CHAPTER 50

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Restraining Order Violations

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§ 50.1 THE ABUSE PREVENTION ACT — INTRODUCTION

G.L. c. 209A, entitled "Abuse Prevention," was enacted in 1978 and has been frequently amended since against the backdrop of an increased popular awareness of domestic abuse.[1] That which Anglo-Saxon law had, for centuries, considered a "private" or "family" matter[2] shifted dramatically and became not only a public policy problem and a punishable crime, but it also became a problem the Legislature, through c. 209A, sought to "prevent." As with other statutes seeking "prevention," there are problems inherent to balancing the social and political pressure to control individual behavior in a legal system arranged to maximize individual liberty.[3] In addition to particular practice problems, some of which are discussed *infra*, c. 209A provided a new level of government intrusion into the lives of average citizens by authorizing the police to arrest for a misdemeanor not committed in their presence.[4] Criminal defense lawyers can help both their clients and the justice system by guarding both against the social impulse to exchange the uncertainties of freedom for the perception of protection.[5]

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[1] Collins, Comment, Mahoney v. Commonwealth: *A Response to Domestic Violence*, 29 NEW ENG. L. REV. 981, 986–88 (1995). A useful resource is the Trial Court's Guidelines for Judicial Practice, Abuse Prevention Proceedings (Revised, September 2011), available at available at www.mass.gov/courts/209a/guidelines-2011.pdf. *See also Tenth Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Domestic Violence*, 10 GEO. J. GENDER & L. 369 (2009); Harrington, *NEJCCC Scribes Award Recipient: Commonwealth v. Finase: The Scope of Massachusetts Abuse Prevention Order Prosecution and Efficacy*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 193 (2003).

[2] "[D]ictim in Massachusetts case law suggested that a husband had a limited right to chastise his wife as late as the nineteenth century." KINDREGAN, JR., & INKER, 3 MASSACHUSETTS PRACTICE § 57.1 at 4 (1996) (citations omitted); Collins, *supra* n. 1 at 987, n. 46.

[3] *See, e.g.*, Commonwealth v. Aime, 414 Mass. 667, 674–84 (1993) (discussion of substantive and procedural due process analysis as it applies to preventive detention statute).

[4] G.L. c. 209A, § 6. The only power to arrest for misdemeanor at common law was where the act was committed in the presence or view of the officer, involved a breach of the peace, and was continuing at the time of the arrest. Commonwealth v. Jacobson, 419 Mass. 269, 272 (1995). *See also* Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987) (case involving illegal arrest of disfavored would-be son-in-law and collusion of police, judges, and lawyers in small town).

[5] Chapter 209A law is relatively new and evolving. There are not yet a large number of c. 209A appellate decisions and every year new cases color this law's reach. More than other, older areas of the criminal law, each new c. 209A case is an opportunity for the defense bar to influence the law's evolution. Some unreviewed constitutional challenges and defenses are suggested below and others await creation. *See infra* $50.3A(4) (art. 15 challenge); $50.3B(2) (art. 12 challenge); $50.3 introduction (motions to dismiss); $50.2B, par. 8 (familial

Unlike most statutes providing for criminal enforcement, c. 209A straddles civil and criminal law and thus creates unusual challenges for the advocate. The c. 209A restraining order begins as a temporary civil action (usually ex parte) and requires a very low burden of proof.[6] During the civil c. 209A process, defendants are typically subject to initial ex parte hearings and court orders including, but not limited to: immediate eviction regardless of title or lease rights; termination of physical and legal custody of children; child and spousal support orders; surrender of all firearms, ammunition, and the loss of any license or firearm identification card; payment of damages, costs, and attorney fees; and the threat of warrantless arrest for the violation of some of these orders.[7] At the hearing where the permanency of the above temporary orders is decided, the defendant's due process rights are minimal. Defendants have been denied notice,[8] discovery,[9] and service of the affidavit supporting the complaint.[10] At the hearing, the rules of evidence are suspended[11] and rights of confrontation[12] and cross-examination have been denied.[13] If any order issues, ex parte or otherwise, the

association); $50.3A(3) (intent); $50.2A (challenges to order based on type of relationship); $50.5 (expungement of records).

[6] Trial Court's Guidelines for Judicial Practice, Abuse Prevention Proceedings 3:06 (Revised, September 2011); Frizado v. Frizado, 420 Mass. 592, 597 (1995) (standard of proof is by preponderance of evidence).

[7] G.L. c. 209A, §3; Frizado v. Frizado, 420 Mass. 592 (1995) (such deprivations without trial and without criminal constitutional trial rights are not unconstitutional). *But see infra*, 50.3A(4) (discussing applicability of state constitutional challenge to denial of right to civil jury trial where property is taken from defendant).

[8] Commonwealth v. Delaney, 425 Mass. 587, 593 (1997) (service of temporary order, combined with evidence of actual knowledge of existence of order, will not prevent criminal liability for violation of extended order despite explicit language in statute to contrary). *See also* Commonwealth v. Bachir, 45 Mass. App. Ct. 204, *f. a. r. denied* 428 Mass. 1104 (1998) (personal service of extended order not required where defendant had been served in hand with temporary restraining order which contained a hearing date and warned the defendant that "an extended or expanded order may remain in effect for up to one year," defendant testified that he had been served with the temporary restraining order and had read its contents and there was other evidence that he knew of the terms of the extended order). If the police are unable to make service and substituted service appears unlikely to reach the defendant, the judge may, after making appropriate findings, excuse service. Zullo v. Gouguen, 423 Mass. 679 (1996). Such determination for excuse of service may not be done retroactively by a later judge deciding the criminal or civil liability for violation of the order. *Compare* Commonwealth v. Molloy, 44 Mass. App. Ct. 306 (1998) (knowledge of the continued order must be proved where continued order was based on prior continued orders and not on a temporary order). *See infra* § 50.3A(2) and (3).

[9] G.L. c. 209A contains no provisions for discovery and although analogies to the Dist./Mun. Cts. R. Civ. P. may be applied, the question appears to be one of court discretion. *See supra* note 1, Trial Court's Guidelines 1:03.

[10] Flynn v. Warner, 421 Mass. 1002 (1995) (pro se appeal from single justice to full bench failed to raise any constitutionally based objection to lack of service of affidavit but where he was permitted to read it in court there was no prejudice).

[11] Frizado v. Frizado, 420 Mass. 592 (1995).

[12] Flynn v. Warner, 421 Mass. 1002 (1995) (sole allegation of threat based on hearsay).

[13] Silvia v. Duarte, 421 Mass. 1007, 1008 (1995) (apparently total denial of cross-examination of plaintiff justified in light of defendant's "history of violence" against plaintiff and others and clairvoyant vision that "rehearing would produce the same result"). *But see* C.O. v. M.M., 442 Mass. 648, 659 (2004) (court found that, absent excusing circumstances (such as

defendant's record will be listed on the statewide domestic violence record-keeping system (regardless of whether the order issued legally or was later vacated) and it may not be expunged by the district court.[14] It would seem not even a statute of limitations protects the defendant from ancient allegations of abuse employed by a petitioner requesting a restraining order.[15]

When a c. 209A order is criminally enforced, the defendant's due process and other rights may be further eroded. For example, despite the explicit requirements of the statute,[16] the Supreme Judicial Court has found that service may be suspended by the court for cause,[17] and has also affirmed a criminal conviction where service of the permanent order was admittedly *never made* and written notice *was never received*.[18] Abuse, when it is not an actual or attempted battery or sexual battery or coercion, is defined by the statute as "placing another in fear of imminent, serious, physical harm." But it has been interpreted by the court as "a reasonable apprehension of possible physical abuse."[19] Thus, the defense attorney faces an uphill battle, particularly where counsel is obtained only after criminal process has issued.

One useful judicial source in this area is the 2011 revision of the *Trial Court Guidelines for Judicial Practice, Abuse Prevention Proceedings*, available at www.mass.gov/courts/209a/guidelines-2011.pdf.

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harassment), due process would be violated where the defendant is not provided with the opportunity to present evidence and cross-examine witnesses).

[14] Vaccaro v. Vaccaro, 425 Mass. 153 (1997) (finding no authority for district court judge to order expungement of record with statewide domestic violence recordkeeping system created by St. 1992 c. 188, § 7). Counsel should consider alternative forums that might support an expunging of an illegal or vacated order such as a civil petition for judicial review of an administrative decision and preliminary injunction against the Commissioner of Probation.

[15] "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." G.L. c. 209A, § 3. As a practical matter, however, it would be difficult for a plaintiff to prove abuse based on an old incident. G.L. c. 209A, § 1. "In determining whether to issue a protective order, the judge must consider carefully whether serious physical harm is imminent and should not issue an order simply because it seems to be a good idea or because it will not cause the defendant and real inconvenience." Larkin v. Ayer Div. of Dist. Court Dep't, 425 Mass. 1020 (1997); Jordan v. Clerk of Westfield Div. of Dist. Ct., 425 Mass. 1016 (1997) (despite past abuse, where defendant was presently incarcerated, defendant's conduct or language was not proved to have reasonably placed plaintiff in fear of imminent serious bodily injury).

[16] "Whenever the court orders . . . the defendant to vacate, refrain from abusing the plaintiff or to have no contact with the plaintiff or the plaintiff's minor child, the register or the clerk-magistrate shall transmit two certified copies of each such order and one copy of the complaint and summons forthwith to the appropriate law enforcement agency which, unless otherwise ordered by the court, shall serve one copy of the each order upon the defendant, together with a copy of the complaint, order and summons and notice of any suspension or surrender ordered pursuant to section three B of this chapter." G.L. c. 209A, § 7.

[17] Zullo v. Gougen, 423 Mass. 679 (1996).

