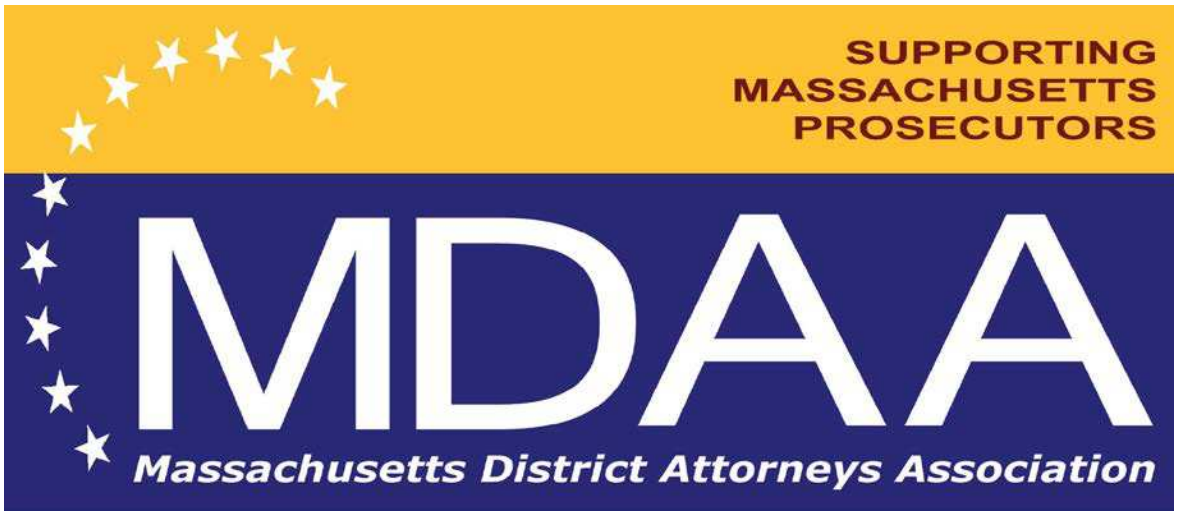

Domestic Violence Trial Notebook

3rd Edition

February 2015

This Domestic Violence Trial Notebook was written and compiled by Carrie W. Newton and includes excerpts from MDAA's Domestic Violence and Sexual Assault Manual, 3rd Edition written by Lisa S. McGovern with updates from Kim Aliprantis. Additional contributions are acknowledged below.

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1. SCOPE

This trial notebook is to aid district court prosecutors in handling the many issues that arise in prosecuting domestic violence cases. This notebook contains excerpts from MDAA's Domestic Violence and Sexual Assault Manual, 3rd Edition and contains new information. If you plan to cite any of the case law, make sure you take the time to read the case, understand the law, and check to make sure it is still good law. In an attempt to keep this notebook a length, which is easy for prosecutors to use in court, in many areas prosecutors are directed to other resources for a more in-depth look at an issue. Please note, that while Appendix B contains many domestic violence motions, there are many more motions for use in domestic violence cases available through MDAA's Home Page on Prosecutors' Encyclopedia at http://myprosecutor.com.

2. LANGUAGE

Throughout the trial notebook, victims are often referred to with feminine gender. This reflects the fact that in the overwhelming majority of domestic violence cases, the victim is female and the offender male. However, where applicable, the contents are intended to pertain equally to male victims, and/or to victims who are the same gender as their assailants or abusers.

In the past decade rape crisis center advocates have deliberately adapted use of the term "survivor" in place of "victim." Due to the statutes, cases and legal authorities that use and define the term "victim," the manual introduces "survivor" but also retains "victim."

3. DYNAMICS IN DOMESTIC VIOLENCE

Understanding the dynamics in abusive relationships is critical to successful prosecution. Since this trial notebook is for a prosecutor's use in court, this topic is not covered in this trial notebook. For a more detailed discussion about the dynamics involved in domestic violence, please access MDAA's webinar Exploring Domestic Violence Dynamics and Statistics through MDAA's website at http://www.mass.gov/mdaa/trainings-and-conferences/exploring-domestic-violence-dynamics-and-statistics-.html.

4. ARRAIGNMENT

4.1. *THE COMPLAINT AND DISCOVERY*

It is important to review the complaint for accuracy in the arraignment session. If you are handling the arraignment of a domestic violence case, make sure the names, dates of birth, incident dates and charges are all accurate. It is easier to make minor changes to the complaint during arraignment than at subsequent proceedings. ***A form motion to correct the complaint is available through MDAA's Home Page on Prosecutors' Encyclopedia.***

When providing discovery, consider whether it may be necessary to ask the court to protect a victim's address that is not known to the defendant. For more information on this issue, refer to Protecting Victim's Safety During Discovery at section 6.1.3. of this trial notebook.

4.2. *BAIL DECISIONS*

The arraignment session is a critical time for a prosecutor to establish contact with the victim, begin safety planning and to make bail decisions that recognize the victim's safety as a paramount concern. It is likely your office maintains policies and procedures on some of the high risk domestic violence cases or on all of the domestic violence cases.

On August 8, 2014, then Governor Patrick, signed into law Ch. 260 of the Acts of 2014. This law, an Act Relative to Domestic Violence ("2014 Act"), made significant changes to the bail statute. Relevant sections of Chapter 276 are summarized below and discussed in more detail in the following sections.

Summary of the Bail Statute, G.L. c. 276

	58 **Regular Bail**	**58A** **Dangerousness Hearing**	**42A** **DV Case: Conditions of Release**	**87** **Pre-Trial Probation**	**58(¶ 3)** **Bail Revocation (60 day)**	**58B** **Bail Revocation** **(90 day)**
Type of Hearing	Argument by ADA	Motion and Evidentiary Hearing	Argument by ADA	Argument by ADA	Motion and Argument by ADA	Motion and Argument by ADA
Burden to Show	Ensuring D returns to court and the safety of the alleged v	Clear and convincing evidence that no conditions of release will ensure safety of V or community	D a danger to V if doesn't follow conditions requested and to ensure the appearance of D	D must agree to these	D given bail warnings on open case; PC new crime; Danger	Conditions set under 42A, 58, 58A or 87, and P/C D committed new crime or C/C D violated a condition and no conditions of release ensure safety
S. Court Review?	Yes	Yes	Yes	N/A b'c agreed	No	No
Length		120 day detention			60 day revocation	90 day revocation
Comments	Presumption is for personal recog. but can set cash bail – judges can now order conditions in specified dv cases	Must be filed on day of arraignment. Rules of evidence are relaxed; Hearsay shall be admissible.	Can be done in conjunction with personal recog. or bail.	Can be done when there is a cash bail too	Look to revoke bail on any open cases, especially if another crime of violence	Must file a motion stating the alleged violations of conditions. ** If revoking on 58A conditions, consider filing to reopen for change in circumstance **

4.2.1. An Act Relative to Domestic Violence 2014 and the Changes to the Bail Statute

4.2.1.1. Factors to be Considered

Prior to August 8, 2014, the different sections of the bail statute had various purposes. For example, § 42A was to ensure the safety of victim and § 58 was focused on ensuring the victim's appearance in court. Now, sections 42A, 57, and 58 of Chapter 276 all ensure the defendant's appearance, protect the safety of the victim, and protect the safety of the community. The judge, or a person authorized to admit a party to bail, will consider all the same factors. These factors were previously listed in section 58 but added into the language of sections 42A and 57: Nature/circumstances of offense; Potential penalty faced; family ties; Employment history; History of mental illness; Reputation; Risk D will threaten/intimidate/obstruct justice (58A only); Record of Conviction (also consider defaults, VOP, aliases/false info police); Drug distribution or present drug dependency; Open Cases; Offense involves abuse per 209A; Protective Order Violations, or history of such orders; Whether the defendant is on probation or parole; Section 58 considers several factors about potential flight risk (i.e., financial resources, length of time in the community, flight to avoid prosecution).

4.2.1.2. Conditions of Release in Domestic Cases

Conditions of release in domestic violence cases may now be ordered under sections 42A, 57 or 58. These conditions can include stay away, no contact, no abuse, alcohol free, drug free, GPS or any other condition that will ensure the safety of the victim and community if the defendant is not detained.

4.2.1.3. 6 Hour Non-Bailable Period

New language added to sections 42A, 57, and 58, creates a six hour period when a defendant cannot be released from custody – unless by a judge in open court. More specifically, a defendant who has attained the age of 18 and was arrested for a violation of a protective order, actions involving abuse as defined in ch. 209A, § 1, ch. 265, § 13M or ch. 265 § 15D cannot be released on bail for the six hours following the arrest, unless, by a judge in open court.

If the defendant was arrested for a violation of a protective order, or, arrested and charged with a misdemeanor or felony crime involving abuse as defined in ch. 209A, § 1, that defendant shall not be released until an in court hearing. G.L. c. 276, § 57.

4.2.1.4. 3 Hour Period after the Complaint is Signed

When a defendant is charged with a protective order violation, ch. 265, § 13M or ch. 265, § 15D, the Commonwealth is the only party that can move for bail within three hours of the complaint being signed. This section gives the Commonwealth time to speak with the victim, assess the risk and consider a safety plan, prior to arraignment.

Be mindful, this three hour period is only for the enumerated offenses and does not include 209A, § 1 abuse.

4.2.1.5. Access to Information

One goal of the 2014 Act was to increase the information available to any person authorized to determine bail. It specified that a person authorized to admit a defendant to bail shall have immediate access to the criminal offender record, board of probation records, and police and incident reports related to the detained person.

4.2.1.6. Preliminary Written Statements

Section 30 of the Act, created G.L. c. 276, § 56A, which specifies that in Superior, District, or Municipal Court when a Defendant is arrested and charged with a crime against a person or property of another, the Court must inquire whether 209A, § 1 abuse is alleged immediately prior to or in conjunction with the crime charged. If the Commonwealth alleges such abuse, the prosecutor files a preliminary written statement and the Court will make a written ruling whether or not it finds abuse has occurred. These preliminary written statements are to be maintained in the domestic violence record keeping system, and will be expunged if the defendant is found not guilty or the Commonwealth files a motion not to prosecute**.**

4.2.1.7. Notification to the Victim

If the defendant is released on bail, by order of the Court, the District Attorney must make a reasonable attempt to notify the victim of the defendant's release. If the defendant is released on bail from the place of detention, the arresting police department must notify the victim. 2014 Act, §§ 28, 31-32.

4.2.1.8. Information to the Defendant

Prior to the admittance to bail, with or without conditions, the defendant shall be provided with information resources related to domestic violence by the person admitting them to bail. This includes but is not limited to certified batterer's intervention programs. 2014 Act, §§ 28, 31-32.

4.2.2. Revoking Bail

Even if no specific conditions are set, pursuant to G.L. c. 276, § 58, a judge must notify a defendant that he shall not commit any new criminal offense as a condition of his release and that any defendant charged with a subsequent crime during the period of his release *may* have his bail revoked.

G. L. c. 276, § 58, paragraph 3

If the defendant has an open case and his bail warning were given to him and noted on the docket, you can revoke his bail in the initial case. You will need to acquire a copy of the docket sheet from the underlying offense, as prima facie evidence that the defendant was given his bail revocation warnings. In addition to proving that the defendant received bail warning, the Commonwealth must also show that the release of said person **will seriously endanger any person or the community and that the**

detention of the person is necessary to reasonably assure the safety of any person or the community. The revocation of bail last for **60 days** at which point if the case is not resolved the defendant has the right to a bail hearing. Revoking bail does not require the testimony of the named victim.

Annotations

There is no requirement that government formally institute additional criminal proceeding as prerequisite to revocation of bail. *Delaney v. Commonwealth*, 415 Mass. 490 (1993).

A bail revocation order issued by a district court judge under this section of the bail statute is not reviewable in Superior Court. *Id*.

When none of the cases against the defendant has been dismissed or resulted in his acquittal, and where no manifest injustice exists, a district court judge may not, under G.L. c 276, § 58, para. 3, vacate a bail revocation order entered by another judge. Once a bail revocation order enters, it shall be valid for a period of sixty days, and that on the sixtieth day, defendant shall be returned to the court with jurisdiction over the charges to which the bail revocation order relates (the original pending charges) for a new bail hearing on those charges. *Commonwealth v. Pagan*, 445 Mass. 315 (2005).

Justice Marshall refused to read into c. 276, §58 a penalty for the court not providing the defendant with a bail warning and therefore found that the bail warnings were not given was not dispositive as to whether bail could be revoked. *Commonwealth v. Tice*, SJC 98-0349 (July 7, 1998).

G. L. c. 276 § 58B
The Commonwealth should move to revoke bail under this section, if the defendant was previously released on conditions and there is either ***probable cause*** to believe the defendant committed a new offense or ***clear and convincing evidence*** that the defendant violated a condition***.***

More specifically, the Court must find:
(1) probable cause to believe that the person has committed a federal or state crime while on release, ***or*** clear and convincing evidence that the person has violated any other condition of release; ***and***
(2) the judicial officer finds that there are no conditions of release that will reasonably assure the person will not pose a danger to the safety of any other person or the community; or the person is unlikely to abide by any condition or combination of conditions of release.

It is a ***90 day detention***. Section 39 of the Act clarified that a judge may revoke bail under this section for violation of conditions imposed pursuant to § 42A or pretrial probation, § 87 by writing these two sections into § 58B. For additional information

about this detention and the obligation to bring the defendant to trial as soon as possible see, see the following section on dangerousness hearings.

4.2.3. Dangerousness Hearings

4.2.3.1. G. L. c. 276, § 58A

Dangerousness hearings are a powerful tool when the situation necessitates the defendant being held and there are no factors suggesting the appropriateness of a high bail. The Commonwealth must move for dangerousness the first time the defendant appears for arraignment for an enumerated offense. In summary, the enumerated offenses include most domestic felonies; violations of restraining orders; or a misdemeanor, in which the defendant was ***arrested*** and charged with a crime involving **abuse as defined by c. 209A § 1**. Refer to the statute for a complete list of the offenses.

Evidentiary Hearing

At the hearing, the defendant has the right to an attorney, to present evidence; however, the rules of evidence do not apply. G.L. c. 276, § 58A. "The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing ***and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness***." 2014 Act, § 35.

As a prosecutor you want to introduce evidence to show the following:

Seriousness of the incident
Defendant's Dangerousness – history of abuse that is uncharged, criminal history, named as a defendant in multiple restraining orders
Intimidation by the Defendant
Victim's Fear

Some possible evidence for the dangerousness hearing:

Victim Testimony
Police Testimony
Copy of the restraining order and affidavit, if victim sought one
Copy of the defendant's record
Copy of prior restraining orders
Pictures of injuries
911 calls
Medical Records – including EMT records
Police Reports (see if there are any prior reports with this defendant and victim)
Jail calls, letters or other evidence of intimidation

At the conclusion of the hearing, the prosecutor's closing argument should highlight the severity of the offense; show the defendant's pattern of conduct for abuse with

this victim and/or with other women; the defendant's violation of any restraining orders, any intimidation by the defendant, the defendant's default history and violations of probation and history of substance abuse or mental health issues. In total, the Commonwealth needs to show that no conditions would keep the victim or public at large safe given the incident and the defendant's flagrant disregard for authority.

4.2.3.2. Judge's Ruling

At the completion of the hearing, a judge may:

(1) release the defendant on his own recognizance (if the defendant is likely to appear on his own recognizance and recognizance will not endanger the safety of any other person);
(2) order conditions of release to ensure appearance and provide safety to the victim; or
(3) find that there is **clear and convincing evidence that no condition of relief will reasonably assure the safety of any other person or the community**.

The court must impose the least restrictive condition or combination of conditions that will meet both goals of assuring the defendant's appearance and protecting the public's safety. The statute lists fourteen conditions, which are also listed on the court's form, "Order of Conditional Release." In domestic violence cases, the judge shall make written determinations as to the considerations required by the subsection and it shall be filed in the domestic violence record keeping system. 2014 Act, § 37. If after the dangerousness hearing, detention is ordered or conditions of release are ordered, the orders shall be recorded in the defendant's criminal record and in the domestic violence record keeping system. 2014 Act, § 38.

If the judge finds there is clear and convincing evidence that no condition of release will reasonably assure the safety of a person in the community, then detention should be ordered. As of August 8, 2014 a defendant detained under 58A is detained for 120 days. A detention under the dangerousness statute mandates that a defendant shall be brought to trial as soon as possible, and the statute allows a 120 day period, except (a) where there is good cause to continue, and (b) excluding any period of delay as defined in Rule 36(b)(2). This means, that if the case is not going to trial within 120 days, the prosecutor needs to determine if there is either good cause for the delay or whether periods should be excluded under Rule 36. Good cause has been held to be things such as DNA testing, etc. Note: Many judges have a practice that upon the end of the dangerousness detention, there needs to be a bail argument. Prosecutors should anticipate this and, if possible, request a trial within the 120 day period. If a defense requests a continuance outside the 120 day window, then the prosecutor should be asking the Court to require a defense waiver to both Rule 36 and G.L. c. 276, § 58B. ***A sample motion to oppose a defendant's request for bail following 120 days and a memorandum to support a motion to extend the defendant's detention under § 58A are available through MDAA's Home Page on Prosecutors' Encyclopedia.***

4.2.3.3. Summons to Victim or Victim's Family

Prior to sending a summons to the victim or the victim's family, the defendant must demonstrate a good faith basis for reasonable belief that the testimony will be material and relevant to supporting a *conclusion for conditions.* 2014 Act, § 34. The Act did not specify what amounts to a good faith basis, but defendant's proffer should show the evidence offered by the witness would support a conclusion for conditions.

4.2.3.4. Reopening Dangerousness Hearing

The 2014 Act, § 36, changed the dangerousness statute to permit the judge, defense attorney or the Commonwealth to move to reopen a dangerousness hearing if 1) information exists that was not known at the time of the hearing or there has been a *change in circumstan*ces; and 2) the information or change has a material bearing on the issue of whether conditions of release will reasonably assure safety of another person or the community.

4.2.3.5. Requesting the Transcript

At the completion of the hearing, order a transcript of the proceedings to use in case the victim or witness later changes their story or becomes unavailable. A prior recorded statement of a witness at dangerousness hearing, who later becomes unavailable, may be admitted so long as there is an applicable hearsay exception and there was adequate opportunity for cross-examination. See *Commonwealth v. Hurley,* 455 Mass. 53 (2009). This recording can also be used if the defendant appeals a district court finding to the superior court.

4.2.3.6. Annotations

No Live Testimony

A prosecutor may show dangerousness by hearsay alone (without calling a live witness). Following the principles applied to probation revocation hearings in *Commonwealth v. Durling*, 407 Mass. 108 (1990) the Court held a prosecutor can show good cause for not calling a live witness in two ways: 1) presenting a valid reason for not offering a live witness; or 2) showing the proffered evidence bears a substantial indicia of reliability and is substantially trustworthy. *Abbott v. Commonwealth*, 458 Mass. 24 (2010).

Review and Appeals

"The judge may reopen the order at any time to consider material new information, G. L. c. 276, § 58A (4), and the prisoner has the right to petition the Superior Court for review of a decision in the District Court. G. L. c. 276, s. 58A (7). ...There is no provision for review of a Superior Court detention order although such review may be had by application to a single justice of this court. G.L. c. 211, § 3." *Mendoza v. Commonwealth*, 423 Mass. 771, 775 (1996).

A Superior Court judge has the authority to review and modify pretrial conditions of release imposed on a defendant by a District Court judge pursuant to G. L. c. 276, § 58A. *Commonwealth v. Madden*, 458 Mass. 607 (2010).

Practice Note: All judges approach bail differently, and some may be inclined to impose a high bail while others will not. Refer to office policy and ask senior ADAs for advice on requesting high bail or other detention strategies when necessary.

4.3. *IDENTIFYING STRANGULATION AT ARRAIGNMENT*

Strangulation is one of the most lethal forms of intimate partner violence and symbolizes an abuser's power and control over a victim. Strack, G. B., & McClane, G. E. (1999, May). How to improve your investigation and prosecution of strangulation cases. Accessed on 12/12/2012 from http://www.ncdsv.org/images/strangulation_article.pdf. Strangulation is defined as a form of asphyxia (lack of oxygen) characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck. *Id*. Strangulation is different from choking, which occurs when the trachea is partially or totally blocked by a foreign object (i.e. food). *Id*. Identifying incidents of strangulation at arraignment is critical because strangulation occurring in a domestic violence context suggests a high fatality risk, may indicate a pattern of severe violence and the victim may still be in need of medical care. Some important information about identifying incidents of strangulation follows:

- Eleven pounds of pressure on both carotid arteries for ten seconds will render a victim unconscious. *Id*.
- In only four to five minutes brain death can occur, if strangulation persists. *Id*.
- Injuries from strangulation can kill the victim up to thirty-five hours, or more, after the incident. *Id.*
- If the victim reports strangulation or exhibits any of the following symptoms, she should be referred for medical care: any level of hoarseness, loss of voice, painful swallowing, swelling of the neck, ringing ears or light-headedness or difficulty breathing. *Id*.
- There are many visible signs of strangulation; including, single bruise on the neck (thumb), scratches on the victim's neck (defensive wounds), Petechiae (ruptured capillaries) around the face, red eyes, swelling of the neck. *Id*.
- Strangulation often leaves no mark or external evidence on the skin; in fact, it is possible for a victim of strangulation to die from her internal injuries weeks after the attack. *Id*.

If a police report or private complaint suggests strangulation, consider documenting all injury with photographs and speaking to the victim to acquire details of the strangulation (i.e., Did the defendant use an object? Did he use one hand or two? What did he say during the incident?). The Strack article, *supra*, contains a list of follow-up questions that may be helpful to prosecutors. Consider whether it is appropriate to suggest to the victim the need for medical treatment after a strangulation incident and whether you should file a motion for dangerousness.

The Act Relative to Domestic Violence created a new felony offense for the crime of strangulation and suffocation, G.L. c. 265, §15D. The crime punishes the intentional interference of the normal breathing or circulation of blood by applying substantial pressure on the throat or neck of another (strangulation) or by blocking the nose or mouth of another person (suffocation). The statute includes aggravating factors that increase the potential penalty for the offense. Identifying strangulation/suffocation at arraignment is important for the purposes of accurately charging the offense, assessing risk, and ensuring the victim receives appropriate medical treatment.

Prosecutors' Encyclopedia offers many documents to help prosecutors identify and document strangulation. ***A sentencing motion requesting a judge consider the severity of strangulation can be found through MDAA's Home Page on Prosecutors' Encyclopedia.***

4.4. *RESTRAINING ORDERS*

Frequently victims will appear in court at arraignment and want to either extend an emergency order or file a complaint for a restraining order. Accordingly, domestic violence prosecutors need to be aware of the laws governing these civil proceedings and orders.

