in a busy court, certain minimum standards of fairness must be observed). Whether cross-examination is by an attorney or a party, the judge should not permit cross-examination to be used for harassment or intimidation or for discovery purposes. *Frizado v. Frizado*, 420 Mass. 592, 596 & n.5 (1995) (judge may limit cross-examination for good cause). *See also Silvia v. Duarte*, 421 Mass. 1007, 1008 (1995). *See* Guideline 5:01 Conduct of Hearings After Notice When Both Parties Appear: General**.**

In-hand service of abuse prevention orders can be critical to proper enforcement of those orders. Whenever a defendant appears in court, any current abuse prevention orders against the defendant in that court should be brought into the courtroom and a check should be done to determine whether in-hand service has been made on each order. If in-hand service has not been made, the defendant should be served with the order and the court officer (or court staff member who served the order) should fill out the return of service. Even when an abuse prevention order has previously been served on a defendant, such service may have been made at last and usual address or by alternate means. Serving the defendant in-hand while the defendant is before the court ensures that the defendant has actual notice of the terms of the order.

Similarly, at arraignments, the judge should note whether there are any open temporary orders from another court (i.e., an order issued within the past ten days), and should attempt to determine whether the defendant has been served (e.g., having clerk contact the issuing court, or asking the defendant if he is aware of the order). If there is a question of service, efforts should be made, to the extent practicable, to effect in-hand service. At the very least, the judge can give notice orally of the existence of the order, the next hearing date, and any orders that appear on the defendant's Court Activity Record Information (CARI).

## 8:10 Warrants in Criminal Cases Involving Alleged Violation of an Abuse Prevention Order or Domestic Abuse

When a defendant charged with a violation of an abuse prevention order, or any crime involving domestic abuse, fails to appear or violates a condition of release, the court should promptly order a warrant to issue. When a warrant is issued, the clerk should promptly enter the warrant in the Warrant Management System (WMS) for immediate execution by the police.

### Commentary

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

## 8:11 Dismissal on Motion of the Commonwealth

If the Commonwealth moves for dismissal of a criminal case charging domestic abuse or a violation of an abuse prevention order prior to the trial date, the court should require that the motion be in writing, setting forth the reasons therefore, in accordance with the requirements of Mass. R. Crim. P. 13.

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

If the Commonwealth answers not ready for trial on the basis that the named victim has failed to appear, and the defendant files a motion to dismiss, the judge should have the Commonwealth state for the record the efforts made to notify the named victim. *See* G.L. c. 258B, § 3.

### Commentary

All pre-trial motions in criminal cases in the District Court, Boston Municipal Court, and Superior Court are required to be in writing, setting forth the reasons therefore. Mass. R. Crim. P. 13. Enforcement of this rule is particularly important when the case that the Commonwealth is asking the court to dismiss is one involving an alleged violation of an abuse prevention order or a crime of domestic abuse, and the reason given is the reluctance or the refusal of the named victim to testify. There are a variety of reasons a prosecutor may request dismissal of the criminal charges, and the court may ask a prosecutor to provide an explanation on the record.

However, the court is responsible for the decision to dismiss a case. If the court believes that dismissal may not be appropriate, it may deny the motion for dismissal. In such a case, the Commonwealth can terminate the case by filing a *nolle prosequi* under Mass. R. Crim. P. 16. If the Commonwealth will neither file a *nolle prosequi* nor proceed with the trial, the court should enter a dismissal on the record "for failure to prosecute." The court should not attempt to compel the Commonwealth to try the case.

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

## 8:12 Dismissal Over the Commonwealth's Objection

The court should not dismiss any criminal case over the objection of the Commonwealth without a basis grounded in a violation of the defendant's constitutional or statutory rights. In order to support a dismissal, any violation of the defendant's rights must prejudice the defendant such that dismissal is the only sufficient remedy. The court may not dismiss a complaint because the court believes, as a matter of policy, that the case should not be prosecuted.

### Commentary

There is no question that the court has the authority to dismiss a complaint over the objection of the Commonwealth based on a violation of the defendant's rights, such as a defective complaint or a violation of the right to speedy trial. Such dismissals must be requested by motion. Mass. R. Crim. P. 13. A judge may not, however, dismiss a criminal case because the judge has made a discretionary determination that the case should not be tried based upon the judge's view of the evidence. *Commonwealth v. Everett*, 88 Mass. App. Ct. 902, 904 (2015). *See Commonwealth v. Taylor*, 428 Mass. 623, 628-630 (1999) (judge may not continue case for the sole purpose of a desire to see the case ultimately dismissed).

"[P]retrial dismissal, over the Commonwealth's objection, of a valid complaint or indictment before a verdict, finding, or plea, and without an evidentiary hearing basically quashes or enters a *nolle prosequi* of the complaint or indictment." *Commonwealth v. Pellegrini*, 414 Mass. 402, 404 (1993). "A decision to *nolle prosequi* a criminal case rests with the executive branch of government and, absent a legal basis, cannot be entered over the Commonwealth's objection." *Id*. at 405.

Justice Morton stated in *Commonwealth v. Tuck*, 20 Pick. 356, 364-365 (1838), "the authority of the Attorney General [or District Attorney], when present, to conduct and manage all criminal prosecutions is unquestionable. It is his exclusive duty to do so." "The district attorney is the people's elected advocate for a broad spectrum of societal interests - from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection." *Commonwealth v. Gordon*, 410 Mass. 498, 500 (1991).

While the phrase "the victim wants to drop the charges" is sometimes used in these cases, it is important to remember that the named victim is not a party in a criminal case. A criminal prosecution is not intended to vindicate the interests of the named victim, but rather, the interests of the public as a whole, as represented by the prosecutor. "In American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Whitley v. Commonwealth*, 369 Mass. 961, 962 (1975), *quoting Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Thus, the law is clear, and this Guideline emphasizes, that it is inappropriate for a judge, over the Commonwealth's objection, to dismiss a criminal case because the judge has made a discretionary determination that the case should not be tried due to the named victim's reluctance

or otherwise. This is a decision that the law leaves to the prosecutor. The prosecutor may have facts that are not known to the judge. These facts may include information concerning the defendant and the named victim, such as past history, mental status, and potential for danger.

## 8:12A Accord and Satisfaction Not Permitted

Disposition pursuant to G.L. c. 276, § 55 is not permitted to resolve violations of abuse prevention orders or any other crime involving domestic abuse.

### Commentary

General Laws c. 276, § 55 was amended by An Act Relative to Domestic Violence, c. 260 of the Acts of 2014, effective August 8, 2014, to exclude violations of abuse prevention orders and any other crime involving abuse as defined by G.L. c. 209A, § 1 from the misdemeanor offenses that can be disposed of by way of an accord and satisfaction. This amendment supersedes *Commonwealth v. Guzman*, 446 Mass. 344, 348 (2006); a judge no longer has discretion to dismiss such cases pursuant to an accord and satisfaction agreement.

## 8:13 Sentencing: Named Victim Not Present

The named victim of a charge of violation of an abuse prevention order, or a crime involving domestic abuse, has the right to be heard regarding "the effects of the crime on the victim and as to a recommended sentence." G.L. c. 258B, § 3(p). General Laws c. 279, § 4B provides that prior to the disposition in any case involving a guilty finding on a felony charge or a crime against a person or where physical injury to a person results, and where the victim is identified and the victim's whereabouts are known, "the district attorney shall give the victim actual notice of the time and place of sentencing and of the victim's right to make a statement to the court, orally or in writing at the victim's option."

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

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

### Commentary

It is important that the court provide an opportunity for a victim to be heard upon the sentencing of a defendant for a violation of an abuse prevention order, or in any case involving domestic abuse.

The duty to attempt to notify the victim when a defendant is released from custody at sentencing is the same as when a defendant is released from custody at any other time. *See* Guideline 8:05 Bail Procedures: In Court. This requirement pursuant to G.L. c. 209A, § 6, last par., appears to apply only when the charge involves domestic abuse, however this practice should also be followed where the charge is violation of an abuse prevention order.

## 8:14 Sentencing Considerations

The court has a variety of sentencing options for defendants who are convicted of, or who admit to sufficient facts to, violating an abuse prevention order or crimes involving domestic abuse.

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

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

Whenever a defendant is convicted, admits to sufficient facts, or receives a continuance without a finding for a violation of an abuse prevention order, domestic assault or assault and battery in violation of G.L. c. 265, § 13M, or strangulation in violation of G.L. c. 265, § 15D, the sentencing judge must order that the defendant complete an intimate partner abuse education (IPAE) program, unless the court makes specific written findings of good cause for not so ordering, or the IPAE program finds that the defendant is not a suitable candidate for the program. *See* G.L. c. 209A, § 7. In addition, G.L. c. 209A, § 7 mandates that the court shall not order substance use disorder treatment or an anger management program as a substitute for an IPAE program. When the court imposes completion of an IPAE program as part of a sentence, G.L. c. 209A, § 10 imposes an assessment of $350.00, in addition to the cost of the IPAE program. This assessment can be waived or reduced when the defendant is indigent or when payment would cause the defendant and/or the defendant's dependents severe financial hardship.

When a defendant is convicted of violating an abuse prevention order, G.L. c. 209A, § 7(5) requires the imposition of a fine of $25.00. There is also a mandatory domestic violence prevention assessment of $50.00 for convictions of violating an abuse prevention order, and any other crime which would constitute domestic abuse. G.L. c. 258B, § 8. These fees are in addition to the victim and witness fees required by G.L. c. 258B, § 8.

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

Upon entry of a conviction for any misdemeanor offense that has an element the use or attempted use of physical force or the threatened use of a deadly weapon the court shall determine whether the victim or intended victim was a family or household member, as defined in G.L. c. 209A, § 1, of the defendant. G.L. c. 265, § 13N. This finding relates to the statutory disqualification for firearm possession under G.L. c. 140, § 129B(1)(i)(F) and G.L. c. 140, § 131(d)(i)(F) for persons convicted of misdemeanor crimes of domestic violence.

In addition to the above statutory requirements, whenever a defendant is placed on probation[7] for violation of an abuse prevention order or a crime involving domestic abuse, the court has a wide range of options in ordering specific conditions of probation. These specific terms of probation can include:

1) abide by the terms of any c. 209A order or order of protection from another jurisdiction;
2) no abuse of and/or stay away from the named victim;

[7] The defendant may be placed on straight probation or, in the District Court or Boston Municipal Court, may be given a split sentence in which there is a committed portion of the sentence followed by a term of probation.