[18] Commonwealth v. Delaney, 425 Mass. 587 (1997) (evidence of actual knowledge). Commonwealth v. Bachir, 45 Mass. App. Ct. 204, *f. a. r. denied*, 428 Mass. 1104 (1998) (service of permanent order unnecessary where temporary order had warned defendant of possibility of extension and defendant knew of the order's terms); Commonwealth v. Crimmins, 46 Mass. App. Ct. 489 (1999) (evidence of service sufficient although the jury received *no* evidence as to how service was performed due to server's failure to check appropriate box on the return of service).

[19] Commonwealth v. Gordon, 407 Mass. 340, 349–50 (1990).

§ 50.2 THE CIVIL PROCESS

§ 50.2A. RELATIONSHIP AND ABUSE

A petitioner who is either a family or household member of the respondent,[20] or is in a "substantive dating or engagement relationship"[21] with a respondent, may file a request for a restraining order ex parte on a claim of "abuse." But there is now recourse for those who do not fulfill the relationship requirement: as of May 10, 2010, any person may apply for a *G.L. c. 258E "harassment prevention order,"* which provides relief similar to a 209A abuse prevention order.[22]

Abuse is defined as "attempting to cause or causing physical harm" or "placing another in fear of imminent serious physical harm" or "causing another to engage involuntarily in sexual relations by force, threat or duress."[23] The petitioner may file in probate, district, Boston Municipal, or superior court but may not bring the petition in superior court if the relationship is a "substantive dating relationship."[24] In challenging a c. 209A order, counsel should first examine both the type of relationship and the sufficiency of the alleged abuse.

A finding of abuse has been sustained by a single hearsay allegation by the plaintiff that, after receiving a plastic toy sword during a visit with his father, the defendant told the son that he [the son] should use it to slit the throats of his mother and mother's attorney.[25] However, an abuse finding was overturned where the allegation involved mere unspecified "threats," which on review could not be factually

[20] Plaintiff or respondent may be an adult or a minor. G.L. c. 209A, § 3. If a minor is a party, the records are to be withheld from public inspection except by order of the court. G.L. c. 209A, § 8.

[21] The statute leaves the finding of a substantive dating relationship to the courts but suggests the court consider the type, length of time of the relationship, frequency of interaction between the parties, and the length of time elapsed since the termination of the relationship. G.L. c. 209A, § 1. *See also* Brossard v. West Roxbury Div. of Dist. Court Dep't, 417 Mass. 183 (1994) and C.O. v. M.M., 442 Mass. 648, 651 (2004) (the existence of a "substantive dating relationship" is to be determined on a case by case basis by using the factors set forth in G.L. c. 209A).

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

[23] G.L. c. 209A, § 1.

[24] G.L. c. 209A, §§ 1, 3.

[25] Flynn v. Warner, 421 Mass. 1002 (1995). But note that there was no objection to the hearsay statements nor a motion to strike. *Id.* Hearsay evidence, although admissible in c. 209A hearings, should be scrutinized for reliability and, where possible, challenged for lack of fairness and "good cause" to permit court's consideration of the hearsay. Frizado v. Frizado, 420 Mass. 592 (1995) (citing Commonwealth v. Durling, 407 Mass. 108, 113 (1990) (Commonwealth must show "good cause" for admitting hearsay evidence in a probation revocation hearing)). Counsel should consider raising confrontation clause challenges under art. 12, Mass. Const. Declaration of Rights where, unlike a probation revocation hearing, at a c. 209A hearing defendant presumably continues to enjoy the full panoply of liberty interests not granted to one on probation. *See supra* chs. 32, 41.

determined to have been threats to damage property or threats to cause imminent and serious physical injury.[26] A finding of abuse was also reversed on appeal where the plaintiff testified that she suffered ”emotionally" and experienced aggravation of her ulcers as a result of receiving the defendant's legal notices by mail or delivery by sheriff's department.[27] In another case the restraining order was vacated because, although the respondent knew the address of the complainant and her children’s school and was serving a prison sentence for kidnapping and assault against the complainant, abuse was not proved.[28] Counsel should examine each allegation to determine whether the plaintiff has proved a reasonable apprehension of serious physical injury.

If the defendant is charged with a crime “involving abuse” under c. 209A, the alleged victim may obtain a written “no contact” order, usually at the arraignment.[29] It is important for defense counsel to note whether the order is for “no contact” or “stay away,” a lesser restriction.[30] In such an event, the fact of a criminal charge appears dispositive of the question of “abuse” although counsel should consider probable cause challenges to the criminal allegations. Arraignment counsel must fully advise the defendant that any failure to obey the stay away order, via writing, gifts, social media such as Facebook or Twitter, third-party communications, even if by invitation of the alleged victim, can result in revocation of bail, additional criminal charges, or both.[31]

§ 50.2B. RESTRAINING ORDER

[26] The criteria of “abuse” is objective. Carroll v. Kartell, 56 Mass. App. Ct. 83 (2002) (odd and/or “very creepy” dating conversations or behaviors did not constitute abuse, threats of abuse or reasonable fear of abuse). *See also* Keene v. Gangi, 60 Mass. App. Ct. 667 (2004) (no abuse order issued where plaintiff testified defendant had placed a surveillance camera in her room, joked that he could have someone taken care of, and possessed a firearms identification card and/or license to carry, as there was no history of violence or abuse between the parties and a lack of evidence to prove fear of imminent serious physical harm); Dollan v. Dollan, 55 Mass App 905 (2002) (“generalized apprehension” of an adult daughter based on past abuse by her mother was not sufficient basis for issuing a protective order); Commonwealth v. Uttaro, 54 Mass. App. Ct. 871 (2002) (error to grant husband’s 209A order against wife who had previously “abused” him by obtaining a 209A order and inviting contact and then having him arrested as such “abuse” was not “abuse” as defined by the statute); Commonwealth v. Jacobsen, 419 Mass. 269, 273–74 (1995) (no record of substance of threats existed for appellate review although Court noted that threats alone, if physical, imminent, and serious, would support warrantless arrest under c. 209A); Wooldridge v. Hickey, 45 Mass. App. Ct. 637, 638–42 (1998) (declining to overturn “stay away” order pertaining to spouse because of gaps in appellate record but vacating order relating to children due to lack of evidence of imminent serious physical harm).

[27] Larkin v. Ayer Div. of Dist. Court Dep't, 425 Mass. 1020 (1997) (on this appeal for review to full bench from denial to single justice, it appears that criminal prosecution based on ultimately invalid 209A order had begun).

[28] Jordan v. Clerk of Westfield Div. of Dist. Court Dep't, 425 Mass. 1016 (1997) (incarcerated defendant cannot produce fear of imminent harm and defendant's words and conduct because being incarcerated had not created reasonable fear of harm).

[29] G.L. c. 209A, § 6.

[30] 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”). *Id*.

[31] *See supra*, ch. 7 (arraignment) and ch. 8 (bail).

On determining that the petitioner's relationship meets the statutory requirements, the court may order any combination of the following:[32]

1. The defendant to refrain from abusing the plaintiff;
2. The defendant to refrain from contacting the plaintiff;
3. The defendant to vacate the household forthwith[33] and to remain away from the household, multiple family dwelling and workplace;
4. Award plaintiff temporary custody of a minor child;
5. The defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both if the defendant is legally obligated to do so;
6. The defendant to pay the plaintiff monetary compensation for the losses suffered as a direct result of such abuse;[34]
7. That the plaintiff's address be impounded;
8. The defendant to refrain from abusing or contacting the plaintiff's child or any child in the plaintiff's custody;[35]
9. The court may also recommend, but not order, that the defendant attends a recognized[36] batterer's treatment program.[37]

The court may also issue *mutual protective orders,* but must articulate a basis for concluding both that mutual abuse occurred and that such reciprocal orders are necessary.[38]

§ 50.2C. PROCEDURE

1. Ex Parte Temporary or Emergency Hearings

The complaint is filed together with an affidavit signed by the plaintiff, which alleges facts supporting the request for the restraining order. In most courts, specially assigned clerks will assist the plaintiff in filing the papers and "advocates" may stand

[32] The statute seems to permit the possibility of other orders as well. G.L. c. 209A, § 3. In the case of "mutual restraining orders" *see* Sommi v. Ayer, 51 Mass. App. Ct. 207 (2001) (court that orders mutual restraining orders must set forth specific basis for conclusion for mutual abuse).

[33] For possible constitutional challenge to this order, *see infra*, § 50.3A(4) (failure to vacate).

[34] G.L. c. 209A, § 3. Such compensation includes but is not limited to "loss 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.L. c. 209A, § 3.

[35] That this provision may violate defendant's rights to familial association has yet to be reviewed on appeal and may be yet a fruitful area for defense. Commonwealth v. Laskowski, 40 Mass. App. Ct. 480, *rev. denied*, 423 Mass. 1101 (1996) (claim that order prohibiting defendant from contacting his former girlfriend's daughter was unreviewable on appeal from conviction for unlawfully contacting former girlfriend and appeal of "no contact" order unreviewable because it was not challenged before trial court).

[36] The Department of Public Health certifies batterer's programs.

[37] Note that the court may not order the defendant's participation in such a program. G.L. c. 209A, § 3. *See also infra* 50.3.