In 1978, the Legislature adopted an act to provide protection to those who suffer from abuse at the hands of a family or household member, "The Abuse Prevention Law," G.L. c. 209A, as inserted by St. 1978, ch. 447, § 2. The definitions for both "abuse" and "family or household member" are provided in the statute § 1. Prosecutors should be familiar with both definitions as they are consistently used through domestic violence prosecution. This statute provided plaintiffs the right to invoke the court's protective authority against abuse, and invested the Superior, Probate, and District Courts, and subsequently the Boston Municipal Court, with jurisdiction to conduct abuse prevention proceedings and to issue restraining orders, called "209A Orders" or "Abuse Prevention Orders." The Probate Court may also issue restraining orders called "Domestic Relations Protective Orders" in probate cases involving divorce (G. L. c. 208, §§ 18, 34B), legal separation (G. L. c. 209, § 32), or paternity (G.L. c. 209 §§ 15, 20).

The courts are empowered to issue orders that prohibit a defendant from abusing the plaintiff or that require the defendant to refrain from contacting the plaintiff or to vacate and stay away from the plaintiff's home or workplace. The fundamental purpose of a proceeding under ch. 209A is to adjudicate the need for protection from abuse and, if that need is found to exist, to provide protective court orders. "The protective purpose of proceedings under c. 209A can be jeopardized if the court attempts to resolve any perceived underlying conflict or problem in the relationship between the parties. While it might seem desirable for the court to play what it believes to be a helpful and constructive role, this is not the purpose of the proceedings." Administrative Office of the Trial Court, Guidelines for Judicial Practice: Abuse Prevention Proceedings, sec. 1:01, p. 14 (2011). Depending on the stage of the proceeding, the court may issue emergency orders, ex parte orders, and orders after notice.

4.4.1. **Emergency Orders**

Emergency orders generally occur over the phone when the court is closed or if the victim is unable to appear in court because of a physical hardship. A judge may grant the emergency order over the phone but the victim will be required to appear in court on the next court business day to file a complaint and attend an ex parte hearing. If the victim is physically unable to appear in court, a representative may appear on her behalf. All emergency orders must be certified, docketed and entered into the Statewide Registry of Civil Restraining Orders on the next business day.

4.4.2. **Ex Parte Hearings and Orders**

Ex parte hearings consist of the testimony of the plaintiff under oath as to the factual grounds for the complaint and the need for relief sought. The signed affidavit may be incorporated into the record. The plaintiff must show a "substantial likelihood of immediate danger of abuse" by a preponderance of the evidence. The common law rules of evidence are relaxed during the hearings.

Ex parte orders have a **maximum duration of ten days**. Within this time, the court will schedule a hearing and give notice of the hearing to the defendant, in order to decide

whether to enter an order after notice. These orders have a maximum duration of one year but may be extended by the court at a renewal hearing. In *Crenshaw v. Macklin*, 430 Mass. 633, 635 (2000), the SJC affirmed a court's authority to issue a permanent order following a renewal hearing. The standard for granting an extension of a protective order is the same as that for granting an initial order; whether the plaintiff has a reasonable fear of "imminent serious physical harm," as shown by a preponderance of the evidence. *Iamele v. Asselin*, 444 Mass. 734 (2005). Irrespective of whether a plaintiff requests them, all ex parte orders ***must*** include:

> An order for the ***immediate suspension and surrender of any license to carry*** firearms, and/or Firearms Identification Card (FID)" that the defendant may hold: and
>
> An order that the ***defendant surrender to the police "all firearms, rifles, shotguns, machine guns and ammunition*** which he then controls, owns or possesses." *Guideline 4:04.*

The clerk-magistrate or register must transmit "forthwith" two certified copies of the order and one copy of the complaint, to the police department of the municipality wherein the defendant can be found. In-hand delivery is preferred, but first class mail is allowable. ***The police must serve a copy of the order and a copy of the complaint on the defendan***t. The order form provides for ***in-hand service***, unless the court specifies otherwise. The police are required to "promptly" make a return of service. If the defendant is incarcerated and asks to attend the hearing, the court should issue a writ of habeas corpus to produce the defendant for the hearing. *Guideline 4:07.*

4.4.3. Hearings After Notice (10 Day Hearing)

Timing: Hearings after notice must be scheduled no later than ten court business days after the issuance of an ex parte order. However, hearings after notice may be held at any time when both parties are present, including at the initial appearance or during the course of an arraignment on related criminal charges. Nothing in the law requires two hearings or a "cooling off period" between the ex parte and the hearing after notice. Guideline 5:00.

Proceedings: The hearing after notice is an adversarial proceeding in which both parties must be allowed to present evidence and the plaintiff bears the burden of proof – the standard of proof is a **preponderance of the evidence**. Guideline 5:04. Both parties have the right to introduce evidence and a general right to cross-examine witnesses but the judge should not permit such cross-examination to be used for harassment or discovery purposes. Neither the plaintiff nor the defendant should be compelled to provide incriminating information. The common law rules of evidence are to be applied with flexibility. Guideline 5:03.

Failure to Appear: If the defendant fails to appear, he is considered to have forfeited his opportunity to be heard, unless there is no return of service, or another acceptable reason for the defendant's absence. Guideline 5:05. If the plaintiff fails to appear, the order will be dismissed, unless the court is given an acceptable reason for the plaintiff's absence. Guideline 5:06. If the plaintiff requests that the order be vacated, the judge should ask the following questions before doing so:

(1) What are the reasons for vacating the order? The reasons should appear on the record, and so that the plaintiff may be referred for supportive services.
(2) Whether any different or lesser order, or part of the order, should be left in effect to accomplish the plaintiff's purpose?
(3) Whether vacating the order will place at risk any children living in the home?

Regardless of the reasons given, the plaintiff who wishes to terminate the order should be permitted to do so. *Guideline 5:08.*

4.4.4. Orders After Notice

Upon a finding of abuse, the court may issue orders protecting the plaintiff from abuse, including but not limited to: ordering refrain from abuse; ordering refrain from contact; ordering to vacate and remain away from the household, multiple family dwelling, or workplace; awarding the plaintiff temporary custody of a minor child; ordering the defendant to pay temporary support (when the defendant; has a legal obligation to support the plaintiff and/or any child in the plaintiff's custody); ordering the defendant pay monetary compensation for losses suffered as a direct result of the abuse (earnings, support, restoring utilities, replacement locks, property removed or destroyed, medical or moving expenses, attorneys' fees); ordering information in the case record to be impounded; ordering the defendant refrain from abusing or contacting the plaintiff's child, or a child in the plaintiff's care or custody. *Guideline 6:00.*

The court ***may recommend and refer*** the parties to appropriate agencies for victims of violence and Certified Batterers' Treatment Programs. The court should not recommend or suggest joint counseling or mediation. *Guideline 6:01.*

The order after notice *must continue any suspension of firearms license, and surrender of firearms and FID card, if the court finds return presents a "likelihood of abuse to the plaintiff.*" In all other regards, the issuance of an order after notice requires proof of a "substantial likelihood of abuse." *Guideline 6:05.*

Service: Service of the order after notice should be made in-hand by court personnel. If the defendant does not appear, the order must be transmitted to the police for service in accordance with c. 209A § 7: in-hand if the terms of the ex parte order have been modified, and either in-hand or by leaving a copy of the order at the defendant's last and usual place of abode, if the terms of the ex parte order have not been changed. If the defendant is served with the ex parte order and fails to appear for the hearing after notice, the order will be valid even if it is not served on the defendant. However, service regarding extension of temporary orders is distinguished from service for successive annual extensions: the extension of an annual order is by no means automatic, even if a defendant fails to appear. In appropriate circumstances, the Court may order an alternative method of service. When the police have made a conscientious and reasonable effort to serve, but have failed, they should notify the judge, who may order that service be made by some other means or may excuse service. *Guideline 6:03.* Section 14 of the 2014 Act, requires that an officer serving a restraining order to the extent practicable, must fully inform the defendant of the restraining order and the penalties if violated. The Officer must also provide informational

services, including, but not limited to the availability of Batterer's Intervention Program, substance abuse and alcoholics anonymous counseling, and financial counseling within the jurisdiction.

In *Singh v. Capuano*, the plaintiff appealed from two District Court orders, extending only certain portions of an abuse prevention order for three months. While the appeal was pending, a subsequent order made this appeal moot; however, the Supreme Judicial Court exercised its discretion to comment on several issues related to abuse prevention proceedings.

Promptness of the Evidentiary Hearing: G. L. c. 209A, and the guidelines promulgated by the Trial Court call for prompt evidentiary hearings on the merits of applications for abuse prevention orders due to the extraordinary sensitivity of these cases. Further, "[w]ithout first hearing the evidence, a judge should not, over objection, vacate any provision of a c. 209A order once issued."

Judicial Consideration of the Defendant Asserting his Privilege Not to Testify: "When a defendant has asserted his privilege not to testify, a judge, as fact finder, is required to carefully consider all the circumstances of the case when making the decision whether to draw an adverse inference."

Duration of 209A Orders: The exclusive focus for determining the duration of a 209A or is the applicant's need for protection, and the inquiry should not turn to the defendant's visitation rights or pending criminal proceeding. 468 Mass. 328 (2014).

4.4.5. **209A Order Renewals**

Each order issued after notice (except permanent orders) should be for a *period of one year*, unless the plaintiff requests a lesser period or the court finds that a lesser period is warranted. The standard for granting an extension of a protective order is the same as that for granting an initial order: whether the plaintiff has a reasonable fear of "imminent serious physical harm" as shown by a preponderance of the evidence. *Iamele v. Asselin*, 444 Mass. 734 (2005). When evaluating whether the plaintiff has met the burden, the court must consider the "totality of the circumstances" of the parties' relationship and outlined the following factors to consider: The basis for the initial order; the defendant's violations of protective orders; on-going child custody or other litigation that may engender hostility; the parties' demeanor in court; the likelihood the parties will encounter one another in the course of their usual activities; and significant changes in the circumstances of the parties. *Id.*

In *Crenshaw v. Macklin*, 430 Mass. 633, 635 (2000), the SJC affirmed a court's *authority to issue a permanent order following a "renewal hearing." Guideline 6:02.*

In *Callahan v. Callahan*, the Appeals Court considered whether for the purpose of extending a restraining order, a plaintiff can establish that she is in fear of *imminent physical harm* when the defendant is incarcerated. The Appeals Court held that based on the totality of circumstances in their relationship and that the plaintiff's sense of security would be substantially diminished if he could contact her from prison, established that this plaintiff met her burden to extend the restraining order. 85 Mass. App. Ct. 369 (2014).

Modifying and Vacating Existing Orders: The court may modify or vacate an existing order upon motion, in writing, by either party, and after hearing. *Guideline 6:04.* When a party seeks to modify an order, the judge must assess "the likelihood that the safety of the protected party may be put at risk by a modification. *Id.* When a party seeks to seeks to terminate an order, the judge must be satisfied by clear and convincing evidence "that the order is no longer needed to protect the victim from harm or the reasonable fear of serious harm. . .[and] should be set aside only in the most extraordinary circumstances" *Mitchell v. Mitchell*, 62 Mass. App. Ct. 769 (2005).

Appeals: There is no provision in c. 209A for ***appeal*** by either party; however, litigants seeking appeals are directed to the Appeals Court. *Guideline 7:00.*

4.4.6. Mutual Orders

Reciprocal orders between the parties are considered mutual restraining orders under G.L. c. 209A, § 3, regardless of whether the orders are obtained within the same court or proceeding. The judge is "required to make specific written findings of fact" in support of the issuance of mutual restraining orders. *Sommi v. Ayer*, 51 Mass. App. Ct. 207 (2001) (Here, no such findings were made; the Appeals Court vacated the orders).

At a hearing for a protective order, even where the evidence shows that the victim repeatedly violated the previous restraining order by contacting the defendant, the defendant is not entitled to a reciprocal order as a method of protecting himself against his fear of arrest. *Uttaro v. Uttaro*, 54 Mass. App. Ct. 871 (2002).

4.4.7. Domestic Animals on Restraining Orders

Effective October 31, 2012, a judge may order the possession or care and control of domestic animals owned by either party of the restraining order. Also, the court may order the defendant to refrain from abusing, threatening, taking, interfering with, transferring, encumbering, concealing, harming or otherwise disposing of such animal. See G.L. c. 209A, § 11; Chapter 193, s. 50 of the Acts and Resolves of 2012.

4.4.8. Custody and Support Orders

Previously if a Probate Court entered a prior custody and support order, the trial courts could not modify it. The passage of ch. 260 of the Acts of 2014 changed this and amended G.L. c. 209A, § 3, to permit Superior Court, District Court, and Boston Municipal Court judges to issue an order of custody or support when there is a prior Probate order for custody and support . However a copy of the order must be provided to the initial Probate Court, these orders are only good for 30 days and will be superseded by subsequent orders from Probate and Family Court. Only a Probate Court may issue orders regarding visitation. If there are inconsistencies between 209A orders issued by other departments of the trial court and orders or judgments entered by the Probate and Family Court, Administrative Order 96-1 permits automatic interdepartmental assignment of a Probate and Family court judge to sit as a judge of the District, Superior or Boston Municipal Court to address these inconsistencies.

4.4.9. **209A Violations**

Violation of a 209A restraining order may constitute a statutory misdemeanor and/or contempt of court. The victim/plaintiff may file a civil or criminal contempt complaint in addition to seeking statutory criminal charges. Once criminal charges are brought, however, the local district attorney, and not the victim, is responsible for prosecuting the complaint. A webinar on prosecuting 209A violations can be found at http://www.mass.gov/mdaa/trainings-and-conferences/prosecuting-restraining-order-violations.html . ***Additional annotations for prosecuting restraining order violations can be found in Appendix A.***

4.4.10. **Full Faith and Credit**

"Any protection order issued that is consistent with subsection (b)of this section by the court of one State, Indian tribe or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory)and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe." 18 U.S.C. § 2265(a).

In *Commonwealth v. Shea*, the Supreme Judicial Court ruled that Massachusetts law governs a violation of an abuse prevention order, even if the order was issues by another jurisdiction. 467 Mass. 788 (2014).

4.5. ***HARASSMENT PREVENTION ORDERS***

Chapter 258E was created to allow a victim to obtain a civil protective order against a menacing stranger or acquaintance, regardless of the relationship. Police may arrest for violations of harassment prevention orders. The process for applying for and receiving a harassment order is similar to that for a 209A order.

The new Chapter 258E defines "Harassment" as:

(i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or

(ii) an act that:

  (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or

  (B) Constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of chapter 265 or section 3 of chapter 272.

Although a civil harassment prevention order under G.L. c. 258E does not require a relationship between the parties, it does require the intentional acts be aimed at a specific person. *DeMayo v. Quinn,* Appeals Court, February 24, 2015.

5. ASSESSING THE CASE AFTER ARRAIGNMENT

5.1. *REVIEWING THE COMPLAINT*

In reviewing the case after arraignment, consider the accuracy of the charges and whether or not any other crimes should have been charged based on the police report and/or affidavit of the victim.

Appendix A contains a list of domestic violence offenses in which there is district court jurisdiction. This list can be used to verify the accuracy of the charges and to see what must be proven at trial. There may be federal jurisdiction for cases involving interstate travel; a list of federal domestic violence offenses is provided in Appendix A.

5.2. *COLLECTING EVIDENCE*

5.2.1. Generally

After arraignment, consider what evidence can be gathered to assist in prosecuting the case and contact the victim. Consider whether there is any outstanding discovery such as pictures; medical records; EMT records; 911 calls; jail calls and visits; physical evidence; digital evidence; surveillance videos or witnesses listed in the police report. Even if the discovery is not listed in the police report, speak with your officers to determine that you have all of the evidence and if needed, ask for them to acquire additional physical evidence or statements that you have good faith to believe exist.

5.2.2. Hospital Records

Hospital records are valuable resources in domestic violence cases. Find out from the victim, if and where she received medical treatment. The simplest way to gain access to the records is to have the victim sign a release of medical records as soon as possible. If you cannot get the victim to sign such a release, you will need to file a R. 17 motion and affidavit with the Court. ***A sample motion is available through MDAA's Home Page on Prosecutors' Encyclopedia***.

If she was transported to the hospital by ambulance, you will want to file a R. 17 motion to get the ambulance company's records. Remember the EMTs are first responders and you may be able to offer these statements as excited utterances. Once it is allowed, forward the judge's order or allowed motion to the medical facility, instructing them to return the records to the Clerk's Office.

A webinar, Using Medical Records at Trial, is available through MDAA's website: http://www.mass.gov/mdaa/trainings-and-conferences/using-medical-records-at-trial.html.

Practice Note: Some judges require that the Commonwealth speak to the victim about the release of her medical records, before they will sign the motion for medical records.

5.2.3. Digital Evidence

Increasingly, prosecutors need to consider whether there is any digital evidence involved in the case that will help establish motive, culpability, etc.. The process for getting electronic

records varies depending on the company that maintains the information. This section deals only with stored records. Surveillance of the creation of digital evidence is dealt with under an alternative statutory structure.

The Stored Communications Act (SCA) creates statutory privacy rights in communications and related records that are held in storage. 18 U.S.C. §§ 2701-2711. The SCA regulates access by law enforcement to stored digital evidence held by organizations fitting the statutory definition of either an electronic communication provider or a remote computing service provider. 18 U.S.C. § 2703. An "Electronic Communication Service," is broadly defined as, "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). A "Remote Computing Service" is defined as, "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).

In addition, the Electronic Communications Privacy Act creates certain statutory privacy rights in personal communications. 18 U.S.C. § 2510 et. seq. Generally speaking, the SCA places information held by providers in three separate categories:

1) ***Basic Subscriber Information*** defined in 18 U.S.C. § 2703(c)(2) as:

(A) name;
(B) address;
(C) local and long distance telephone connection records, or records of session times and durations;
(D) length of service (including start date) and types of service utilized;
(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
(F) means and source of payment for such service (including any credit card or bank account number).

This information is subject to the least privacy protection.
Note that subsection (E) includes IP address logs.

2) ***Records***
The term "Records" is not as clearly defined as other definitions used in the statute. Section (c)(1) of 18 U.S.C. § 2703 states that a government entity can obtain, "a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications)." Thus, a record appears to be something more than basic subscriber information and less than content. Records are subject to increased privacy protection. Prosecutors most commonly seek records in the form of cellular site tower logs. *See In re Application of United States*, 509 F. Supp. 76, 80 (D. Mass. 2007).

3) Content
Content, when used related to any wire, oral, or electronic communication, is defined as, "any information concerning the substance, purport, or meaning of any wire, oral, or electronic communication." 18 U.S.C. § 2510(8). Examples of communications content include e-mails, voice messages, or saved files.

Acquiring Digital Evidence in Massachusetts

Generally, acquiring digital evidence is a two part process; preservation and acquisition.

Preservation of Evidence

First, you will need to preserve the evidence so that the information is not erased after a lapse in time. Currently, Internet service providers are not required to retain records for specific periods of time. Data retention periods and policies are subject to the policy of the Internet service provider. However, the SCA mandates that providers secure records upon a demand by law enforcement pending issuance of a proper subpoena, or court order, or search warrant. 18 U.S.C. § 2703 (f). This type of "freeze" order is commonly referred to as a "2703(f)" or "f" order.

See Sample Freeze Order in Appendix B.

There is no requirement that the order be in writing. **The best practice is to use a written demand letter served upon the provider with an acknowledgment or verification of receipt.** A demand letter does not have to be served or drafted by a prosecutor or court. Police officers and investigators can issue freeze orders. The provider must preserve the records for a period of 90 days. U.S.C. § 2703 (f). At the expiration of the 90 days, a subsequent demand may be issued for an additional 90 days of preservation.

The provider may alert the account holder (which could be a suspect) that the records have been frozen by request of law enforcement. Notification may be delayed in accordance with the provisions of 18 U.S.C. § 2705. This section of the SCA contemplates delayed notification where an "adverse result" is a potential risk of the notification. Adverse results are more clearly described as: endangering the life or physical safety of an individual; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id*.

Requesting Evidence

There are different processes for requesting digital evidence depending on whether you plan to acquire subscriber information, records, or content.

> ***Subscriber Information:*** In order to get the subscriber information for an account, you may file a R. 17 motion with the Court and instruct them to send the records to the Clerk's Office (much like medical records). Prosecutors should be aware of *Commonwealth v. Odgren* when issuing any subpoena during the pre-trial, post-indictment phase of a litigated case. 455 Mass. 171 (2009) (if a prosecutor or law enforcement is going to subpoena records to a date other than the trial date, the prosecution must go through the Rule 17 process which requires a filing of a motion).
>
> The alternative is to issue an administrative subpoena for basic subscriber information under the authority of G.L. c. 271, § 17B. The legal standard for issuance of an administrative subpoena is that the records sought are, "relevant and material to an ongoing criminal investigation." G.L. c. 271, § 17B. Massachusetts administrative subpoenas can only be issued for basic subscriber information,

despite alternative uses defined in the SCA. *Id*. Administrative subpoenas may only be issued by a district attorney or attorney general, not a police officer. *Commonwealth v. Feodoroff*, 43 Mass. App. Ct. 725 (1997).

Records: Records are most often acquired through a court order. Under section 2703(d) of the Stored Communications Act, court orders can be issued by a judge sitting in a court "competent jurisdiction." A court of competent jurisdiction is defined as, "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants." 18 U.S.C. § 2711(3).

Court orders under the SCA are commonly referred to as a "D" order. The legal standard for issuance is that, "the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." An application, order, and affidavit detailing the basis for the belief that the standard is met, are necessary.

Content: There are exceptions in the SCA, but search warrants are the most common means of obtaining account content. Once the requirements of the search warrant are met, the government entity requesting the search warrant can also demand records and basic subscriber information that could be obtained with a subpoena or court order. Consequently, where probable cause is established, search warrants are the preferred method for obtaining information from providers.

Massachusetts has a specific search warrant statute for the purpose of the warrants contemplated in the SCA. G.L. c. 276, § 1B. This search warrant expands the powers of Massachusetts courts, allowing the court to authorize "searches" for responsive records both within and outside Massachusetts. The standard for issuance of the search warrant is probable cause established by affidavit. The process for application and the completion of forms does not differ from standard search warrants.

Service

Under G.L. c. 276, § 1B and G.L. c. 271 § 17B, providers have 14 days to respond to demands. This creates a problem where the return of the search warrant needs to be filed within 7 days. Where the records are returned within 7 days, the search warrant return is easily filed with that notation. Otherwise, the returning officer may detail that the warrant has been served and that results are expected. A supplemental return is another alternative.

Further, under both statutes, proper service of legal demands is required (by hand, US mail, commercial delivery, facsimile, or to certain agents of the third party). G.L. c. 276, § 1B(a). Where these search warrants are legal demands to the custodian of records, presence of the officer is not required at the search location. 18 U.S.C. § 2703(g).

