

◇

Introduction: Is Your Client the Victim of a Wrongly Obtained Massachusetts Restraining Order?

◇

This is a legal 'how-to' book. It does not cite every conceivable case for an appellate brief, but it is based on reviewing all of them.

The goal of this book is to enable you to practice Chapter 209A restraining order defense law as effectively as possible. This book is needed because the statute is poorly written, fails to provide defendants traditional elements of due process, and the law is applied with no predictability in court.

Bluntly, it is difficult to wrestle justice from the restraining order system, even with knowledge, ability, and a supreme effort. It is widely acknowledged by lawyers, judges and those in the system that this law is not uniformly fair and just. Nor does it objectively prevent abuse, an obvious goal of the law.¹

As you study this book and attend hearings to defend clients in Chapter 209A restraining order cases, you will also

likely adopt these premises as your own reality, based on your experience. This book assumes their veracity, and trusts that you either have discovered them to be true already, or will in due course.

Real Law And Practice - Not the Story-Book Version

This book respects the reader by being ruthless enough to cut through the political fog on both sides of the restraining order debate, and fearlessly explains how to present an ethical, effective defense.

It sets out with clarity and detail, the real law and practice concerning domestic abuse restraining orders under Mass. General Laws Chapter 209A - how it is actually practiced in the courts of the Commonwealth.

This book offers clear advice about legal strategy, hearing preparation, and how to conduct court hearings. Because the issue has been so politicized, and those politics affect the outcome, this book also pays heed to the political aspects of this law. It also covers how to get back in the arena and do it all again if you lose the first time.

¹ Klein, Andrew, *Re-Abuse in a Population of Court-Restrained Male Batterers - Why Restraining Orders Don't Work*. Buzawa, Editor, From *Do Arrests and Restraining Orders Work*. Sage Publications (1996).

Many Chapter 209A restraining orders are issued by courts on weak factual or legal grounds. They are sometimes driven by ulterior motives of the petitioner, such as wanting to get custody of children in a divorce, dumping a boyfriend, or getting revenge. It is all too easy to make false allegations of domestic abuse and obtain an order.

Therefore, this book will help a client oppose or get rid of a wrongly obtained 209A restraining order, if it has been issued on weak, false, or ulterior motive evidence in a District Court, Boston Municipal Court, or Probate and Family Court in Massachusetts.

The material in this book is not intended to find a rationale or improper defense for domestic abuse. A major problem in the law - and in life - is to determine what is actual "abuse". Some view abuse as a physical or sexual assault only, where others believe that abuse also is a threat to do harm. Some even define abuse as psychic harm, such as long term control, manipulation or chronic, nasty, or unkind speech.

The law does make an attempt to define abuse, but as set out in Chapter 8 of this book, the definition in Section One of Chapter 209A is too ambiguous to be useful or fair in litigation.

What this book will not do is promise success if you just do a few simple things. It does not work that way. Any success that you do get will come from intense preparation, careful study, experience, luck, and mercy from on high.

Families Harmed by Restraining Orders

I have felt an unbearable disappointment and heartbreak for families that have been treated unfairly by the family law legal system.

Many of the tens of thousands of restraining orders issued each year by the Massachusetts courts are not based on genuine criminal abuse. They are issued on alleged threats of "imminent, serious physical harm," which is subject to subjective interpretation and substantial judicial discretion.

For example, the Appeals Court had to overturn a restraining order issued by the District Court, where the judge stated *on the record* that she found no evidence of abuse or even a threat of it, but that she was going to issue the restraining order anyway.²

Far too many orders are issued on marginal facts, out of an abundance of caution or concern to keep potential abuse from happening, but the judges generally don't admit it on the record, as this one did.

Well meaning judges sometimes try to protect a compelling petitioner, without considering that they are also causing a whole series of grave and unintended consequences to the other persons in a family system, when the order was not what was needed to solve the real problem.

The children of the parties often suffer in ways that judges don't get to see. They sometimes shoot an ant with an elephant

²*Adams v. Pisecco*, Rule 1:28 Decision, Mass. Appeals Court, Docket No. 12-P-714 (2013).

gun by issuing an order that overreaches, and then when family destruction ensues, they are on to the next case and have no idea what pain they may have caused.

The suffering wrought by these orders is rarely seen, considered or calculated by legislators, activists, bureaucrats, or judges. Children are deprived of parents, and families have no way to work through a bad patch in their relationships. Employees lose jobs, parents lose heart, everyone loses health, money, sleep, and even hope.

You will find little in this book to assist those clients who have actually committed a criminal act of assault or abuse. It is not written to enable, justify, or assist a person to get away with that. Actual abuse should be duly prosecuted like any other crime.

Why THIS Book?

Why this book? Because it supplies the things you want and need in a legal book: A clear explanation of the law and an accurate description of how the legal issue works in real live practice. It contains on-the-carpet step-by-step breakdowns of what you do in court in just about every situation you will encounter in a restraining order case.

It supplies real-world knowledge about how to properly prepare your case, and strategy and tactics for the tough ones. It will help you avoid traps for the unwary that lurk in this law.

Have you noticed how few practice books concern themselves with persuasion, not just with legal theory.

Here, you will find both. Knowing the technical information, without the ability to persuade the court will not win cases. Of course, persuasion, while indispensable, is not sufficient either. With both a mastery of the rules, and how to apply them to obtain a good outcome, then the book becomes fully useful.

If your client has been falsely accused of abuse, this book will help you to:

- Develop a strategy to successfully win the case;
- Prepare properly for the hearing;
- Develop effective examinations of witnesses and persuasive affidavits;
- Know the correct law and case opinions to apply, despite their maddening ambiguity;
- Know the correct court procedure, even though it is written nowhere;
- Say the right things to the judge;
- Know the politics behind these orders, and how they may affect your case.