[38] The purpose of requiring specific written findings of fact are to ensure that a judge will carefully consider all evidence to determine the identities of the victim and aggressor and whether mutual orders are warranted. Sommi v. Ayer, 51 Mass App 207 (2001).

with the party during the hearing.[39] A brief, informal[40] hearing will follow where the court will examine the complaint and affidavit and may question the petitioner. Although the burden of proof is on the plaintiff to prove abuse by a preponderance of the evidence, this is rarely difficult to do in an ex parte hearing.[41] The court will examine the allegations of abuse in light of the history of the relationship including allegations of any prior abuse[42], the basis for the entry of any prior c. 209A restraining orders,[43] any violations of such orders, and any criminal or civil record the defendant may have involving either domestic abuse or "other violence."[44] If the plaintiff demonstrates to the court a "substantial likelihood of immediate danger of abuse," the court may temporarily order such relief as above without any notice to the defendant as it "deems necessary to protect the plaintiff from abuse."[45] The hearings should be public but may be closed if the court makes findings on the record for good cause.[46]

If court is closed for business or the plaintiff is unable to appear due to a physical condition, any judge of the appropriate courts may issue an emergency restraining order, which also may include the relief detailed above, if the plaintiff shows a "substantial likelihood of immediate danger of abuse."[47] On weekends, nights, and holidays, the police, in responding to a domestic violence call, may make the necessary arrangements for the emergency order.[48] Regardless of whether the order is granted pursuant to an in-court filing or an emergency telephone petition, the order is temporary and is effective for only ten days.[49] On the date the temporary order is to expire, the case will be called forward for an extension hearing.[50]

2. Notice

Whenever the court temporarily or permanently orders the defendant to vacate, refrain from abusing plaintiff, or to have no contact with the plaintiff or the plaintiff's minor child, the complaint and the summons is to be sent from the clerk's office to the police who shall serve one copy of each order on the defendant and make return of

[39] Trial Court's Guidelines 3:09, *supra* note 1.

[40] "The common law rules of evidence, e.g., those regarding hearsay, authentication, and best evidence, should be applied with flexibility at the ex parte hearing, subject to considerations of fundamental fairness." Trial Court's Guidelines, 3:06, *supra* note 1.

[41] Frizado v. Frizado, 420 Mass. 592 (1995) (noting that defendant's failure to testify cannot be used to justify restraining order unless other evidence is presented); Commonwealth. v. Mendonca, 50 Mass. App. Ct. 684 (2001) (issuance of protective order is a civil procedure, and abuse in violation of the order need only be proved by a preponderance of the evidence).

[42] Past abuse alone, without plaintiff's present fear of imminent physical harm, is insufficient to justify the issuance of an abuse prevention order. Dollan v. Dollan, 55 Mass. Apt. Ct. 905 (2002).

[43] G.L. c. 209A, § 7.

[44] Smith v. Joyce, 421 Mass. 520 (1995).

[45] G.L. c. 209A, § 4.

[46] Guidelines 3:04, *supra* note 1.

[47] G.L. c. 209A, § 5.

[48] G.L. c. 209A, § 6(5).

[49] G.L. c. 209A, § 4.

[50] *See infra* § 50.2C(3).

service to the court.[51] The notice must contain language warning the defendant which specific behaviors are prohibited and which are mandated,[52] and the time and place where the extension hearing, in the case of a temporary order, will be held.[53] The order must also include the statement that violation of the order is a criminal offense.[54] Attached to the order is a notice of the suspension and surrender of any license to carry firearms, firearm identification card, and all firearms and ammunition that the defendant owns, controls, or possesses.[55] These are to be surrendered to the police on service.[56] This original suspension and surrender of guns and licenses is based, as the restraining order itself, on a showing of "a substantial likelihood of immediate danger of abuse."[57] The defendant is not entitled to be served with a copy of the complainant's affidavit in support of the application for the restraining order[58] but counsel should always review it before the hearing.[59] (The Supreme Judicial Court has also held that the public should have access to affidavits filed in support of domestic abuse protective order.[60]) In spite of the explicit language of c. 209A,[61] the Supreme Judicial Court has found sufficient proof of service of the permanent order where last and usual address service was shown for a temporary restraining order, combined with some evidence of actual notice.[62]

3. Extension Hearings, Modification, and Appeal

After the temporary[63] or emergency order[64] has been issued, the defendant has the right to be heard as to whether the temporary order should be continued.[65] The

[51] G.L. c. 209A, §§ 4, 7.

[52] Such as the requirement to attend a batterer's program, to pay temporary support for plaintiff or child, or to pay compensation. G.L. c. 209A, §§ 3, 7. *See also* Commonwealth v. Borgan, 415 Mass. 169 (1993) (order is not read broadly but is limited to its language and reasonable, limited inferences).

[53] G.L. c. 209A, § 7.

[54] G.L. c. 209A, § 7.

[55] G.L. c. 209A, § 3B.

[56] G.L. c. 209A, § 3B.

[57] G.L. c. 209A, § 3B.

[58] Flynn v. Warner, 421 Mass. 1002 (1995); Commonwealth v. Munafo, 45 Mass. App. Ct. 597, 558–602 (1998) (failure to serve complaint or summons where defendant received order in-hand held to be harmless error).

[59] "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." Frizado v. Frizado, 420 Mass. 592, 597 (1995). *See infra* § 50.3.

[60] Boston Herald, Inc. v. Sharpe, 432 Mass. 593 (2000).

[61] G.L. c. 209A, § 7. *See also* Commonwealth v. Delaney, 425 Mass. 587, 601–02 (1997) (Lynch, dissenting); Commonwealth v. Bachir, 45 Mass. App. Ct. 204, *f. a. r. denied,* 428 Mass. 1104 (1998).

[62] Commonwealth v. Delaney, 425 Mass. 587 (1997). *See also*, Commonwealth v. Bachir, 45 Mass. App. Ct. 204, *f. a. r. denied,* 428 Mass. 1104 (1998). *Cf.* Commonwealth v. Crimmins, 46 Mass. App. Ct. 489 (1999), Warner, J., dissenting in part (well-reasoned objection to the Court's reliance on a series of presumptions, none of which were presented to the jury, as substitute for proof of service in case where there was no proof of actual knowledge).

[63] G.L. c. 290A, § 4.

extension hearing is to be held no more than ten days after the issuance of the emergency order.[66] If the plaintiff does not appear, the temporary or emergency orders expire.[67] If the defendant does not appear, the restraining order shall continue in effect without further order of the court for no more than one year.[68] If the order is extended, it must state the date of its expiration. On the day the order expires, the case is called and, if the plaintiff appears, the court shall determine whether to extend the order for any additional time "reasonably necessary" to protect the plaintiff.[69]

The standard and burden of proof for granting an extension are similar to the criteria for granting an ex parte temporary order.[70] Thus the plaintiff must show by a preponderance of the evidence that an extension of the order is necessary to protect the plaintiff from the likelihood of abuse.[71] In determining whether the plaintiff has met his or her burden, the judge must consider the totality of the circumstances of the parties' relationship by examining various factors.[72] Not one factor is determinative, rather the totality of the circumstances that exist at the extension hearing, viewed with the initial order, govern the decision.[73] Additionally, the plaintiff does not need to prove new abuse at the extension hearing.[74] However, the court cannot extend an ex parte order

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[64] G.L. c. 209A, § 5.

[65] G.L. c. 209A, § 4.

[66] G.L. c. 209A, § 4; Trial Court's Guidelines 5:06 (Court must be given "acceptable reasons for Plaintiff's absence"), note 1 *supra*.

[67] G.L. c. 209A, § 3, 4, 5.

[68] G.L. c. 209A, § 3.

[69] G.L. c. 209A, § 3. Note that the defendant has notice that failure to appear at the extension hearing after the temporary order has issued may result in the order's extension. There is no similar notice that the defendant's failure to appear on the day the permanent order expires may result in an extension because the permanent order's extension is not virtually automatic as the extension of the temporary order is but hinges on the court's determination of whether "any additional time is reasonably necessary to protect the plaintiff." G.L. c. 209A, § 3. Commonwealth v. Molloy, 44 Mass. App. Ct. 306 (1998) (reversing defendant's conviction where permanent order extended over course of three years with no showing by Commonwealth that defendant had any notice of the last two extensions).

[70] Iamele v. Asselin, 444 Mass. 734 (2005).

[71] *Id*. at 739-740.

[72] *Id*. at 740.

The factors the judge should examine include, but are not limited to: "…the basis for the initial order…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." *Id*. *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 to extend a c. 209A order where parties have not been in contact for eight years).

[73] Rauseo v. Rauseo, 50 Mass. App. Ct. 911, 913 (2001), *rev. denied*, Rauseo v. Rauseo, 434 Mass. 1103 (2001). *See also*, Mitchell v. Mitchell, 62 Mass. App. Ct. 769, 774 (2005) ("[T]he fact abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient grounds for allowing an order to be vacated").

[74] Corrado v. Hedrick, 65 Mass. App. Ct. 477, 483-485 (2006). *See also*, Banna v. Banna, 78 Mass. App. Ct. 34, 35-36 (2010) (held there was insufficient evidence to extend the

where the plaintiff fails to prove that "abuse" has occurred solely because of a subjective fear that violence may occur if the parties have contact with one another.[75]

At the extension hearing, whether after a temporary order or a so-called "permanent" (one-year or less[76]) order, the defendant has a right to be heard through counsel or pro se. The rules of evidence are not followed, "provided that there is fairness in what evidence is admitted and relied on."[77] Because the hearing is civil, the criminal trial rights to due process and confrontation under Massachusetts Declaration of Rights article 12 do not apply although the requirements of civil due process under article 12[78] and substantive justice do.[79] Although such hearings are informal, counsel should argue against the admission of hearsay on grounds of unfairness, lack of reliability, and independent corroboration.[80] Counsel should file a request for a continuance if more time is necessary to discover the evidence, prepare, or to bring witnesses. The defendant may seek to vacate the order or modify it either at this hearing or on motion at any time.[81] Oral modification orders from the bench are

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ex parte order where judge only used the original affidavit and merely asked the plaintiff if she wanted to extend the order instead of determining whether there was a likelihood of further abuse based on the parties' circumstances).

[75] Corrado v. Hedrick, 65 Mass. App. Ct. 477, 483-485 (2006).

[76] Jones v. Gallagher, 54 Mass. App. Ct. 883 (2002) (error to extend order without any evidence that petitioner still had reason to fear and the burden of proof is on the Petitioner); Smith v. Jones, 75 Mass. App. Ct. 540 (2009) (court found permanent extension of abuse order inappropriate where defendant had not tried to contact plaintiff in three years and there was no additional evidence to support plaintiff's fear of harm); Crenshaw v. Macklin, 430 Mass. 633 (2000) (clarifying that, after the initial extension, restraining orders under c. 209A § 3 may be extended permanently, for a year, or for "any time reasonably necessary" to protect the abused person); Champagne v. Champagne, 429 Mass. 324 (1999) (interpreting G.L. c. 208 § 18 as granting Probate and Family Court authority to issue permanent protective orders in divorce proceedings and to incorporate them into final judgments of divorce nisi and removing doubt cast by Commonwealth v. Blessing, 43 Mass. App. Ct. 447 (1997)).