Costs

A government entity demanding records under the SCA may, with some exception, have to pay a reasonable fee for the production of records. 18 U.S.C. §2706(a). The fee must be mutually agreed upon. 18 U.S.C. §2706(b). Absent agreement, the fee should be litigated (if

necessary) in the court of jurisdiction over the offense, or by the court that issued the demand. *Id*.

Voluntary Disclosure

There are several exceptions in the SCA allowing voluntary (or compelled) disclosure by providers. 18 U.S.C. §2702. Particularly pertinent is the emergency disclosure provision. Under 18 U.S.C. §2702(b)(8), a provider may disclose records, content, or other information without delay where the service provider, "in good faith believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency." Most providers request that the law enforcement officer making such a demand complete an emergency disclosure form. The preferred practice is to issue an appropriate legal demand followed by communication with the provider and a request to expedite the request.

Remedies for Violating the SCA

Penalties for violations of the SCA, including civil and administrative provisions, are the exclusive remedy for non-constitutional violations of the SCA. 18 U.S.C. §2708. Suppression is not a remedy. *Id*.

Two webinars on obtaining and admitting digital evidence are available on MDAA's website: **http://www.mass.gov/mdaa/trainings-and-conferences/obtaining-admitting-telephone-call-and-txt-mess-evid.html.**
http://www.mass.gov/mdaa/trainings-and-conferences/obtaining-and-admitting-email-and-social-media-evidence.html.

5.3. *CONTACTING THE VICTIM*

Establish a rapport with the victim early on by ensuring that you or your advocate has actual contact with the victim (not just leaving a message). As you prepare for the pre-trial conference, ask the victim if there is any additional evidence, witnesses, statements, or whether there may have been prior acts of violence between the parties in the past. If she is cooperative, this is a good time to **collect as many phone numbers as possible** (ex. friends, family, neighbors, employers) in case you have difficulties contacting her later in the proceedings.

6. PRE-TRIAL CONFERENCE

6.1. *DISCOVERY*

Mass. R. Crim. P. 14 governs discovery procedures and includes an extensive list of automatic discovery for the Commonwealth to provide to defense. This Rule is critical to a prosecutor's practice and prosecutors are responsible for knowing and reviewing this Rule to ensure compliance. Keep in mind, a prosecutor is responsible for any materials in his/her custody and control. See *Kyles v. Whitney*, 514 U.S. 419, 437 (1995)(A prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Commonwealth v. Martin*, 427 Mass. 816, 823-24 (1998). However, an independent witness, including a complainant, is not an agent of the government; thus, a court may not order the prosecution to make defense-directed inquiries of the witness. *Commonwealth v. Beal*, 429 Mass. 530, 531 (1999).

Notably, there is an obligation for the Commonwealth to disclose any information that is exculpatory.

6.1.1. Exculpatory Evidence

One obligation under Mass. R. Crim. P. 14(a)(1)(A)(3) is that the Commonwealth must provide any facts that are exculpatory in nature. Exculpatory evidence includes "evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Commonwealth v. Ellison*, 376 Mass. 1, 22 (1978). Taking the most liberal view possible of "exculpatory" evidence will minimize the likelihood of error.

If a domestic violence victim recants or mitigates her account of the defendant's criminal activity, produce this new statement to the defense, even if you don't believe the altered version. Evidence that is material to the impeachment of a Commonwealth witness is exculpatory and must be disclosed. Impeachment material includes any prior or subsequent inconsistent statements of a witness, partial or total recantations, or any evidence inconsistent with guilt.

Practice Note: If your victim recants in an oral statement to you or you advocate, it may be best to reduce the recantation into writing and not provide your personal notes.

6.1.2. Victim Witness Advocate Notes

While attorneys' notes and advocates' notes are protected work product, if there is documentation of a victim's exculpatory statement – they are discoverable. *Commonwealth v. Liang*, 434 Mass. 131 (2001)(VWA notes are protected as work-product but "accompanying this protection is an affirmative duty on the prosecutor to review the notes of advocates and inquire about their conversations with victims. This responsibility stems from the Commonwealth's obligation to produce exculpatory evidence and, on request, material and relevant 'statements' of persons."). Best practice is to provide a written memorandum to defense counsel regarding the exculpatory information and also docketing this with the court.

6.1.3. Protecting Victim's Safety During Discovery

If defense counsel is entitled to discovery pursuant to R. 14 but you believe there is good cause not to disclose this information, consider filing a motion for a protective order pursuant to R. 14(a)(6). ***See Sample Motion and Affidavit in Appendix B.***

You are not obliged to provide the current address of the victim if it has been impounded, pursuant to G. L. c. 209A, § 8:

> Upon the request of the plaintiff, the court shall impound the plaintiff's address by excluding same from the complaint and from all other court documents which are available for public inspection including any copy of a protection order issued by another jurisdiction, and shall ensure that the address is kept confidential from the defendant and defendant's attorney.

Neither are you obliged to provide the address of a shelter or a program where a victim may be receiving counseling, pursuant to G. L. c. 233, § 20L:

> The location and street address of all domestic violence victims' programs, as defined in G.L. c. 233, s. 20K and rape crisis centers, as defined in G.L. c. 233 s. 20J, shall be absolutely confidential and shall not be required to be revealed in any criminal or civil proceeding.

6.1.4. Certificate of Compliance

After you have provided the defendant with all required discovery you must file a certificate of compliance pursuant to Rule 14(a)(3). The certificate identifies what has been provided. Filing this certificate of compliance then allows you to request a specific date for defendant's compliance with discovery obligations or request additional discovery that has yet to be provided.

6.1.5. Reciprocal Discovery

After the Commonwealth provides the defendant with its required discovery, and files a certificate of compliance, the defendant must provide automatic reciprocal discovery pursuant to Rule 14(a)(1)(B).

"The defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(vi)[expert witness information], (vii)[police reports, tangible evidence, photographs, etc.] and (ix)[promises, rewards, or inducements] which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial." Mass. R. Crim. P. 14 (a)(1)(B).

The obligation of defense counsel to provide discovery can sometimes be overlooked but ***trial by ambush is prohibited***.

Upon motion, a judge **may** order a defendant to provide the Commonwealth with written statements of witnesses whom the Commonwealth intends to call at trial which are in the possession, custody or control of the defendant or his attorney, and the order is not limited to statements the defendant could use for impeachment. *Commonwealth v. Durham*, 446 Mass. 212 (2006); Mass. R. Crim. P. 14(a)(2). The defendant is not entitled to a system which only operates for his benefit. See *Commonwealth v. Paszko*, 391 Mass. 164, 188 (1984). (SJC held that the trial judge acted consistently with "Mass. R. Crim. P. 14 (a) (3) in ordering the reciprocal production of the defense ballistics report (a report of 'scientific tests or experiments') and the investigator's report (containing 'statements of persons')").

6.1.6. Joinder

While at the pretrial conference, consider whether any of the complaints and charges against the defendant should be joined. It is best to bring up joinder as soon as possible. A more detailed discussion about when to file a motion for joinder is provided in section 7.4.4. of this trial notebook.

6.2. *DWYER MOTIONS*

On December 29, 2006, the SJC rewrote the protocol governing a defendant's requests to inspect statutorily privileged records that are in possession of a third party in *Commonwealth v. Dwyer*, 448 Mass. 122 (2006). The *Dwyer* protocol created a less stringent standard for defense to access these records but created additional protection for presumptively protective records. It is discussed below.

1. Defense's Motion Rule 17(a)(2)

a. Defense must file a motion and affidavit as required in Rule 13(a)(2). The affidavit may rely on hearsay so long as the source of the hearsay is identified.
b. The motion must:
    i. Identify the name and address of the records' custodian
    ii. Name the person who is the subject of the motion
    iii. Be precise with regards to the records sought
c. The affidavit must "establish with specificity the relevance of the requested documents."
d. So long as the motion and affidavit requirements are satisfied, the Court will schedule a date for the Lampron hearing and the Commonwealth must forward the motion, affidavit, and notice of that date to both the record holder and the subject of the records.

2. The Lampron Hearing

a. This is the one and only opportunity that both the record holder and the subject of the records have to be heard in court during this process; however, their presence is not required to proceed. The victim has the right to be represented by counsel, and there are several legal services groups in the Commonwealth that are available to assist the victims in this process. Your Office may maintain a list of these agencies.
b. At the hearing, the court must consider arguments and determine whether the moving party made a showing that
    i. the documents are relevant and have evidentiary value;
    ii. the documents cannot otherwise be reasonably procured in advance of trial – affirmative obligation to show there is no other way to procure the documents;
    iii. the defendant cannot properly prepare for trial without production and inspection in advance of trial, and the failure to obtain such inspection may unreasonably delay the trial; and
    iv. the request is made in good faith and is not intended as a "fishing expedition."
c. The judge makes written or oral findings whether
    i. The defendants satisfied the requirements of 17(a)(2); and
    ii. If the documents are presumptively privileged (because of statutory privilege) or not privileged. This determination affects how the records are sent to the clerk's office and what can be viewed, as discussed below.

3. Classification Governs the Process of Summonsing and Access to the Records

Non- Presumptively Privileged: A summons issues directing the record holder to produce the records to the clerk on the return date. The clerk shall maintain the records separately from the court file, and make them available for inspection by defense counsel. *The Commonwealth's ability to inspect or copy the records is within a judge's discretion*. However, the Commonwealth may inspect or copy any records if consent is given by the

record-holder or third-party subject. Also, a defendant may have discovery production obligations under Rule 14.

Presumptively Privileged: The summons requires the records holder to produce the records to the clerk in a sealed container marked "PRIVILEGED," with the name of the record holder, the case name and docket number, and the return date. The clerk shall maintain the records separately from the court file with the clear designation "presumptively privileged records."

- These records may be inspected only by defense counsel, who must sign and file a protective order in a form approved by the SJC.
- After reviewing the documents, if defense counsel believes they are not presumptively privileged he can file a motion to release the records from the protective order and notify the Commonwealth. The Commonwealth has an opportunity to review the records before the hearing. If the judge finds the documents are not privileged, he can release them from the protective order and allow inspection consistent with non-presumptively privileged documents.
- **Defense Motion to Modify PO:** If defense counsel seeks to copy or disclose privileged records to other persons to prepare for trial, s/he must file a motion to modify the protective order. The motion must contain an affidavit naming the person who will receive the documents, exclude any reference to the content of the records, and provide notice to all parties. After a hearing and an in-camera review, the judge decides whether to modify the protective order and to what extent.
- **Introduction at trial, by Motion:** Defendant seeking to introduce presumptively privileged materials shall file a motion in limine *at or before any final pretrial conference*. The Commonwealth, under the same protective order, may review enough of the records to be able to adequately respond to the motion. The judge may allow the motion only upon oral or written findings that the privileged material is necessary for the defendant to obtain a fair trial. Prior to permitting the motion, the judge shall consider alternatives to introduction, including stipulations or redacting portions of the records.
- **Preservation of Records for Appeal:** Rule 17(a)(2) records shall be retained by the clerk of the court until the conclusion of any direct appeal following a trial or dismissal of a case.

6.3. *DISPOSITIVE MOTIONS AT THE PRETRIAL CONFERENCE*

During the prosecution of many domestic violence cases, defense attorneys often try various avenues to have the case dismissed and at times the court may even try to persuade the Commonwealth to dismiss these cases prior to trial. However, the existence of an open case leaves many options open to the Commonwealth should the defendant reoffend during the pendency of the case, or should the victim resume cooperating in the prosecution. It is for these reasons that a prosecutor handling domestic violence cases should be prepared to oppose dispositive motions at the pretrial conference.

6.3.1. Motions to Dismiss

At the pretrial conference (and at trial), defense counsel may make a motion to dismiss the case based on the victim's desire not to go forward. The court should not dismiss a complaint over the objection of the Commonwealth without a basis grounded in a violation of the defendant's constitutional rights. Some arguments against dismissal are:

Separation of Powers
Article 30 creates a separation of powers among the branches of government essentially granting the prosecutor exclusive power to decide whether to prosecute a case. *Commonwealth v. Pellegrini*, 414 Mass. 402, 404-406 (1993).

The Power to Nolle Prosequi is a Prosecutor's Power
Pretrial dismissal, over the Commonwealth's objection, of a valid complaint or indictment before a verdict, finding or plea, and without an evidentiary hearing basically quashes or enters a nolle prosequi of the complaint or indictment. *See Commonwealth v. Gordon*, 410 Mass. 498, 503 (1991). A decision to nolle pros a criminal case rests with the executive branch of government and, absent a legal basis, cannot be entered over the Commonwealth's objection. *Id.* at 500.

Defense did not follow proper procedure
If defense counsel wants the court to entertain a motion to dismiss, a motion and affidavit should have been served on the Court, the prosecutor and the case marked for a motion date allowing the Commonwealth time to respond.

MA Judicial Guidelines for Abuse Prevention Proceedings 8:12
"It is inappropriate for the court to dismiss the complaint because the court believes, as a matter of policy, that the case should not be prosecuted."

6.3.2. Privileges

The Fifth Amendment right against self-incrimination and spousal privilege are both privileges related to giving testimony and therefore should not be asserted at the pre-trial conference, but rather, at the trial session. See *In the Matter of Grand Jury Subpoena*, 447 Mass. 88 (2006)(referring to the spousal privilege as a privilege against providing testimony). Additional discussion concerning trial privileges can be found at sections 8.3.2., Fifth Amendment Assertions by the Victim, and 8.3.3., Spousal Privilege of this trial notebook.

6.4. *SENTENCING RECOMMENDATIONS*

By the time you are in the pre-trial conference session, you should know what your sentencing recommendation would be should the defendant offer a plea. Consider the factors referred to in Section 9. Sentencing.

Practice Note: Consider writing this recommendation in your files so that if a colleague covers the case you will be on the same page. It will also help you remember what your pretrial sentencing recommendation was at future court dates.

7. TRIAL PREPARATION

7.1. *PREPARING YOUR WITNESS(ES)*

Prosecuting domestic violence cases requires an ability to work well with all types of victims, including challenging victims. It is important to begin building a rapport and relationship as early as arraignment. From the beginning, speak honestly and with detail to the victim about the case and the proceedings.

The Massachusetts Victim Bill of Rights, G.L. c. 258B provides a lengthy list of victims' rights. There is a detailed discussion about the statute and the advocate's role in ensuring these rights are met in MDAA's Victim Witness Reference Manual.

Your relationship and communication with the victim will have a significant impact on how she views her relationship, the case, and the criminal justice system. MDAA's Victim Witness Reference Manual contains helpful sections concerning the advocate's role, cultural competency, and how to effectively communicate with a victim of domestic violence. This manual also contains sections detailing whether to call a child witness to testify, how to prepare a child witness to testify, as well as, provides suggestions for working with disabled and elderly victims.

Ideally, you want to meet with the victim at the courthouse before the trial. The witness should be given a chance to review the police reports or any affidavit she completed. It is best to familiarize the victim with the courtrooms, the safety features and protocols, and the roles of the Judge, clerk, defense attorney, probation and jury.

Take the time to explain the process of direct and cross-examination and how important her demeanor throughout the trial will be critical to her credibility and ultimately the case. If she has prior convictions, explain that they may be used for impeachment purposes. Emphasize that the most important thing she can do for the trial, is focus on telling the truth. At this meeting, take the time to review the potential defenses, the strengths and weaknesses of the case, and any statements the defense is likely to make at closing arguments so that the victim is not surprised by any of these trial strategies.

7.2. *EVALUATING YOUR EVIDENCE: WHAT IS ADMISSIBLE AND HOW?*

As the trial date approaches, it is important to evaluate what evidence you have and what you will need to prove to establish each element for the crimes charged. Consider using a worksheet to chart out the charges, elements and evidence you will offer at trial.

For every piece of evidence you wish to offer, consider:

- Is it relevant?
- Is it admissible?
    - Will the admissibility depend on authenticating the item?
    - If so, how will you authenticate the evidence?
    - Is it hearsay?
    - Is there an applicable hearsay exception?
    - If there is a hearsay exception, how will you satisfy the confrontation clause?
- Is the evidence more probative than prejudicial?

What are the legal issues in your case? Anticipate the legal issues that may arise with any of the charges or elements, research what the law says, and be prepared to analyze these issues for the Court. You may need to file a motion in limine to alert the judge to any outstanding evidentiary issues that should be considered before the start of trial.

Start considering what will you do if the witness becomes unavailable? Can you prove your case with evidence-based prosecution? How?

The following sections will consider the main limiting principles for the admissibility of evidence; including, relevancy, authentication, hearsay, and the confrontation clause.

7.2.1. **Relevant:**

The evidence has the tendency to make the existence of a fact, material to an issue in the case, more or less probable. Mass. G. Evid. § 401 (2012).

7.2.2. **Authentication:**

The admissibility of evidence depends on proper authentication. Authenticating a document requires "evidence sufficient to support a finding that the matter in question is what the proponent claims." Mass. G. Evid. § 901(a) (2012).

In domestic violence cases, you will need to authenticate photographs, 911 calls, digital evidence, handwriting samples, and voice testimony by laying a foundation through a live witness. However, properly certified and attested to medical records, public records and business records are self-authenticating. You will not need to call a live witness to authenticate these documents.

The following statutes create the authority for self-authenticating documents:

- Medical records (G.L. c. 233, § 79)
- Public Records (G.L. c. 233, §§ 76, 79A)
- Business Records (G.L. c. 233, § 78)

7.2.2.1. **Authenticating Voice Identification Testimony**

Where a witness has heard the defendant's voice prior to the crime and is familiar enough with it to recognize it, the voice identification may be admitted. Alternatively, authentication may be accomplished through a voice "line up," a recording, or the use of experts.

In such circumstances of prior familiarity, substantially the same rules apply as those that govern the authentication of handwriting. See *Commonwealth v. Perez*, 411 Mass. 249, 262-263 (1991) (telephone conversations); *Commonwealth v. Anderson*, 404 Mass. 767, 770 (1989) (telephone conversation); *Commonwealth v. Mezzanotti*, 26 Mass. App. Ct. 522, 527 (1988) (overheard conversation).

There are a variety of circumstances that will suffice to authenticate the identity of a person with whom a witness has had a telephone conversation. It is sufficient if the witness testifies that she recognizes the voice on the other end of the telephone, regardless of who initiated the conversation. *Commonwealth v. Leonard*, 413 Mass. 757 (1992).

7.2.2.2. **Authenticating Photographs**

Photographs can be authenticated through "[a]ny witness who could have testified that the photographs were a fair and accurate representation of the victim's wounds[.]" *Commonwealth v. Housen*, 458 Mass. 702, 712 (2011) (citing *Eldredge v. Mitchell, 214 Mass. 480, 483, 102 N.E. 69 (1913)*; *Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 646, 779 N.E.2d 669 (2002))*.

7.2.2.3. **Authenticating Digital Evidence**

The relevance and admissibility of digital evidence will depend upon the communications being authored by a specific person, generally the defendant. *Commonwealth v. Purdy*, 459 Mass 442, 447 (2011). A judge may look to "confirming circumstances" that would allow a reasonable jury to find by a preponderance of the evidence that the item is what the proponent says it is. *Id*. at 448-449. In *Commonwealth v. Purdy,* the SJC held that the 10 emails from defendant were properly authenticated when the emails were sent from an account bearing defendant's name; emails found on the hard drive to the computer defendant acknowledged owning and knew the passwords; and one of 10 emails had a photograph of the defendant. Compare *Purdy* with *Commonwealth v. Williams,* 456 Mass. 857 (2010), where the SJC held a message from MySpace web page was not properly authenticated because there was no testimony to establish the security of the webpage, who can access it, and what passwords are necessary; the messages could have been sent from any computer able to access the Internet; and the messages did not identify the author. In *Commonwealth v. Foster F.*, 86 Mass. App. Ct. 734 (2014) the Appeals Court ruled that rather than determining the admissibility of the evidence before trial, the trial judge should have instructed the jury on determining the authentication of Facebook evidence: "While we agree that the judge could have found the Facebook messages to be authored by the juvenile, the better practice would have been to instruct the jurors that, in order to consider the Facebook messages as evidence of the statements contained therein, they first needed to find by a fair preponderance of the evidence that the juvenile was the author." citing *Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359, 367 (2014).

7.2.2.4. **Authenticating Handwriting Samples**

If you are prosecuting a case that relies on authenticating the defendant's handwriting in order to establish an element of the crime, you do not need an expert to testify. The two ways to authenticate handwriting samples without an expert are discussed below:

> 1) "A witness who is familiar with a person's handwriting may give an opinion as to whether the specimen in question was written by that person. Whether a witness is qualified to give such an opinion is a question, in the first instance, for the judge." *Commonwealth v. Ryan*, 355 Mass. 768 (1969).
>
> 2) "Where signatures of the defendant have been admitted in evidence as genuine and submitted to the jury, they may be used as a standard against which the jury may compare the disputed signatures and decide the question of authorship without the need for expert testimony." *Commonwealth v. O'Connell*, 438 Mass. 658 (2003).

Practice Note: If the evidence is not self-authenticating, ask defense attorney to stipulate to the items authenticity (not admissibility) to avoid calling in a keeper of the records to testify.

7.2.3. **Hearsay:**

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Mass. Guide To Evidence § 801(c).

Certain extrajudicial statements are not hearsay and can be admitted for the truth of the matter asserted. The following are statements which are not hearsay:

(1) Admission by a party opponent. Mass. G. Evid. § 801(d)(2) (2012); and
(2) "Prior Inconsistent Statement Made Under Oath or Penalty of Perjury at Certain Proceedings. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement which is (i) inconsistent with the declarant's testimony; (ii) made under oath before a grand jury, or at an earlier trial, a probable cause hearing, or a deposition, or in an affidavit made under the penalty of perjury in a G. L. c. 209A proceeding; (iii) not coerced; and (iv) more than a mere confirmation or denial of an allegation by the interrogator.." Mass. G. Evid. § 801(d)(1)(A) (2012). See section 7.3.5 of this notebook.

7.2.4. Hearsay Exceptions:

Several hearsay exceptions may be applicable in a domestic violence case. The following list includes many of these exceptions, but this is not an exhaustive list of all available hearsay exceptions. Once you determine there is an applicable hearsay exception, you will likely need to address the **confrontation clause**, as discussed in section 7.2.5.

Declarant's Availability Not Material	Must Prove Declarant Not Available
Excited Utterance	Dying Declaration
Statements for Purpose of Medical Diagnosis or Treatment	Declaration Against Interest
Then Existing Condition	Prior Recorded Testimony
Business Records - G.L. c. 233, § 78	Forfeiture by Wrongdoing
Hospital Records- G.L. c. 233, § 79	
Official Records –	
Generally – G.L. c 233, § 76	
Ballistics Report, G.L. c. 111, § 13	
Drug Certificates, G.L. c. 140, § 121	

7.2.4.1. Hearsay Exceptions: Declarant Availability Not Material

a) Spontaneous/Excited Utterances

"(A) There is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (B) the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought. " Mass. G. Evid. § 803(2) (2012); *Commonwealth v. Santiago*, 437 Mass. 620, 623 (2002).