3) enter and complete an IPAE program (required, as noted above, for a violation of an abuse prevention order, domestic assault or assault and battery in violation of G.L. c. 265, § 13M, or strangulation in violation of G.L. c. 265, § 15D);
4) submit to a court clinic or other evaluation for a substance use disorder and comply with the recommendations of the evaluation, including inpatient or outpatient treatment;
5) submit to a court clinic or other evaluation for mental health issues, and comply with the recommendations of the evaluation, including inpatient or outpatient treatment;
6) abstain from drugs and/or alcohol with random testing;
7) comply with electronic monitoring.

## Commentary

These sentencing considerations apply to convictions or continuances without a finding of violations of abuse prevention orders and crimes involving domestic abuse, and do not depend on the crime having as an element the relationship between the defendant and the victim. These considerations of course apply to violations of G.L. c. 265, § 13M, which was rewritten, effective August 8, 2014, to create a first offense of assault and assault and battery on a family or household member. The definition of "family or household member" for purposes of § 13M is more limited than the definition under G.L. c. 209A, § 1, as it only applies to persons who (i) are or were married to one another, (ii) have a child in common regardless of whether they have ever married or lived together, or (iii) are or have been in a substantive dating or engagement relationship (and not to persons who are or were residing together in the same household are or were related by blood or marriage). This more limited definition that applies only to G.L. c. 265, § 13M, is often referred to in shorthand as "intimate partner abuse," and the broader definition under c. 209A is referred to as "domestic abuse." The subsequent offense portion of § 13M and its heightened penalties for this felony offense (up to 2½ years in the house of correction or up to 5 years in state prison), which was previously unenforceable as there was no first offense, remains in effect and is now enforceable where a defendant has previously been convicted of violating G.L. c. 265, § 13M.

A conviction or continuance without a finding pursuant to G.L. c. 209, § 7 (violating an abuse prevention order), G.L. c. 265, § 13M (assault or assault and battery on a family or household member), or G.L. c. 265, § 15D (strangulation or suffocation), requires the sentencing judge to order completion of a certified batterer's program (now called intimate partner abuse education (IPAE) programs) unless the judge makes specific written findings of good cause why it should not be ordered. Note that the crime of strangulation and suffocation pursuant to G.L. c. 265, § 15D is not limited to family or household members and, where such relationship does not exist, this would be a basis to decline to order completion of the IPAE program. A Order And Findings For Waiving

Intimate Partner Abuse Education Program form has been promulgated for use when issuing an order finding good cause not to complete an IPAE program and can be found on Courtyard, the Trial Court's Intranet.

Probation terms must be clear and strictly enforceable in order to be effective. *Commonwealth v. Lally*, 55 Mass. App. Ct. 601, 603 (2002) ("ambiguities in probation conditions are construed in favor of the defendant"). A judge may not delegate to probation the setting of the terms of probation. *Id*. (probation condition ordering "treatment as deemed necessary" will not be read to require random screens). It appears that delegating the scope of a treatment plan to be developed by a substance use or mental health provider, however, is permissible. *Commonwealth v. Lomberto*, 86 Mass App. Ct. 1109 (2014) (unpublished) ("allowing sex offender program to specify rules for treatment is not an improper delegation of the sentencing judge's authority to set the conditions of probation") (internal quotation marks omitted). Substance use and mental health issues often contribute to the occurrence of violence in domestic relationships. Substance use disorder treatment and/or mental health treatment alone does not address violence in intimate partner relationships and should not be used as a substitute for completion of an IPAE program.

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

While the court may not impose probationary terms unrelated to the substance of the underlying offense, the court retains the authority to impose probationary conditions appropriate to the defendant's history, the interrelationship between the defendant and victim, and the abusive nature of the case. *Commonwealth v. Gomes*, 73 Mass. App. Ct. 857, 857-860 (2009).

The Department of Public Health (DPH) certifies IPAE programs for the Commonwealth. All offer sliding scales for their fees, and most permit participants to perform community service in lieu of fees. These programs are offered in a number of locations, are conducted in a number of languages, and are available to persons of all sexual orientations. There are also programs specifically for juveniles. For a list of IPAE programs go to Mass.gov, search for "Intimate Partner Abuse Education Program Services," and click on "Download a list of Massachusetts Certified Intimate Partner Abuse Education Programs."

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

The mandatory domestic violence prevention assessment of $50.00 is provided for by G.L. c. 258B, § 8 and is to be deposited in the Domestic and Sexual Violence Prevention and Victim Assistance Fund. That fund will be controlled by the DPH and will fund grants for innovative domestic violence prevention programs. G.L. c. 17, § 20. This fee, along with the victim witness fee,

shall be the defendant's first obligation. If it is determined by a written finding of fact that payment of the fee cause a substantial financial hardship to the person against whom the assessment is imposed or the person's immediate family or the person's dependents, the court may order a structured payment plan, or, if even a structured payment plan would continue to impose a severe financial hardship, the person should be ordered to complete at least eight hours of community service in order to satisfy the assessment. A finding of a severe financial hardship shall be made independently of a finding of indigency for purposes of appointing counsel. An Assessment or Waiver of Moneys in Criminal Case form is available on Courtyard, the Trial Court's Intranet. If the person is sentenced to a correctional facility in the Commonwealth and the assessment has not been paid, the court shall note the assessment on the mittimus.

General Laws c. 265, § 13N requires the court to make a judicial finding about the relationship of the defendant and victim or intended victim for qualifying offenses upon entry of a conviction for any misdemeanor offense that has an element the use or attempted use of physical force or the threatened use of a deadly weapon, and whether the conviction is entered as a result of a trial, or a plea, or conviction entered after a probation violation. This finding, which relates to the statutory disqualification for firearm possession under G.L. c. 140, § 129B(1)(i)(F) and G.L. c. 140, § 131(d)(i)(F) for persons convicted of misdemeanor crimes of domestic violence, is required to be reported to the Department of Criminal Justice Information Services (DCJIS). The Domestic Violence Misdemeanor Convictions for Firearm Disqualification form to capture this information and business user guide docketing instructions that enable the automatic reporting of the required information from MassCourts to DCJIS are available on Courtyard, the Trial Court's Intranet.

## Other Court Proceedings Related to Abuse Prevention Proceedings

10:00 Civil Commitment for Alcohol or Other Substance Use Disorder
10:01 Guideline Intentionally Deleted
10:02 Actions for Divorce or Separate Support
10:03 Care and Protection Proceedings
10:04 Elder Abuse Actions
10:05 Child Requiring Assistance (CRA) Actions
10:06 Mental Health Actions
10:07 Actions Involving Disabled Persons

## 10:00 Civil Commitment for Alcohol or Other Substance Use Disorder

Where testimony during abuse prevention order proceedings reveals an underlying problem of alcohol or other substance use disorder, the court may advise an appropriate person of the availability of procedures for petitioning a District Court, Boston Municipal Court, or Juvenile Court for involuntary commitment on the grounds of alcohol or substance use disorder under G.L. c. 123, § 35. Such a referral should not take the place of an abuse prevention order where the plaintiff is otherwise entitled to c. 209A relief and wishes to have an order issued.

### Commentary

Substance use disorder frequently contributes to the violence in relationships, although the exact nature of the connection remains unclear. One means of addressing this aspect of the problem, where there is a likelihood of serious harm as a result of the person's alcohol or substance use disorder, is involuntary commitment for up to ninety days under G.L. c. 123, § 35. That statute defines "alcohol use disorder" as "the chronic or habitual consumption of alcoholic beverages by a person to the extent that (1) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning, or (2) the person has lost the power of self-control over the use of such beverages." A "substance use disorder" is defined as "the chronic or habitual consumption or ingestion of a controlled substance or intentional inhalation of toxic vapors by a person to the extent that: (1) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning; or (2) the person has lost the power of self-control over the use of such controlled substances or toxic vapors." G.L. c. 123, § 35. *See In re G.P.*, 473 Mass. 112 (2015), which upholds the standard of proof, admissibility of hearsay, and appellate review procedures set forth in the Uniform Trial Court Rules for Civil Commitments Proceedings for Alcohol and Substance Use Disorders, and provides substantial guidance in how to analyze whether a person's disorder poses a likelihood of serious harm.

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

## 10:01 Guideline Intentionally Deleted

### Commentary

Substantive content is now included in Guideline 6:05B Support Orders.

## 10:02 Actions for Divorce or Separate Support

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

### Commentary

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

## 10:03 Care and Protection Proceedings

If, in the course of proceedings under G.L. c. 209A, court personnel or the judge has reasonable cause to believe that a child under the age of 18 has suffered harm or that there is a substantial risk of harm to the child's health or welfare, a report should be made to the Department of Children and Families (DCF) for an investigation under G.L. c. 119, § 51A. *See* Guideline 1:06 Minors as Plaintiffs in c. 209A Actions.

In addition, if a minor (person under the age of eighteen) defendant is ordered to vacate or stay away from their home, the parent or guardian retains the responsibility to provide a safe residence for the minor. The parent or guardian should be required to identify where the minor defendant will reside. If no appropriate placement is identified, the court may inform the minor defendant's parents of the availability of a Child Requiring Assistance (CRA) petition. *See* Guideline 10:05 Child Requiring Assistance (CRA) Actions. Absent an appropriate placement of the minor defendant, the judge should request, pursuant to G.L. c. 119, § 51A, that court personnel immediately file a report with the Department of Children and Families (DCF) and that the DCF respond to the court on an emergency basis to take custody of the minor. *See* Guideline 1:06A Minors as Defendants in c. 209A Actions.

### Commentary

Information may come to light in a c. 209A case that causes a reasonable belief that "a child is suffering from physical or emotional injury resulting from: (i) abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare, including sexual abuse [or] (ii) neglect, including malnutrition . . ." G.L. c. 119, § 51A. In such an instance, the c. 209A case should continue, but, in addition, the information should be provided to the clerk or a probation officer to file a 51A report. In appropriate cases, a victim witness advocate may be asked to file the 51A report. While certain persons are designated as "mandated reporters," anyone can file a 51A report where there is reasonable cause to believe a child is suffering from abuse or neglect. G.L. c. 119, § 51A(f). Persons in the court system who are required to make a report of such information, i.e., "mandated reporters," are probation officers and clerk magistrates of a District Court or Boston Municipal Court. G.L. c. 119, § 21. Mandated reporters also include police officers, social workers, and parole officers. *Id*.

If a plaintiff requests that an abuse prevention order be terminated and the judge has reason to believe that terminating the order may cause a substantial risk of harm to a minor child's health or welfare, the judge should advise the plaintiff that a 51A report will be filed immediately.

Depending on the outcome of its investigation in response to a 51A report, the Department of Children and Families (DCF) may initiate a care and protection proceeding.

## 10:04 Elder Abuse Actions

If, in the course of proceedings under G.L. c. 209A, the judge has reasonable cause to believe that a person over the age of sixty has been abused, an elder abuse report should be made to the Executive Office of Elder Affairs (EOEA) in accordance with G.L. c. 19A, § 15(a).