[77] Frizado v. Frizado, 420 Mass. 529 (1995); Trial Court's Guidelines 5:03, *supra* n. 1.

[78] Adoption of Quentin, 424 Mass. 882, 891–93 (1997) (discussing process due in civil proceedings under art. 12 and level of reliability required for admission of hearsay in civil proceedings).

[79] Frizado v. Frizado, 420 Mass. 592, 594 (1995). *See also* White v. White, 40 Mass. App. Ct. 132 (1996) (evidence in civil custody hearing taken outside presence of defendant in chambers and witness's comment on credibility of other witnesses and parties resulted in substantial injustice). At least one court has referred to the extension hearing as a "trial" (Souza v. Cochran, 1996 LW 427964 Mass. Super.) and because present substantive rights will be litigated and future criminal process is implicated, it could be argued that due process should be followed. Although there are virtually no confrontation rights left under the Sixth Amendment, art. 12 has been and will continue to be applied more liberally. Adoption of Quentin, 424 Mass. 882 (1997) (art. 12 requires hearsay to be reliable and independently corroborated even for civil hearing use). *Cf.* White v. Illinois, 502 U.S. 346 (1992) (any traditional exception to hearsay rule will not violate confrontation rights).

[80] Edward E. v. Department of Social Servs., 42 Mass. App. Ct. 478 (1997) (reliability of multilevel hearsay is determined by circumstances under which statements are made rather than their admissibility as evidence); Adoption of Quentin, 424 Mass. 882, 893 (1997) (specifically discussing civil due process limitations to admission of hearsay pursuant to new statute permitting use in civil custody and criminal hearings and trials).

[81] G.L. c. 209A, § 3.

ineffective; any such order must be in writing so that it may be transmitted to both the defendant and law enforcement.[82]

Chapter 209A provides for no appeal mechanism and the Supreme Judicial Court initially accepted appeals to the single justice under its general supervisory powers over the inferior courts pursuant to G.L. c. 211, § 3. The Court has modified this practice and directed that all c. 209A appeals be brought in the Appeals Court.[83] Appeals of temporary c. 209A orders that expire, are not extended, or are vacated are not necessarily mooted if counsel is sufficiently alert.[84] In the appropriate case, counsel should consider the advisability of direct appeal to the U.S. Supreme Court.[85]

4. Special Relief and Review

The defendant has a right to have the court review the suspension of firearm identification cards, guns, and ammunition within two days of the issuance of the temporary order. To obtain this hearing the defendant must petition the court and file an affidavit and request an expedited hearing. The affidavit must state that the firearms, ammunition, licenses, and/or firearm identification cards are necessary to his employment.[86] This hearing shall address that issue only.[87] Otherwise, the surrender matter may be heard together with all other issues at the extension hearing ten court days after the emergency order.[88] While the original surrender order attached to the temporary order is made on a showing of "a substantial likelihood of immediate danger of abuse," the suspension order may be made permanent on the showing of only "a likelihood of abuse."[89] The defendant may also move for a modification of this order at "any subsequent time."[90]

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[82] Commonwealth v. Rauseo, 50 Mass App 699, 706 (2001), citing G.L. c. 209A, § 7 and Commonwealth v. Delaney, 425 Mass. 587, 590 (1997).

[83] Lantsman v. Lantsman, 429 Mass. 1018 (1999) (failure to pursue appeal in Appeals Court precluded G.L. c. 211 § 3 review; failure to produce record would have also precluded review); Zullo v. Gougen, 423 Mass. 679 (1996). Counsel should recall that it is the petitioner's duty and burden to create and produce the record for appeal. *See* Wooldridge v. Hickey, 45 Mass. App. Ct. 637, 639 n.2 (1998) (because c. 209A orders and their review are civil, transcript of the proceedings below are not automatically provided on appeal and burden of production is on the petitioner).

[84] Larkin v. Ayer Dist. Court Dep't, 425 Mass. 1020 (1997) (expiration of extended order did not render moot defendant's appeal of order and request to stay criminal proceedings against him which included multiple violations of original, temporary, ex parte order); Frizado v. Frizado, 420 Mass. 592 (1995) (vacated order not moot because order has continuing effect on defendant by its inclusion in statewide domestic violence record-keeping system of commissioner of probation and exposes him to increased judicial scrutiny in event that Commonwealth seeks to hold him in preventive detention in criminal case under G.L. c. 276, § 58A). *But see* Vacarro v. Vacarro, 425 Mass. 153 (1997) (vacated order may not be expunged). *See infra* §50.5.

[85] Where no remedy exists as right defendant has no state remedies that need to have been exhausted before appealing to the U.S. Supreme Court where there is subject matter jurisdiction.

[86] G.L. c. 209A, § 3.

[87] G.L. c. 209A, § 3.

[88] G.L. c. 209A, § 3.

[89] G.L. c. 209A, § 3(c). *But see* Caplan v. Donovan, 450 Mass. 463, 472 (2008) (ordering the defendant to surrender his firearms is an affirmative duty that can only be imposed

§ 50.3 DEFENDING THE CRIMINAL C. 209A VIOLATION

Probably more than any other criminal case, excluding those alleging child abuse, the unpopularity of the domestic abuse case tests the advocate's ability to secure a fair trial. From the beginning of the case[91] to the end, defense counsel must expect to educate the courts on even the most basic points of law. Counsel must be particularly alert to procedural defenses and should thoughtfully examine the charging documents, the restraining order itself, the application for the restraining order, and its supporting affidavit. As with any other case, the defense must conduct a full investigation.[92] Interviewing the alleged victim is not always possible but should always be attempted and his or her certified copies of conviction, together with appearance or notice of counsel, should be collected. The case must be scrutinized for the possibility of any viable pretrial motions to dismiss.[93]

If the case goes to trial, the first step counsel must take is to develop and settle on a theory or theories of defense.[94] All other decisions and trial preparation will flow from this choice. The trier of fact will frequently have an unspoken assumption of the defendant's guilt.[95] Counsel should try to defuse[96] this common notion, where possible, and must show that the Commonwealth's evidence falls short of proof beyond

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by a court with personal jurisdiction over the defendant, therefore that portion of a order would be invalid).

[90] G.L. c. 209A, § 3.

[91] The government may move at arraignment for a pretrial detention hearing under G.L. c. 276, § 58A. *See supra* ch. 7 (arraignment) and ch. 8 (bail).

[92] *See supra* ch. 11.

[93] Legal deficiency in the presentment to the grand jury (Commonwealth v. McCarthy, 385 Mass. 160 (1982)) and any Mass. R. Crim. P. 13(c)(2) motion. *See* Commonwealth v. L.A.L. Corp., 400 Mass. 737, 738 (1987); Commonwealth v. Brandano, 359 Mass. 332, 337 (1971) (permitting dismissal over objection of Commonwealth in some circumstances and describing procedure required).

[94] Defense counsel is well advised to scrutinize the government's proof closely and to pressure the Commonwealth to prove each element with admissible evidence. Possible acquittals may be lost where, in a rush to the merits, seemingly subtle or unglamorous procedural issues are ignored and the defense inadvertently supplies the Commonwealth's quiver with arrows it may not have had. *See e.g.*, Commonwealth v. Silva, 431 Mass. 401 (2000) (finding, in an "affirmative defense" case, that admission of hearsay, without which proof of service probably could not have been proved, was harmless).

[95] In some instances an apparent presumption of guilt may come from judges. *See* Commonwealth v. Johnson, 45 Mass. App. Ct. 473 (1998) (trial judge, after correcting his jury instruction that the defendant was to be "presumed guilty" twice referred to that misstatement as a "Freudian slip" but trial counsel failed to object to the "correction" and the Appeals Court found this created no substantial risk of a miscarriage of justice).

[96] Many subtle and not so subtle techniques for this exist, from humanizing the defendant and making sure to the extent counsel can that the theatre of the courtroom works toward the defense, to explicitly telling the trier of fact to hold alleged victim witnesses to the same level of credibility expected of any other witness and to test those statements for bias, internal consistency, and against other evidence in the case. Keeping in mind the trier of fact's perspective throughout the trial will help to shift the legal fiction of the presumption of innocence to a fact.

reasonable doubt. In addition to the procedural defenses and those suggested by the elements of the crime, some defenses include: accident,[97] alibi, diminished capacity,[98] duress,[99] entrapment,[100] incredibility,[101] insanity, necessity,[102] and self-defense.[103] Some of these defenses are admittedly exotic and will be unavailable in most cases but where no defense leaps to mind, counsel should review the facts for any missed opportunity.

As with any trial, counsel must both try the case and protect the appellate record. This is even more important in the c. 209A trial where conviction seems likely. Unpreserved error in the areas discussed below has destroyed many appellate possibilities for success.[104] How the error is preserved is arguably as important as the fact of its preservation and counsel needs to be aware that the pretrial motion in limine absent the trial objection will subject the point of law to a reduced level of appellate scrutiny.[105] If a c. 209A violation is joined with other charges counsel should file a motion to sever where such joinder is prejudicial.[106] Counsel should consider the

[97] There is no strict liability for 209A Violations. Commonwealth v. Raymond, 54 Mass. App. Ct. 488 (2002) (defendant could not be convicted for violation of a no-contact provision of a restraining order where he couldn't reasonably be expected to know that the protected person was present). A defendant should not be held liable for failure to stay away from a plaintiff who, for example, arrives at a theatre after the defendant and sits behind him where he is not aware of her presence. *See infra* § 50.3(A)(3).

[98] A defendant's mental capacity or incompetence may provide grounds for defense.