When you know these secrets of law and strategy, and you know the pitfalls to avoid, you will have confidence when you go to court, instead of feeling unsure and wary.

No Pulling Punches or Political Correctness

Legal books are not a place to be squeamish and politically correct. Readers want to learn how to deal with this area of law as it is, not as it may be idealized by either its proponents or its detractors. They want the straight story on how to prepare a case and win in court.

You will also get some raw stories that other books would not dare to tell. For example, one prominent District Court judge would not issue a restraining order on behalf of an adult daughter against her mother, even though the judge said - on the record - that he wished he could.

He explained that he had already been overturned three times by the Massachusetts Appeals Court on the same legal point raised by the defense, and he wasn't about to have that happen again, so he was going to have to follow the law, although he wished he didn't have to. That is the real - but often secret - world of restraining orders.

Herewith are the premises of this book, based on the law, the constitution, observation, common sense, years of hard-won experience, and comparison with our historical legal precedent:

- Some restraining orders are not issued per the actual legal standard set out in Mass. Gen. Laws Chapter 209A, § 1;
- Some restraining orders are not needed for protection from abuse, but are sought for ulterior motives;
- The definition of "abuse" in Section 1 of Chapter 209A is vague and easy to

manipulate.

- This law is often used as a weapon by parties in divorces to obtain custody or other legal advantage, or by those wishing to end dating relationships.
- The restraining order law violates many of our traditional notions of due process which we used to give to defendants. The Supreme Judicial Court has ruled otherwise, but that doesn't change the obvious³;
- The designation of the law as "civil", while applying essentially criminal penalties and depriving defendants of fundamental rights, puts them in an unfair position;
- The law's relaxed procedural and evidentiary standards deny a defendant an adequate means to test the truth of the allegations in complaints, in violation of Article XII of the Mass. Declaration of Rights and the 6th Amendment to the U.S. Constitution;
- The law has a high barrier to civil discovery, which deprives the defendant of obtaining evidence that could disprove the plaintiff's claims;
- The law does not punish or hold accountable perjurers who use it for ulterior motives, thus inducing many

³*Frizado v. Frizado*, 420 Mass. 592 fn 3, (1995).

unscrupulous persons to lie to obtain orders;

- The loose standards for service of process, such as telephone service of an issued order, are not reliable or adequate, but are considered “good” service in a criminal prosecution for violation of the order;⁴
- The purpose of the law could more effectively be accomplished by other means;
- Defendants have no reasonable way get their names expunged from the statewide registry of restraining orders, even if the order was obtained for an ulterior purpose;⁵
- The legislature has essentially stricken the common law torts of abuse of process and malicious prosecution under the so-called anti-SLAPP law⁶, which could otherwise serve as a deterrent to using restraining orders for ulterior motives.

Quick Start Guide

⁴*Commonwealth v. Delaney*, 425 Mass. 587 (1997).

⁵ *Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725 (2006).

⁶M.G.L. c. 231, §59H. Although there is a small sliver of relief in the case of *Blanchard v. Steward Carney Hospital, Inc.*, 477 Mass. 141 (2017).

When you get a new computer or appliance, they often include a quick-start guide to help you get going on the basics. Here is a basic outline and summary to prepare a restraining order case when your client is wrongly accused. This book expands on each of these concepts and explains them in detail.

- 1) First, go to the clerk’s office in the courthouse where the restraining order was issued, and get everything in the case file, including the restraining order application and affidavit under oath of the plaintiff.
- 2) Order an audio recording of the initial hearing and any other previous hearings in the case, either at the clerk’s office if the court still uses the old CD system, or on line if it uses the new streaming recording system.
- 3) Listen to the recording of the hearings, and compare the oral allegations with those stated in the written material.
- 4) Bring in the client, and go over all the allegations in the affidavit and listen to the audio recording together. Get a clear idea what allegations are true and which are not.
- 5) Discuss all negative evidence that the plaintiff may have against the client or anything that may come back to legally harm the client’s case.
- 6) Elicit the names of any witnesses or types of documents known to the

client that could disprove any of these allegations or to provide an alibi.

- 7) Based on this information, think about strategy for fighting the order. Look for false allegations and bad motives that the plaintiff may have for getting an order, such as starting a divorce, or getting back at the client.
- 8) Gather all evidence to disprove the false allegations - an alibi witness who can testify that the defendant was elsewhere, cell phone records that show there was no threatening calls, photos, police reports, medical records, anything that may show that what happened at the initial hearing was not true.
- 9) Summons or get commitments from any witnesses who can testify that the claim of abuse is not true, or who can provide an alibi.
- 10) Prepare examinations of the defendant and any other witness, and cross-examination of the plaintiff.
- 11) Go over the testimony with the witnesses prior to the hearing and make sure it is effective.
- 12) Learn the restraining order practice from this book, and learn how to prepare a good case based

on evidence and persuasion.

- 13) Obtain the restraining order law and case opinions which apply, along with the *Guidelines for Judicial Practice: Abuse Protection Proceedings*, so you can confidently present the facts and law applicable to your case.
- 14) Make copies of all the evidence and key laws and cases for the court and the opponent, to have them ready for court.
- 15) Go prepared on court day with your witnesses and copies of everything well organized, feeling like you have an edge, because you know exactly what to do.
- 16) Present your case and the evidence in a compelling way in order to show the judge that what your client did is not abuse and the judge should dismiss the order.

The legal system often falls short of its own stated ideals of providing justice when it comes to restraining order jurisprudence. This book will provide idealistic lawyers a means to redress that inequity.