### Commentary

Domestic abuse may also constitute elder abuse under G.L. c. 19A, where the person abused is sixty years old or older. The definition of elder abuse includes "an act or omission which results in serious physical or emotional injury." G.L. c. 19A, § 14.

Probation officers are "mandated reporters" of elder abuse under G.L. c. 19A, § 15, and should therefore be familiar with the filing process. Like a 51A report, it is not required that a mandated reporter file the report; anyone, including a clerk or victim witness advocate, can make the report where there is reasonable cause to believe that an elderly person is suffering from abuse. G.L. c. 19A, § 15(c). The Executive Office of Elder Affairs (EOEA), acting itself or through a designated agency, may provide protective services to an elderly person, including petitioning the Probate and Family Court for appointment of a conservator or guardian or for emergency protective services.

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

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

## 10:05 Child Requiring Assistance (CRA) Actions

In appropriate cases, the court may inform parents of a minor defendant subject to a c. 209A order of the availability of a Child Requiring Assistance (CRA) action. *See* Guideline 1:06 Minors as Plaintiffs in c. 209A Actions. The filing of a CRA application is not meant to be a substitute for a c. 209A order. Rather, the initiation of a CRA proceeding may offer a means of providing treatment and rehabilitative services to a child, while the c. 209A order ensures protection for the household members.

### Commentary

One category of domestic abuse involves abusive conduct by a child against a parent, sibling, grandparent, or other household member. A Child Requiring Assistance (CRA) application may be filed by a parent or legal guardian where the child "repeatedly refuses to obey the lawful and reasonable commands" of the parent or guardian resulting in an "inability to adequately care for and protect" the child. G.L. c. 119, § 39E. In such cases, the court can refer the parent or legal guardian to the appropriate Juvenile Court to file the required application to initiate the CRA proceeding. *See* G.L. c. 119, §§ 39E – 39I.

While CRA actions are only available until the child's eighteenth birthday, such actions should still be pursued even if the child is close to their eighteenth birthday as the availability of a court clinician evaluation and initiation of services through this procedure, even if only for a short period of time, can be beneficial and may result in identifying services available to persons over the age of eighteen.

## 10:06 Mental Health Actions

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

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

### Commentary

On occasion, the behavior of a party involved in a c. 209A action is such that involuntary civil commitment may be appropriate. The standard for such commitment is: (1) the party suffers from a "mental illness," which for the purposes of involuntary commitment is defined as "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but shall not include intellectual or developmental disabilities, autism spectrum disorder, traumatic brain injury or psychiatric or behavioral disorders or symptoms due to another medical condition as provided in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), 5th edition published by the American Psychiatric Association, or except as provided in 104 CMR § 27.18, alcohol and substance use disorders; provided however, that the presence of such conditions co-occurring with a mental illness shall not disqualify a person who otherwise meets the criteria for admission to a mental health facility." 104 CMR § 27.05(1) (promulgated by the Department of Mental Health); (2) poses a danger of serious harm, either to the person themself or to others; and, (3) there is no less restrictive alternative to commitment available. If it does appear at a c. 209A hearing that these tests may be met, the court should consider advising the appropriate person of the right to file the necessary petition for commitment pursuant to G.L. c. 123, § 12(e). Given the nature and ramifications of the civil commitment procedure, it would appear that its use should be limited to unusual cases.

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

## 10:07 Actions Involving Disabled Persons

If, in the course of proceedings under G.L. c. 209A, court personnel or the judge has reasonable cause to believe that a disabled person has suffered a serious physical or emotional injury resulting from abuse, including nonconsensual sexual activity, a report should be made to the Disabled Persons Protection Commission (DPPC) in accordance with G.L. c. 19C, §§ 1 and 10.

### Commentary

Domestic abuse may also constitute abuse of a disabled person which should be reported pursuant to G.L. c. 19C, § 1. A "disabled person" is defined as "a person between the ages of eighteen to fifty-nine . . . with an intellectual disability . . . or who is otherwise mentally or physically disabled and as a result of such mental or physical disability is wholly or partially dependent on others to meet his daily living needs." G.L. c. 19C, § 1. "Intellectual disability" is defined as a person who has "significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social and practical adaptive skills and beginning before age 18, and consistent with the most recent definition provided by the American Association on Intellectual and Developmental Disabilities; provided, that in applying this definition the following shall be considered: (i) limitations in present functioning within the context of community environments typical of the individual's age, peers and culture; (ii) cultural and linguistic diversity and differences in communication, sensory, motor, and behavioral factors; (iii) limitations often coexist with strengths within an individual; (iv) an important purpose of describing limitations is to develop a profile of needed supports; and, (v) with appropriate personalized supports over a sustained period, the life functioning of a person with an intellectual disability will generally improve." G.L. c. 123B, § 1.

A "reportable condition" is a "serious physical or emotional injury resulting from abuse, including unconsented to sexual activity." G.L. c. 19C, § 1.

Probation officers are "mandated reporters" of such abuse under G.L. c. 19C, § 1. However, it is not required that a mandated reporter make the report; anyone, including a clerk or victim witness advocate, can make the report where there is reasonable cause to believe that a disabled person is suffering from abuse. G.L. c. 19C, § 10. A report can be made by notifying the Disabled Persons Protection Commission (DPPC) "orally of any reportable condition immediately upon becoming aware of such condition and shall report in writing within forty-eight hours after such oral report." *Id*.

The DPPC refers complaints regarding individuals with physical disabilities to the Massachusetts Rehabilitation Commission (MCR) and other complaints to the Department of Developmental Services (DDS) or the Department of Mental Health (DMH), depending on the disability of the individual being referred.

These services may also be available in circumstances where the defendant in a c. 209A proceeding is disabled and has been ordered to vacate the residence. *See* G.L. c. 19C, § 6.

## Emergency Response

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

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

During the hours when the court is not open for business, a judge is available through the Judicial Response System to assist parties seeking a c. 209A abuse prevention order. In conducting this hearing, the on-call judge should follow the Guidelines established for conducting an *ex parte* hearing and issuing an *ex parte* order. *See* Guideline 3:00, et. seq., *Ex Parte* Hearings and Guideline 4:00, et. seq., *Ex Parte* Orders. Usually these hearings are conducted by telephone, with the plaintiff relating the facts directly to the judge.

Under the Judicial Response System, the police department will contact the regional on-call judge. Before contacting the judge, the police must have:

1) the plaintiff fill out a c. 209A complaint and affidavit, unless physically unable to do so;
2) run the defendant's criminal record, including both in-state and out-of-state, and obtain information from the Statewide Registry of Civil Restraining Orders, as to any current or prior abuse prevention orders; and,
3) run a Warrant Management System (WMS) check of the defendant.

Once the police department has provided this information to the judge, the judge should speak directly to the plaintiff. The judge should ascertain the reasons for the plaintiff's request for an emergency abuse prevention order, the relationship between the parties, and the requested relief sought by the plaintiff. Applying the same standard as an in-court *ex parte* hearing, the judge must determine whether or not a substantial likelihood of immediate danger of abuse exists. If the judge decides to issue an order, he or she should review the terms of the order with the plaintiff. The plaintiff should be told that the emergency order is only a temporary order, and will only be in effect until the close of business on the court's next business day. The plaintiff should be told that

the order will be heard on the next business day and that if the plaintiff wants the order extended, the plaintiff must appear in court at 9:00 a.m. for a hearing before the judge. Otherwise, the order will expire at the close of business on that day if the plaintiff does not appear.

When serving on the Judicial Response System, the judge is not limited to returning the order to the judge's court department or a court with venue. Rather, the judge can return the order to the most logical court location. This may be the court where the defendant is scheduled to appear on criminal charges so that a two-party hearing may be held rather than an *ex parte* hearing in a District Court or Boston Municipal Court with venue over the plaintiff's residence. Where no criminal charges are pending, the order could be returned to a court convenient to where the plaintiff works if the plaintiff so requests. If return is made to a court without venue, the judge should advise the plaintiff that the hearing may have to be continued if the defendant objects. *See* Guideline 5:01A Venue: Objection. The judge issuing the order can also consider returning the order to the appropriate division of the Probate and Family Court (rather than to a division of the District Court or Boston Municipal Court) if the judge determines that:

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

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

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

1) the defendant in the domestic abuse action has also been arrested in connection with the abuse alleged in the c. 209A complaint, or a warrant for the defendant's arrest has issued or will be sought; or,
2) the appropriate division of the Probate and Family Court does not sit on a regular, full-time basis; or,
3) the plaintiff is unable to get to the division of the Probate and Family Court.

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

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

The police should deliver all of the paperwork, including the order, to the court where the order is returnable on the next business day when the clerk's office is open, whether or not there is a judge sitting in that court on that date. All emergency orders issued through the Judicial Response System must be certified and docketed in the court to which it was returned. The order should also be entered that day into the Statewide Registry of Civil Restraining Orders.

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

## Commentary

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

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

Occasionally, direct contact with the plaintiff is not possible, due to the plaintiff's physical condition or a language issue. Where the plaintiff is unable to communicate with the judge because of a physical disability, the judge may rely on information provided by the police, an eyewitness, and any other reliable sources. Where the plaintiff is unable to communicate with the judge due to a language issue, the judge may rely on information provided by the police or may utilize the assistance of a police officer or the *LanguageLine* for translation of the plaintiff's statements. *See* Guideline 1:07 Limited and Non-English Speaking Parties in c. 209A Actions.

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

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

The on-call judge should always consider carefully which court is the most appropriate forum for hearing the petition on the next business day. The judge should consider returning a case to the appropriate division of the Probate and Family Court if the parties have an impending or ongoing case in the Probate and Family Court and the plaintiff consents to this decision. However, orders should not be made returnable to the Probate and Family Court if the defendant has been arrested on criminal charges (and will thus be arraigned in the District Court or Boston Municipal

Court), the appropriate division of the Probate and Family Court does not sit on a regular or full-time basis, or the plaintiff is unable to travel to the Probate and Family Court. The on-call judge should obtain input from the plaintiff in determining if there is an ongoing case in the Probate and Family Court, whether or not the plaintiff consents to the matter being returned to that court and the plaintiff's ability to travel to that court. The judge should also advise the police where the order is to be returned so that both the plaintiff and the defendant are properly advised where to go for the hearing.

It is critical that the emergency order properly memorialize the terms of the order as well as the specific details about the date, time, and location of the next hearing. If the defendant is served with an order that clearly advises the defendant of the date, time, and location of the next hearing, the court, at that hearing the judge may conduct a hearing after notice and may issue an order for up to one year. *See* Guideline 5:05 Failure of the Defendant to Appear.