[99] It is unlikely that such facts would result in a criminal charge, but if the defendant were forced to violate the order at the hands of another, a duress claim lies.

[100] Such defense requires the government to be an agent but could be made if the facts support it.

[101] The complainant's lack of credibility may be shown by evidence of bias, prior conviction, intoxication, or other incapacity at the time of the alleged violation. Be aware that while the general rule is that the record of a witness's criminal convictions must be left unexplained where that record is introduced to impeach the witness, abandonment of that rule has been deemed "harmless error" by at least one Appeals Court panel. Commonwealth v. Crimmins, 46 Mass. App. Ct. 489, 495 (1999).

[102] Necessity could excuse a failure-to-vacate violation where the defendant enters the household in order to remove an endangered child. Commonwealth v. Hutchins, 410 Mass. 726 (1991) (discussion of elements of necessity defense).

[103] Self-defense, particularly where coupled with an assault and battery charge, goes a long way toward explaining the motive the recanting plaintiff may have had at the time she made a false allegation.

[104] *See* Commonwealth v. Chartier, 43 Mass. App. Ct. 758 (1997) (substantive use of defendant's prior conviction for violation of c. 209A at c. 209A criminal trial); Commonwealth v. Napolitano, 42 Mass. App. Ct. 549 (1997) (failure to preserve constitutional confrontation claim); Commonwealth v. Martinez, 43 Mass. App. Ct. 408 (1997) (prior bad acts evidence that was not objected to at trial may have been error but was reviewed under more forgiving "substantial risk of a miscarriage of justice" standard and found, unsurprisingly, insubstantial in light of overwhelming evidence of guilt).

[105] Commonwealth v. Whelton, 428 Mass. 24, 26 (1998) (failure to object at trial to victim's spontaneous utterances after having lost motion in limine limited judicial review of admissibility issue to "substantial miscarriage of justice" rather than error).

[106] *But see* Commonwealth v. Delaney, 425 Mass. 587 (1997) (citing Commonwealth v. Feijoo, 419 Mass. 486, 494–95 (1995) (joinder not prejudicial where offenses arise out of course of criminal conduct or series of criminal episodes connected together or constituting single scheme or plan).

possibilities of raising venue, jurisdiction, and statute of limitations challenges also to remove some charges. At trial, counsel should be well prepared with appropriate pretrial motions, specifically designed jury voir dire, a list of likely objections with authorities to cite in support at sidebar, limiting instructions, and "pocket briefs"[107] to educate the court in the event that any of the usual c. 209A issues arise at trial. In a jury trial, counsel should file appropriate requests for instructions[108] and should know whether the judge prefers submission of jury instructions prior or subsequent to the close of the evidence.

§ 50.3A. ELEMENTS OF THE CRIME

To sustain a conviction, the Commonwealth must prove each of the following elements beyond a reasonable doubt:

1. That a valid c. 209A order[109] had been entered and was in effect;
2. That defendant had notice of the order;
3. That the defendant had intent;
4. That the defendant's act(s) were in violation of the court order.

1. The Existence of a Valid Restraining Order

The existence of a legally valid c. 209A restraining order is proved by the introduction of a court-certified copy of the restraining order. If the document is not certified it is inadmissible hearsay.[110] The Commonwealth must prove that the particular order was in effect on the day of the alleged violations. It is important to know the exact language of the order to challenge its clarity.[111] For instance, the Appeals Court vacated a conviction where the interpretation of the restraining order urged by the Commonwealth and adopted by the trial judge was imprecise.[112]

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[107] A pocket brief is a concise one-page assertion of authority counsel provides the court to aid ruling on an important point in the midst of trial.

[108] *See, e.g.,* Commonwealth v. Raymond, 54 Mass. App. Ct. 488 (2002) (error to instruct on abuse element when violation based exclusively on failure to refrain from contact); Commonwealth v. Stewart, 52 Mass. App. Ct. 755 (2001) (failure to request unanimity instruction); Commonwealth v. Leger, 52 Mass. App. Ct. 232 (2001) (defendant entitled to jury instruction that it could find that contact with plaintiff during course of defendant's attempt to speak with defendant's child was permissible, incidental contact).

[109] The order must require the defendant to refrain from abusing the plaintiff, refrain from contacting the plaintiff, and/or vacate the plaintiff-defendant household.

[110] Commonwealth v. Pierre, 53 Mass. App. Ct. 1112 (2002) (unpublished) (admission of 209A order at defendant's assault and battery trial was error, was not a "prior consistent statement" and continued extraneous, prejudicial material); Commonwealth v. Foreman, 52 Mass. App. Ct. 510 (2001) (same); Commonwealth v. Kirk, 39 Mass. App. Ct. 225 (1995) (affidavit in support of c. 209A order is hearsay and is not admissible under official records exception or by judicial notice); Commonwealth v. Smith, 38 Mass. App. Ct. 324, 326 (1995) (uncertified copies of conviction are hearsay and are admissible at revocation hearing because hearsay is admissible there).

[111] The terms of a restraining order must be clear. Commonwealth v. Borgan, 415 Mass. 169, 171 (1993).

[112] Commonwealth v. O'Shea, 41 Mass. App. Ct. 115 (1996) (order that defendant stay 100 yards away from petitioner and stay away from her workplace when she was not there and he never reached property) .

2. Notice

As discussed above,[113] the statute specifically requires the court to serve the defendant with the restraining order.[114] Ordinarily notice is proved by the court-certified notice, summons, and return of service. If a temporary order has issued and the defendant has either not attended the ten-day extension hearing or has not received notice that the permanent order has issued, the fact that he did not receive the notice for the permanent order will be no defense to its violation.[115] Notice of the ex parte c. 209A order informs the defendant that a permanent order may issue and he ignores the possibility to his detriment.[116] Although the statute creates a right to notice, this right will not be enforced by the court via a criminal acquittal.

If the prosecution cannot prove that notice was served on the defendant, whether the order is temporary or permanent, or if the defendant is able to rebut the Commonwealth's showing, the prosecutor may introduce such evidence as exists of the defendant's actual or constructive notice.[117] The prosecution may not argue that notice is inferred because the standard for extending the permanent order is not automatic on the plaintiff's appearance.[118]

3. Defendant's Intent

The Commonwealth must prove beyond a reasonable doubt that the defendant knowingly violated the order.[119] This requires proof that the defendant knew there was

[113] *See supra* § 50.2C(4).

[114] G.L. c. 209A, §§ 4, 7.

[115] Commonwealth v. Delaney, 425 Mass. 587, 591–93 (1997). *See also* Commonwealth v. Henderson, 434 Mass. 155 (2001) (defendant incarcerated during extension hearing but received notice thereof); Commonwealth v. Bachir, 45 Mass. App. Ct. 204, *f. a. r. denied* 428 Mass. 1104 (1998). *Contrast* Commonwealth v. Welch, 58 Mass. App. Ct. 408 (2003) (extended order held invalid where no evidence that defendant was ever served with ex parte or extended order, either in hand or at defendant's last and usual place of abode).

[116] Commonwealth v. Chartier, 43 Mass. App. Ct. 758 (1997) (failure to attend extension hearing will not supply defendant with defense that he was unaware of extension of hearing so long as it is shown that he had notice of hearing; "a party may not shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it has actually been received" (citations omitted)).

[117] Commonwealth v. Chartier, 43 Mass. App. Ct. 758 (1997); Commonwealth v. Delaney, 425 Mass. 587, 592 (1997); Commonwealth v. Bachir, 45 Mass. App. Ct. 204, *f. a. r. denied* 428 Mass. 1104 (1998). However, where the defendant is simply "warned" that there is a restraining order against him, notice is not proved. Commonwealth v. Todd (Essex Superior Court, van Gestel, J., Lawyer's Weekly No. 12-372-99, March 13, 2000).

[118] Commonwealth v. Molloy, 44 Mass. App. Ct. 306 (1997).

[119] Commonwealth v. Raymond, 54 Mass. App. Ct. 488 (2002) (defendant could not be convicted for violation of no-contact order where defendant couldn't reasonably be expected to know that the protected person was present). Commonwealth v. Delaney, 425 Mass. 587 (1997), announced the statute's lack of "manifest" intent (apparently a synonym for the more widely used term, "general" intent) and in confusing language suggested that the Commonwealth need prove nothing beyond the defendant's knowledge of the existence of the restraining order. Less than nine months later, the Court was forced to back away from that overly broad statement in a case where the conviction relied on *Delaney*'s description of intent but raised substantial questions of intent. Commonwealth v. Collier, 427 Mass. 385 (1998). In one of the most narrow

a restraining order against him and proof that he knew or should have known the terms of the order.[120] In addition to the defendant's knowledge of the restraining order and the terms allegedly violated, the Commonwealth must prove that the defendant's actions were intentional,[121] but the Commonwealth need not prove that the defendant had any intent to violate the order.[122] The knowing violation of a restraining order should not be confused with strict liability where the Commonwealth need prove no intent other then the act itself.[123]

4. Failure to Refrain from Abuse, Contact, or Failure to Vacate

Counsel should carefully examine the charging documents and the specific language of the order itself[124] to determine which part of the restraining order is alleged

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holdings written, the court explicitly refused to acknowledge the troubled waters of intent and asserted that such questions would arise only in the "rare" case where a third party conducts the violation and there is doubt whether defendant knew or acquiesced in the violation. *Id.*

[120] *See* Commonwealth v. Delaney, 425 Mass. 587 (1997); Commonwealth v. Welch, 58 Mass. App. Ct. 408 (2003) (judge found insufficient evidence that defendant knew of c. 209A order where alleged victim testified that "once or twice maybe" she had spoken to defendant about the existence of a c. 209A order). *Compare* Commonwealth v. Melton, 77 Mass. App. Ct. 552, 555-556 (2010), *rev. denied*, Commonwealth v. Melton, 458 Mass. 1109 (2010) (court found sufficient evidence of knowledge where, in a telephone call from defendant to alleged victim, latter said "there's a restraining order").