"[T]here can be no definite and fixed limit of time [between the incident and the statement]. Each case must depend upon its own circumstances." *Commonwealth v. McLaughlin*, 364 Mass. 211, 223 (1973).

Children who have witnessed a domestic violence incident or sexual assault may also be capable of excited utterances, even if they are not old enough to be competent to testify. "[C]ompetency for the purposes of an excited utterance is not the same as that for a witness who testifies at trial. *Commonwealth v. Tang*, 66 Mass. App. Ct. 53 , 64-67 (2006). Competency for a declarant of an excited utterance requires only that the declarant's factual assertion rest on personal knowledge. In other words, the declarant must have had an opportunity to observe the facts contained in the extrajudicial statement. *Id.* at 64-65." *Commonwealth v. Figueroa*, 79 Mass. App. Ct. 389, 396 (2011).

The Commonwealth need not show the witness is unavailable in order for excited utterances to be admitted. *Commonwealth v. Napolitano*, 42 Mass. App. Ct. 549, 557, *further appellate rev. den*., 425 Mass. 1104 (1997). "The deeply rooted hearsay exception for excited utterances is deemed so specially reliable that the usual requirement of proving the declarant unavailable is dispensed with." *Id.* (citing *Hetel v. Messier's Diner, Inc*., 352 Mass. 140, 142 (1967)).

Once admitted, the statement is admitted substantively: you may use the statement as proof of an element of a crime alleged in your case**.** *Commonwealth v. Lawson*, 46 Mass. App. Ct. 627, 630-31 (1999); *Commonwealth v. Whelton*, 428 Mass. 24, 29-30 (1998).

The statement itself may prove the exciting event; there is no requirement that the underlying exciting event be proved by any evidence other than the spontaneous exclamation itself. If the foundational requirements of contemporaneousness and explanation are met, the underlying event is self-authenticated by the statement. *Commonwealth v. Nunes*, 430 Mass. 1 n.3 (1999); *Commonwealth v. Whelton*, 428 Mass. 24, 27 (1998).

In relating background information and the specifics about the incident surrounding the statement, be sure to "lay the foundation" for the Court to see that they qualify as excited utterances: relate as much detail as possible about when police received a call, when officers were dispatched, when they arrived, how soon thereafter the witness made the statement, the witness's demeanor, and what the witness did during the time periods between the incident and the statements. Include these important factors:

- the nature of the (traumatic) exciting event;
- the declarant's physical condition;
- the declarant's emotional state and demeanor;
- the declarant's age (more leeway given for children);
- the amount of time between event and statement;
- what occurred between event and statement;
- whether statement occurred at same location as event;
- whether the declarant has any motive to fabricate; and
- facts and circumstances corroborating the statement.

A webinar on excited utterances is available at http://www.mass.gov/mdaa/trainings-and-conferences/excited-utterances.html.

Commonwealth's Motions to Admit a Spontaneous Utterance (911 call and statement to non-law enforcement) are included in Appendix B.

b) <u>Then Existing Mental, Emotional, or Physical Condition</u>

Physical Condition

Statements the victim made to any witness describing her physical condition can qualify as an exception to the hearsay rule. (*i.e.*, "My ribs hurt"; "My arm feels like it's broken").

Mental Condition

"Statements of a person as to his or her present friendliness, hostility, intent, knowledge, ore other mental condition are admissible to prove such mental condition." Mass. G. Evid. § 803(3)(B)(i) (2012).

Conversations between the defendant and his girlfriend, which furnished a reason for the defendant to harbor anger towards his victims, anticipate a confrontation with them and arm himself with two handguns, were properly admitted to show the impact of the conversations on the defendant's state of mind. *Commonwealth v. Bush*, 427 Mass. 26 (1998).

The defendant's admission that he was jealous of his wife, made six weeks before he assaulted her, was admissible to show a course of conduct between husband and wife and to show the defendant's motive and state of mind. *Commonwealth v. DiMonte*, 427 Mass. 233 (1998).

The testimony of police officers concerning the victim's reports of domestic violence incidents and other testimony concerning her accounts to others of the defendant's violence and her own fear was properly admissible as relating to the victim's state of mind, where there was evidence that the defendant knew of that state of mind. The defendant was convicted of first degree murder and stalking of his estranged girlfriend. *Commonwealth v. Cruz*, 424 Mass. 207 (1997).

c) <u>Statements for the Purpose of Medical Diagnosis or Treatment</u>

A physician may testify to "statements made for the purpose of medical diagnosis or treatment describing medical history, pain, symptoms, condition, or cause, but not as to the identity of the person responsible or legal significance of such symptoms or injury." Mass. G. Evid. § 803(4) (2012). While many times medical records are admissible without a live witness, consider utilizing the testimony of a nurse or doctor to rebut defenses or explain how injuries may be inflicted. A live witness is generally more compelling than the medical record itself.

Hospital records relating to medical history and treatment (diagnosis, prognosis, causation and medical condition), which have been properly authenticated, are admissible as an exception to the hearsay rule pursuant to G. L. c. 233, § 79. Hospital bills are admissible "evidence of the fair and reasonable charge for such services or the necessity or such services or treatment." G. L. c. 233, § 79G. The statute was expanded in 1988 to admit doctor's opinions regarding the cause of an injury: "the opinion of (a) physician or dentist as to proximate cause of the condition so diagnosed"

Id. However, the statute does not authorize the admission of a recorded opinion as to criminal liability.

The hearsay exception is to be interpreted liberally; unless the hospital records are unintelligible to a lay person, they may be admitted without testimonial corroboration. *Commonwealth v. Copeland*, 375 Mass. 438, 442 (1978). "The fact that the record may contain second-level hearsay is of no consequence as long as the broad requirements of the statute are met." *Doyle v. Dong*, 412 Mass. 682, 684 (1992).

Remember that while there is a psychotherapist-patient privilege, there is no general statutory "doctor-patient" privilege: private communications between doctor and patient are not privileged. Thus, attempts to prevent you from offering medical records or medical testimony on the basis of a privacy interest should fail. See e.g., *Commonwealth v. Pellegrini*, 414 Mass. 402, 408-09 (1993) (mother could not assert a privacy interest in her child's medical records).

However, the statutory exception does not extend to diagnostic speculation, hearsay statements unrelated to treatment, or medical history or other material "which has reference to the question of liability." *Commonwealth v. Baldwin*, 24 Mass. App. Ct. 200, 201-203 (1987) (it was an error to admit part of a hospital record stating "Diagnosis: Sexual Molestation").

In this notebook, section 8.7. contains a list of what must be redacted before medical records are published to a jury.

d) Past Recollection Recorded/ Present Recollection Revived

"A past recorded statement may be admissible if (i) the witness has insufficient memory to testify fully and accurately, (ii) the witness had firsthand knowledge of the facts recorded, (iii) the witness can testify that the statement was truthful when made, and (iv) the witness made or adopted the recording when the events were fresh in the witness's memory." Mass. G. Evid. § 803(5)(A) (2012).

"As to the fourth element of the foundation, where the recording was made by another, it must be shown that the witness adopted the writing 'when the events were fresh in [the witness's] mind.'" *Commonwealth v. Evans*, 439 Mass. 184, 189-190 (2003).

Domestic violence victims can find recalling events difficult, and the cases may involve prolonged events. If you solicit written statements, letters, or diary entries during the initial stages of a case, you should be prepared to offer them in order to refresh the witnesses' memories at trial. Do this soliciting at the assessment and investigation stage, so that you will not run into discovery problems nearer to trial.

e) Business Records

Business records are a statutorily recognized hearsay exception. G. L. c. 233, § 78. The custodian of records or a person familiar with how the records are generated may testify or the records can be authenticated by the keeper of the records. Four preliminary findings must be made for the business records hearsay exception:

a) that the entry was made in good faith;

b) in the regular course of business;
c) before the action was begun; and
d) that it was the usual course of business to make the entry at the time of the event recorded or within a reasonable time thereafter.

G. L. c. 233, § 78; Mass. G. Evid. § 803(6)(A) (2012).

Some business records you can consider: Computer and E-mail Records; Employment Records ; E.M.T. Run Sheets; Fax Records; Operator transcripts for 911 calls; Phone Records; Police Logs; School Records (to show opportunity or identity).

f) Public Records ("Official Written Statements")

In certain instances, "official" or "public" records may be admitted as hearsay exceptions, as evidence of the truth of the facts recorded therein, if made by a public officer in the performance of his official duty. G.L. c. 233, §76. Official or public records are defined as a "record of primary fact, made by a public officer in the performance of official duty." *Commonwealth v. Shangkuan*, 78 Mass. App. Ct. 827 (2011).

These records may provide the jury with critical evidence as to the defendant's state of mind, his motive, and/or the sequence of events (*i.e.,* she filed for divorce, and he became outraged and attacked her the next day), or simple, yet critical information, such as where the defendant and the victim lived.

Some public records to consider: applications for restraining orders; applications for marriage licenses; divorce filings; separation agreement filings and custody rulings.

7.2.4.2. Hearsay Exceptions: Requiring Declarant's Unavailability

a) When is a Witness Unavailable?

A witness is unavailable to testify if exempted by a ruling of the court or by asserting a privilege from testifying concerning the subject matter of the statement. The court can also recognize a witness's unavailability based on the Commonwealth's inability to procure the witness's appearance at trial. Generally, a witness who refuses to testify or who suffers from a lack of memory as to the statement is not considered unavailable. See Mass. G. Evid. § 804(a) (2012). This is a fact-based decision to be made on the day of trial. See *Commonwealth v. Fisher,* 433 Mass. 340, 356 (2001).

The Commonwealth did not fulfill its burden of demonstrating that a witness was unavailable to testify within the meaning of Mass. R. Crim. P. 35(g) so as to warrant the admission of the witness's deposition as substantive evidence of assault and battery and several counts of breaking and entering a residential facility with intent to commit a felony. The court held that where the witness was in a foreign country and the Commonwealth failed to demonstrate that a reasonable effort had been made to obtain the witness, the defendant was entitled to a new trial. *Commonwealth v. Ross*, 426 Mass. 555 (1998).

The Commonwealth properly satisfied the court of the witness's unavailability despite the fact that it failed to have the witness held when he showed up to court after two subpoenas and a capias issued for his appearance. The witness had indicated that he would testify and the Commonwealth's efforts demonstrated a good faith effort and

sufficient diligence to obtain the attendance of the witness. *Commonwealth v. Perez*, 65 Mass. App. Ct. 259 (2005).

Recently, the SJC set out a framework to analyze whether a witness is unavailable due to illness or infirmity in *Commonwealth v. Housewright.* "[T]he Commonwealth bears the burden of showing that there is an unacceptable risk that the witness's health would be significantly jeopardized if the witness were required to testify in court on the scheduled date. To meet this burden, the Commonwealth must provide the judge with reliable, up-to-date information sufficient to permit the judge to make an independent finding." A judge in his/her own discretion can require additional documentation. If the witness is determined unavailable because of illness, the Court can consider whether continuing the date will resolve the witness' unavailability or whether the witness' health would be jeopardized if the testimony were obtained through a deposition at a suitable out-of-court location, such as an attorney's office, the witness's home, or a health facility prior to admitting a prior recorded statement. *Commonwealth v. Housewright*, SJC-11617, February 19, 2015.

b) <u>Prior Recorded Testimony</u>

An ***unavailable*** witness's prior testimony under oath, where the ***defendant had prior adequate opportunity to cross examine the witness***, may be admissible as a prior recorded testimony. Grand Jury testimony of the victim **is not admissible** because the defendant does not have had the opportunity to cross-examine as required by the confrontation clause.

> "A defendant has an adequate prior opportunity to cross-examine an unavailable witness when (1) the declarant was under oath at the prior proceeding, (2) the defendant was represented by counsel at the prior proceeding, (3) the prior proceeding was conducted before a judicial tribunal, equipped to provide a judicial record of the hearings, (4) the prior proceeding was addressed to substantially the same issues as in the current proceeding, and the defendant had reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant." *Commonwealth v. Hurley,* 455 Mass. 53, 60 (2009)(internal citations and quotations omitted).
>
> Testimony given under oath at a dangerousness hearing, pursuant to G.L. c. 276, § 58A, could be offered as a prior recorded testimony at trial when the victim was no longer available to testify. The Court found defendant had an opportunity and similar motive in cross-examining the declarant at the hearing and therefore the hearsay exception applied and admitting the statements did not violate the confrontation clause. *Commonwealth v. Hurley,* 455 Mass. 53 (2009).
>
> Keep in mind that a prior adequate opportunity to cross-examine exists even if during earlier cross-examination defense counsel didn't cover every detail and possible avenue of impeachment that counsel wishes to pursue, or if the subsequent trial involved additional evidence against the defendant that was

unknown at the time of the prior cross-examination. See *Commonwealth v. Sena*, 441 Mass. 882 (2004).

Admissibility depends upon a reliable record or report of the former testimony. The prior testimony must be able to be "substantially reproduced in all material particulars." Commonwealth v. Martinez, 384 Mass. 377, 381(1981). See G. L. c. 233, § 80 (official transcripts). A stenographic transcript of the prior testimony is the preferable way of establishing its content; the use of such a transcript is authorized under G. L. c. 233, § 80. In the absence of a transcript, a witness may testify to the testimony if it can be stated with substantial accuracy. *Id*. citing *Commonwealth v. Bohannon*, 385 Mass. 733, 746-747 (1982).

Practice Note: If you proceed on a dangerousness hearing and the victim testifies, be sure to order transcripts of the prior hearing in time to comply with discovery requirements, so that you could file a motion in limine to use the recording/transcript at trial.

c) Statement Against Interest

"A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, the exception does not apply to a statement that is offered to exculpate the defendant or that is offered by the Commonwealth to inculpate the defendant, and that tends to expose the declarant to criminal liability, unless corroborating circumstances clearly indicate the trustworthiness of the statement." Mass. G. Evid. § 804(b)(3) (2012).

7.2.5. Confrontation Clause:

Since the 2004 Supreme Court decision in *Crawford v. Washington*, it is no longer sufficient to say that the statement/evidence fits within a hearsay exception and therefore it is admissible. 541 U.S. 36 (2004). Instead, if the statement is testimonial, a prosecutor must also prove that the defendant's right to confrontation has been satisfied. This section will look at documentary evidence and statements as they relate to domestic violence prosecution. A review of *Crawford v. Washington* can be accessed in the MDAA webinar *Overcoming Crawford Objections,* http://www.mass.gov/mdaa/trainings-and-conferences/overcoming-crawford-objections-verbal-statements-.html.

7.2.5.1. Documentary Evidence:

Over the last several years, the courts have decided whether admitting various types of documentary evidence without a live witness violates the confrontation clause. ***A complete list of cases addressing whether the documentary evidence offered was deemed testimonial or not can be accessed through MDAA's Home Page on Prosecutors' Encyclopedia.*** The cases most pertinent to district court domestic violence prosecutions are provided below:

Hospital Records, G.L. c. 233 § 79: Not Testimonial

The defendant's medical records in an OUI case were not testimonial per se and when analyzed under the testimonial in fact test, they "clearly are related to evaluating his condition at the time of his admission in order to determine appropriate treatment. Nothing in the notations in this context suggests that the notations were made in anticipation of their use in investigation and prosecution of a crime." Therefore admission of the medical records did not violate the Sixth Amendment. *Commonwealth v. Lampron,* 65 Mass. App. Ct. 340 (2005).
A defendant's blood alcohol content result, which was taken pursuant to hospital's routine procedures and included in a hospital medical record is not testimonial in nature, and thus is not subject to the confrontation clause. Medical records do not violate the confrontation clause. *Commonwealth v. Dyer*, 77 Mass. App. Ct. 850 (2010).

Medical Records Authentication: Not Testimonial
The keeper of the records certificate authenticating medical records is explicitly excluded from the confrontation clause. The court cited *Melendez-Diaz* for authority and stated, "in effect, the certification is doubly removed from a right of confrontation. It constitutes a nontestimonial authentication of records of nontestimonial information." *Commonwealth v. McLaughlin*, 79 Mass. App. Ct. 670 (2011)

Return of Service on A Restraining Order: Not Testimonial
A properly completed and returned, 209A return of service is admissible hearsay under the official or public record exception. Its admission without live testimony from the serving officer does not violate the confrontation clause. The primary purpose of the service is to carry out the administrative functions of the court system and ensure the defendant received fair notice. While this service may be used for establishing a fact at the defendant's criminal trial, its primary purpose makes it not testimonial. *Commonwealth v. Shangkuan*, 78 Mass. App. Ct. 827 (2011)

7.2.5.2. **Statements:**

In order to determine whether a statement is testimonial a prosecutor will need to analyze the statement to determine if it is testimonial per se (statements made to law enforcement or other official forms of testimony) or testimonial in fact ("whether a reasonable person in the Declarant' position would anticipate the statement being used against the accused in prosecuting or investigating a crime").

DO YOU HAVE A *CRAWFORD ISSUE*?

You only have a *Crawford* issue, if
1) Offering the statement for the truth of the matter
2) The victim/declarant is unavailable
3) No prior opportunity for cross-examination; **AND**
4) ***THE STATEMENT is TESTIMONIAL***

If there is a C*rawford* issue with a statement, the following chart and the subsequent case summaries are designed to aid in the prosecutor's analyzing whether or not the statement is testimonial and implicates the confrontation clause.

IS THE STATEMENT TESTIMONIAL?

CONFRONTATION CLAUSE CASES for ANALYZING STATEMENTS:

The following is a small sample of the most recent cases discussing the analysis for admitting statements after *Crawford*. ***A more complete list of cases and summary of those cases can be found through MDAA's Home Page on Prosecutors' Encyclopedia.***

Not Testimonial Per Se: Emergency and Medical Care Exceptions

MI v. Bryant*, 562 U.S. 344, *131 S. Ct. 1143 (2011)
A victim's dying declaration, which included the identification of the shooter, and a description and location for the shooting, was admitted as an excited utterance and did not violate the confrontation clause. The Court recognizes that the emergency exception from *Davis* and *Hammon* extends beyond the danger to a domestic violence victim and includes the danger posed to the public and the police in a shooting case. Whether an ongoing emergency exists and whether the primary purpose of the interrogation is to resolve this emergency is a highly context dependent inquiry and requires objectively examining the encounter, the interrogator's statements and the declarant's statements to determine whether the statements were "procured with a primary purpose of creating an out of court substitute for trial testimony."

Applied to this case, the description of the shooter and the location of the shooting were not testimonial. The Court considered the involvement of a gun, the defendant's whereabouts were unknown, the nature of the dispute was unknown (if it was private the emergency would have ended), the informality of the encounter and that the declarant/victim statements were punctuated

with concern for when medical care would arrive and found the statements fell within the ongoing emergency/volatile scene exception.

***Commonwealth v. Smith,* 460 Mass. 385 (2011)**

The statement "He has a gun. He's wrapping it in a black sock," was not testimonial. The purpose of the statement was to elicit police assistance in securing a volatile scene. The court focused on the declarant's visible signs of anxiety; that the statement was made while the event was unfolding; the possibility of immediate danger to the police; the use of a gun, a weapon with lethal force; the danger to surrounding neighbors and found that the statements were not testimonial because the primary purpose was to secure an ongoing emergency. The Court considered the *MI v. Bryant* primary purpose test and clearly stated: "Thus, the 'primary purpose' inquiry is divorced from the subjective or actual intentions of the individuals involved in a particular encounter."

In the unpublished Appeals Court decision, *Commonwealth v. Smith,* 2009 Mass. App. Unpub. LEXIS 876, the court found it irrelevant to the Commonwealth's argument that the statement was volunteered rather than a response to law enforcement questioning: "[T]he confrontation clause is ultimately concerned with the nature of the statement admitted, and not the way it was elicited." The SJC did not touch upon this statement in its recent decision.

***Commonwealth v. Beatrice*, 460 Mass. 255 (2011)**

After the defendant punched the victim, she fled out of their shared apartment to use a neighbor's phone and call 911. The victim was unavailable at trial. The statement was admissible as an excited utterance and its admission did not violate the confrontation clause because it was within the volatile scene exception. The SJC upheld the Appeals Court decision in *Beatrice*. This was the first confrontation clause case after *MI v. Bryant*, and the court restated that for a statement to be non-testimonial there must be an ongoing emergency, and the primary purpose of the interrogation must be to meet that emergency. This is an objective analysis without consideration of the subjective or actual purpose of the individuals in the particular encounter. "The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." The court found there was an ongoing emergency given the recentness of the alleged assault, the defendant was still in their shared apartment, victim requested an ambulance and for the police to stop the defendant. It also noted that the 911 dispatcher's questioning was informal, focused on the medical needs and addressing the emergency and did not ask for any historic information.

In the Appeals Court decision*, Commonwealth v. Beatrice*, 75 Mass App. Ct. 153 (2009), the court considered the following factors in its determination: the victim's demeanor during the call (out of breath and frantic); the assault had taken place only moments earlier; the defendant was still in the apartment; and the victim needed an ambulance. The court noted that the dispatcher's questions were narrowly tailored to determine what was necessary to resolve the present emergency and did not reflect a high level of formality. The defendant argued that like *Commonwealth v. Lao* the physical separation between the victim and defendant alleviated the ongoing emergency. The court was not persuaded: "An ongoing emergency may still exist even though the victim and the assailant are physically separated at the time the 911 call is made."

***Commonwealth v. Simon*, 456 Mass. 280 (2010)**

The Supreme Judicial Court found that all but five statements made to a 911 dispatch were admissible because there was an ongoing emergency: the call was made to secure medical care for

shooting victims; dispatchers questions were tailored to address the emergency; identification information was necessary to determine whether the suspect was at the scene; the level of danger the first responders would encounter; and the questioning was informal. The statements concerning the details of the shooting and information about where the suspect worked out were inadmissible as they did not aid in securing an ongoing emergency. In its decision, the court clarified that statements, which fall within the emergency exception to testimonial per se, will never become testimonial in fact.

Not Testimonial in Fact

***Commonwealth v. Linton*, 456 Mass. 534 (2010)**

The defendant was charged with murdering his wife in February 2005. The Commonwealth sought to introduce prior bad acts by having the victim's father testify to her excited utterances approximately five months before the murder. In first reviewing the common laws of evidence, the court found the statement was an excited utterance: "A physical attack that leaves the declarant unconscious is an external shock sufficiently startling to serve as the basis of an excited utterance." Given that the victim was still hysterical, crying, nervous and in fear, the twenty minutes that passed between the incident and the statements did not diminish the excitement. The court next considered whether the statements were testimonial in fact. The victim never availed herself to the court system by way of either a restraining order or reporting the case to the police. Accordingly, the Court determined that the victim made the statements to explain to her father what happened and were not testimonial.