# Related Probate and Family Court Matters

12:00 Probate and Family Court: Parenting Time and c. 209A Proceedings
12:01 Parenting Time in Probate and Family Court: Safety Assessment Pertaining to the Plaintiff in Abuse Prevention Proceedings
12:02 Custody and Parenting Time Orders in Probate and Family Court: Assessment of Impact of Domestic Violence on Children
12:03 Parenting Time Orders in Probate and Family Court: Safety Assessment and Terms of Parenting Time
12:04 c. 209A Proceedings in Probate and Family Court: Records Check
12:05 Proceedings in Probate and Family Court: Pre-Trial Conferences and Other Court Proceedings
12:05A Guideline Intentionally Deleted
12:06 Custody Orders in Probate and Family Court: Allegations of Abuse
12:06A Custody Orders in Probate and Family Court: Custody Presumption Applicability
12:07 Custody and Parenting Time Orders in Probate and Family Court: Amending Inconsistent c. 209A Orders
12:08 Interstate Custody Issues
12:09 Non-Parent Custody and No-Contact Orders
12:10 Issuance of Protective Orders: Divorce Proceedings
12:11 Issuance of Orders to Vacate Marital Residence: Divorce, Separate Support, or Maintenance
12:12 Issuance of Protective Orders: Separate Support
12:13 Issuance of Protective Orders: Paternity Actions
12:14 Service of Domestic Relations Protective Orders

## 12:00 Probate and Family Court: Parenting Time and c. 209A Proceedings

Orders issued pursuant to c. 209A should be made to maximize the safety of the plaintiff and any child(ren). Parenting time should be considered only in limited circumstances in c. 209A proceedings. For more comprehensive parenting time orders, a separate parenting time complaint should be filed in the Probate and Family Court.

### Commentary

In the context of a c. 209A proceeding, the statute defines the relief available to the plaintiff. General Laws c. 209A, § 3 lists the remedies that the plaintiff may request, including but not limited to, the following: refrain from abuse; refrain from contact; vacate and stay away from household, multiple family dwelling, and workplace; an award of temporary custody of child(ren) to plaintiff; spousal or child support; monetary compensation for losses related to the abuse; impounding an address; and, refrain from abusing or contacting plaintiff's child(ren). In addition, § 3B expressly provides for the surrender of firearms and firearm licenses, and § 11 expressly provides for orders relative to domesticated animals owned, possessed, leased, or kept by either party.

The focus of a c. 209A proceeding is the protection of the plaintiff. If the plaintiff has not requested that the court permit parenting time or does not readily agree to amend the petition to include parenting time, the court ordinarily should not issue a parenting time order in the c. 209A proceeding. The preferred practice would be not to address a contentious custody/parenting time issue at the hearing after notice, but to assign the matter for hearing at a later date on a separate parenting time or custody complaint filed by one or both of the parties in the Probate and Family Court.

If the parties agree to parenting time, the court should still make findings that the parenting plan proposed by the parties is not injurious to the child(ren). *See* Guideline 12:02 Custody and Parenting Time Orders in Probate and Family Court: Assessment of Impact of Domestic Violence on Children.

General Laws c. 209A, § 3, provides, *inter alia*, that if the Probate and Family Court orders parenting time to the parent who has been abusive, the court must provide for the safety and well-being of the child(ren) and the safety of the parent who has been abused. The court may consider, but is not limited to: an order for supervised parenting time; ordering the parent to attend and complete an intimate partner abuse education (IPAE) program as a condition of parenting time; ordering the parent who has been abusive to abstain from possession or consumption of alcohol, or controlled substances, during the parenting time, and for twenty-four hours prior to commencement of the parenting time; or, an order prohibiting overnight parenting time. For a list of IPAE programs go to Mass.gov, search for "Intimate Partner Abuse Education Program Services,"

and click on "Download a list of Massachusetts Certified Intimate Partner Abuse Education Programs."

An order allowing, or not allowing, parenting time affects a parent's access to information concerning a child. For example, G.L. c. 71, § 34H provides that any parent without physical custody of their child(ren) may receive school information concerning the child(ren) unless: (a) the parent's access to same has been prohibited by a temporary or permanent abuse prevention order; (b) the parent has been denied parenting time; or, (c) based upon a threat to the child(ren)'s safety, as specifically noted in the custody or parenting time order, the parent has been denied legal custody, or has been restricted to supervised parenting time only.

A subsequent parenting time order by the Probate and Family Court supersedes any previously issued conflicting order issued by any court department. When a Probate and Family Court judges issues an order that conflicts with an existing order, the judge must modify the existing order to resolve the inconsistency. *See* Guideline 12:07 Custody and Parenting Time Orders in Probate and Family Court: Amending Inconsistent c. 209A Orders.

## 12:01 Parenting Time in Probate and Family Court: Safety Assessment Pertaining to the Plaintiff in Abuse Prevention Proceedings

The risk of harm and potential for continuing abuse through the child(ren) must be considered when making parenting time orders.

### Commentary

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

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

The following factors are among those to consider:

**General Factors to Consider:**

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

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

**2. About the child(ren)**

- Has/have the child(ren) witnessed, heard, seen, or been exposed to the violence or its aftermath?

- Has/have the child(ren) been used to exert control over the plaintiff?
- Has/have the child(ren) been hurt or neglected?
- Is the Department of Children and Families (DCF) involved with the family? If so, for what reason? Was a report of abuse and/or neglect supported? Abuse and/or neglect by which parent?

**3. About the parent who has been abusive**

- Is that parent claiming to be the victim?
- Is that parent misusing systems like DCF, the police, or the courts to control or have contact with the parent who has been abused?
- Does that parent have a history of abuse prevention orders, criminal charges or convictions that suggest violent behavior?
- Is there evidence that that parent has not been compliant with court orders?

**4. About the parent who has been abused**

- Is that parent currently safe?
- Has that parent sustained injuries?
- Can that parent separate their needs from those of the child(ren)?
- Is there a history of prior victimization, mental illness, substance use disorder?
- What is that parent's expressed level of fear?

**Factors to consider regarding each parent:**

**1. Takes responsibility for the situation.** A parent who is able to acknowledge their part in a situation is more likely to be able to consider the child(ren)'s experience(s) than a parent who projects blame onto others. Of greatest concern is a parent who believes that the child is responsible for the current conflict. (This factor should not be read to mean that a victim of domestic violence should take responsibility for the abuser's behavior.)

**2. Awareness of the impact of the negative behavior on the child(ren).** Unfortunately, many parents have difficulty imagining that their child(ren)'s experience(s) may be different than their own. Parents who cannot empathize with their child(ren), that is, cannot see the world through their eyes, are less likely to be aware of their child(ren)'s needs.

**3. Other factors affecting parental capacity.** If, in addition to the allegations of abuse, a parent who appears to have a substance use disorder, a major mental illness or limited parenting experience may present additional safety risks to the child(ren). A judge should inquire about any current treatment programs or other intervention currently in place that are addressing these issues.

**Recognizing Patterns of Abuse**[8]

Safe parenting time is more likely to occur when the order takes into account the specific patterns of domestic violence in the family. The following describe some of the different patterns of domestic violence and some of the considerations to take into account when ordering parenting time in these circumstances. Keep in mind that most families will not "fit" precisely only one of the following patterns, but it is important to tailor custody and parenting time orders that best meet the relevant safety needs.

- **Chronic pervasive control reinforced by severe violence.** Chronic pervasive control reinforced by severe violence is usually characterized by physical abuse that is intermittent or chronic over the course of the relationship or marriage. It is often associated with a more pervasive pattern of psychological and economic coercion and isolation, as well as more severe forms of violent acts. The prognosis for ceasing this pattern of violence is poor, even upon separation of the partners. Consideration should be given to a very strong response to any evidence of abuse prevention order violations, including referral for psychological evaluation and to intimate partner abuse education programs. Consideration should be given to suspension of contact with children, or limiting contact to professionally supervised settings. Children will often exhibit signs of disturbed behavior. Exposure to the perpetrator may cause the child(ren) to be re-traumatized and contact should be suspended until they feel, and are, safe.
- **Violence by a parent who appears to have impaired or distorted thinking.** Illnesses such as psychosis or paranoia may create distorted or delusional thinking about the other person. In these cases, the parent who has been abusive may also experience serious bouts of depression with homicidal or suicidal thoughts. This may result in attempts or threats to harm self or others which may be very traumatic to the child(ren). It is difficult to predict what the prognosis is for cessation of the violence until there has been an adequate psychological evaluation of the parent who has been abusive. Consider referral of the parent who has been abusive for psychological evaluation to answer the specific question of

[8] *See* Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 Fam. Ct. Rev. 500 (2008). *See also*: Gabrielle Davis, *A Systematic Approach to Domestic Abuse-Informed Child Custody Decision Making in Family Law Cases*, 53 Fam. Ct. Rev. 505 (2015); *Custody and Visitation in Civil Protection Orders*, National Council of Juvenile and Family Court Judges (2017); and, *A Judicial Guide to Child Safety in Custody Cases*, National Council of Juvenile and Family Court Judges (2008).

the relationship of the possible mental illness to the violence in the relationship. Children may have been exposed to any number of violent incidents associated with the mental illness of the parent who has been abusive. To promote the safety of the child(ren), both physically and emotionally, consider suspension of parenting time pending completion of a psychiatric or psychological assessment, particularly in cases where the parent who has been abusive appears: (a) obsessed with the parent who has been abused, (b) paranoid or delusional, or (c) suicidal or homicidal.

- **Aggression and intimidation during arguments.** The next pattern is one that escalates until the more aggressive partner asserts control during disputes, either by physical intimidation or assault. These incidents may arise from mutual provocation that escalates until the more aggressive partner causes injury. It is not associated with brutal beatings, marital rape, sadistic infliction of pain or a pervasive pattern of coercion and control over the parent has been abused. The prognosis for the cessation of the violence between these parties may be good once the partners are physically separated. However, some parents who have been abusive will require a clear signal that violations of an abuse prevention order will result in arrest. Children may have been exposed to a number of violent incidents in the course of the relationship of the adults. Violence is often the primary method of dispute resolution within the family. Children are not ordinarily at risk except at points of potential contact of the parents, such as at parenting time exchanges. Children may need their parenting time exchanges supervised or structured for a time to feel safe. Evaluation of the child(ren)'s functioning should be considered.

- **Isolated incidents during relationship strain.** In cases where the violence is restricted to isolated acts caused by separation, the onset and incidents of violence are substantially limited to periods of marital strain or transitions associated with the separation and divorce. This pattern is distinguished by uncharacteristic violent behavior. Violence tends to decrease or cease once the immediate strains associated with divorce and custody disputes settle. Despite these circumstances, children living in the home during these incidents may show signs of trauma. Intervention of a child therapist and/or parental education may be appropriate.