[121] Mere inadvertent contact does not violate the no contact provision of a restraining order, Commonwealth v. Raymond, 54 Mass. App. Ct. 488 (2002) and Commonwealth v. Leger, 52 Mass. App. Ct. 232 (2001), provided the incidental contact does not include hostile language or other abuse. Commonwealth v. Silva, 431 Mass. 194 (2000). Even under Commonwealth v. Delaney, 425 Mass. 587 (1997), and Commonwealth v. Collier, 427 Mass. 385 (1998), if a violation was not the product of the defendant's intentional act and even if no third party were involved, as *Collier* seems to require, it seems unlikely that intent may be proved. One could imagine a father ordered to stay away from his wife attending their child's graduation ceremony when he reasonably believed his wife was out of the country. While he knows there is an order and he knows the terms, the violation is unintentional. 209A violations are not strict liability crimes so that mistakes or accidents are defenses. Commonwealth v. Raymond, *supra*.

The violation of the "stay away" provision of an abuse prevention order is a violation enumerated under G.L. c. 209A § 7 and can be criminally prosecuted. Commonwealth v. Finase, 435 Mass. 310 (2001). Elements of court orders which are not part of the 209A order can not be "imported" into the 209A violation trial for criminal prosecution. Commonwealth v. Leger, *supra*.

[122] Commonwealth v. Collier, 427 Mass. 385, 389 (1998); Commonwealth v. Stewart, 52 Mass. App. Ct. 755 (2001).

[123] Statutory rape is a strict liability crime. Commonwealth v. Knap, 412 Mass. 712, 714 (1992) (citing Commonwealth v. Miller, 385 Mass. 521 (1982) (reasonable mistake is no defense to statutory rape)). *See also* Commonwealth v. Baker, 17 Mass. App. Ct. 40 (1983) (deriving support from child prostitution does not require Commonwealth to prove that defendant knew or should have known age of prostitute); Commonwealth v. Alvarez, 413 Mass. 224, 228–30 (1992) (knowledge of school boundaries unnecessary to prove distribution in school zone).

[124] *See* Commonwealth v. Leger, 52 Mass. App. Ct. 232 (2001) (209A order did not "import" other court order which could not be criminally enforced); Commonwealth v. O'Shea, 41 Mass. App. Ct. 115 (1996).

to have been violated[125] and whether the order that is alleged to have been violated is itself legally valid[126] and clear.[127]

Failure to refrain from abuse is defined by the statute as "placing another in fear of imminent serious physical harm,"[128] which the Supreme Judicial Court has compared to the common law crime of assault.[129] Assault requires that the act place another in "reasonable apprehension that force may be used."[130] The alleged victim's subjective fear, while relevant to circumstances "is not an essential ingredient of the common law crime of assault."[131] The actions and words of the defendant will be examined "in light of the attendant circumstances."[132] The facts of prior physical abuse, threats, name-calling and hostility, if recent enough to be probative, will be admissible. Thus, in *Commonwealth v. Gordon*,[133] sufficient evidence of abuse and failure to vacate was found where the defendant had argued with the victim five days before the day of the alleged violation of the c. 209A order, had arrived at the home unannounced on the day of the violation, had told the victim that she was being "immature and ridiculous"

[125] The complaint should state with particularity whether defendant is charged with having failed to refrain from contact, abuse, or having failed to vacate the household. Any attempt to amend the complaint, particularly on the trial date or after the close of discovery, should be vigorously opposed on due process grounds. Counsel must carefully compare the precise charged conduct with the exact prohibited conduct not just in order to prepare the necessary jury instructions but also to create a "check-list" of the Commonwealth's proof of elements and, most importantly, to prevent the defendant from possibly being held criminally liable for actions which are not, in fact, criminally prosecutable. *See e.g.*, Commonwealth v. Leger, *supra* (not all conduct by defendant was a 209A violation although some of the contact might have been prohibited and separately enforced by criminal contempt in the Probate Court that had issued a different order); Commonwealth v. Johnson, 45 Mass. App. Ct. 473 (1998) (court erroneously instructed that the defendant could be found guilty of a 209A violation by proof that he either abused the victim or that he contacted her when the order itself only prohibited abuse).

[126] Counsel should always examine the order itself for any constitutional defenses. Under the Mass. Const. Declaration of Rights, the defendant has a constitutional right to a jury trial in "all controversies concerning property, and in all suits between two or more persons." Mass. Const. part 1, art. 15. Although c. 209A does not effect defendant's legal title, the order to vacate doubtless nullifies defendant's possessory rights if he is a co-owner or cotenant of the property from which he was evicted. Although a full analysis of the issue is beyond the scope of this chapter, counsel should study the cases that address art. 15. One such case held that jury trials need not be granted for civil motor vehicle infractions because such cases are not a suit between two persons and because a defendant's interest in a monetary fine was not deemed property under art. 15. Commonwealth v. Mongardi, 26 Mass. App. Ct. 5 (1988). Neither such issue would appear to prevent an art. 15 challenge to the c. 209A order that evicts the tenant from an apartment or a homeowner from the home.

[127] Commonwealth v. O'Shea, 41 Mass. App. Ct. 115 (1996) (order could not support vague term).

[128] G.L. c. 209A, § 1.

[129] Commonwealth v. Gordon, 407 Mass. 340, 349 (1990) (citing Commonwealth v. Delgado, 367 Mass. 432, 437 (1975)).

[130] Commonwealth v. Delgado, 367 Mass. 432 (1975).

[131] Commonwealth v. Delgado, 367 Mass. 432 (1975) (quoting Commonwealth v. Slaney, 345 Mass. 135, 139 (1962)).

[132] Commonwealth v. Gordon, 407 Mass. 340 (1990).

[133] 407 Mass. 340 (1990).

when she refused to open the door, put his foot in the door and propped his back against it to prevent her from closing it. In *Commonwealth v. Robicheau*,[134] the court sustained a conviction where the evidence of abuse showed that the defendant, while clearly verbally abusive (including a telephone threat to kill), never got physically closer than the other side of a locked door and most of the abuse stemmed from aggressive remarks made over the phone or shouted from the street below.

Criminal conviction for violation of a "no-contact" restraining order does not require that the person protected be placed in fear.[135] Such convictions have been sustained by proof of victim seeing the defendant as he was waving his arms one or more block away from the victim's home, collect phone calls to the victim from the same jail unit where the defendant was then being held, a call from a third party requesting that the victim accept a collect call from the defendant, following the victim's car, and the anonymous delivery of flowers to the victim.[136] A conviction was reversed, however, where the Commonwealth's evidence showed that the defendant had called the plaintiff's home and work telephone numbers but had not shown that he reached her, left a message, or even that she was aware that he had attempted to call.[137] Failure to stay at least 100 yards away from the victim and to stay away from her workplace was not sustained on appeal by mere proof of defendant's presence in the vicinity of her workplace when she was not there.[138]

As noted earlier, an intentional violation is required.[139]

§ 50.3B. SELECTED TRIAL ISSUES

A complete checklist of trial strategies is beyond the scope of this chapter but several of the most common c. 209A trial issues include the following:

1. Jury Voir Dire

Because of the highly emotional and politicized nature of domestic violence, counsel should draft a special set of jury questions.[140] A carefully crafted set of jury

[134] 421 Mass. 176 (1995).

[135] Commonwealth v. Mendonca, 50 Mass App 684 (2001) (defendant's fear of imminent serious physical harm was not a necessary element of a "no contact" violation; contact by telephone held sufficient).

[136] Commonwealth v. Basile, 47 Mass. App. Ct. 918 (1999); Commonwealth v. Russell, 46 Mass. App. Ct. 307 (1999); Commonwealth v. Crimmins, 46 Mass. App. Ct. 489 (1999); Commonwealth v. Butler, 40 Mass. App. Ct. 906 (1996) (complainant received flower delivery with card stating that sender's name was "requested withheld," contacted florist and florist confirmed and testified that defendant was person who had ordered flowers delivered). "Protestations of 'nonhostile intent or 'a desire to make amends are quite irrelevant to the enforcement of a no-contact order." *Butler, supra,* 40 Mass. App. Ct., 906, n.3. *See also* Commonwealth v. Thompson, 45 Mass. App. Ct. 523 (1998) (First Amendment rights are not violated by a no-contact c. 209A order although defense was waived by failure to raise it below).

[137] Commonwealth v. Cove, 427 Mass. 474 (1998) (order required defendant to restrain from contacting plaintiff and jury instructions that may have permitted defendant to be convicted for "attempted" contact was not reached in appellate review because insufficiency of the evidence required reversal).

[138] Commonwealth v. O'Shea, 41 Mass. App. Ct. 115 (1996).

[139] *See supra* 50.3A(3).

voir dire questions will reveal a surprising number of biased jurors. Typical questions should include but are not limited to beliefs about domestic violence cases, personal experience with domestic violence, whether friends or relatives have been victims, any exposure to a recent news items concerning a publicized case of c. 209A violation or domestic abuse, and the juror's participation in various organizations such as battered women's shelters. Counsel should be prepared to argue that because of general public outrage and the large number of people said to be affected,[141] c. 209A cases require the court to examine the jury specifically with respect to domestic abuse "community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons."[142]

2. Spontaneous Declaration

The spontaneous declaration or excited utterance exception to the rule against hearsay is currently invoked in many district court and Boston Municipal Court c. 209A prosecutions. Vigorous opposition should also be a matter of course. In cases where the alleged victim recants or refuses to testify, the prosecution will usually begin its case with police officers' testimony regarding the 911 call, the apparent disarray of the scene, the victim, the defendant, the visible injuries, and a spontaneous declaration. Then the emergency medical technician, nurse, or doctor is called and may testify to more extrajudicial statements as well as any injuries. The Commonwealth may call neighbors who heard an argument, a bang on a wall, someone "being slapped," or crying.