***Commonwealth v. Figueroa*, 79 Mass. App. Ct. 389 (2011)**

Commonwealth charged the defendant with sexual assaulting an 86 year-old patient at a nursing home. The victim suffered early dementia and was not called to testify at trial based on competency concerns. On the evening of the sexual assault a certified nurse assistant, Matthew Smith, walked in on the defendant sexually assaulting the victim. Within five minutes he asked the victim "if anything happened that night" and through his inquiry the victim provided various statements describing the sexual assault, which the victim thought was a "test" ordered by one of her doctors. The court held that the statements were made immediately after the assault and not a product of reflective thought because there was evidence that the victim was still frightened, very nervous and scared. They were admissible as excited utterances

Next, the court considered whether the statements violated the confrontation clause. The analysis began at testimonial in fact because the statements were made to a civilian. The court noted that the inquiry of testimonial in fact focuses on the objective view of a reasonable person in the declarant's position, not in the position of the person hearing the statement. It found the inquiry was in an informal setting (victim's room in a nursing home), it was related to medical care, and that a reasonable person in the victim's position would not anticipate that the statements would be used against the defendant to prosecute a crime. The statements were not testimonial in fact.

***Commonwealth v. Palmer*, 2010 Mass. App. Unpub. LEXIS 1369**

In an armed robbery and aggravated assault and battery by means of a dangerous weapon trial, in which the victim did not testify, statements made to a civilian were not testimonial in fact: "We fail to see how this victim, on the verge of unconsciousness, could have anticipated that her statements to the neighbor would be used to prosecute the defendant, notwithstanding that she had just asked her to call 911."

7.3. *OTHER EVIDENTIARY CONSIDERATIONS WHEN PREPARING FOR TRIAL*

7.3.1. Consciousness of Guilt Evidence

Testimony concerning the defendant's **actions in fleeing the scene, attempting to leave the jurisdiction, or hiding from law enforcement** is admissible as standard evidence of consciousness of guilt. "Evidence of flight, escape or concealment ... is admissible under appropriate circumstances as probative of the defendant's guilty state of mind." M.S. Brodin & M. Avery, Massachusetts Evidence § 4.2.1 , at 113 (8th ed. 2007). Also admissible for consciousness of guilt is evidence of false statements, giving a false name, evidence tampering, and **witness intimidation or bribery**. See MA Criminal Model Jury Instructions District Court 3.580 (revised May 2011); *Commonwealth v. Sowell*, 22 Mass. App. Ct. 959 (1986); *Commonwealth v. Toney*, 385 Mass. 575, 584 n.4 (1982).

In a criminal case, the Commonwealth may offer evidence of a defendant's conduct that occurred subsequent to the commission of the crime if

(1) the evidence reflects a state of consciousness of guilt;
(2) the evidence supports the inference that the defendant committed the act charged;
(3) the evidence is, with other evidence, together with reasonable inferences, sufficient to prove guilt; and
(4) the inflammatory nature of the conduct does not substantially outweigh its probative value.

Evidence of consciousness of guilt alone is not sufficient to support a verdict or finding of guilt. The judge should instruct the jury accordingly. Mass. G. Evid. § 1110 (2012).

If the defendant materially **altered his appearance after a crime**, it may be offered as evidence of consciousness of guilt. *Commonwealth v. Doucette*, 408 Mass. 454, 461 (1990*); Commonwealth v. Pina*, 406 Mass. 540, 548 (1990).

Consciousness of guilt evidence may be admitted even though the defendant presents plausible alternative explanations for the conduct that are consistent with innocence of the crime charged. M.S. Brodin & M. Avery, Massachusetts Evidence § 4.2.1, at 114 (8th ed. 2007).

The *Toney* Instruction: When consciousness of guilt evidence is admitted, the jury should be instructed that they are not to convict on the basis of that evidence alone; they may, but need not, consider the evidence as one factor tending to prove the guilt of the defendant. *Commonwealth v. Toney*, 385 Mass 575, 585-586 (1982).

7.3.2. Certification of Out-of-State Court Orders (e.g. Restraining Orders)

Proof of another state's court records is provided for under G. L. c. 233, § 69, which states that such records are admissible "if authenticated by the attestation of the clerk or other officer who has charge of the records of such court under its seal." This appears to endorse the introduction of out-of-state records through either a written certification or attestation of the out-of-state's court clerk. Case law also supports the introduction of records in either manner:

Commonwealth v. Rondoni, 333 Mass. 384 (1955) (Defendant's Connecticut record was admitted upon the certification by an assistant clerk on court stationery, to which the court seal was affixed, over his signature, that the "foregoing [record] is a true copy of the judgment rendered on [ ] in case # [ ], on file in records of this court"; SJC held the document met the requirements of G.L. c. 233, § 69).

Commonwealth v. Key, 381 Mass. 19 (1980) (Defendant's Virginia conviction was admitted upon the attestation of a Virginia deputy clerk. While prior cases established the principle that where the certifying officer is not the clerk, "it should appear by the certificate or otherwise that [the officer] has 'charge of the records'," *Willock v. Wilson*, 178 Mass. 68 (1901), the SJC upheld the admission, taking judicial notice of the Virginia law providing the deputy clerk with the same authority as the clerk and concluding that the deputy clerk had "charge of the records" for purposes of the statute).

Kaufman v. Kaitz, 325 Mass. 149 (1949) (The requirements of G.L. c. 233, § 69 are not applicable where the court clerk actually testifies to the authenticity of the records).

7.3.3. Descriptions of the Victim's Appearance and Demeanor

A lay witness may testify to the victim's appearance and any visible signs of injury. *Commonwealth v. Barber*, 261 Mass. 281, 288-289 (1927) (finger marks on the victim's legs).

7.3.4. Prior Consistent Statements: "Rehabilitation"

You should be ready to offer prior consistent statements by the victim, which are admissible when offered in response to defense claims of recent contrivance, bias, improper influence, or motive. *Commonwealth v. Jiles*, 428 Mass. 66 (1998); M.S. Brodin & M. Avery, Massachusetts Evidence § 6.22, at 370-371. The statements need to have been made prior to the motivation to contrive. *Id*. at 372. The statement will be admissible to show the testimony is not a product of the alleged bias or contrivance, but it is not admissible for the truth of the matter asserted. *Id*. at 373.

7.3.5. Prior Inconsistent Statements

a) As Substantive Evidence

In a case where you anticipate the victim will take the stand and minimize or recant on the facts of an incident, if applicable, consider offering the victim's restraining order affidavit as substantive evidence. The affidavit of a restraining order may be offered as substantive evidence when the restraining order is written in the declarant's own words and the declarant is available for cross-examination. *Commonwealth v. Belmer*, 78 Mass. App. Ct. 62 (2010), *further appellate rev. den.,* 459 Mass. 1101 (affidavit offered to show inconsistencies in a reluctant victim's trial testimony). Be mindful that you cannot secure a conviction exclusively on the inconsistent extrajudicial statement and instead will need to provide corroborating evidence. The test for corroboration is lenient and requires a showing that the crime is real and not imaginary. *Id.* ***Motion to Offer a 209A Affidavit as Substantive Evidence is provided in Appendix B.***

b) For Impeachment

An affidavit for a restraining order could not be admitted as a prior inconsistent statement where the affiant testified that she did not remember writing the affidavit, because there

was no inconsistency between the witness's present failure of memory and her past existence of memory. The affidavit was properly admitted to impeach the witness, but not as substantive evidence. *Commonwealth v. Johnson*, 49 Mass. App. Ct. 273, *further appellate rev. den*., 432 Mass. 1105 (2000). But see *Commonwealth v. Daye*, 393 Mass. 55, 73 and n.17 (1984) (overruled on other grounds) ("We leave open the question whether, when the circumstances at trial indicate that a witness is falsifying a lack of memory, a judge may admit the statement as 'inconsistent' with the claim of lack of memory").

If a police officer neglects to include "important details" of an incident in his police report but testifies to those details at trial, the trial judge must, upon the defendant's request, instruct the jury that it may consider prior inconsistent statements in determining the witness's credibility. The Court reasoned that an omission from the earlier statement is inconsistent with a later statement of fact when it would have been natural to include the fact in the earlier statement. *Commonwealth v. Ortiz*, 39 Mass. App. Ct. 70, *further appellate rev. den*., 432 Mass. 1105 (1995).

7.3.6. Preparing for the Defense of Self-Defense

Self-defense is often offered in domestic violence cases. It is important to limit self-defense testimony and evidence in domestic violence cases because they expose the victim to scrutiny and cross-examination about her (possibly violent) past. This may leave her hostile on the stand and unwilling to testify. It shifts the focus away from the defendant's action and puts focus on the victim's character. Once self-defense is raised the Commonwealth bears the burden of proving that the defendant did not act in self-defense, beyond a reasonable doubt. Said another way, "[i]f the jury has a reasonable doubt whether or not the defendant acted in self-defense, the verdict will be not guilty." Model Jury Instructions Instruction 9.260 Self-Defense [Use of Non-Deadly Force].

Character Evidence in Self-Defense

Character Evidence is evidence of a person's character or trait offered to prove that the party acted in conformity therewith. It can be in the form of opinion, reputation, or specific acts. Generally, character evidence is not admissible in Massachusetts. One exception is that the character of the victim may be offered in criminal proceedings to support a claim of self-defense. Mass. G. Evid. § 404(a)(2). Opinion evidence is not an admissible form in Massachusetts. There are two theories of self-defense and different character evidence can be offered for each one:

1) **The Defendant Acted Out Reasonable Apprehension of Violence**
   A defendant may offer evidence to show he acted out of reasonable apprehension of violence. Evidence that may be offered to show he acted out of an apprehension of violence includes either reputation evidence or evidence of a specific incident but it must be ***known to the defendant*** at the time of alleged crime.

2) **The Victim was the First Aggressor**
   A defendant may offer evidence that shows the victim was the first aggressor. Showing that the victim was the first aggressor may be done by offering specific

incident(s) of victim's violent behavior. These incidents need not be known to the defendant at the time of incident.

- Defense counsel must provide notice of a first aggressor defense no later than 21 days after the pretrial hearing. Mass. R. Crim. Pro. R. 14 (b)(4) (Effective September 2012).
- The Commonwealth can now provide rebuttal evidence of the defendant's prior violent acts to show the defendant was the first aggressor. The Commonwealth must give the defendant "notice appropriately in advance of its intent to introduce such evidence" and the trial judge must determine "that introduction of such evidence is more probative of its intended purpose than prejudicial to the defendant." *Commonwealth v. Morales*, 464 Mass. 302 (2013). In addition to the time frames established in *Morales*, Mass. R. Crim. Pro. R. 14 (b)(4)(B) also creates discovery obligations for the Commonwealth, with regards to rebuttal evidence. The Commonwealth must within 30 days of receiving defense's notice of a first aggressor defense provide reciprocal disclosure. This reciprocal disclosure includes a description of the rebuttal evidence the Commonwealth intends to use, as well as, the names, addresses and dates of birth of any rebuttal witnesses.
- A judge must find that the rebuttal evidence is more probative than prejudicial before it will be admissible. *Id*.
- ***Contemporaneous Jury Instructions***: If rebuttal self-defense evidence is offered at trial by the Commonwealth, "the trial judge must instruct the jury specifically on the proper and limited use of such evidence both contemporaneously with the introduction of the evidence at the end of the case." *Id*.

See Motion to Offer Rebuttal Self-Defense Evidence in Appendix B.

A webinar on the Defense of Self-Defense in Domestic Violence Cases is available at MDAA's website: http://www.mass.gov/mdaa/trainings-and-conferences/the-defense-of-self-defense.html.

7.4. *PREPARING MOTIONS IN LIMINE*

Motion practice is important in domestic violence cases. This is true for cases where there is a history of violence between the parties, and either a motion for prior bad acts or joinder will help the prosecution or when the victim is no longer available. The following are a brief list of motions that prosecutors should consider filing in domestic violence cases when applicable.

7.4.1. Motion for Admission of 911 Call/Statements

In domestic violence cases, prosecutors frequently need to rely on out of court statements when proceeding with evidence-based prosecution. A motion to admit an out of court statement should be filed in advance of the start of trial and include case law concerning the hearsay exception being utilized and the applicable *Crawford* analysis.

Motion for Admission of Statements made in 911 Call is Included in Appendix B.
Motion for Admission Statements Made to a Civilian is Included in Appendix B.

7.4.2. Forfeiture by Wrongdoing

Forfeiture by wrongdoing is a powerful tool in prosecuting domestic violence cases when the victim is unavailable and the defendant procured her unavailability. The SJC recognized the doctrine in *Commonwealth v. Edwards,* 444 Mass. 526, 527-528 (2005): "whereby a defendant is deemed to have lost the right to object (on both confrontation and hearsay grounds) to the admission of the out-of-court statements of a witness whose unavailability the defendant has played a meaningful role in procuring."

The Commonwealth must file a motion in limine for forfeiture by wrongdoing and request an evidentiary hearing. At that hearing, through live witness testimony the Commonwealth must prove by a **preponderance of the evidence** that

1) The witness is unavailable;
2) The defendant was involved in, or responsible for, procuring the unavailability of the witness; and
3) The defendant acted with the intent to procure the witness's unavailability. *Id.* at 540

Evidence a prosecutor can offer at the hearing; includes but is not limited to, jail recordings (after filing a R. 17 motion and acquiring tapes) and testimony from victim's friends, family, victim advocate, or police officer.

A prosecutor may proceed with forfeiture by wrongdoing even if the victim was a willing participant in the event that made her unavailable, so long as the Commonwealth can prove that the defendant "actively facilitate[] the carrying out of a witness's independent intent not to testify." *Commonwealth v. Szerlong*, 457 Mass. 858, 862 (2010)(forfeiture shown where the victim married the defendant to avoid testifying).

Be mindful that if forfeiture by wrongdoing is allowed, the defendant waives his right to object based on hearsay and the confrontation clause. However, a conviction secured with this evidence needs to satisfy the requirements of due process. A webinar on forfeiture by wrongdoing can be accessed at http://www.mass.gov/mdaa/trainings-and-conferences/forfeiture-by-wrongdoing.html.

Motion for Forfeiture by Wrongdoing is Included in Appendix B.

7.4.3. Defendant's Prior Bad Acts

Generally, prior bad acts of the defendant are inadmissible to show the defendant's character or propensity to commit a crime. However, prior bad acts can be offered for these discreet purposes: 1) Common scheme; 2) Pattern of operation; 3)Absence of accident or mistake; 4) Identity; 5) Intent; or 6) Motive. *Commonwealth v. Helfant*, 398 Mass. 214, 224 (1986).

When you spoke with the victim, did she identify any prior incidents of violence? How close in time is that incident to your charged offense? If the evidence is admissible for a purpose other than the past incident showing a propensity to commit the charged crime, consider filing a motion for prior bad acts. If the court allows the motion for prior bad acts, this

evidence can be critical to explain the hostile nature of the relationship, a pattern of abuse, motive, identity, the reasonableness of the victim's fear and to negate any of the potential defenses in the case.

A webinar on Prior Bad Acts is available at MDAA's website: http://www.mass.gov/mdaa/trainings-and-conferences/prior-bad-acts.html.

See Appendix B for two Sample Prior Bad Acts Motions.

Annotations

"The admission of such evidence generally is 'a matter on which the opinion of the trial judge will be accepted on review except for palpable error.'" *Commonwealth v. Martino*, 412 Mass. 267, 280 (1992) (quoting *Commonwealth v. Young*, 382 Mass. 448, 462-63). See also *Commonwealth v. Fordham*, 417 Mass. 10, 22-23 (1994); *Commonwealth v. Cordle*, 404 Mass. 733, 744 (1989).

Even prior misconduct directed towards individuals other than the victim, not connected with the charged offense, may be admissible as evidence of part of an ongoing criminal enterprise or plan, and to show the defendant's criminal intent. *Commonwealth v. Helfant*, 398 Mass. 214, 227 (1986).

Evidence of prior bad acts may be properly admitted in a domestic violence case where the acts are relevant to or probative of the crimes charged and the defendant's relationship to the victim. See *Commonwealth. v. Martinez*, 43 Mass. App. Ct. 408 (1997); See also *Commonwealth v. Eugene*, 438 Mass. 343, 348-349 (2003)(evidence that victim obtained abuse prevention order against defendant was admissible to demonstrate evidence of a hostile relationship and existence of some form of dispute, tension, or hostility between the victim and the defendant).

Evidence of prior acts of violence was admissible where it was limited to show a pattern of conduct by the defendant. *Commonwealth v. Butler*, 445 Mass. 568 (2005); *Commonwealth v. Crimmons*, 46 Mass. App. Ct. 489 (1999).

Evidence of incidents after the charged incident may also be admitted: *Commonwealth v. Myer*, 38 Mass. App. Ct. 140 (1995). In *Myer*, the court found that an incident seven months after the charged offense tended to prove that assaulting the complainant was a critical element of the defendant's hostile relationship with her -- that his hostility was a vital aspect of his "state of mind." The evidence had probative value outweighing any prejudice, and the credibility of the complainant was critical to the prosecution's case in light of the complainant's vacillation in pressing charges. Thus, the prosecution had a substantial and legitimate interest in rehabilitating the complainant by showing the charged conduct was not an isolated event, but rather part of a pattern, and in assisting the jury to understand the victim's relationship to the defendant and her apparent vacillation on cross. *Id*.

7.4.4. **Joinder**

Joining cases in domestic cases may be beneficial for several reasons and can be done early in the prosecution of the case or at trial. First, it can result in an increase the severity of the charges against the defendant. For example, you may be able to seek a complaint for stalking in violation of a restraining order (mandatory 1 year sentence) instead of handling three separate violations of restraining order. It will also help the Commonwealth show the nature of the relationship and establish the severity of the situation for the victim by showing this was not an isolated incident. Successful joinder ensures that prior evidence of a hostile relationship will be admitted because the Commonwealth will not rely on the judge's discretion in ruling on a motion for prior bad acts. Refer to Mass. R. Crim. Pro. R. 9 for guidance on filing for joinder. An excerpt of that rule is provided below:

(a) Joinder of Offenses.

(1) Related Offenses. Two of more offenses are related offenses if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.

(2) Joinder of Related Offenses in Complaint or Indictment. If two or more related offenses are of the same or similar character, they may be charged in the same indictment or complaint, with each offense stated in a separate count.

(3) Joinder of Related Offenses for Trial. If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice.

See Appendix B for Sample Motion and Memorandum of Law in Support of Joinder.

8. TRIAL ISSUES

8.1. *DEVELOPING A THEME AND THEORY FOR THE CASE*

As a prosecutor, you must make the defendant's behavior make sense to the jury. This is achieved by creating and utilizing a theme of the case. It should be one sentence that summarizes the case, including the defendant's actions. The theory goes more to the defendant's motive and means. The two concepts are closely related and important to present to a jury when trying a domestic violence case. Remember, the defendant's actions are what brought the incident to court. Make sure your prosecution remains focused around the defendant and not the victim.

8.2. *IMPANELLING THE JURY AND VOIR DIRE*

The procedures for impaneling the jury are set forth in Mass. R. Crim. Proc. 20. Generally the voir dire is examined on oath as a group to determine if any of them are related to either party, have any interest in the case, have expressed or formed an opinion, or are sensible of any bias or prejudice. Jurors are then called until a full number is seated. Excuses (I can't leave work; I am sole care taker of my pet iguana, etc.) and challenges for cause are then considered. Finally, peremptory challenges are exercised -- first by the Commonwealth, and then by the defendant.

8.2.1. Challenges

- ***To the Array***
  Either party may challenge the array by a motion for appropriate relief pursuant to Rule 13(c), on the ground that the prospective jurors were not selected or drawn according to law.

- ***For Cause***
  Prospective jurors may be questioned to learn whether they are related to either party, have any interest in the case, have expressed or formed an opinion, or are sensible of any bias or prejudice. The prospective juror may be examined about extraneous issues if it appears the issues may have affected the juror's impartiality. Either party may challenge for cause. The burden is initially on the party seeking to challenge for cause to demonstrate that such cause exists. *Reynolds v. United States*, 98 U.S. 145, 157 (1879). The judge then determines whether the challenge is proper -- whether the reason for the challenge would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). In doing so, the judge is accorded wide discretion. *Commonwealth v. Latimore*, 396 Mass. 446, 449 (1985).

  Prosecutors are permitted to use potential juror's CORI information to determine "their qualifications to serve and their impartiality." *Commonwealth v. Cousin*, 449 Mass. 809, 816 (2007). This type of record check should be done at the start of the trial and shared immediately with defense counsel. *Id*.

- ***Peremptory***
  Each defendant is entitled two peremptory challenges in a trial before a jury of six. The Commonwealth is entitled to "as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled." Mass. R. Crim. P. 20 (c) (1). *Commonwealth v. Soares*, 377 Mass. 461, 486-489 (1979) prohibits the use of peremptory challenges to exclude prospective jurors solely because of their sex, race, color, creed, or national origin. There is no constitutional basis for challenging the exclusion of young persons, *Commonwealth v. Samuel*, 398 Mass. 93, 95 (1986); *Soares* does not prohibit the exercise of peremptory challenges based on age. *Commonwealth v. Wood*, 389 Mass. 552, 564 (1983).

8.2.2. Improper Exclusion by Race or Gender

Neither the defendant nor the Commonwealth may use peremptory challenges solely for reasons of race, color, gender, religion, or national origin; such a practice violates articles 1 and 12 of the Declaration of Rights. *Commonwealth v. Soares*, 377 Mass. 461, 486, 489 n.35 (1979). Also, under equal protection analysis, excluding a juror on the basis of gender or race is improper as it implies the juror holds stereotypical views assumed to be common to the juror's group. See *Batson v. Kentucky*, 476 U.S. 79, 82-84 (1986). Peremptory challenges based on how a juror looks or a prosecutor's "gut" feeling is rarely adequate because they can easily be pretexts for discrimination. *Commonwealth v. Maldonado*, 439 Mass. 460 (2003).

"The Commonwealth is equally entitled to a fairly selected and representative jury, and may challenge a defendant's exercise of peremptory challenges, if it appears that the goal of

obtaining a representative jury is being purposely thwarted." *Commonwealth v. Fruchman*, 418 Mass. 8, 13 (1994).