## Parenting Support Resources

- **Parent Education Programs**

  Divorcing parents in Massachusetts are required to attend a mandatory parent education class pursuant to Probate and Family Court Standing Order 2-16 (effective May 1, 2016). This standing order prohibits the parties from attending the same session of any program. As such, the existence of a c. 209A order would not preclude attending this parent education program.

  Where the court is considering waiving in person attendance of a parent education program, the court may, instead, permit use of a five hour DVD or online program entitled

KidCare for CoParents: An Educational Program for Divorcing Families, to satisfy the Parent Education Program requirement. While never married parents are not required to attend a parent education program (except in the Hampshire Division of the Probate and Family Court)[9], Probate and Family Court judges may, in their discretion, nevertheless order attendance.

Court approved programs across the state, listed by county, can be found on Mass.gov by searching "Parent Education Programs."

- **Parent Coordinators**

Parent coordination is a child-focused process in which both parents work with a neutral parenting coordinator (usually an attorney or a psychotherapist) in an effort to reduce or eliminate the effects of conflict on the child(ren) involved in a parenting plan. In 2014, the Supreme Judicial Court restricted court appointment of parenting coordinators if the order required a parent to pay for such services without that parent's consent. *Bower v. Bournay-Bower*, 469 Mass. 690 (2014). This restriction remains in effect. In July 2017, the Probate and Family Court issued a Standing Order consistent with this ruling and added additional requirements relating to the appointment of Parenting Coordinators in the Probate and Family Court. *See* Standing Order 1-17.

Subsection 13 of Standing Order 1-17 limits the appointment of a Parenting Coordinator when domestic violence issues are present. Firstly, if the only action before the court is a G.L. c. 209A complaint, appointment of parenting coordinators is prohibited. *See* Section 1(d) of Standing Order 1-17. Secondly, Subsection 13 of the Standing Order prohibits the court appointment over the objection of one party "[i]f there are credible allegations or findings of domestic violence committed by one party, against a party or child or children involved in the action."

*See* Guideline 12:02 Custody and Parenting Time Orders in Probate and Family Court: Assessment of Impact of Domestic Violence on Children.

[9] The Hampshire Division of the Probate and Family Court is governed by Probate and Family Court Standing Order 1-10 which requires never married parents to attend a parent education program.

## 12:02 Custody and Parenting Time Orders in Probate and Family Court: Assessment of Impact of Domestic Violence on Children

Children respond to domestic violence with a range of symptoms. The court must demonstrate in its findings that the effects of the violence have been considered and that the custody and parenting time orders advance the best interest of the child(ren).

### Commentary

Where "the record raises sufficient concerns regarding domestic violence," the court is required to "make detailed and comprehensive findings of fact on the issues of domestic violence and its effect upon the child." *Care and Protection of Lillith*, 61 Mass. App. Ct. 132, 139 (2004), *quoting Custody of Vaughn*, 422 Mass. 590, 599 (1996) (additional quotation omitted). When making an order for custody and parenting time, the court should consider the symptomatology of the child(ren). The range of reactions experienced by children when exposed to domestic violence varies with the age(s) and gender(s) of the child(ren), the intensity and frequency of the violence, and the proximity of the child(ren) to the event(s). Very disruptive symptoms related to trauma can be exhibited by children even when they have not been personally subjected to direct physical or sexual abuse. Assessing and evaluating the impact of the violence on the particular child(ren) is required where credible evidence of physical abuse to a household member is perpetrated by a person seeking custody of or parenting time with the child(ren) in a divorce proceeding. *See Schechter v. Schechter*, 88 Mass. App. Ct. 239 (2015) (Probate and Family Court judge did not abuse discretion when the judge ordered that the mother have sole legal and physical custody of the child and that there be a one year cessation of contact between the father and the child where the judge found that the father engaged in physical, emotional, and financial abuse of the mother).

To assess the impact of the credible domestic violence on the child(ren), the court should consider the following factors: has/have the child(ren) ever been hit or physically hurt by inadvertent or intended violence; has/have the child(ren) ever been threatened by the parent who has been abusive; has/have the child(ren) personally witnessed any violence; has/have the child(ren) ever called the police to stop the violence or intervene in a violent episode; and, has/have the child(ren) developed problems in school or with peer relationships. Other questions relating to the child(ren)'s emotional, psychological, and physical well-being should be asked to determine the need for further professional evaluation of the child(ren). If there is such a need, the court should consider the safety of the child(ren) which may result in a more restrictive order such as supervised parenting time or suspended parenting time pending the evaluation.

A Probate and Family Court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child(ren) to be placed in sole custody, shared legal custody, or shared physical

custody with the defendant. G.L. c. 208, §§ 31 and 31A. *See* Guideline 12:06A Custody Orders in Probate and Family Court: Custody Presumption Applicability.

## 12:03 Parenting Time Orders in Probate and Family Court: Safety Assessment and Terms of Parenting Time

The court shall consider the safety and well-being of the child(ren) and the safety of the parent who has been abused when parenting time is awarded to the parent who has been abusive.

### Commentary

Although psychological research and clinical experience demonstrate that by and large children fare better if allowed an ongoing relationship with both parents, the risk of harm to a child maintaining contact with a parent who has been abusive must be considered against the impact of disrupting the parent-child relationship. In any event, no contact should be allowed unless and until the safety of the child(ren) and the parent who has been abused is considered. If the court finds that parenting time is appropriate under the circumstances, it must make "explicit findings" which demonstrate that it has considered "safety and well-being of the children" when ordering parenting time. *Maalouf v. Saliba*, 54 Mass. App. Ct. 547, 551 (2002), citing G.L. c. 208, § 31A; *Custody of Vaughn*, 422 Mass. 590, 600 (1996). The court should order parenting time that maximizes the safety and well-being of the child(ren) and the safety of the parent who ash been abused.

When ordering parenting time to the parent who has been abusive, the court should consider the following:

a) ordering an exchange of the child(ren) to occur in a protected setting or in the presence of an appropriate third party;

b) ordering parenting time supervised by an appropriate third party, visitation center or agency;

c) ordering the parent who has been abusive to attend and complete, to the satisfaction of the court, an appropriate intervention program as a condition of parenting time;

d) ordering the parent who has been abusive to abstain from possession or consumption of alcohol or controlled substances during the parenting time and for twenty-four hours preceding the parenting time;

e) ordering the parent who has been abusive to pay the costs of supervised parenting time;

f) prohibiting overnight parenting time;

g) requiring a bond from the parent who has been abusive for the return and safety of the child(ren);

h) ordering an investigation, appointing a category E *guardian ad litem* (GAL), or attorney for the child(ren); and,

i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child(ren) and the safety of the parent who has been abused.

G.L. c. 208, § 31A. The court may also consider ordering a mental health evaluation and/or treatment for substance use disorder. The court may also order enrollment in an intimate partner abuse education (IPAE) programs. *See* Guideline 12:02 Custody and Parenting Time Orders in Probate and Family Court: Assessment of Impact of Domestic Violence on Children.

For a list of IPAE programs go to Mass.gov, search for "Intimate Partner Abuse Education Program Services," and click on "Download a list of Massachusetts Certified Intimate Partner Abuse Education Programs."

If supervised parenting time is required, the parenting time order should also delineate the reason for the supervision and the party or parties responsible for the cost of such supervision. The obligations and authority of an individual designated to supervise parenting time should also be clearly outlined by the court.

Although the facts of the c. 209A action may indicate a one-year abuse prevention order between the parties would be appropriate, sometimes the court may need more information to determine an appropriate order relative to the child(ren). Pending an investigation, evaluation and/or evidentiary hearing, a judge should consider interim orders that prioritize child safety. Although a no contact or supervised parenting time order with the child(ren) may be appropriate at the outset, a review should be scheduled after an appropriate period of time.

## 12:04 c. 209A Proceedings in Probate and Family Court: Records Check

When a complaint is filed, in addition to conducting a check of the Warrant Management System (WMS), criminal history information, and the Statewide Registry of Civil Restraining Orders, *see* Guideline 2:10 Check of Criminal History Information, Including the Statewide Registry of Civil Restraining Orders, and Other Probation Department Involvement and Guideline 2.11 Check of the Warrant Management System (WMS) and Court Files, all Probate and Family Court records shall be checked to cross-reference other cases between the same parties.

### Commentary

When entering c. 209A orders, a judge should be aware of any existing orders. For example, a judge should determine whether there are in place support, custody, or parenting time orders, a guardianship or other order giving custody to a third party, or temporary orders entered in connection with a currently pending divorce, or other complaint. Where a related action (e.g., complaint for divorce, custody, separate support, or paternity, or a petition for the appointment of a guardian of a minor) is in the same court, all files should be pulled and brought into the courtroom together. If an order exists in another pending action within the Probate and Family Court and the terms of the c. 209A order alter the prior order, a modification of the prior order should enter on the original action. A copy of that modified order shall be served on the defendant and forwarded to the probation department for processing.

Custody, support and parenting time orders by the Probate and Family Court supersede a previously issued c. 209A order issued by the Probate and Family Court or another court department. G.L. c. 209A, § 3. When a Probate and Family Court judge issues an order that conflicts with an existing c. 209A order, the judge must modify the existing c. 209A order to resolve the inconsistency. *See* Guideline 12:07 Custody and Parenting Time Orders in Probate and Family Court: Amending Inconsistent c. 209A Orders and Guideline 13:00 Amending c. 209A Orders to Make Consistent with Subsequent Probate and Family Court Orders Regarding Children.

A support or custody order which exists only by virtue of the c. 209A order will not remain in effect beyond the life of the c. 209A order. Particular attention should be paid to any c. 209A support order that is enforced through an income assignment through the Department of Revenue (DOR). Although the c. 209A support order is no longer valid when it lapses or is terminated, until a Request for Termination of Full Child Support Services is signed and transmitted, the obligor's wages will continue to be subject to income withholding.

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

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

### Commentary

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

Attorneys may be excused from the requirement that counsel and the parties have a four-way conference prior to the pre-trial conference. The court may order that the two attorneys meet without their clients and conference the case prior to the pre-trial conference hearing.

## 12:05A Guideline Intentionally Deleted

### Commentary

Substantive content is now included in Guideline 12:06A Custody Orders in Probate and Family Court: Custody Presumption Applicability.

## 12:06 Custody Orders in Probate and Family Court: Allegations of Abuse

A Probate and Family Court judge must make written findings in support of an order for shared legal or physical custody in cases where abuse has been alleged, regardless of whether a c. 209A order is or has been issued. G.L. c. 208, § 31, G.L. c. 209, § 38, and G.L. c. 209C, § 10(a). *See Custody of Vaughn*, 422 Mass. 590 (1996).

