

## Practice Tips

# Guidelines On Abuse Prevention Proceedings: Navigating Rough Seas

By Rebecca Cazabon

**S**ure to stir a wide range of emotions, restraining orders have become ubiquitous in our society. Practitioners in the criminal law and domestic relations law arenas, as well as others, encounter restraining orders on a frequent basis. For this reason, lawyers should become familiar with the particulars of Chapter 209A law, and resources available to help navigate what can appear to be a confusing process. One such resource is the *Guidelines for Judicial Practice: Abuse Prevention Proceedings*. Promulgated by the Office of the Trial Court in 1996, and later revised in 1997, 2000, and most recently in 2011, the *Guidelines* are an essential tool for anyone handling a 209A matter.

Enacted in 1978, the Abuse Prevention Act, M.G.L. Chapter 209A provides a statutory mechanism for those suffering from domestic abuse to seek legal recourse to stop and prevent abuse from occurring in the future. Court orders available under c. 209A include, instructing the defendant to stop abusing or threatening to abuse the plaintiff, forcing the defendant to stop contacting the plaintiff, requiring the defendant to leave and stay away from the plaintiff's household and workplace, granting temporary



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custody of a minor child/ren to the plaintiff, and directing the defendant to pay temporary support to the plaintiff or the minor child/ren of the relationship. While 209A proceedings are civil in nature, a violation of a 209A order is a criminal offense.

To be eligible for a 209A order, a victim must show an intimate or familial relationship with the defendant, including marriage, substantive dating, cohabitation, relation by blood or marriage, or having a child together. Victims who never knew their perpetrators, or knew them only marginally, such as many survivors of sexual assault, rape, and stalking, are ineligible to file for a 209A order. To provide these and other victims with legal recourse, in 2010, the legislature enacted an Act Relative to Harassment Prevention Orders, M.G.L. 258E. To be eligible for 258E relief, the plaintiff must prove the defendant committed at least three acts of willful and malicious conduct against the plaintiff, with the intent to cause fear, intimidation, abuse or damage to property, and that said conduct did in fact cause fear, intimidation, abuse or damage to property; or the defendant committed any act by force, threat or duress, that caused the plaintiff to engage in sexual relations; or the defendant committed a violation of a list of enumerated crimes. The Supreme Judicial Court recently held that appeals from 258E decisions are appealed to the Massachusetts Appeals Court (as are 209A appeals). *O'Brien v. Borowski*, 461 Mass. 415 (2012).

The *Guidelines for Judicial Practice: Abuse Prevention Proceedings* were issued to help judges and court personnel sensitively and objectively address the broad range of complex issues that arise under c. 209A. Intended to promote the safety of applicants, while ensuring the due process rights of defendants, the *Guidelines* provide uniformity and a coordinated response by the trial courts to domestic violence. It is important to note that the *Guidelines* apply only to 209A proceedings, and are not an amendment to the existing statute.

The *Guidelines* provide a detailed and expansive analysis of the legal requirements under 209A, recommended interpretations of the law, and best practices for 209A policy and procedure, particularly

in areas where the law is vague or silent. See *Guidelines for Judicial Practice: Abuse Prevention Proceedings* § 1:00 commentary (September 2011). Given the sensitive nature of the issues involved, and the high level of tension that is often present, lawyers can benefit from thoughtful and practical guidance on how to represent clients in these cases.

The fourth edition of the *Guidelines* was compiled and implemented by the Trial Court, with significant assistance from the Boston Municipal Court, District Court, Probate and Family Court, and Superior Court Departments. The revisions reflect several major substantive and procedural changes in 209A practice. The revised *Guidelines* can be found on the Trial Court website, <http://www.mass.gov/courts/formsandGuidelines/domestic/index.html>. Links to other documents, such as *Highlights of September 2011 Revisions to Guidelines*, and documents referenced in the *Guidelines*, including the newly revised c. 209A forms, which went into effect in January, 2012, can also be found on the Trial Court website.

The 2011 revisions to the *Guidelines* can be divided into three categories: changes based on appellate case law decided between December, 2000, when the *Guidelines* were previously revised, and September, 2011, when they were most recently revised; changes based on statutory amendments and new statutory law; and changes based on the Trial Court's desire to clarify and improve court policies and procedures covering 209A proceedings. Brief descriptions of the most significant revisions to the *Guidelines* can be found in the Highlights on the Trial Court website. Certain revisions, however, deserve special mention.