If you feel the defendant is improperly excluding potential jurors or if the defendant objects to your peremptory challenges, the following procedure must be followed:

1) The objecting party must make a prima facie showing of a discriminatory motive, by demonstrating a "pattern" of excluding members of a discrete group and the likelihood that membership in that group is the basis for the challenge. *Commonwealth v. Harris,* 409 Mass. 461, 467 (1991).
2) If the court finds the moving party made the requisite prima facie showing, the defendant will have to provide a race or gender neutral explanation for the challenge. *Commonwealth v. Vann Long*, 419 Mass. 798, 807 (1995). The explanation must be "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, but a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection" *Purkett v. Elam*, 115 S. Ct. 1769, 1771 (1995). The explanation need not rise to the level of a challenge for cause, but it must be based on a juror characteristic other than race or gender, and the explanation may not be pretextual. *Commonwealth v. Young*, 401 Mass. 390, 401 (1987).
3) The court will decide if the moving party proved purposeful discrimination. The court should make an explicit finding as to a showing of both a pattern of exclusion of a discreet group AND reasonable inference that the challenge is based on membership in the group. If the court sustains the challenge, the remedy is in the court's discretion. The struck juror may be reinstated, or the venire may be quashed and started again. See *Commonwealth v. Fruchtman*, 418 Mass. 8, 15 (1994). If improperly challenged jurors have already been excused, the judge must obtain an entirely new venire, because the objecting party is entitled to a random draw from a venire that has not been even partially stripped of members of a cognizable group by improper peremptory challenges. *Comm. v. Hutchinson*, 395 Mass. 568 (1985).

8.2.3. Voir Dire for Domestic Violence Cases

You should use jury selection to explore potential jurors' attitudes on domestic violence and to explore their backgrounds for bias. One way to do this is to offer the court proposed voir dire questions that address these issues. Below are several possible voir dire questions for impanelling a jury in a domestic violence case:

- Do you feel that family problems that lead to violence should be handled in the home, and not in our criminal courts?
- Do you feel that prosecuting crimes that occur in the home, among domestic partners, is a waste of the taxpayers' money?
- Do you feel a person has a right to use physical force on his spouse or companion?
- Do you think that the law allows family members to hit or punch other family members?
- Do you think that violence that occurs between family members should be treated differently from violence that occurs between strangers?

- Do you think society should be any more concerned or any less concerned about prohibiting violence between people who know each other than between people who are strangers?
- Do you think that an assault in a kitchen is different from an assault in the street?
- Have you ever experienced fear due to apprehension of violence?
- Have you ever been abused or struck by your spouse or partner?
- Have you ever abused or struck your spouse or partner?
- Have you ever known a victim of domestic abuse -- a victim of abuse from a spouse, or from a girlfriend or boyfriend, or from a relative?
- Have you ever known a domestic abuse offender?
- Has someone ever attempted to or successfully taken out a restraining order against you, a close friend, or family member?
- Have you ever heard what you believe was a physical altercation taking place at a neighbor's home? If so, did you call the police?
- Have you ever had occasion to call the police for your own protection from domestic violence?
- Would you have any negative feelings toward a witness because she (he) is testifying against her husband (wife/partner)?
- Do you believe a woman (husband/partner) should stay married to a man (wife/partner) who is physically violent to her, since he is her husband (wife/partner)?
- Do you think a person who is being abused has an obligation to leave a violent relationship?
- If a person is abused and does not leave the marriage (relationship), does that factor make the abuse less grievous or more tolerable?
- If a wife (husband/partner) is abused by her husband (wife/partner), but she does not report the abuse to the police, does that factor make the abuse less grievous or more tolerable?
- Do you believe that in a marriage (relationship) the wife (one partner) must be obedient or submissive to the husband (the other partner)?
- Would you have negative feelings about the defendant or alleged victim because they live(d) together in an intimate relationship but are/were not married? Or because they have children together but have never been legally married?
- If evidence is presented that convinces you beyond a reasonable doubt of the defendant's guilt, would it be difficult for you to follow the law and convict the defendant because of your religious or philosophical beliefs?
- Do you believe the Commonwealth should not prosecute if the victim is not present in court to testify?
- Do you have any feelings that the government should not have the right to prosecute a case if the victim does not want the government to do so?
- Are you familiar with the phrases, "The victim dropped charges" and "The victim pressed charges"? Do you understand that it is the Commonwealth of Massachusetts, not the victim, prosecuting the defendant for these crimes? Do you understand that a victim cannot "drop charges" or decide "not to press charges"?

- Do you agree that the Commonwealth has a responsibility to prosecute persons who cause violence in the home even though the victim -- whether out of loyalty or love or fear or persuasion -- does not want to proceed?

8.3. *OBSTACLES TO PROSECUTION, AND STRATEGIES TO HANDLE THEM*

8.3.1. Trial Delay

Delays in trial often results in an absent or uncooperative victim. Delays allow time for the defendant to try and persuade the victim not to participate. Mass Rules of Professional Conduct RULE 3.2 EXPEDITING LITIGATION speaks directly to this issue: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. Comment [1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay." While most judges will allow defense's continuances, make sure you make an objection for the record noting the presence of your victim.

8.3.2. 5th Amendment Assertions by the Victim

Fifth Amendment assertions in domestic violence cases are frequent and frustrating. If a victim alerts you to a Fifth Amendment right, you are obligated to inform the court. Generally an attorney will be appointed to speak to the victim. It is the role of the victim's attorney to advise the victim concerning any potential Fifth Amendments, and report back to the court. It is not the role of that attorney to assert or decide whether a Fifth Amendment exists. Once an attorney is appointed for the victim, your communications with the victim should include the presence of her appointed attorney.

The Judge's Role in Assessing Fifth Amendments:
Whenever a witness or the attorney for a witness asserts the privilege against self-incrimination, the judge "has a duty to satisfy himself that invocation of the privilege is proper in the circumstances." *Commonwealth v. Martin*, 423 Mass. 496, 503 (1996).

The mere assertion of the privilege is not sufficient. The witness or counsel must show "a real risk" that answers to the questions will tend to indicate "involvement in illegal activity," as opposed to "a mere imaginary, remote or speculative possibility of prosecution." *Id*. at 502.

There is NO Fifth Amendment right for future perjury
"[A] witness may not claim the privilege out of fear that he will be prosecuted for perjury for what he is about to say, although he may claim the privilege if his new testimony might suggest that he had perjured himself in testifying on the same subject at a prior proceeding." *Commonwealth v. Borans*, 388 Mass. 453 (1983) (citing *United States v. Partin*, 552 F.2d 621, 632 (5th Cir.), cert. denied, 434 U.S. 903 (1977). See *United States v. Fortin*, 685 F.2d 1297, 1298 (11th Cir. 1982);

United States v. Housand, 550 F.2d 818, 823 (2d Cir.), cert. denied, 431 U.S. 970 (1977)).

Martin Hearing
If the court is unable to make the required finding that a basis exists for the assertion of the privilege, it may conduct an in camera hearing (hereafter "*Martin* hearing") and require the witness to "open the door a crack." *Commonwealth v. Martin*, 423 Mass. at 504–505.

We emphasize that a *Martin* hearing should be conducted only as an exception to the information provided in open court. See *Commonwealth v. Sanders*, 451 Mass. 290, 295-296 (2008). Indeed, before a *Martin* hearing is conducted, the judge should invite the parties to provide the court with information that may shed light on whether the witness's testimony, both on direct and cross-examination, could possibly tend to incriminate him. Only in those rare circumstances where this information is inadequate to allow the judge to make an informed determination should the judge conduct an in camera *Martin* hearing with the witness to verify the claim of privilege. *Pixley v. Commonwealth*, 453 Mass. 827, 833 (2009).

Commonwealth's Motion to Request a Martin hearing is included in Appendix B.

The Fifth Amendment is Not a Blank Assertion: it should be asserted on the stand in response to a specific question.
"A witness also is not entitled to make a blanket assertion of the privilege. The privilege must be asserted with respect to particular questions, and the possible incriminatory potential of each proposed question, or area which the prosecution might wish to explore, must be considered." *Commonwealth v. Martin*, 423 Mass. 496, 502 (1996).

For example, a Fifth Amendment assertion will not prevent you from calling a witness to the stand to identify her attacker or to acquire testimony about another discreet issue in the case that does not implicate the witness's Fifth Amendment.

8.3.3. Spousal Privilege

"Except as otherwise provided in section seven of chapter 273 and except in any proceeding relating to child abuse, including incest, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other." G.L. c. 233, § 20, clause two states:

This statute privileges a witness-spouse from testifying against the other spouse in a criminal trial only; it does not apply to a spouse summonsed to appear before a grand jury. *In the Matter of a Grand Jury Subpoena*, 447 Mass. 88 (2006).

Only the witness-spouse may claim the privilege. **The witness-spouse may waive her privilege and testify**. *Commonwealth v. Saltzman*, 258 Mass. 109, 154 (1927). However, if a spouse testifies in the grand jury, it does not constitute a waiver of the privilege at trial. *In the Matter of a Grand Jury Subpoena*, 447 Mass. 88 (2006).

Spousal Disqualification

General Laws c. 233, § 20, clause one disqualifies husbands and wives from testifying to private conversations with each other (including grand jury proceedings). However, this disqualification does not apply in "any criminal proceeding in which one spouse is a defendant alleged to have committed"

"a crime against the other spouse"; or

"to have violated a restraining order" (types of order are specified in the statute); or

"a proceeding involving abuse of a person under the age of eighteen, including incest"

8.3.4. Motion to Dismiss

At trial, you may need to oppose the defendant's motion to dismiss. This topic is discussed in detail in section 6.3.1. of this trial notebook.

8.4. *OPENING STATEMENTS*

The opening statement is the first time a prosecutor gets to speak to the jury about his or her case and it is important to learn ways to advocate without arguing. MDAA's Webinar, Opening Statements: Advocacy without Argument, reviews the purpose and goals of opening statements, discusses the restrictions for opening statements and suggests best practices for delivering an effective opening. Access this webinar at http://www.mass.gov/mdaa/trainings-and-conferences/opening-statements-advocacy-without-argument.html.

8.5. *DIRECT EXAMINATION*

8.5.1. Generally

The Commonwealth's direct examination is the victim's opportunity to tell her version of the incident. The majority of domestic violence cases rely heavily on credibility and you should be prepared to offer a direct examination that allows the victim to speak to the jury.

In preparing for trial, consider making a chart of the areas you will need to cover with your victim. Be careful to listen to her response, and ask follow-up questions when appropriate. Never assume that the jury knows the colloquial language the victim is offering and follow-up by asking her to explain what she meant when she said "he was slammin' me."

8.5.2. Using Demonstrative Evidence

While not every domestic violence case will have physical evidence to offer, consider using a chalk, or demonstrative evidence, in all of your cases. Demonstrative evidence is used for illustrative purposes. It can help the jury better understand the victim's testimony on direct exam and will allow the witness to explain details of the case to the jury. The following chalks can be helpful in domestic violence cases: a timeline, diagram or drawing of where the incident occurred, a picture of where the incident occurred, a family tree or a picture of the weapon used. Although a chalk will not be published to the jury during deliberations, make sure you mark the chalk for identification to preserve it for a potential appeal.

8.5.3. Reluctant Witness

If your victim is reluctant to testify, you will need to spend time preparing her and yourself for direct examination. If she is reluctant, remind her that you all are there because of the defendant's actions, which resulted in a crime being committed, and that his decision not to admit culpability is why the trial is necessary. Make it clear that It is not her fault that she will be called to testify against the defendant.

Deciding Not to Call a Reluctant Witness:

If the victim remains reluctant, you will have to choose whether to compel the witness to the stand. You may decide not to call her at all, for a number of reasons. First, forcing a victim to testify may complicate a precarious relationship with an abuser and increase the risks to her safety. Second, forcing a victim to testify may hinder her recovery and/or further traumatize her. Third, forcing a reluctant victim to testify at a time when she is minimizing or denying the abuse she has suffered may result in recorded testimony, under oath, of lies which may come back to haunt you when she is ready, at a later time, to pursue another crime the defendant commits against her. The prior testimony will be a rich source of impeachment for the defense in the future.

Strategies for Calling a Reluctant Witness to Testify:

In certain situations you may decide to call a reluctant or refusing witness to the stand. You may decide to do so in order to inquire and ascertain, on the record and in front of the jury, that the victim has been coerced or intimidated. You may decide the case is best served, and the victim's safety best protected, by calling her to the stand despite her reluctance: perhaps the danger is so great you and the advocate feel you must prosecute now as best you can. If you decide to call a reluctant or minimizing witness to the stand, consider the following strategies:

- If the victim previously applied for a restraining order, consider asking the court to admit the affidavit as substantive evidence if and when she testifies inconsistently. See section 7.3.5. (a) of this trial notebook for additional information about prior inconsistent statements as substantive evidence. ***A Motion for Offering a Restraining Order Affidavit as Substantive Evidence is Provided in Appendix B.***

- Consider asking the court and laying the foundation to treat her as an adverse witness. If she is an adverse witness, you will be allowed to employ leading questions (questions that suggest to the witness the answer desired by the examiner).

- Consider impeaching your witness:
  G.L. c. 233, § 23, impeachment of party's own witness:
  "The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them."

- If she claims to have no memory of making the prior statements, use the statements to refresh her recollection. See *Commonwealth v. Hartford*, 346 Mass. 482, 487(1963) (leading questions were not impeachment but rather refreshed witness's recollection), and *Commonwealth v. Reddick*, 372 Mass. 460 (1977) (cross-examiner not barred by series of answers of "I don't remember"; prior written statements were used to refresh recollection).

- Confront her (gently!) with relevant physical evidence which supports her original account (pictures of her bruises, her torn clothing, damaged items from the scene of the assault, etc.)

Suggested Direct Examination Questions for a Reluctant Victim are provided in Appendix C.

At all times, on and off the stand, treat her respectfully. She may be acting with her own personal safety foremost in her mind. It is not our role to be judgmental of her personal choices.

A webinar on Recanting Witnesses is available at http://www.mass.gov/mdaa/trainings-and-conferences/recanting-witnesses.html.

8.6. *PREPARING FOR DEFENSE'S CASE*

8.6.1. Anticipating the Defense

In preparing for trial, you should anticipate the defense that will be offered and prepare to counter this defense. There are only a limited number of defenses that can be offered in domestic violence cases, and they are discussed below.

"It never happened/She exaggerates"
Defense's strategy will be to discount the credibility and testimony of your witnesses and bolster the credibility of their percipient witnesses. Collecting any evidence that corroborates the victim's account will be helpful in combating this defense. Some examples of helpful evidence are pictures, hospital records, other witnesses and 911 calls.

"I acted in self-defense"
Counsel should give you advance notice of self-defense. You will want to offer the jury evidence of who called the police, consider the size and injury of the parties and the police report on demeanor of victim and defendant.

See Section 7.3.6. of this Notebook for more information on preparing for a defense of self-defense.

A Motion to Preclude Bad Character References to the Victim is Included in Appendix B.

8.6.2. Defense Witnesses

Before your trial begins, you will want to know the purpose of each of defense's witnesses. Besides percipient witnesses, scrutinize and guard heavily against reputation or character witnesses. ***A Motion to Voir Dire a Defendant's Potential Character Witness is Included in Appendix B.*** In preparing for the cross-examination of defense's witnesses, consider the following approaches to impeachment.

Impeachment by Certified Copies of Convictions:

No matter what the defense is offering as a theory, you must be prepared for the cross-examination of their witnesses. Make sure that defense provided you adequate notice of his witnesses. In preparing for trial, make sure you run a board of probation report on all potential witnesses and if there are any certified convictions that can be used at trial, get a certified copy of those convictions and provide notice of your intention to use the convictions to counsel and the court. Prior convictions for crimes involving fraud and deceit are highly probative of a defendant's credibility regardless of their prejudicial character. *Commonwealth v. Diaz*, 383 Mass. 73, 79 (1981); see also *Commonwealth v. Elliot*, 393 Mass. 824, 835 (1985) (conviction for a crime of violence is probative of a defendant's disregard for accepted norms of conduct, including the sworn obligation to tell the truth); *Commonwealth v. Whitman*, 416 Mass. 90, 93 (1993) (same). See G.L. c. 233, § 21 for time limit requirements regarding the use of convictions to impeach (the limits depend on whether the conviction was for a misdemeanor or a felony, whether a state prison sentence was served, and whether subsequent convictions have occurred within certain time frames).

The decision to admit a prior criminal conviction is within the judge's discretion. Such discretion must be exercised with particular care when the Commonwealth proposes to impeach a defendant with a conviction for a crime similar to the one for which he is being tried, "particularly a crime not reflecting previous untruthfulness." *Commonwealth v. Chase*, 372 Mass. 736, 750 (1977).

Prior Inconsistent Statements:

A witness's testimony may be challenged by showing that he made a contradictory statement -- either oral or written -- at some time prior to trial. In order to impeach, it is not necessary that the prior statement be a complete, plain or explicit contradiction of his trial testimony. *Commonwealth v. Simmonds*, 386 Mass. 234 (1982). It is sufficient if "taken as a whole, either by what it says or by what it omits to say, [it] affords some indication that the fact was different from the testimony." *Commonwealth v. West*, 312 Mass. 438, 440 (1942); M.S. Brodin & M. Avery, Massachusetts Evidence § 6.13.2, p. 318-319 (8th ed. 2007).

> There is no inconsistency between a present failure of memory on the witness stand and a past existence of memory. Mass. G. Evid. § 613, Note subsections (a)(2) and (3) (2012).
>
> Consider the various sources which may reveal material for impeachment: evidence of prior inconsistent statements may be gathered from other

witnesses, pretrial statements, transcripts of prior hearings or cases, reports, letters, documents, etc.

Impeaching the Defendant:

If the defendant takes the stand or offers witnesses, impeaching their version of events can be done in several ways. Consider establishing the motive to lie, bias, or prejudice of the defense witness during cross-examination. It may be possible to establish the defendant's bad character by calling a rebuttal witness to testify to the defendant's reputation for truth and veracity or to provide evidence of the defendant's general reputation. A witness will not be permitted to testify about the defendant's character in general nor can the party testify to specific acts of lying or misconduct. See M.S. Brodin & M. Avery, Massachusetts Evidence § 6.16, at 347 (8th ed. 2007).

8.7. *USING MEDICAL RECORDS AT TRIAL*

Offering medical records can corroborate your victim's testimony or may be necessary to prove a case based on evidence only. There are several things to keep in mind when offering medical records at trial and publishing them to the jury.

- Medical records must be offered pursuant to G.L. c. 233, § 79 and may not be offered as business records, G.L. c. 233, § 78. *Commonwealth v. Irene*, 462 Mass 600 (2012).
- *Section 79 of G. L. c. 233* "permits the admission in evidence, in the judge's discretion, of certified hospital records 'so far as such records relate to the treatment and medical history.'" *Commonwealth v. Dargon*, 457 Mass. 387, 394 (2010).
- Under G.L. c. 233, § 79 a "record which relates directly and mainly to the treatment and medical history of the patient, should be admitted, even though incidentally the facts recorded may have some bearing on the question of liability." *Commonwealth v. DiMonte,* 427 Mass. 233, 242 (1998).
- Must redact statements concerning identification. "…but nothing therein contained shall be admissible as evidence which has reference to the question of liability" G.L. c. *233, § 79.*
- Must redact "ultimate conclusions concerning the charged crimes" *Commonwealth v. Dargon*, 457 Mass. at 395 (the word assault and assailant on SANE FORM 2 needed to be redacted before being published to the jury).

A webinar, Using Medical Records at Trial, is available at http://www.mass.gov/mdaa/trainings-and-conferences/using-medical-records-at-trial.html .

When publishing redacted medical records to a jury, consider asking the court to given a jury instruction concerning redaction. ***A sample instruction can be found through MDAA's homepage on Prosecutors' Encyclopedia.***

8.8. *CLOSING ARGUMENT*

Closing argument is the prosecutor's final opportunity to persuade the jury or a judge that the facts prove the defendant's guilt. A prosecutor's closing argument requires both skillful advocacy and an acute awareness of the pitfalls that can create reversible error. MDAA's webinar on closing arguments provides participants with suggestions for persuasive advocacy and reviews the distinctions between proper and improper arguments and can be accessed through MDAA's website at: http://www.mass.gov/mdaa/trainings-and-conferences/closing-arguments.html .

9. SENTENCING

In domestic violence cases, sentencing recommendations should be based on the defendant's criminal history; more specifically, his success/failure on probation, prior periods of incarceration and any history of domestic violence. Sentencing recommendations must also take into consideration the severity of the incident, the safety needs of the victim, her family, and the community at large. When applicable, request the Certified Batterer's Intervention Program. Be mindful of the defendant's mental health and substance abuse issues when formulating a sentencing recommendation.

The 2014 Act, § 20 amended G.L. c. 258B, § 8 and added a domestic violence prevention fee and victim assistance assessment of $50 in the following cases: protective order violations; conviction or adjudication for an act which constitutes 209A § 1 abuse; and violations of 13M or 15D.

9.1. *CERTIFIED BATTERER'S PROGRAM*

9.1.1. **Restraining Order Violations**

"For any violation of such order, the court shall order the defendant to complete a certified batterer's intervention program unless, upon good cause shown, the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention. The court shall not order substance abuse or anger management treatment or any other form of treatment as a substitute for certified batterer's intervention." G.L. c. 209A, § 7. This section now mandates the certified batterer's intervention program for continuations without a finding on a 209A violation. 2014 Act, § 15.

> "In sentencing a person for a violation of any provision of this chapter, the penalty for which includes imprisonment, a judge sitting in superior court or in a jury of six session who does not impose such sentence of imprisonment shall include in the record of the case specific reasons for not imposing a sentence of imprisonment. Notwithstanding any general or special law to the contrary, the record of such reasons shall be a public record." G.L. c. 265, § 41.

9.1.2. **Strangulation and Domestic Assault and Battery**

The 2014 Act mandated a sentence including certified batterers program for the crime of strangulation/suffocation, G.L. c. 265, § 15D and for Domestic Assault and Battery, G.L. c. 265, § 15M. For any violations of these sections or as a condition for a CWOF the court shall order a Certified Batterer's Intervention Program, unless upon with good cause shown, the court issues specific written findings why it should not be ordered or the defendant is not suitable for intervention. 2014 Act, §§23-24.

10. APPENDIX A: DISTRICT COURT DOMESTIC VIOLENCE CHARGES

Assault ("Simple Assault") c. 265, § 13A

assaults another (by an attempted battery) or (by an offer of harm which places another in reasonable apprehension of an immediate battery)	2 1/2 yrs. house or $1000

Simple assault is either an attempted battery or an unlawful offer of harm which places another in reasonable fear or apprehension of an immediate battery. *Commonwealth v. Gorassi*, 432 Mass. 244, 247 (2000); *Commonwealth v. Slaney*, 345 Mass. 135, 138 (1962).

Two Theories of Assault:

Attempted Battery

Attempted battery requires **proof of "a conscious design" to achieve a criminal end and proof of an overt act.** See *Commonwealth v. Ortiz*, 408 Mass. 463, 470 (1990) (defendant searched for but never found intended victim).

Mere preparation and planning is not enough. See *Commonwealth v. Peaslee*, 177 Mass. 267, 271-72 (1901).

Sufficient: Placed poison on the lip of the intended victim's cup. *Commonwealth v. Kennedy*, 170 Mass 18, 21 (1897).

The overt acts relied upon to support a charge of attempt must be alleged in the complaint. *Commonwealth v. Burns*, 8 Mass. App. Ct. 194, 196-207 (1979).