### Commentary

Shared legal or physical custody must be supported by written findings if there is a c. 209A order in effect, or if there had been a prior order. *Custody of Vaughn*, 422 Mass. 590, 599-600 (1996), citing G.L. c. 208, § 31. Section 31 provides that:

> If, despite the prior or current issuance of an abuse prevention order against one parent pursuant to chapter two hundred and nine A, the court orders shared legal or physical custody either as a temporary order or at a trial on the merits, the court shall provide written findings to support such shared custody order.

The findings required by G.L. c. 208, § 31 must indicate that the court has evaluated the effects of domestic violence on the child(ren) and how such a custody order advances the best interest of the child(ren). In *Custody of Vaughn*, 422 Mass. 590 (1996), the Supreme Judicial Court affirmed the Appeals Court's decision to reverse and remand the Trial Court's supplemental judgment, which granted primary physical custody to the father, for further consideration of evidence regarding domestic violence perpetrated by the father against the mother and the effect of the family violence on the child. *Id*. The Supreme Judicial Court found that, "the Probate Court had failed to give sufficient weight to the effects of domestic violence on women and their children." *Id*. at 596. In remanding the case, the Supreme Judicial Court stated that the Probate and Family Court shall make "explicit findings" in this regard. *Id.* at 600. *See also Adoption of Imelda*, 72 Mass. App. Ct. 354, 364-365 (2008), *rev. denied*, *Adoption of Imelda*, 452 Mass. 1105 (2008); *Care and Protection of Lillith*, 61 Mass. App. Ct. 132, 139-143 (2004).

The Appeals Court has held that that "in order for joint custody or shared responsibility to work, both parents must be able mutually 'to agree on the basic issues in child rearing and want to cooperate in making decisions for [their] children.'" *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404 (1981). The essence of shared custody is the ability to effectively communicate and to engage in joint decision-making. As such, if the parties have a demonstrated history of an inability to communicate safely, then an award of joint custody would be inappropriate.

The express language of G.L. c. 209C provides that joint custody can be awarded "only if the parents have entered into an agreement pursuant to section eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of

the proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interest." G.L. c. 209C, § 10(a) (emphasis added); *see also Custody of Odette*, 61 Mass. App. Ct. 904, 905 (2004) (award of joint custody, in the absence of positive findings entered by trial judge as to parents' demonstrated ability to communicate, constitutes reversible error). If such an award of custody is inconsistent with the no-contact provisions of a c. 209A order, *see* Guideline 12:07 Custody and Parenting Time Orders in Probate and Family Court: Amending Inconsistent c. 209A Orders.

Where the parties have reached an agreement on the issue of custody, the court should carefully review the agreement to ensure that the best interest of the child(ren) has been promoted by the agreement, and that the agreement provides for the safety and well-being of the child(ren) and the safety of the abused parent. The best interest of the child(ren) must be advanced in any award of custody or parenting time. If the court determines that the agreement of the parties is not in the best interest of the child(ren), the court must make a specific finding to that effect. *See* G.L. c. 208, § 31 ("Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, unless specific findings are made by the court indicating that such an order would not be in the best interest of the children").

In circumstances where the court finds, by a preponderance of the evidence, that "a pattern or serious incident of abuse" has occurred, there is a rebuttable presumption against shared legal or physical custody. G.L. c. 208, § 31A. *See* Guideline 12:06A Custody Orders in Probate and Family Court: Custody Presumption Applicability.

When the parent who has been abusive is the primary care giver, the court is presented with a more complicated decision. Cessation of violence sometimes occurs following separation if there is no parental contact during exchanges. It is not uncommon for the parent who has been abusive to continue the conflict through the child(ren) by actions such as the withholding of parenting time. It is not uncommon for parents who have been abusive and who initiate violence to possess underlying emotional problems that impact their parenting. In many such cases, the primary caretaker and the child(ren) have an intense relationship that cannot be immediately severed without doing harm to the child(ren). A professional evaluation should be considered. Pending the evaluation, the court should consider whether to enter additional orders to prevent further harm to the child(ren).

Custody determinations may also have other consequences, such as the ability of the non-custodial parent to access their child(ren)'s school records. A statute pertaining to availability of school information to non-custodial parents, G.L. c. 71, § 34H provides:

> For purposes of this section, any parent who does not have physical custody of a child shall be eligible for the receipt of information unless: (1) the parent's access to the child is currently prohibited by a temporary or permanent protective order, except where the protective order, or any subsequent order which modifies the protective order, specifically allows access to the information

> described in this section; or (2) the parent is denied visitation, or, based on a threat to the safety of the child, is currently denied legal custody of the child or is currently ordered to supervised visitation, and the threat is specifically noted in the order pertaining to custody or supervised visitation. All such documents limiting or restricting parental access to a student's records or information which have been provided to the school or school district shall be placed in the student's record.

If there is an outstanding abuse prevention order but the parties have a written agreement that allows equal access to school records, or if the Probate and Family Court wishes to order such equal access in the parenting judgment or orders, then the Probate and Family Court should specifically amend the abuse prevention order to clarify those rights of equal access. If there is no outstanding abuse prevention order but the Probate and Family Court denies a non-custodial parent's request for shared or sole legal custody, the Court should clarify whether or not such denial was based upon, at least in part, credible evidence of a threat to the safety of the child(ren) and/or to the custodial parent. That specific finding by the Probate and Family Court would prevent the non-custodial parent from obtaining access to school records under G.L. c. 71, § 34H(a). In all circumstances, given the statutory restrictions of G.L. c. 71, § 34H, best practice principles suggest that all orders and judgments from the Probate and Family Court involving minor children should clearly state each parent's rights of access, if any, to school records.

## 12:06A Custody Orders in Probate and Family Court: Custody Presumption

### Applicability

In a custody proceeding brought in the Probate and Family Court pursuant to G.L. c. 208, G.L. c. 209, or G.L. c. 209C, if the court finds, by a preponderance of the credible evidence, that a pattern of or a serious incident of abuse has occurred toward a parent or child(ren), a rebuttable presumption is created that it is not in the best interest of the child(ren) to be placed in sole custody or shared legal and physical custody with the abusive parent. G.L. c. 208, § 31A, G.L. c. 209, § 38, and G.L. c. 209C, § 10. This presumption may be rebutted if the court finds that awarding custody to the abusive parent is in the best interests of the child(ren).

When issuing any custody order where there has been a pattern, or serious incident, of abuse, the court must, within ninety days thereafter, enter findings indicating: the effects of the abuse on the child(ren), that the order is in the best interest of the child(ren), and that the order provides for the child(ren)'s safety and well-being.

### Commentary

The issuance of one or more orders pursuant to c. 209A does not, in and of itself, constitute a pattern or serious incident of abuse. In addition, an *ex parte* order or orders will not be admissible to show whether a pattern or serious incident of abuse has occurred. *Ex parte* orders may, however, be admissible for other purposes as the court may determine. Finally, the underlying facts upon which an order or orders issued pursuant to c. 209A was based may form the basis for a finding by the Probate and Family Court that a pattern or serious incident of abuse has occurred. G.L. c. 208, § 31A, G.L. c. 209, § 38, and G.L. c. 209C, § 10. These statutes further provide:

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

> to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, "bodily injury" and "serious bodily injury" shall have the same meanings as provided in section 13K of chapter 265. . .
>
> A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child.

G.L. c. 208, § 31A, G.L. c. 209, § 38, and G.L. c. 209C, § 10.

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

If the court finds during a contested trial that a pattern or serious incident of abuse has occurred, findings in support of the judgment should be entered in specific detail. *See Custody of Vaughn*, 422 Mass. 590 (1996); *see also Care and Protection of Lillith*, 61 Mass. App. Ct. 132, 139 (2004) (where the record reveals "sufficient concerns" about abuse, the court must "make detailed and comprehensive findings of fact on the issues of domestic violence and its effect upon the child."), *quoting Custody of Vaughn*, 422 Mass. 590, 599 (1996) (additional quotation omitted).

There will be instances, however, when the child has been impacted by the pattern or serious incident of abuse, but, notwithstanding these effects, the best interest and the safety and well-being of the child necessitate that the court grant custody to the parent who has been abusive. Some of these instances include: the child poses a threat to the safety of the parent who has been abused or the other child(ren) in the household of the parent who has been abused; the parenting ability of the parent who has been abused is compromised, such that the child is presently at risk of danger in the care of the parent who has been abused; the child demonstrates a substantial emotional connection to the parent who has been abused; or, custody to the parent who has been abused currently poses a serious risk to the child's psychological development.

In *K.A. v. T.R.*, 86 Mass. App. Ct. 554, 561 (2014), the court found "that there was a pattern of abuse by the father against the mother within the meaning of G.L. c 208, § 31A, giving rise to the statutory presumptions that it is not in the best interests of the children to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Nonetheless the judge concluded that the father had rebutted the presumption that it was not in the children's best interests to be in his primary physical custody. In arriving at his decision the judge considered among other things the children's antagonism toward and alienation from the mother, the mother's

inability to control or discipline the children, the potential for violence between the mother and the children and the children's feelings of safety when they were with the father."

Regardless of who is granted custody – the parent who has been abusive or the parent who has been abused – the court is required to make findings as to the effects of the abuse on the child(ren). Effects may be fear of one parent, problems in school, trouble sleeping, nightmares, regressive behavior, and/or exhibiting hostile or aggressive behavior. *See* Guideline 12:02 Custody and Parenting Time Orders in Probate and Family Court: Assessment of Impact of Domestic Violence on Children.

## 12:07 Custody and Parenting Time Orders in Probate and Family Court: Amending Inconsistent c. 209A Orders

There may be cases in which the Probate and Family Court issues a custody or parenting time order that is inconsistent with an existing c. 209A order issued by the District Court, Boston Municipal Court or Superior Court. As provided by c. 209A, Probate and Family Court orders supersede c. 209A orders with respect to child support, custody, and contact. Because a custody or parenting time order out of the Probate and Family Court is a separate order, the Probate and Family Court Judge should, to the extent possible, specifically and clearly identify which of the specific paragraphs of the c. 209A order are now amended by the issuance of the Probate and Family Court order. For example, the modified order should not simply refer to an attached order or agreement, particularly with respect to provisions regarding the contact and stay-away orders between the parties and/or child(ren). Without such specification, a c. 209A defendant may be subject to an improper arrest. *See* Guideline 13:00 Amending c. 209A Orders to Make Consistent With Subsequent Probate and Family Court Orders Regarding Children. The amended orders should be provided to the probation department for entry into the Statewide Registry of Civil Restraining Orders.