There are several usual grounds of defense. The most common are that the declaration was not spontaneous but was the product of reflection and/or an effort to manipulate the perception of third parties; that it was not caused by an exciting event, was too remote in time, was not independently corroborated, and that other circumstances render the declaration unreliable.[143] Less common challenges include questioning the basis for the exception itself. While admissibility presumes a folk-wisdom reliability, scientific studies show such statements are actually unreliable.[144] Counsel must raise and preserve every Massachusetts Declaration of Rights art. 12 confrontation and due process error.[145] Finally, although there should be no doubt on the matter, the defense is absolutely entitled to impeach any out-of-court declarant.[146]

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[140] G.L. c. 234, § 28. *See supra* ch. 30 (juror examination and selection).

[141] Studies indicate that nationwide domestic abuse occurs every 12 seconds and between two and four million women are physically abused every year. Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence*, 74 B.U. LAW REV. 329 (1994). One study estimated that one million women are physically abused each year by an intimate partner, while another found that four million women are abused annually. *See* Maytal, Note, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197 (Fall 2008).

[142] G.L. c. 234, § 28.

[143] If the declarant was under the influence of drugs or alcohol, the ability to correctly perceive, recall, and describe the event should be argued.

[144] Moorehead, Compromising the Hearsay Rule: The Fallacy of Res Gestae, 29 LOY. L.A. REV. 203 (1995); Goldman, Distorted Vision: Spontaneous Exclamation as a "Firmly Rooted" Exception to the Hearsay Rule, 23 LOY. L.A. L. REV. 453 (1990).

[145] While Commonwealth v. Whelton, 428 Mass. 24 (1998) (no objection to excited utterance at time of trial thus question reviewed at reduced level of scrutiny), and Commonwealth v. Napolitano, 42 Mass. App. Ct. 549 (1997), may appear at first blush to

3. Witness Problems and Privileges

Chapter 209A prosecutions frequently involve an alleged victim/plaintiff who recants the allegations at trial. The Commonwealth may attempt to prove that the complainant's recantation is false and that the initial criminal allegations were genuine. However, where the supporting evidence is equivocal, inconclusive, or nonexistent, the question of guilt is not proved beyond reasonable doubt.[147] If the recanting witness made a false statement to the police, the witness may invoke the Fifth Amendment and without other substantive evidence the Commonwealth's case is lost. If there is other evidence such as bruises or excited utterances in, for example, a failure to refrain from abuse violation, any available evidence of self-defense should be presented and the appropriate jury instruction requested.

Defense counsel should also look to the alleged victim/plaintiff's possible motives when investigating in preparation for trial. For instance, protective orders may be used by the alleged victim inappropriately as leverage in a property dispute,[148] or as

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destroy any realistic art. 12 argument, the unpreserved nature of those claims together with the fact that the defendant did in fact call the victim as his witness should be read together with Commonwealth v. Kirk, 39 Mass. App. Ct. 225 (1995). In *Kirk*, the court held that art. 12 barred the conviction of the defendant where, without cause, he was denied his right to confront the witness. Other cases suggesting that the S.J.C. has already found art. 12 to guarantee greater confrontation rights than the Sixth Amendment include: Commonwealth v. Amirault, 424 Mass. 618, 630–35 (1997) (failure to challenge seating arrangements in courtroom may have been ineffective assistance of counsel); Adoption of Quentin, 424 Mass. 882 (1997) (applying and extending confrontation protections in legislation permitting hearsay declarations in some criminal and civil cases); Commonwealth v. Colin C., 419 Mass. 54 (1994) (approving of statutory scheme permitting extrajudicial statements where government proves good faith, due diligence, independent corroboration and shows by "more than a preponderance of the evidence a compelling need"). *But see Whelton, supra*, 428 Mass. at 28 (art. 12 identical to Sixth Amendment for hearsay purposes). *See also* Commonwealth v. Ivy, 55 Mass. App. Ct. 851 (2002) (prosecution, including identification, entirely based on out-of-court statements; hope for defending against prosecution by out-of-court declaration was misplaced); Commonwealth v. King, 436 Mass. 252 (2002) (spontaneous declarations common in 209A prosecutions but interesting issues raised regarding impeachment and recanting witness's Fifth Amendment waiver). At least issues regarding the foundation for excited utterances remain. Commonwealth v. DiMonte, 427 Mass. 233, 236-239 (2002) (fax sent more than 8 hours after alleged abuse was not properly admissible). New decisions on this issue are bound to be published after this book's press date and updating this research will be critical to asserting any issue on these grounds.

[146] Commonwealth v. Mahar, 430 Mass. 643 (2000). *See also* Commonwealth v. Sellon, 380 Mass. 220, 224 n.6 (1980) (court's failure to permit such impeachment is reversible error); Commonwealth v. Mahar, 430 Mass. 643, 650 (2000) (court could find "no reason to put a proponent of an absent witness in a better position than a proponent of a live witness" and accepted the principles of rule 806 of the Proposed Massachusetts Rules of Evidence, which states, "the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."); Fed. R. Evid. 806.

[147] Custody of Eleanor, 414 Mass. 795, 800 (1993) (clear and convincing proof, which is lower than proof beyond reasonable doubt, was not made by evidence of recanted criminal allegation where there was no corroborating evidence).

[148] Corrado v. Hedrick, 65 Mass. App. Ct. 477, 480 (2006) (judge determined plaintiff had sought a restraining order not out of fear for her safety but as a leverage in property dispute with defendant).

a "weapon in circumstances of reciprocal hostility between divorced parents",[149] or in so many other unimaginable scenarios that defense must investigate the plaintiff's motives.[150]

If the complainant and the defendant are married, the plaintiff has an absolute privilege not to testify and may not be compelled to testify at a c. 209A trial.[151] Although the fact of a legal marriage is to be assumed by its invocation and the government bears the burden of disproving its validity, counsel should anticipate the court's reluctance to watch a probable c. 209A conviction slip from its grasp and come to court armed with an appropriate, although brief, memorandum of law on this point.[152] If that spouse does testify, either party may invoke the marital conversation disqualification[153] to prevent the plaintiff from testifying as to the substance of private conversations not permitted by statute.[154] If it appears that a damaging marital conversation may be admitted, counsel should consider the possible exceptions or exclusions to the rule itself or other rules of evidence that may render the statements inadmissible. Finally, if the plaintiff and defendant are divorced, the marital conversation disqualification survives the marriage although the marital privilege does not.

4. Prior Bad Acts

[149] Szymkowski v. Szymkowski, 57 Mass. App. Ct. 284 (2003) (father appealed child protective order ex-wife sought on behalf of child for father's unacceptable conduct; "c. 209A is not designed as a prod toward better parenting. Rather, the statute, as we have said, aims to prevent physical harm").

[150] Investigation can range from interviewing the alleged victim, to interviewing the alleged victim's family and friends, to interviewing the defendant's family and friends, to obtaining criminal or medical records of the alleged victim, to following-up on various leads from interviews, to obtaining the ex parte order and court tape recording, and doing anything else that is ethically and humanly possible in order to understand the alleged victim's possible motives.

[151] G.L. c. 233, § 20. Waiver must be voluntary and the defendant does not typically have the necessary standing to assert a violation of the other spouse's right. Commonwealth v. Sylvia, 35 Mass. App. Ct. 310 (1993). There are exceptions. *See* Commonwealth v. Rosa, 412 Mass. 147, 161–62 (1992) (surprising ramifications of the involuntary waiver of marital privilege and court's failure to appoint counsel after Fifth Amendment rights appeared implicated).

[152] *See* G.L. c. 233, § 20.

[153] The marital conversation disqualification is distinct from the spousal privilege. *See* G.L. c. 233, § 20. No one, not spouse nor third party, may give testimony about a private conversation between wife and husband. G.L. c. 233, § 20; Commonwealth v. McCreary, 12 Mass. App. Ct. 690, 693–98 (1981). The disqualification, like a rule of incompetence, cannot be waived because it is not a privilege belonging to an individual but protects the spousal conversation from exposure. *McCreary, supra*; LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE, 723 (1994).

[154] LIACOS, *supra* note 134, at 723. At common law neither spouse nor any third party could testify as to the substance of any private conversation between a husband and a wife and is distinct from the rule of privilege because neither spouse can waive it, and unlike the marital privilege, which dies on divorce, the marital conversation disqualification survives divorce. Commonwealth v. Spencer, 212 Mass. 438, 450–51 (1921); LIACOS, *supra* note 134, at 723.

Counsel should anticipate the Commonwealth's request to introduce evidence of the defendant's prior bad acts by filing discovery motions, motions in limine, and, if the evidence is admitted, moving to strike, and if that motion is denied, by moving for a limiting instruction.[155] Every single reference to the uncharged misconduct evidence by the assistant district attorney to the jury during opening statements and closing argument should find defense counsel ready to object if the prosecutor attempts to use the evidence to argue propensity.[156] The Commonwealth may not argue that evidence that the defendant behaved badly, criminally or not, proves a propensity to commit the crime charged, and may not introduce bad acts solely on that ground.[157] Prior bad acts may be admitted if the evidence is relevant to proving knowledge, intent, motive, or method.[158]

Counsel should carefully examine the issue at trial and what probative effect the alleged prior bad acts have relative to the exact trial issue. Allegations by the Commonwealth that it is entitled to "put the relationship between plaintiff and defendant in context" are usually a transparent effort to conduct a character trial and should be opposed. If the issue is "did defendant fail to stay away" and the evidence is that the defendant, prior to the criminal charge, abused the complainant, the evidence is not only insufficiently probative of the issue at trial, but irrelevant.[159]

Once the court determines that the evidence goes to a relevant issue, the court must still determine whether the evidence's probative effect outweighs the prejudicial value. Counsel should argue that the prior bad acts are so remote in time and more prejudicial than probative. As nearly all evidence against the defendant has some prejudicial effect, counsel should focus on the lack of probative value by examining the exact factual issue the trier of fact will be deciding and showing how that issue cannot logically turn on an appeal to the bad acts evidence. Bad acts that may have led to the issuance of the restraining order should generally not be put into evidence.[160]

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[155] Actively working to protect the trial court from error by objection, motion to strike, and requests for limiting instructions will provide a stricter level of review on appeal. Commonwealth v. Martinez, 43 Mass. App. Ct. 408 (1997) (challenges to bad acts evidence, some of which was inadmissible, raised on for the first time on appeal examined not for error but for miscarriage of justice standard); Commonwealth v. Munafo, 45 Mass. App. Ct. 597, 602–3 (1998) (despite having possibly objected to court's allowance of Commonwealth's motion in limine to introduce "prior bad acts" evidence, trial lawyer's failure to object during trial at time of the introduction of said evidence reduced level of available scrutiny on appeal to the lower "substantial risk of a miscarriage of justice" standard). Counsel is well advised to object clearly, as soon as the trial judge announces the ruling and then again at trial before the testimony is introduced and even, in some instances, afterwards, by moving to strike.