An assault by means of an attempted battery is defined by a defendant's intent to cause bodily harm to the victim. *Commonwealth v. Prater*, 431 Mass. 86, 99 (2000).

Fear on the part of the victim need not be proved in the common law crime of assault. *Commonwealth v. Slaney*, 345 Mass. 135, 139 (1962).

In case of attempted battery type of assault, there is no requirement that victim be aware of attempt or put in fear by it, but in case of threatened battery type of assault, Commonwealth must prove that defendant engaged in objectively menacing conduct with intent to put victim in fear of immediate bodily harm. *Commonwealth v. Gorassi*, 432 Mass 244 (2000).

Attempted battery is a lesser included offense of threatened battery, which has the additional element of intending to instill fear or apprehension in the victim. *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 524-25, *rev'd*, 421 Mass. 610 (1996).

Threatened Battery

It is well established that an act placing another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault. *Commonwealth v. Delgado*, 367 Mass. 432, 437 (1975), and cases cited therein.

Commonwealth need not prove the defendant had the actual ability to carry out the threat. *Commonwealth v. White*, 110 Mass. 407, 409 (1872).

A threat of future violence is not an assault, as the victim is not placed in apprehension of an immediate battery. Informational words offering actual violence, as opposed to words that are merely menacing, may substitute for a movement or gesture and complete an assault. See *Commonwealth v. Delgado*, 367 Mass. 432, 436-37 (1975) (defendant implied he had a gun).

Defendant's Intent

Under the theory of the crime of assault of "immediately threatened battery," the Commonwealth must prove an intent to cause fear or apprehension on the part of the defendant. *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519 (1995), *rev'd on other grounds*, 421 Mass. 610 (1996).

Proof of intent to cause fear is required in case of threatened battery. *Commonwealth v. Spencer*, 40 Mass. App. Ct. 919 (1996).

Objectively menacing conduct intended to arouse fear or the apprehension of imminent bodily harm constitutes threatened battery. *Commonwealth v. Gorassi*, 432 Mass. 244, 247 (2000).

"In a case of simple criminal assault, the Commonwealth need not prove that the defendant actually intended to harm the victim, it need only prove that the defendant's threats were reasonably calculated to place the victim in imminent fear of bodily injury." *Commonwealth v. Matsos*, 421 Mass. 391, 395 (1995).

Victim's Fear

An assault committed by means of a threatened battery requires that the victim be aware of the threatening act. *Commonwealth v. Chambers*, 57 Mass. App. Ct. 47 (2003).

In determining whether an apprehension of anticipated physical force is reasonable, a court will look to the actions and words of the defendant in light of the attendant circumstances. *Id.* at 436-37.

If the defendant's conduct is intentionally menacing, the Commonwealth is not required to prove that the victim was actually placed in fear, only that a reasonable person in the victim's position would have anticipated the imminent use of force. The assault is determined by the defendant's intentional conduct; the victim's state of mind is irrelevant. *Commonwealth v. Slaney*, 345 Mass. 135, 139 (1962) ("(N)either fear, nor terror nor apprehension of harm is an essential ingredient of the common law crime of assault").

Estranged husband's intimidating behavior towards his wife could have reasonably been interpreted by a jury as "creat(ing) a picture of a volatile situation in which the possibility of physical abuse was present" despite the lack of any testimony by the wife that she was actually fearful of harm. *Commonwealth v. Gordon*, 407 Mass. 340, 349-50 (1990).

Warrantless Arrest:
If a police officer has reason to believe that defendant's conduct towards persons protected under G.L. c. 209A placed that person in fear of imminent serious physical harm, **warrantless arrest** for assault may be made. *Commonwealth v. Jacobsen*, 419 Mass. 269 (1995).

Assault w/ Intent to Commit Felony (i.e. to kill) c. 265, § 29

assaults another with intent to commit felony	10 yrs. prison; or $1,000 and 2 1/2 yrs. house (if punishment of such assault "not hereinbefore provided")

Assault with intent to kill consists of assault, specific intent to kill, and mitigating factor of heat of passion induced by sudden combat or reasonable provocation, while assault with intent to murder consists of assault, specific intent to kill, and absence of mitigation. *Commonwealth v. Nardone*, 406 Mass. 123 (1989).

Assault w/Intent to Murder, Maim, or Disfigure c. 265, § 15

assaults another with intent to commit murder or to maim or disfigure (cuts tongue, destroys eye, cuts/tears off ear, cuts/slits/mutilates nose or lip, cuts off /disables limb or member)	10 yrs. prison; or $1,000 and 2 1/2 yrs. house

Assault with intent to murder requires proof of both malice and a specific intent to kill. *Commonwealth v. Henson*, 394 Mass. 584, 590-93 (1985).

Malice, as the element differentiating assault with intent to murder from assault with intent to kill, "can only mean the absence of mitigation, i.e., the absence of reasonable provocation, sudden combat, or excessive force in self-defense." *Commonwealth v. Nardone*, 406 Mass. 123, 131 (1989).

Assault by Means of a Dangerous Weapon ("Aggravated Assault") c. 265, § 15B

by means of a dangerous weapon commits assault upon another	5 yrs. prison or $1000 or 2 1/2 yrs. house
victim 60 or older	if 2d offense: same, min. 2 yrs. to be served

Aggravated assault is either an attempted battery by means of a dangerous weapon or an unlawful offer of harm by means of a dangerous weapon. *Commonwealth v. Slaney*, 345 Mass. 135, 138 (1962).

Conviction requires proof of overt act undertaken with intention of putting another person in fear of bodily harm and reasonably calculated to do so, whether or not defendant actually intended to harm victim. *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987 (1984).

Behavior for the offense is outward demonstration of force, which breaches the peace and requires only apparent ability to injure. *Commonwealth v. Appleby*, 380 Mass. 296 (1980)(unloaded gun that only the defendant knew was unloaded can be a dangerous weapon).

The type of weapon alleged in a complaint of assault dangerous weapon is not an essential element of the crime. *Commonwealth v. Rumkin*, 55 Mass. App. Ct. 635 (2002).

Defendant's Intent:
Intent may be inferred on the basis of an overt act which puts another person in fear and that fear is reasonable. *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1008 (1988) (defendant brandished tire iron).

Any misplaced confidence on the part of the defendant in the efficacy of the weapon or any undisclosed inability to bring about the threatened harm is immaterial. *Commonwealth v. Cataldo*, 423 Mass. 318, 319 n.1 (1996).

Possession of the Weapon:
Defendant who told victim he had knife and would kill her if she screamed was properly convicted of ADW, **even in absence of evidence that he actually displayed or brandished weapon**. *Commonwealth v. Foley*, 17 Mass. App. Ct. 238 (1983) (*overruled on other grounds, Commonwealth v. McLaughlin*, 431 Mass. 506 (2000)).

The presence or apparent presence of a weapon may be inferred from a defendant's informational words, such as "hold him or I am going to shoot him." *Commonwealth v. Delgado*, 367 Mass. 432, 435-437 (1975).

Conviction for armed robbery improper where defendant, with his hand held suggestively in his pocket, threatened "to pull the trigger," but was arrested in the victim's presence, and no weapon was found. *Commonwealth v. Howard*, 386 Mass. 607, 609-10 (1982). *Compare* to cases where Defendant was apprehended weeks after robbery, no weapon found, and court said ok because defendant could have disposed of weapon during the interval: *Commonwealth v. Tarrant (No. 2)*, 14 Mass. App. Ct. 1022, 1023 (1982); *Commonwealth v. Jackson*, 419 Mass. 716, 724-25 (1995); or *Commonwealth v. Powell*, 40 Mass. App. Ct. 430, 434 (1996) (gun could have been thrown away as the defendant fled). Prosecutor could also argue applicability of logic from *Commonwealth v. Caracciola*, 409 Mass. 648, 652 (1991): "the (rape victim) was entitled to take the defendant's threatening words [that he was a police officer and would 'lock her up'] … at face value."

What is a Dangerous Weapon?
The weapon need not be dangerous in fact but need only reasonably appear as such. *Commonwealth v. Henson*, 357 Mass. 686, 693-694 (1970) (starter's pistol).

A dangerous weapon is any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm. There can be little doubt that a dog (in this case a medium-sized German shepherd) used for the purpose of intimidation or attack falls within the definition of dangerous weapon. *Commonwealth v. Tarrant*, 2 Mass. App. Ct. 483, 485 (1974), *aff'd*, 367 Mass. 411, 417 (1975)(internal quotations and citations omitted).

Toy gun may be a dangerous weapon if the victim is put in fear from this gun. *Commonwealth v. Nicholson*, 20 Mass. App. Ct. 9, 17 (1985).

Assault by means of a dangerous weapon when the defendant put his truck into drive and "lurched" at the victim, a police officer, who was standing only a few feet away, stopping only when the officer aimed his

service weapon at defendant; defendant's overt act of putting the truck into drive and driving it at the officer was more than sufficient to permit the inference that defendant's conduct was intentional. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429 (2010).

Firing a gun through living room window of home, from car moving quickly up the street constitutes assault with a dangerous weapon. *Commonwealth v. Iancono*, 20 Mass. App. Ct. 83 (1985).

Jury could properly have found that the duct tape used by the assailant was a "dangerous weapon," where the evidence showed that the duct tape, which was two and a half inches wide, was used to cover and close the victim's mouth, thereby affecting the victim's ability to breathe. *Commonwealth v. Mattei*, 455 Mass. 840 (2010).

Assault & Battery c. 265, § 13A

assault and battery	2 1/2 yrs. house or $1000
if causes serious bodily injury; or commits assault upon a pregnant woman, knowing or having reason to know she is pregnant; or upon another who he knows has an outstanding temporary or permanent restraining or no contact order	5 yrs. or 21/2 or $5,000 or both

A&B is intentional, unprivileged, unjustified touching of another with such violence that bodily harm is likely to result; offensive touching may be direct, as by striking another, or indirect, as by setting in motion some force or instrumentality with the intent to cause injury. *Commonwealth v. Dixon*, 34 Mass. App. Ct. 653 (1993).

Intentional force on the person of another, however slight, if offered without justification or excuse, is a battery. *Commonwealth v. McCan,* 277 Mass. 199, 203 (1931).

Intentional and unconsented spitting on another constitutes a criminal battery. *Commonwealth v. Cohen*, 55 Mass. App. Ct. 358 (2002).

Deliberately setting in motion an injurious force may result in a battery. See *Commonwealth v. Stratton*, 114 Mass. 303 (1873) (poisoned food).
"(I)f, by a wrongful act, a man '**creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself**, the person who creates such a state of mind' is criminally responsible for those injuries." *Commonwealth v. Bianco*, 388 Mass. 358, 362-63 (1983)(rev'd on other grounds); *Commonwealth v. Parker*, 25 Mass. App. Ct. 727, 734 (1988) (wife injured while struggling to escape from her distraught husband).

Assault and battery by means of reckless, wanton and willful conduct requires actual physical injury as necessary element of required proof. *Commonwealth v. Welch*, 16 Mass App 271 (1983).

Assault and battery is a lesser included of rape where evidence supported a finding that A&B was part of the ongoing felony of rape. *Commonwealth v. Ortiz*, 47 Mass. App. Ct. 777, *rev. den*., 430 Mass. 1110 (1999).

Defendant's Intent:
Wanton and reckless behavior is the legal equivalent of intentional conduct for purposes of battery. *Commonwealth v. Sheppard*, 404 Mass. 774, 776 n.1 (1989). The essence of wanton or reckless conduct is intentional conduct, by way either of commission or omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." *Commonwealth v. Welansky*, 316 Mass. 383, 402 (1944).

Battery does not require proof of a specific intent to injure; only general intent to do the act causing injury. *Commonwealth v. Appleby*, 380 Mass. 296, 307-08 (1980).

Proof of intent to cause fear is required in case of threatened battery. *Commonwealth v. Spencer*, 40 Mass. App. Ct. 919 (1996). An assault committed by means of a threatened battery requires that the victim be aware of the threatening act. *Commonwealth v. Chambers*, 57 Mass. App. Ct. 47 (2003).

Defendant's intent transfers, for example, one who shoots, intending to hit A, and accidentally hits and injures B, is liable for an assault and battery on B. *Commonwealth v. Hawkins*, 157 Mass. 551, 553 (1893).

Not a Viable Defense:
Consent is immaterial to a harmful touching offered "with such violence that bodily harm is likely to result." *Commonwealth v. Burke*, 390 Mass. 480, 482 (1983).

Spouses may not use force to discipline one another. *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871).

Voluntary intoxication is not a defense. *Commonwealth v. Malone*, 114 Mass. 295, 298 (1873).

Defendant not entitled to jury instruction on necessity in A&B trial where defendant claimed that he slapped his girlfriend only because he feared that she had overdosed and it was his way of waking her up. Where defendant's version is "debatable or speculative." the defendant's actions were not an effective means of abating any danger, and where other alternatives would have been better than slapping his girlfriend, such as calling 911, necessity defense is unwarranted. *Commonwealth v. O'Kane*, 53 Mass. App. Ct. 466 (2001), *further appellate rev. den.*, 436 Mass. 1102 (2002).

Serious Bodily Injury:
Under G.L. c. 265, § 13A, "impairment" of a bodily function occurs when a part or system of the body (other than organ or limb) is significantly impeded in its ability to fulfill its role. "Impairment" of an organ occurs when damage to the structure of the organ is significant enough to compromise its ability to perform its function in the victim's body. And, "impairment" of a limb occurs when, because of significant damage to its structure, its capacity to perform its usual function is compromised. The degree of impairment must be more than "merely transient and trifling."
The use of medical records alone to establish the severity of the injury to the victim may be insufficient to meet the Commonwealth's burden. *Commonwealth v. Scott*, 464 Mass. 355 (2013).

Assault & Battery, Family or Household Member c. 265, § 13M

Assault and Battery, when the defendant and victim: - Are or were married - Have a child in common - Are in a substantial dating relationship** ** same definition as 209A, § 1	Not more than 2.5 HOC, up to a $5,000 fine, or by both and mandatory CBIP
Second or Subsequent Offense	Not more than 21/2 HOC or 5 years prison and mandatory CBIP (no fine available)

This new crime has a different definition for "family and household" than c. 209A, § 1. It excludes "are or were residing together in the same household" and "are or were related by blood or marriage."

Assault & Battery, Elderly or Disabled Person c. 265, § 13K

elder person (60 or older) or disabled person (mentally or physically disabled, wholly or partially dependent on another person to meet his daily living needs)	3 yrs. prison or 2 1/2 yrs. house or $1,000 or both fine and prison
if causes bodily injury (sustained impairment i.e. burn, fracture, hematoma, injured organ, repeated harm to bodily function or organ, including skin)	5 yrs. prison or 2 ½ yrs. house or $1000 or both fine and prison
if serious bodily injury	10 yrs. prison or 2 1/2 yrs. house or $5,000 or both
caretaker of (family, fiduciary, or contractual duty) elderly/disabled wantonly or recklessly permits bodily injury to such person or wantonly or recklessly permits another to commit an assault & battery upon such person which causes bodily injury	5 yrs. prison or 2 1/2 yrs. house or $5,000 or both
if wantonly or recklessly commits or permits another to commit abuse, neglect or mistreatment upon such elder or disabled person	3 yrs. prison or 2 ½ yrs. house or $5,000 or both
if serious bodily injury	10 yrs. prison or 2 1/2 yrs. house or $10,000 or both

Assault & Battery, Dangerous Weapon c. 265, § 15A

Assault & Battery by means of dangerous weapon	10 yrs. prison or 2 ½ yrs. house or $5,000 or both

if person 60 or older commits ABDW on another causing serious bodily injury (permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death); or commits ABDW on another who is pregnant (knowing or having reason to know victim is pregnant); or commits ABDW on another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment in effect; or commits ABDW where offender is 17 yrs or older and victim is a child under 14;	10 yrs. prison or 2 ½ yrs. house or $1,000 2d offense: min./mand. 2 yrs. to be served 15 yrs. prison or 2 ½ yrs. house or $10,000 or both

The Commonwealth can prove circumstantially that the defendant intentionally assaulted and battered his victim *Commonwealth v. Roman*, 43 Mass. App. Ct. 733 (1997), *aff'd*, 427 Mass. 1006 (1998) (exposing 18-month-old child to unknown scalding agent while the child was alone in defendant's custody sufficient ABDW).

Defendant's Intent:

ABDW "..does not require specific intent to injure; it requires only general intent to do the act causing injury." *Commonwealth v. Appleby*, 380 Mass. 296, 307 (1980); see also *Commonwealth v. Waite*, 422 Mass. 792 (1996).

ABDW "...requires proof only that the defendant intentionally and unjustifiably used force, however slight, upon the person of another, by means of an instrumentality capable of causing bodily harm." *Quincy Mutual Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 87 n.4 (1984).

The jury should be instructed that the defendant intended to touch the victim with the dangerous weapon; the jury need not be instructed that the defendant intended to use the object as a dangerous weapon. *Commonwealth v. Garofalo*, 46 Mass. App. Ct. 191 (1999).

Wanton or reckless conduct resulting in harm to another is the legal equivalent of intentional conduct for purposes of aggravated battery. *Commonwealth v. McLaughlin*, 87 Mass. 507, 509 (1862).

Evidence supported the instruction that the jury could find ABDW based on reckless conduct (defendant struck victim in face with axe handle): defendant testified "just swung," "no intention," opening up possibility of a conviction based on reckless conduct. *Commonwealth v. Cleary*, 41 Mass. App. Ct. 214 (1996).

Not Dangerous Weapon:

Human teeth and other parts of the body are not dangerous weapons although they may be used to inflict permanent injuries serious enough to warrant a mayhem conviction. See *Commonwealth v. Davis*, 10 Mass. App. Ct. 190, 196 (1980).

Ocean could not be a dangerous weapon as it couldn't be possessed or controlled by defendant *Commonwealth v. Shea*, 38 Mass. App. Ct. 7 (1995) (defendant threw two women overboard, five miles out at sea, after they refused his sexual advances).

Dangerous Weapon:
Certain weapons are classified as dangerous *per se;* use in a dangerous fashion need not be proved, i.e. firearms, daggers, stilettos, brass knuckles, mace and dirk knives. *Commonwealth v. Appleby*, 380 Mass. 296, 308 (1980); *Commonwealth v. Lord*, 55 Mass. App. Ct. 265, *rev. den.*, 437 Mass. 1108 (2002).

Whether objects which are not designed to inflict death or grievous injury, but are capable of being used in a dangerous or potentially dangerous fashion, are dangerous weapons is decided by considering the object's nature, size, and shape, the manner in which it was handled or controlled, and by the circumstances surrounding the assault. *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984).

That a dangerous weapon was used may be inferred from the victim's injuries, see *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 923-24 (1984) (whether defendant wore boots or sneakers immaterial in light of victim's injuries); even if no weapon is recovered or described in testimony, *Commonwealth v. Roman*, 43 Mass. App. Ct. 733, 736 (1997), aff''d, 427 Mass. 1006, 1008 (1998).

Conviction supported by victim's testimony that defendant struck her, knocked her to ground, punched her, kicked her, and pressed something against her back, which she took to be a gun; by officers' observations of injuries; and by medical summary of victim's condition. *Commonwealth v. Johnson*, 41 Mass. App. Ct. 81 (1996).

Footwear can be used as a dangerous weapon, *Commonwealth v. Durham*, 358 Mass. 808, 809 (1970), only if "because of the manner in which it is used, ... [it] endangers the life or inflicts great bodily harm, or is calculated as likely to produce death or serious bodily injury." *Commonwealth v. Sinnott*, 399 Mass. 863, 878 (1987).

Evidence sufficient for shod foot ABDW, even if Comm. did not prove exactly what kind of shoes defendant was wearing, where there was evidence the defendant kicked victim viciously around the head and the victim suffered head injury. *Commonwealth v. Zawatsky*, 41 Mass. App. Ct. 392 (1996).

Defendant, convicted of armed robbery, used his sneakers as a dangerous weapon where he (20 yrs. old, 175 lbs.) "stomped real hard" on a 74 year-old woman's abdomen while she was lying on cement. The Comm. was not required to show that the defendant intended to use the sneakers as a weapon. *Commonwealth v. Tevlin*, 433 Mass. 305 (2001).

"The prosecutor should keep in mind the distinction between the kicking foot, incidentally encased in a shoe, and the shoe or boot used deliberately to inflict injury." Stearns, District Court Prosecutors' Guide, p. 406 (2001) (citations omitted).

Automobile, used to back over and knock down police officer on motorcycle, was a dangerous weapon. *Commonwealth v. Saia*, 18 Mass. App. Ct. 762 (1984).

Large ring may be dangerous weapon from manner in which it is used. *Commonwealth v. Rossi*, 19 Mass. App. Ct. 257 (1985).

Lighted cigarette is not per se, but may become DW by manner in which it is used. *Commonwealth v. Farrell*, 322 Mass. 606 (1948).

Ordinary innocuous items can be considered dangerous weapon when they are used in improper and dangerous manner. Stationary object, e.g. sidewalk, can be a dangerous weapon when it is used as a means of inflicting serious harm. *Commonwealth v. Sexton*, 425 Mass. 146 (1997) (joint venture; defendant's brother repeatedly banged victim's head against pavement while defendant kicked him.). Windowpane can be a dangerous weapon where defendant used his fists to shatter window, causing shards of glass to seriously injure victim. *Commonwealth v. McIntosh*, 56 Mass. App. Ct. 827 (2002), *rev. den.*, 438 Mass. 1109 (2003).

Not a Defense:
Consent to ABDW is ineffective. *Commonwealth v. Appleby*, 380 Mass. 296, 311 (1980). That a dangerous weapon is used in the context of a private adult sexual relationship with the full consent of the battered victim is irrelevant. *Id.* at 309-311.

Voluntary intoxication neither justifies nor mitigates a battery with a DW. *Commonwealth v. Malone*, 114 Mass. 295, 298 (1873).

The complaint may be amended at any time to conform the specification of the weapon to the evidence. *Commonwealth v. Salone*, 26 Mass. App. Ct. 926, 929-30 (1988). See also *Commonwealth v. Rumkin*, 55 Mass. App. Ct. 635 (2002) (type of weapon alleged in assault dangerous weapon complaint not necessary since it is not an essential element of the crime).

Criminal Harassment c. 265, § 43A

willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress	$1,000 or 2 ½ years house or both
after conviction, commits second or subsequent such crime OR having previously been convicted of a violation of section 43 (stalking)	2 ½ years house or **10 years prison**

The criminal harassment statute, G.L. c. 265, § 43A (a), is not overbroad nor vague and is constitutional on its face. *Commonwealth v. Johnson*, Supreme Judicial Court, December 23, 2014.

Section 43A(a) was not unconstitutional as applied to the facts, where the defendants' pattern of harassing conduct included both communications made directly to the victims and false communications made to third parties through Internet postings, which encouraged the third parties to engage in harassing conduct toward the victims. The pattern of harassing conduct that included speech was not protected by the First Amendment, but rather, a hybrid of conduct and speech integral to the commission of a crime. *Id*.