### Commentary

A c. 209A no contact order entered by the Probate and Family Court should be amended to reflect a subsequently entered custody order in a divorce, paternity, or other custody proceeding. If the original c. 209A order is in a different Probate and Family Court division, the court entering the subsequent parenting time order may telephone the Administrative Office of the Probate and Family Court to request a special assignment to amend the original c. 209A order. If the conflicting no-contact order was issued by a court in a different department, it should be amended pursuant to Trial Court Administrative Order 21-3. *See* Guideline 13:00 Amending c. 209A Orders to Make Consistent With Subsequent Probate and Family Court Orders Regarding Children.

To ensure that a c. 209A defendant is not subject to an improper arrest, the Probate and Family Court judge, to the extent possible, should specifically and clearly identify the amended provisions on the face of the c. 209A order. For example, assume that paragraph 7 of the District

Court c. 209A order prohibits a defendant from having any contact with the minor child of the parties. In a later proceeding, a Probate and Family Court judge orders (either directly or by incorporation of a stipulation of the parties into a court order) that the c. 209A defendant shall have supervised parenting time with that child at a local visitation center. At the same time that the Probate and Family Court judge enters such an order, that judge should amend the District Court c.209A order by using language similar to the following:

> "Paragraph number 7 of this order is amended to permit the defendant to have supervised parenting time with the child at the Main Street Visitation Center, Boston, MA, all pursuant to a Probate and Family Court order dated this day at docket number SU18D000."

Probate and Family Court personnel are to provide copies of the amended c. 209A order to the parties, if present, and, in accordance with Trial Court Administrative Order 21-3, the probation department in the Probate and Family Court will immediately transmit a copy of the order, including all additional pages of the order if there was inadequate space on the original order to include complete details of the modification, to the issuing court. The Probate and Family Court must also enter the order into the Statewide Registry of Civil Restraining orders, notify the appropriate police department of the modified order, and update its case file.

## 12:08 Interstate Custody Issues

General Laws c. 209B authorizes Massachusetts to enter emergency orders to protect the plaintiff and child(ren) from harm, notwithstanding the pendency of a custody proceeding in another state.

### Commentary

If there is a prior or pending action or an existing custody order from another state and that state continues to have jurisdiction under its own law(s), Massachusetts must defer to the jurisdiction of the other state unless that state relinquishes jurisdiction to Massachusetts. Even if a parent has fled from another jurisdiction to Massachusetts to avoid abuse, the state from which that parent fled will remain the child(ren)'s home state for six months.

If a petition for protection from abuse is properly filed in Massachusetts, however, and another state has prior custody jurisdiction, G.L. c. 209B, § 2(a)(3)(ii) allows a Massachusetts court to enter a custody or parenting time order on an emergency basis only. The issuance of a c. 209A order is a sufficient finding of an emergency to justify a temporary custody order. Any custody order is subject to the initial jurisdictional requirements of the Massachusetts Child Custody Jurisdiction Act (MCCJA), pursuant to G.L. c. 209B, and the continuing jurisdiction of Parental Kidnapping Protection Act (PKPA), pursuant to 28 U.S.C. § 1738A (1988). *See Umina v. Malbica*, 27 Mass. App. Ct. 351, 358 (1989); and, *Delk v. Gonzalez*, 421 Mass. 525, 529 (1995). For a further discussion about requirements of personal jurisdiction, *see I.S.H. v. M.D.B.*, 83 Mass. App. Ct. 553 (2013).

If custody jurisdiction is contested, the judge should make specific findings relative to abuse and risk to the child(ren) that should be communicated to the court with primary custody jurisdiction, either through telephone communication or by providing a copy of the findings or both. While a telephone conference can be held without the parties being present, the conversation should be held on the record if practicable, or memorialized in some other way for the record. Only factual findings or procedural issues should be discussed. If returning the child(ren) would create an undue risk of harm, the court may request that the other state consider bifurcating the proceeding with the Massachusetts court conducting a hearing or investigation for the benefit and use of the court with primary custody jurisdiction.

Child support awards in c. 209A orders may not conflict with awards in existence from another state. If there is a child support amount ordered by an out of state entity, the Uniform Interstate Family Support Act (UIFSA) is applicable. *See* G.L. c. 209D.

## 12:09 Non-Parent Custody and No-Contact Orders

If the safety of the minor child(ren) of the defendant necessitates allowing the child(ren) to remain with the non-parent plaintiff, a temporary custody and/or no contact order may be entered pursuant to a separate guardianship of a minor petition. Once temporary guardianship is ordered, the plaintiff or guardian may seek custody of the minor child(ren).

## 12:10 Issuance of Protective Orders: Divorce Proceedings

Protective orders may be entered pursuant to G.L. c. 208, § 18 during the pendency of a divorce to prohibit one spouse from imposing restraint on the personal liberty of the other spouse.

### Commentary

A request may be filed pursuant to G.L. c. 208, § 18 in the Probate and Family Court in which a divorce action is pending seeking that the other spouse be prohibited from imposing any restraint on the other spouse's personal liberty in order to preserve the peace. General Laws c. 208, § 18 "has come to serve two, somewhat different, purposes," as it not only authorizes judges to issue protective orders designed to prevent abuse, it also allows entry of protective orders designed to prevent harassing behaviors which do not rise to the level of abuse but nevertheless require temporary intervention during the pendency of the divorce proceedings. *Hennessey v. Sarkis*, 54 Mass. App. Ct. 152, 155 (2002). When G.L. c. 208, § 18 is "utilized for abuse prevention purposes akin to those of [G.L. c. 209A] . . . the serious consequences of such an order require that procedural formalities like those employed in 209A proceedings be observed." *Id*. at 155-156 (internal citations omitted). A protective order issued pursuant to G.L. c. 208, § 18 is considered akin to an order entered pursuant to G.L. c. 209A when violation thereof carries criminal penalties. *See Sertel v. Kravitz*, 54 Mass. App. Ct. 913, 914 (2002). Either spouse or their guardian may request additional orders to protect the spouse, a ward, or their child(ren) including a request to have a party vacate the marital home in accordance with G.L. c. 208, § 34B.

Protective orders entered pursuant to § 18 are considered temporary orders. They can be extended as necessary, but will be revoked by operation of law upon the entry of a final judgment of divorce unless incorporated in the judgment. If the court intends the order to be revoked, it must be vacated on the existing order, sent to the police, and entered in the Statewide Registry of Civil Restraining Orders. If the court intends to extend protection, after incorporating the temporary order in the final judgment, the order should be examined and extended for an appropriate duration. All changes must be served on the defendant and the police and entered in the Statewide Registry of Civil Restraining Orders.

The Supreme Judicial Court has ruled that the Probate and Family Court is authorized to issue permanent protective orders and incorporate them into judgments of divorce nisi, pursuant to the second sentence of G.L. c. 208, § 18. *Champagne v. Champagne*, 429 Mass. 324 (1999). *Cf. Commonwealth v. Blessing*, 43 Mass. App. Ct. 447 (1997). In *Crenshaw v. Macklin*, 430 Mass. 633, 635 (2000), the Supreme Judicial Court affirmed a court's authority to issue a permanent order following a "renewal hearing."

When requesting an extension of a protective order, the plaintiff need not make a showing of new abuse. *See* Guideline 6:08 Further Extending an Order After Notice on Its Expiration Date.

## 12:11 Issuance of Orders to Vacate Marital Residence: Divorce, Separate Support, or Maintenance

An order to vacate a marital residence may be entered pursuant to G.L. c. 208, § 34B.

### Commentary

Orders to vacate the marital home may be entered during the pendency of divorce, separate support, or maintenance actions. At the commencement, or during the pendency, of an action, the court may enter an order requiring a spouse to vacate the marital home for an initial period not to exceed ninety days, and an additional period upon further motion. Each order is predicated upon a showing of danger to the health, safety, or welfare of the moving party or any minor child(ren) residing with the parties. There is no requirement that the child(ren) be born of the marriage.

It should be noted that the standard for an order to vacate after notice to the other spouse is that "the health, safety, or welfare of the moving party or any minor child(ren) living with the parties would be endangered or substantially impaired." In a highly contested custody case, the court should consider the extent to which the conflict may endanger the child(ren). Upon a showing of a substantial likelihood of immediate danger to the moving party or the child(ren) residing with them, the court may allow *ex parte* relief. In such case, the court shall schedule a second hearing no later than five days after the temporary order to vacate is entered. The time frames for the second hearing in this section differ from c. 209A which requires a second hearing within ten days. All other motions to vacate the marital home must be marked for hearing in compliance with the Massachusetts Rules of Domestic Relations Procedure, Rule 6(c) (seven days' notice to the opposing party). An order to vacate may enter even if the opposing party is not residing in the marital home or if the moving party has vacated to protect their safety or the safety of any minor child(ren).

The court must be mindful that the order to vacate the marital residence must be properly extended to, or on the date of, the expiration of its initial ninety day period, as a defendant could otherwise avoid a conviction for violating the order that has expired. *See, e.g.*, *Commonwealth v. Blessing*, 43 Mass. App. Ct. 447, 449-450 (1997). Additionally, a temporary order to vacate in a divorce action pursuant to G.L. c. 208, § 34 does not survive the judgment nisi. *Id*.

## 12:12 Issuance of Protective Orders: Separate Support

Protective orders may enter as part of an action for separate support pursuant to G.L. c. 209, § 32.

### Commentary

Orders prohibiting interference with the personal liberty of the other spouse may enter in a separate support action. A separate support judgment may issue when the court finds that a spouse failed without justifiable cause to provide suitable support, deserted the other spouse, or has justifiable cause for living apart. According to G.L. c. 209, § 32, the orders are governed by the Massachusetts Rules of Civil Procedure, notwithstanding Rule 1 of the Massachusetts Rules of Domestic Relations Procedure.

If the protective order pursuant to G.L. c. 209, § 32 is entered as a temporary order, it shall be terminated by operation of law upon entry of final judgment of separate support, and the Statewide Registry of Civil Restraining Orders should be updated to reflect this. The final order may be for a time certain or until further order of the court.

*Ex parte* relief should be granted only upon a finding of a substantial likelihood of harm. If *ex parte* relief is granted, a further hearing, after notice, should be held within ten days. *Mitchell v. Mitchell*, 62 Mass. App. Ct. 769 (2005). The service requirements are the same as those applicable to an order issued pursuant to c. 209A. If the order is subsequently modified, the defendant must be served again, and provided with the modified order. Failure to properly serve the defendant may hamper criminal prosecution in the event the order is violated. *See* Commentary to Guideline 8:01 Enforcing Violations of Abuse Prevention Orders.

## 12:13 Issuance of Protective Orders: Paternity Actions

Protective orders may be entered as part of a paternity action pursuant to G.L. c. 209C, §§ 15 and 20.