[156] Commonwealth v. Bassett, 21 Mass. App. Ct. 713, 716 (1986) (reversible error where prosecution argued defendant's criminal record as evidence that defendant committed offense for which he was on trial).

[157] Commonwealth v. Holloway, 44 Mass. App. Ct. 469 (1998) (citing Commonwealth v. Helfant, 398 Mass. 214, 224 (1986)).

[158] Commonwealth v. Ferguson, 425 Mass. 349 (1997); Commonwealth v. Crimmins, 46 Mass. App. Ct. 489 (1999).

[159] Commonwealth v. Yelle, 19 Mass. App. Ct. 465 (1985) (trial issue was consent, evidence of prior bad acts that related only to method was irrelevant to question); Commonwealth v. Johnson, 45 Mass. App. Ct. 473, 478 (1998) *citing* Commonwealth v. Picariello, 40 Mass. App. Ct. 902, 903 (1996).

[160] Commonwealth v. Picariello, 40 Mass. App. Ct. 902 (1996) (where issue was contact and not abuse, fact of any prior abuse was not probative in the least and was greatly prejudicial).

§ 50.4 CRIMINAL AND CIVIL PENALTIES

Violation of the relevant provisions of c. 209A is punishable by up to two and one-half years in a house of corrections and a fine of not more than $5,000 or both.[161] Chapter 209A similarly punishes violations of protection orders issued by another jurisdiction.[162] In addition to these punishments, the court may order the defendant to attend a certified batterer's program if the court finds that the defendant "has no prior record of any crime of violence" and the "court believes, after evaluation to a certified or provisionally certified batterer's treatment program, that the defendant is amenable to treatment."[163] The defendant should be advised that the communications he makes with the program are not confidential and may be reported to probation, the court, and/or third parties (including local battered women's programs), and may be used against him in this or a future proceeding.[164] Beware if the court places the defendant in treatment and sentences him to a suspended sentence, particularly if the client appears unlikely to complete the program.[165] A strict reading of the statute appears to remove all discretion from the court where the defendant fails to complete the program as "the original sentence shall be reimposed if the defendant fails to participate in said program as required by the terms of his probation."[166] If the court finds that the restraining order was violated by the defendant in retaliation for the defendant being reported to the department of revenue for failure to pay child support or to establish paternity, the defendant faces a mandatory sentence of no less than sixty days.[167] All criminal penalties for violation of c. 209A are nonexclusive and the defendant may also be criminally or civilly prosecuted for any additional offenses, such as trespass, malicious destruction of property, threats, contempt,[168] intimidation of a witness, assault and battery, stalking, and harassment.[169]

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[161] G.L. c. 209A, § 7.

[162] G.L. c. 209A, § 7.

[163] G.L. c. 209A, § 7.

[164] G.L. c. 209A, § 7. Although the statute specifies that such communications should only be made to the extent permitted by professional requirements of confidentiality, some programs have interpreted this to mean that there is no confidentiality. Counsel should consider litigating egregious violations of confidentiality as there probably is a legally enforceable confidentiality. Some programs are more notorious than others for violating the defendant's right to confidentiality and counsel should steer defendants toward better programs where possible. Many courts will permit on motion that defendant attend a specific program, or at least not be required to attend a specific program where counsel is able to allege lack of confidentiality.

[165] According to some statistics, fewer than 35 percent of court-ordered participants complete their programs. Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence*, 74 B.U. LAW REV. 329, 352 (1994).

[166] If such an event were to occur, counsel should consider arguing that the suspended sentence may not be "reimposed" as it was never imposed in the first instance and all ambiguities in the statute's language are to be read in favor of the defendant. Commonwealth v. Wotan, 422 Mass. 740, 742 (1996); Commonwealth v. Roucoulet, 413 Mass. 647, 652 (1992).

[167] G.L. c. 209A, § 7.

[168] Mahoney v. Commonwealth, 415 Mass. 278 (1993) (no double jeopardy where defendant held in civil contempt for violation of c. 209A at arraignment on criminal charge).

In addition to the above criminal punishments, the court may also order the defendant to attend a substance abuse program where the court determines the defendant has such a problem. The defendant may also be ordered to pay the complainant for all damages, including but not limited to costs for shelter or emergency housing, lost earnings or support, out-of-pocket and medical expenses, cost for obtaining an unlisted telephone number, reasonable attorney fees,[170] and an assessment in addition to the cost of the certified batterer's program if the defendant is ordered to attend one.[171]

§ 50.5 COLLATERAL CONSEQUENCES

The issuance of a c. 209A restraining order against the defendant is a matter of record and will be considered by any future court asked to hold the defendant in preventive detention.[172] The court will also consider the prior issuance of a c. 209A restraining order in a request for a new restraining order[173] and it may also affect the defendant's bail hearing at any future arraignment.

In addition to the possible criminal and civil penalties and the surrender of guns, ammunition, firearm identification cards, and licenses to carry as discussed above,[174] in 1998 the state legislature enacted a rebuttable presumption against granting custody of minor children to persons who are found, by a preponderance of the evidence, to have been involved in either a "pattern" of abuse or in a "serious incident of abuse."[175] It is important to note that the issuance of a c. 209A order alone, nor an order entered ex parte under c. 209A cannot trigger the application of the rebuttable presumption.[176] Yet the court may look to the facts of the underlying order and find that they prompt the application of the presumption.[177] Moreover, the courts are making custody determinations based on findings of intrafamily violence.[178] Counsel should point out the existence and possibility of such consequences to any unschooled jurist

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Massachusetts Rules of Civil Procedure governing civil contempt did not apply to the district court department at the time but do now that the District Court Rules merged into the Mass. R. Civ. P. Reporter's Notes, Mass. R. Civ. P. *See supra* ch. 46.

[169] G.L. c. 209A, § 7.

[170] G.L. c. 209A, § 7.

[171] G.L. c. 209A, § 10. Counsel for indigent defendants should always argue that these and other costs and fines be waived.

[172] G.L. c. 276, § 58A(5). *See supra* ch. 9.

[173] G.L. c. 209A, § 7; G.L. c. 276, § 85.

[174] *See supra* § 50.1; G.L. c. 209A, § 3(b), (c).

[175] G.L. c. 208, § 31A. In addition to amending ch. 208, this act also amended sections of chs. 209, 209A and 209C. *See also*, Opinion of the Justices to the Senate, 427 Mass. 1201 (1998).

[176] G.L. c. 209A, § 3; G.L. c. 208, § 31A.

[177] G.L. c. 209A, § 3.

[178] Custody of Vaughn, 422 Mass. 590 (1996) (probate court's award of custody to father remanded where trial court had not made findings of fact on family violence issues); Adoption of Ramon, 41 Mass. App. Ct. 709 (1996) (father's arrest for assault on mother caused report of neglect of child to be filed and, eventually with addition of a host of other facts, loss of custody).

who, despite case law,[179] may be inclined to make permanent a temporary order issued on the presumption that the defendant's rights will not be significantly affected by the issuance of a permanent order. Appeals, motions to vacate, and modifications may protect the client's other and/or future interests.

As was addressed *supra*, the issuance of even a temporary order, which on review at the extension hearing is vacated, will place the defendant's name and identifying information in the statewide domestic violence record-keeping system. Although the Supreme Judicial Court has held that the district courts have no authority to expunge the defendant's name from the reporting system even in the event that the order is vacated,[180] counsel should consider moving to expunge where the defendant can demonstrate more than a generalized fear of injury but has an actual injury to a liberty or property interest (such as future bail determinations),[181] or filing a separate civil complaint against a party that is empowered to expunge such records.

[179] Judge should never grant c. 209A "simply because . . . it will not cause the defendant any real inconvenience." Jordan v. Clerk of Westfield Div. of Dist. Ct. Dep't, 425 Mass. 1016 (1997) (quoting Smith v. Joyce, 421 Mass. 520, 523 n.1 (1995)).

[180] Vaccaro v. Vaccaro, 425 Mass. 153, 161–62 (1997); Faye v. Flemming, 48 Mass. App. Ct. 1113 (1999) (unpublished), Lawyers Weekly No. 81-850-99 (December 27, 1999) (*nunc pro tunc* vacation of c. 209A entered in order to strengthen defendant's claim to expunge record from the Statewide domestic violence reporting system). *But see*, Comm'r of Prob. v. Adams, 65 Mass. App. Ct. 725, 737 (2006) (judge may expunge c. 209A order in "rare and limited circumstance" that order was obtained through fraud by clear and convincing evidence).

[181] Such interests include the right to be free from having any future court use the 209A order as a factor in determining bail. Wooldridge v. Hickey, 45 Mass. App. Ct. 637 (1998) (appeal of expired c. 209A order held not moot where petitioner argued that future bail decisions may be adversely decided against him as a result of the unlawfully issued order). *But see*, Wotan v. Kegan, 438 Mass. 1003 (1998) (late c. 211 § 3 appeal of c. 209A order rejected as moot despite appellant's desire to "clear" her name and remove it from the statewide domestic violence record keeping system).