To begin with, the *Guidelines* have been revised to reflect that a court does not need personal jurisdiction over a defendant to issue a 209A order, except that it may not impose any affirmative obligations on a non-resident defendant, like ordering to pay child support or to surrender firearms. Additionally, in light of the rise of social media over the last decade, the *Guidelines* provide that a

209A order prohibiting contact can be violated through e-mail, texts, Facebook, and Twitter. The *Guidelines* now arm practitioners with helpful analysis based on key appellate law governing what a plaintiff must show in order to support a finding of risk of abuse to warrant an extension of a 209A order. These factors include, ongoing custody or other litigation that engenders hostility, the parties' demeanor in court, and the likelihood that the parties will encounter each other in their usual activities. In addition, the revised *Guidelines* reflect recent case law supporting the holding that the fact that abuse has not occurred during the pendency of a 209A order does not in itself constitute sufficient grounds for allowing an order to be vacated. In situations where the parties reverse roles in two different courts, and obtain 209A orders against one another, the revised *Guidelines* dictate that they be treated as mutual orders, which require specific written findings of fact, and should be issued only sparingly.

Further revisions that warrant special attention are those that are based on the Trial Court's desire to clarify and improve court policies and procedures. For example, the revised *Guidelines* now specify that a plaintiff should be informed that a defendant will have access to the affidavit supporting the 209A request. The revised *Guidelines* also clarify that discovery orders are within the court's discretion, but should be issued only upon a showing that such discovery is necessary to provide specific essential information, removing the presumption that discovery is not allowed in 209A cases except in extraordinary circumstances. In addition, the *Guidelines* reinforce that 209A cases are public hearings and as such should not be conducted at side bar. The revised *Guidelines* specify that a 209A order must be immediately transmitted by the court to police as promptly as possible, either by faxing it to the appropriate department or arranging for the police to retrieve the order from the courthouse. Orders that have expired or have been terminated by a judge are now referred to as "terminated" instead of "vacated". Finally, the *Guidelines* recommend that the clerk's office request photo identification from a plaintiff wishing to terminate an order.

While the *Guidelines* lack the force of law of a legislative statute, and are not legally binding on the courts, they do provide persuasive judicial interpretations of statutes, case law and court procedure. The Courts regularly apply the *Guidelines* to support their interpretation of domestic violence law. For example, in support of its assertion of the minimum standards of fairness that must be observed in abuse prevention proceedings, and addressing specifically that a judge is prohibited from cutting short an abuse prevention hearing because of her belief that it should move to another forum, the Appeals Court recently cited to the *Guidelines*, “If the court in which a person initially seeks protection under c. 209A has jurisdiction, the person should be heard as soon as possible in that court, and should not be sent to another court”. *Guidelines for Judicial Practice: Abuse Prevention Proceedings* § 1:01.” *S.T. v. E.M.*, 80 Mass.App.Ct. 423, 953 (2011).

As another example, the Supreme Judicial Court used the *Guidelines* to reinforce its holding that a trial court committed an error of law in ignoring the four factors contained in c. 209A that should be considered in deciding whether the parties are engaged in a “substantive dating relationship”, instead improperly relying on non-statutory factors, including, the existence of a pending criminal case, and the young age of the alleged victim. “[T]he issue of family violence has become the focus of legitimate and increasing public concern. However, that concern must not be permitted to affect or diminish the court’s responsibility to remain neutral, to protect the rights of the accused in each case, and to address each case individually on its own merits.” *Judicial Guidelines* § 1:02 commentary.” *C.O. v. M.M.*, 442 Mass 648 (2004).

As the Trial Court acknowledges, “[t]he Abuse Prevention Act ... is one of the most sensitive and potentially volatile areas of Trial Court jurisdiction.” *Guidelines for Judicial Practice: Abuse Prevention Proceedings*, §1:00 commentary (September 2011). Fortunately, practitioners can look to the *Guidelines* for comprehensive guidance on handling the myriad of complex and emotionally charged issues that arise in any given 209A case. ■