### Commentary

General Laws c. 209C was enacted more recently than the protective provisions of G.L. c. 208 and G.L. c. 209, and it includes comprehensive language which most closely mirrors the protections of c. 209A. Because the appellate courts have held that all parties, regardless of their marital status, and their children should be accorded equal protection of the law, the comprehensive rights under this section shall be accorded to all parties seeking protection pursuant to a divorce or separate support action. *See Doe v. Roe*, 32 Mass. App. Ct. 63, 65 (1992), *rev. denied*, *Doe v. Roe*, 412 Mass. 1103 (1992).

Pursuant to G.L. c. 209C, § 11(a), a voluntary, written acknowledgment of parentage executed jointly by the mother and putative father of a child, whether a minor or not, and filed with the registrar of vital records and statistics or with the court shall be recognized as a sufficient basis for seeking an order of support, parenting time, or custody with respect to the child without further proceedings to establish paternity. G.L. c. 209C, § 11(a).

The court may enter either temporary orders or a final judgment which includes a vacate, no contact, or restraining provision. If the order is temporary, the statute provides that unless modified or revoked (pursuant to G.L. c. 209C, § 20) it shall continue in force and will be incorporated in the final judgment. Notwithstanding the statute, best practice would be that the court incorporate the order into the final judgment in order for the order to remain effective. If the court intends to revoke the order, it must be vacated, sent to the police, and entered in the Statewide Registry of Civil Restraining Orders. If the court intends to extend protection, after incorporating the temporary order in the final judgment, the order should be examined to determine the appropriateness of its duration. Any changes must be served on the defendant by the police and entered in the Statewide Registry of Civil Restraining Orders. Failure to properly serve the defendant may hamper criminal prosecution. *See* Commentary to Guideline 8:01 Enforcing Violations of Abuse Prevention Orders.

## 12:14 Service of Domestic Relations Protective Orders

Protective orders issued pursuant to G.L. c. 208, §§ 18 and 34B; G.L. c. 209, § 32; or G.L. c. 209C, §§ 15 and 20 shall be served on the defendant by the appropriate law enforcement officials and shall otherwise be treated in a manner similar to c. 209A orders.

### Commentary

Any protective order issued pursuant to G.L. c. 208, G.L. c. 209, or G.L. c. 209C shall be entered into the Statewide Registry of Civil Restraining Orders and shall be served in the same manner as orders entered pursuant to c. 209A. *See* Guideline 4:07 Transmission of *Ex Parte* Orders to the Police for Service on the Defendant and Guideline 6:03 Service of Initial Orders After Notice on the Defendant, regarding methods of service. Failure to properly serve the defendant may hamper criminal prosecution if the order is violated. *See* Commentary to Guideline 8:01 Enforcing Violations of Abuse Prevention Orders, regarding proper notice.

As with c. 209A orders, where the issuing judge is aware of any information that raises safety concerns for a police officer serving the order (e.g., outstanding warrants, firearms, suicidality), that information should be included on the order (or otherwise conveyed to the serving police department). If an outstanding warrant exists against the defendant, the judge must make a finding as to whether or not an imminent threat of bodily injury exists to the plaintiff. If such threat exists and the defendant is not present, the judge shall notify the appropriate law enforcement officials who are required to execute the warrant as soon as is practicable. In any event, the appropriate law enforcement officials shall be notified of any outstanding warrant. *See* Guideline 3:05 Court Action on Defendant's Default, Probation, Parole, or Warrant Status at *Ex Parte* Hearings; Heightened Safety Concerns. In cases where the defendant is present, courts are referred to Guideline 5:07 Court Action on Defendant's Warrant Status.

## Interdepartmental Judicial Assignments

13:00 Amending c. 209A Orders to Make Consistent With Subsequent Probate and Family Court Orders Regarding Children

## 13:00 Amending c. 209A Orders to Make Consistent With Subsequent Probate and Family Court Orders Regarding Children

Whenever a party to an active c. 209A Order appears before a justice of the Probate and Family Court Department and the justice issues a subsequent custody, parenting time, and/or support order that is inconsistent with an existing c. 209A Order, said justice must amend the active c. 209A Order, in accordance with Trial Court Administrative Order 21-3, to eliminate any conflict between the superseding order(s) and the active c. 209A Order. If such amendments are required, the Probate and Family Court judge must issue a superseding c. 209A Order which should, to the extent possible, specifically and clearly identify the amendments made to the c. 209A Order on the superseding c. 209A Order. The superseding c. 209A Order should not simply refer to an attached agreement, particularly with respect to the no contact and stay away provisions of the c. 209A Order.

The justice of the Probate and Family Court issuing the superseding c. 209A Order shall advise the party or parties appearing before said justice of the effect of the superseding c. 209A Order and explain that the superseding c. 209A Order will be immediately returned to the issuing Court, subject to further modification, extension or termination as authorized by G.L. c. 209A when a party to the order appears before the issuing court in future proceedings.

Under Trial Court Administrative Order 21-3, a Probate and Family Court judge may terminate an order in its entirety, but only at the plaintiff's request. *See* Guideline 5:08 Request by the Plaintiff to Terminate Abuse Prevention Order.

### Commentary

General Laws c. 209A, § 3 provides that child custody, contact, and support orders issued by the Probate and Family Court subsequent to a c. 209A order supersede inconsistent provisions of a previously issued c. 209A order. Because the Probate and Family Court order is a separate order,

the c. 209A order must be amended to reflect the superseding orders. *See* Administrative Order 21-3.

## Orders from Other Jurisdictions

14:00 Filing and Enforcement of Abuse Prevention and Other Protective Orders Issued by Other Jurisdictions

## 14:00 Filing and Enforcement of Abuse Prevention and Other Protective Orders Issued by Other Jurisdictions

Abuse prevention and other protective orders issued by other jurisdictions outside of Massachusetts for the purpose of preventing violent or threatening acts against, or contact or communication with, or physical proximity to another person, including *ex parte* and orders after notice issued by civil and criminal courts filed by or on behalf of a person seeking protection, shall be given full faith and credit throughout the Commonwealth and enforced as if they were issued in the Commonwealth for as long as they are in effect in the issuing jurisdiction.

A person entitled to protection under a protection order issued by another jurisdiction may file such order in the District Court, the Boston Municipal Court, the Probate and Family Court, or the Superior Court by filing with the court a certified copy of such order which shall be entered into the Statewide Registry of Civil Restraining Orders. Such person shall swear under oath in an affidavit that to the best of such person's knowledge such order is currently in effect as written. The Affidavit for Filing Out-Of-State Protective Order may be used for this purpose. The clerk shall provide a certified copy of the protection order issued by the other jurisdiction to a law enforcement agency upon request.

Statutory provisions pertaining to Massachusetts abuse prevention orders also apply to protection orders issued by other jurisdictions. Violations of orders from other jurisdictions shall be afforded the same treatment as violations of Massachusetts abuse prevention orders with respect to penalties and orders to pay damages. The exception to the rule of spousal disqualification (which bars a husband and wife from testifying about their private conversations), which applies, *inter alia*, to criminal proceedings in which one spouse is a defendant alleged to have committed a crime against the other spouse or to have violated a Massachusetts order, also applies to criminal proceedings in which one spouse is a defendant alleged to have violated a protection order issued by another jurisdiction. Persons who commit the crime of stalking in violation of an

order issued by another jurisdiction are subject to the same penalty as those who commit the same crime in violation of a Massachusetts abuse prevention order.

## Commentary

General Laws c. 209A, § 5A provides that protection orders issued by another jurisdiction shall be given full faith and credit throughout the Commonwealth. General Laws c. 209A, § 1 describes another jurisdiction as another state, territory or possession of the United States, the Commonwealth of Puerto Rico, the District of Columbia, or a tribal court. The statute apparently is intended to work in conjunction with the full faith and credit provisions of 18 U.S.C. § 2265.

Section 5A appears to include protection orders involving persons who may or may not be family or household members or who are in a substantive dating or engagement relationship, as provided by Massachusetts law. It is also worded to encompass orders restricting a broad variety of activities, including protection orders, the purpose of which is to prevent, in the alternative, violent or threatening acts, harassment, contact or communication with, or physical proximity to another person. Such orders may be temporary or final and may have been issued by "civil and criminal courts." Court personnel should accept for filing any orders which fall into these categories in a manner reflecting the broad scope of the statute.

Violations of orders issued by other jurisdictions are to be treated the same as violations of orders issued by Massachusetts courts. G.L. c. 209A, §§ 5A and 7. See *Commonwealth v. Shea*, 467 Mass. 788, 789 (2014) (concluding that Massachusetts law governs violations of protection orders issued by another state where the violation occurred in Massachusetts). Law enforcement authorities are required to enforce foreign protection orders as they do Massachusetts orders. Specifically, police "may presume the validity of, and enforce . . . a copy of a protection order issued by another jurisdiction which has been provided to the law enforcement officer by any source; provided, however, that the officer is also provided with a statement by the person protected by the order that such order remains in effect. Law enforcement officers may rely on such statement by the person protected by such order." G.L. c. 209A, § 5A (emphasis added). The filing of an order from another jurisdiction is not a prerequisite to enforcement in the Commonwealth. 18 U.S.C. § 2265; G.L. c. 209A, § 5A. Protection orders from other jurisdictions are included among the types of orders the violation of which requires a police officer to make an arrest. G.L. c. 209A, § 6. Section 6 also authorizes police to make warrantless arrests if they have probable cause to believe that a firearms suspension and surrender provision of an order has been violated.

General Laws c. 265, § 43(b) provides that a person who commits the crime of stalking in violation of a protection order issued by another jurisdiction shall be punished the same as a person who committed the same crime in violation of a Massachusetts order. The crime of stalking may be "prosecuted and punished" in any jurisdiction of the Commonwealth where "an act constituting an element of the crime was committed." G.L. c. 277, § 62B.

Memoranda and forms have been issued to facilitate filing of orders issued by other jurisdictions in the courts of the Commonwealth and logged onto the Registry of Civil Restraining Orders: a memorandum from Chief Justice for Administration and Management John Irwin, October 30, 1996, "Out-of-State Domestic Violence Restraining Orders," including a memorandum from Commissioner of Probation Donald Cochran, October 30, 1996, "Chapter 209A, Section 5A: Out-of-State Protective/Restraining Orders;" District Court Transmittal No. 622, November 6, 1996, "Out-of-State Domestic Violence Restraining Orders;" and a memorandum from Probate and Family Court Chief Justice Mary Fitzpatrick, November 5, 1996, "Registration of Foreign Protection Orders." Persons who are protected by an order issued by another jurisdiction and who want to file a certified copy of it in a Massachusetts court with jurisdiction are required to file an affidavit stating that the out of state order is currently in effect as written. The Affidavit for Filing Out-Of-State Protective Order may be used for this purpose. *See* G.L. c. 209A, § 5A. *See also* Guideline 1:08 Plaintiff Unable to Appear in Court and Guideline 2:03 Completing the Complaint; Obtaining Required Information.