The "seriously alarms" prong of G.L. c. 265, § 43A (a) does not require that each of the separate acts of harassment caused serious alarm; rather, the Commonwealth must show the overall pattern of conduct alarmed the victim. *Id*.

Requires a showing of at least **three separate incidents** of willful and malicious conduct to support a conviction, and may include conduct or acts involving harassing speech or statements. *Commonwealth v. Clemens*, 61 Mass.App. Ct. 915 (2004); *Commonwealth v. Welch*, 444 Mass. 80 (2005).

Unexpected and menacing appearances in places where the victim frequents, after being advised to stay away, satisfy the elements of willful and malicious conduct under the criminal harassment statute even if the defendant never spoke to the victim. *Commonwealth v. Paton*, 444 Mass. 1104 (2005).

When instructing a jury regarding the charge of criminal harassment, the element of substantial emotional distress must be specifically defined as something that is markedly greater than that commonly experienced as part of ordinary living. *Commonwealth v. Robinson*, 444 Mass. 102 (2005).

Willful conduct is established with proof that the conduct was intentional, not that the consequences of the conduct were intended. An act is done maliciously if it is done willfully without justification or mitigation. *Commonwealth v. O'Neil*, 67 Mass. App. Ct. 284 (2006).

Defendant's convictions of violating 209A order were not duplicative of his conviction of criminal harassment, as the two crimes had different elements, and the conduct forming the basis of the criminal harassment charge predated service of the 209A order and violations thereof and thus was distinct from that forming the basis of the 209A order violations. *Commonwealth v. Kulesa*, 455 Mass. 447 (2009)
Act of regularly driving on a public street, looking at people in their driveways or on their porches, or at their dogs and gardens, could not alone support conviction of a wilful and malicious act directed at a specific person under G. L .c 265, § 43A. *Commonwealth v. McDonald*, Mass. LEXIS 361 (2012).

Destruction of Property c. 266, § 127

willful and maliciously destroys or injures personal property, dwelling or building of another not particularly described in other sections of c. 266 value of property greater than $250	Felony: 10 yrs. prison; or $3,000 or 3 times the value of property, whichever greater, and 2 1/2 yrs. House
if wanton and value of property is greater than $250 (other elements same as above)	Misdemeanor: $1,500 or 3 times the value of the property, whichever greater; or 2 1/2 yrs house
if value of property less than $250, either willful and malicious **or** wanton (other elements same as above)	Misdemeanor: 3 times the value of the damage or injury to the property or 2 1/2 months house

Willful or Malicious:

Willful or malicious act injurious to property is deemed criminal when it is shown to have been committed with a spirit of cruelty, revenge, or hostility. Wanton destruction of property concerns a

spirit of indifference or recklessness, perhaps even arrogance or insolence, but not cruelty, revenge or hostility. *Commonwealth v. Ruddock*, 25 Mass. App. Ct. 508 (1988).

"**Willful"** means intentional and by design, in contrast to that which is thoughtless or accidental. *Commonwealth v. McGovern*, 397 Mass. 863 (1986). **"Malicious"** refers to state of mind of cruelty, hostility or revenge. *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437 (1983). Both willfulness and malice must be proved beyond a reasonable doubt. *Commonwealth v. Armand*, 411 Mass. 167, 170 (1991).

A wilful actor intends both his conduct and the resulting harm, whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm. *Commonwealth v. Smith*, 17 Mass. App. Ct. 918, 920 (1983).

Wanton:

Wanton conduct is synonymous with a reckless disregard for the rights of others. *Commonwealth v. Byard*, 200 Mass. 175, 177-178 (1908).

Wanton destruction requires only a showing that the actor's conduct was indifferent to or in disregard of probable consequences. *Commonwealth v. Armand*, 411 Mass. 167, 171 (1991).

Lesser Included:

Wanton is **not** a lesser included offense of willful and malicious since wanton requires proof of an element not required for willful and malicious (that the likely effect of the defendant's conduct is substantial harm). *Commonwealth v. Schuchardt*, 408 Mass. 347 (1990).

Value of the Property:

To determine whether a malicious destruction of property offense is a felony (damage greater than $250) or a misdemeanor (damage is less than $250) where only a portion of the property is damaged, the "value of the property" is the reasonable cost of repair or replacement, or the pecuniary loss. This also applies to the felony offense of wanton destruction of property. *Commonwealth v. Deberry*, 441 Mass. 211 (2004).

The finder of fact may determine from common experience or descriptive testimony that the damaged property has a value in excess of $250. *Commonwealth v. Hosman*, 257 Mass. 379, 386 (1926).

An owner may be permitted to offer an opinion as to the value of his property. *Selby Associates v. Boston Redevelopment Authority*, 27 Mass. App. Ct. 1188, 1190 (1989).

Intimidation of Witness/Victim c. 268, § 13B

(1) victim was a witness or a juror in a criminal or civil proceeding (or any person furnishing information to a criminal investigator) (2) defendant willfully endeavored (tried) to influence him/her (impede, obstruct, delay or interfere with, by means of gift, offer or promise of anything of value, or by misrepresentation; or injure person or property)	2 1/2 yrs house or 2 1/2 - 10 yrs. prison; and $1,000 - $5,000

(3) defendant did so by means of intimidation, force, or threats of force, whether express or implied (4) defendant did so with the specific intent of influencing her testimony or verdict.	

Cases may be brought either where the underlying case is being prosecuted or in the jurisdiction where the intimidation occurs. G.L. c. 268, § 13B.

The term "witness" includes any person who has been or who may possibly be called upon to testify in a criminal proceeding. *Commonwealth v. Burt*, 40 Mass. App. Ct. 275, 277-78 (1996). The exact nature of the underlying criminal proceeding is irrelevant. *Commonwealth v. Wiencis*, 48 Mass. App. Ct. 688, 691 (2000).

Defendant's Intent:
Because the test is objective, the **defendant's subjective intent is irrelevant**. *Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 236 (1998).

Use of "endeavors" indicates legislative intent to punish any willful conduct that amounted to "effort or essay." **Endeavor is a lower threshold than attempt**. *Commonwealth v. Rondeau*, 27 Mass. App. Ct. 55 (1989).

While defendant's intent may have had an element of ambiguity, his violent confrontation with a witness at the very door of the courtroom could have led a jury to properly infer that his purpose was either to rattle the witness or to influence his testimony. *Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 800-801 (1998).

Intimidation:
The intimidation of a witness statute has a broad scope and proscribes activity beyond attempts to influence a witness's testimony. *Commonwealth v. Cathy C*, 64 Mass. App. Ct. 471 (2005).

Intimidation, unlike a threat of force, does not require that a victim be placed in fear or apprehension of actual physical harm. *Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 235-236 (1998).

Not essential element that actual witness or juror be approached. *Commonwealth v. Rondeau*, 27 Mass. App. Ct. 55 (1989) (victim's niece paid by mistake, instead of victim, to drop A&B).

Pulling phone cord out of a wall after his sister-in-law stated that she was going to call police was sufficient because the defendant "forcefully interfered with his sister-in-law's attempt to furnish information to the police… ." There is no requirement that the investigation be "on-going" when the intimidation occurs. *Commonwealth v. Isle*, 44 Mass. App. Ct. 226, *further app rev. den.*, 427 Mass. 1103 (1998).

Defendant called witness day after she testified in a stalking case made statements intending to frighten her. *Commonwealth v. Potter*, 39 Mass. App. Ct. 924 (1995).

A charge of witness intimidation under § 13B may trigger a motion by the Commonwealth for pretrial detention pursuant to Mass. Gen. Laws c. 276, § 58A.

In light of the abusive nature of defendant's relationship with his girlfriend, the victim of an assault, and the vehemence and timing of his demands regarding her statements in an affidavit, a rational jury could have concluded that defendant had endeavored to influence his girlfriend by means of force or threats of force in violation of G. L. c. 268, § 13B. *Commonwealth v. Pagels*, 69 Mass. App. Ct. 607 (2007) review denied 449 Mass 1113 (2007).

When defendant was prosecuted for witness intimidation for pointing a cellular telephone at an undercover officer waiting to testify against defendant and making a gesture consistent with using the telephone to take the officer's picture, even if an obvious link between defendant's acts and intent were not shown, it could be reasonably inferred, when defendant suggested that defendant sent the pictures allegedly taken to defendant's home computer, that defendant intended to unlawfully influence the officer's testimony. *Commonwealth v. Casiano*, 70 Mass. App. Ct. 705 (2007) review denied 450 Mass. 1107 (2008).

The intimidation of a witness statute is ambiguous concerning retaliatory conduct that retaliates for a past criminal proceeding that was no longer open. Since the Court "cannot interpret an ambiguous statute in a manner that disadvantages a criminal defendant," the Court reversed the defendant's witness intimidation in this case. *Commonwealth v. Hamilton*, 459 Mass. 422 (2011)

Kidnapping/Unlawful Restraint c. 265, § 26

without lawful authority forcibly or secretly confines or imprisons another within Mass. or forcibly carries or sends out of Mass. or forcibly seizes and confines or inveigles or kidnaps with intent to do the above or in any way cause the person to be held to service against his will	10 yrs. prison; or $1,000 and 2 1/2 yrs. house
with the intent to extort money or other valuable thing	life or any term of years
if armed with firearm, rifle, shotgun, machine gun or assault weapon (not apply to parent)	not less than 10 yrs. prison; or 2 ½ yrs. house
with the intent to extort and when armed with firearm, shotgun, machine gun or assault weapon	not less than 20 yrs. prison
serious bodily injury or sexual acts	not less than 25 yrs. prison
if victim is child under 16 (does not apply to parents who take custody of children under 18)	15 yrs. prison;

Defendant could be found guilty after locking victim in apt. for two hours or placing car in such a way to prevent victim from leaving premises in her car. *Commonwealth v. Sumner*, 18 Mass. App. Ct. 349, *rev. den.* 393 Mass. 1101 (1984).

Defendant moved into victim's car uninvited, shoved victim from steering wheel and took him to secluded area, where further confined him. *Commonwealth v. Saylor*, 27 Mass. App. Ct. 117 (1989).

Fact that kidnapping and assault victim might have tried to escape or summon help but failed to do so would not palliate abduction or assault. *Commonwealth v. Dean*, 21 Mass. App. Ct. 175 (1985), rev. *den.*. 396 Mass. 1105 (1986).

Physical force need not be applied against the victim, if the victim is subdued by "display of potential force." Sufficient evidence that defendant intended forcibly to confine victim against her will, where 18 year-old stepdaughter of defendant was "scared" of defendant, followed his instruction to sit in the car; defendant drove away and held her against her will while threatening to kill her; and stepdaughter escaped only by fleeing from defendant's grasp when car stopped. *Commonwealth v. Titus*, 32 Mass. App. Ct. 216, *rev. den*., 412 Mass. 1104 (1992).

The charge of Aggravated Kidnapping under either the theory of kidnapping with serious bodily injury or based on a sexual assault that occurs during the kidnapping requires proof that the defendant possessed a dangerous weapon during the commission of the kidnapping. *Commonwealth v. Rodriguez*, 83 Mass. App. Ct. 267 (2013).

Kidnapping of Child by Relative c. 265, § 26A

relative of child under 18 without lawful authority holds or intends to hold the child permanently/or protracted period or takes or entices child from lawful custodian or takes or entices from lawful custody any incompetent person or other person entrusted to custody of another person/institution	1 yr. house or $1,000 or both
if child taken/held outside Mass. or if exposed to safety risk	$5,000 or 5 yrs. prison or both

Parental kidnapping requires that the offending parent be in violation of a court order. *Commonwealth v. Beals*, 405 Mass. 550 (1989) (plaintiff husband got ex parte 209A order granting him temporary custody of the children ten days *after* the defendant/wife left the country with their children; she had no knowledge of the order and could not be prosecuted for parental kidnapping).

Trial court erred in dismissing an indictment charging defendant with parental kidnapping based on the alleged unconstitutionality of G.L. c 209C, § 10(b) because the indictment could rest on § 10(c) based on Commonwealth's evidence before the grand jury that defendant relinquished care of the parties' nonmarital child to the mother. *Commonwealth v. Gonzalez*, 462 Mass. 459 (2012).

Mayhem c. 265, § 14

with malicious intent to maim or disfigure: cuts out or maims tongue puts out or destroys eye cuts or tears off an ear cuts, slits or mutilates the nose or lip	20 yrs. prison; or $1,000 and 2 1/2 yrs. house

cuts off or disables a limb or member or assaults with dangerous weapon, substance, or chemical and by such assault disfigures, cripples or inflicts serious or permanent physical injury or whoever is privy to such intent or whoever is present and aids in the crime	

To maim means to cripple or mutilate in any way, to inflict upon a person any injury which deprives him of use of any limb or member of body or renders him lame or defective in bodily vigor, or to inflict any serious bodily injury. *Commonwealth v. Farrell*, 322 Mass. 606 (1948).

Single blow with ax handle, however heinous, did not show the sustained or prolonged type of attack from which a specific intent to maim or disfigure could be inferred. *Commonwealth v. Cleary*, 41 Mass. App. Ct. 214 (1996).

Substance of requisite mental state for mayhem is that the actor is aware that what he is doing will eventuate in grievous damage of the victim, and in most prosecutions is established inferentially. *Commonwealth v. Lazarovich*, 28 Mass. App. Ct. 147 (1989), *rev. den.*, 406 Mass. 1104 (1990).

Two Theories:
The first branch of the statute requires malicious intent; the second branch requires a specific intent to maim or disfigure. See *Commonwealth v. Robinson*, 26 Mass. App. Ct. 441, 442 (1988).

Second branch of the statute requires actual use of dangerous weapon as element. *Commonwealth v. Hawkins*, 21 Mass. App. Ct. 766 (1986).

> Lighted cigarette may become a dangerous weapon by the manner in which it is used. *Commonwealth v. Farrell*, 322 Mass. 606 (1948).
>
> Dirt is a dangerous substance when applied to a delicate organ such as the eye. *Commonwealth v. Tucceri*, 9 Mass. App. Ct. 844 (1980) (defendant repeatedly rubbed handfuls of dirt in victim's eye).

First branch does not necessarily involve use of a dangerous weapon. For example, teeth may be used to mutilate or disfigure a victim. *Commonwealth v. Davis*, 10 Mass. App. Ct. 190, 196 (1980).

Single Incident or Multiple Events:
Consecutive sentences for ABDW and Mayhem improper in this case, since the series of blows to the victim comprised a single event based on the same evidence. *Commonwealth v. Hogan*, 7 Mass. App. Ct. 236 (1979).

Because use of a DW in not an essential element of the first branch, and because the first branch requires proof of malicious intent, a def may be convicted of both first branch mayhem and ABDW on the facts of a single incident. *Commonwealth v. Hogan*, 379 Mass. 190, 194-95 (1979).

Consent not a Defense:
To commit battery upon a person with such violence that bodily harm is likely to result is unlawful, and consent thereto is immaterial. *Id.*

Stalking c. 265, §§ 43(a), (b) and (c)

Stalking, 43 (a): 1.) willfully and maliciously 2.) engages in a knowing pattern of conduct or series of acts (over a period of time) (directed at a specific person) 3.) which seriously alarms or annoys that person 4.) and would cause a reasonable person to suffer substantial emotional distress, and 5.) makes a threat (with the intent to place the person in imminent fear of death or bodily injury)	5 yrs. prison or $1,000 or 2 1/2 yrs. house or both fine and imprisonment
Stalking in Violation of an Order, 43(b): commits stalking (same as above) in violation of temporary or permanent vacate, restraining, or no- contact order or judgment (pursuant to c.208, §§§ 18, 34B, 34C; c. 209, § 32; c. 209A secs 3,4,5; c.209C secs 15, 20; or a prot. order issued by another jurisdiction; or a temporary order or prelim. or permanent injunction issued by the superior court)	1-5 yrs. prison; min./mand. one year imprisonment
Stalking, Second Offense, 43(c): after having been convicted of stalking, commits a second or subsequent such crime (elements above)	2-10 yrs. prison or jail; min./mand. two yrs imprisonment

The crime of stalking may be prosecuted and punished in any territorial jurisdiction of the Commonwealth wherein an act constituting an element of the crime was committed. G.L. c. 277, § 62B.

A defendant charged with stalking, who **continues stalking** his victim after criminal proceedings have commenced, **may also be charged with intimidation of a witness** (G.L. c. 268, § 13B). *Commonwealth v. Potter*, 39 Mass. App. Ct. 924 (1995).

Violation of agreed to "stay-away" order in a divorce judgment in Probate court (under G.L. c. 208, § 18) sufficient to support a conviction of stalking in violation of G.L. c. 265, § 43(b). *Commonwealth v. Alphas*, 430 Mass. 8 (1999).

Number of Incidents & Defendant's Pattern of Behavior:
A pattern or series would involve **more than two incidents**. *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 547-548 (1994). The legislature amended the statute to incorporate the Court's instruction in *Kwiatkowski*.

For a discussion on the evolution of the statute, see *Commonwealth v. Jenkins*, 47 Mass App. Ct. 286, 289-290 (1999).

Following a woman on two separate occasions, and threatening her once, did not amount to stalking where defendant was charged with "stalking by repeatedly following a victim;" **"repeatedly following" requires proof of more than two incidents of following**. *Commonwealth v. Martinez*, 43 Mass. App. Ct. 408, *further appellate rev. den.*, 426 Mass. 1103 (1997).

Where defendant was charged with unarmed burglary (with the intent to stalk), defendant argued it is legally impossible to commit a stalking during the course of a single event because that crime requires a pattern of conduct or a series of acts involving more than two incidents of harassment or following. The Court ruled there was sufficient evidence to prove that the defendant broke and entered into the victim's house with intent to stalk her. **The burglary was the "culmination of a pattern of persistent harassment and following" sufficient to constitute the "two or more acts"** required for the underlying felony offense of stalking, even though the burglary itself was only a single event. **What the Commonwealth has to prove is that the defendant specifically intended to commit an act which in the circumstances, when considered in conjunction with other actions of the defendant, would constitute an act of stalking**. The record is replete with incidents from which the jury could have found the requisite "more than two" acts necessary to constitute a stalking. *Commonwealth v. Bibbo*, 50 Mass. App. Ct. 648 (2001).

The defendant's **pattern of aggression and violence** toward his victim which created a reasonable apprehension on her part that she was in danger of imminent physical harm was sufficient in proving that the defendant murdered and stalked his estranged girlfriend. *Commonwealth v Cruz*, 424 Mass. 207 (1997).

The Commonwealth can present admissible "**evidence of the totality of the defendant's conduct toward the victim.**" Evidence of prior violent acts by the defendant against his ex-girlfriend properly admitted to prove that the threats were intended to instill fear of death or serious bodily injury. *Commonwealth v. Martinez*, 43 Mass. App. Ct. 408, *further appellate rev. den.,* 426 Mass. 1103 (1997).

In a stalking case, the Commonwealth is entitled to present to a jury **admissible evidence of the totality of the defendant's conduct toward the victim**. *Commonwealth v. Matsos*, 421 Mass. 391 (1995) (improper to exclude some of 40 letters on grounds of repetition, irrelevance and undue prejudice: they revealed defendant's intense obsession with the victim, and his anger at her rejection of him).

At trial for stalking, the judge correctly **excluded as irrelevant evidence** of victim's prior applications for protective orders which had been denied by other courts. *Commonwealth v. Alphas*, 430 Mass. 8 (1999).

The Threat:
The Commonwealth must prove the defendant made a threat with the intent to place the victim in imminent fear of death or bodily injury; **this element closely approximates the common law definition of the crime of assault.** The common law definition of assault is an act placing another in reasonable apprehension of anticipated force. Thus, in proving a threat under the stalking law, "The Commonwealth need not prove that the defendant actually intended to harm the victim, it need only prove that the defendant's threats were reasonably calculated to place the victim in imminent fear of bodily injury." *Commonwealth v. Matsos*, 421 Mass. 391, 395 (1995) ("…but you will never see me, your eyes will always be closed").

"The Legislature placed the adjective "imminent" before the word "fear" and not before the words "death or bodily injury." The additional terms of § 43(a)(1) concentrate upon the emotional welfare of the contemplated victim, specifically the consequences of "alarm[]," "annoy[ance]," and "emotional distress." The terms of § 43(a)(2) specifically include within stalking activity "conduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device." Those remote means of communication do not typically present the fear of immediate physical harm but do inflict emotional distress. The plain meaning of the language selected by the Legislature aims to protect victims of stalking from fear itself, and not merely ultimate physical harm." "[T]he dictum in *Matsos*, supra at 394, treating the threat element of stalking as an approximation of criminal assault constitutes, at most, an analogy and certainly not an equation. The essential reasoning and holding of that case were that threats of harassment and violence conveyed by letters would satisfy the definition of stalking. *Id*. at 395-396. The dictum stands for the proposition that acts rising to the level of common-law criminal assault are sufficient, but not necessary, to satisfy the threat element of the stalking statute." *Commonwealth v. Gupta*, 84 Mass. App. Ct. 682, 686-687 (2014).

Strangulation and Suffocation c. 265, § 15D

Strangles (the intentional interference of the normal breathing or circulation of blood by applying substantial pressure on the throat or neck of another) or suffocates (the intentional interference of the normal breathing or circulation of blood by blocking the nose or mouth of another) another person	Not more than 5 years prison or 2.5 HOC, or by a fine of not more than $5,000, or by both and CBIP
Aggravating Factors: i. Serious Bodily Injury ii. Victim is Pregnant and Defendant has Reason to Know of Pregnancy iii. While a protective order is in effect iv. After previously being convicted under this statute	Up to 10 years in prison, 2.5 years HOC, fine not more than $10,000 and CBIP

Threat to Commit Crime c. 275, § 2, 4

threatens to commit a crime against the person or property of another	$100 or 6 mos. House

Generally:
The crime of threats does not constitute "abuse" as defined in G.L. c. 209A, § 1**. Police cannot make a warrantless arrest for the crime of threats**; police may arrest without a warrant for assault. *Commonwealth v. Jacobsen*, 419 Mass. 269 (1995). (Of course, police may get a warrant quickly and arrest for threats.)

Conviction of threatening to commit a crime and violation of a protective order arising out of the same act are not duplicative because each crime requires proof of a separate and distinct element from the other crime. *Commonwealth v. Johnson Sr.*, 45 Mass. App. Ct. 473 (1998).

The **first Amendment does not protect conduct that threatens another**. *Commonwealth v. Robicheau*, 421 Mass. 176, 183 (1995).

Threats by one spouse against the other are **not "private conversations" within the marital privilege** of G.L. c. 233, § 20. *Commonwealth v. Gillis*, 358 Mass. 215, 218 (1970).

A conviction for threats to commit a crime, in violation of G.L. c. 275, § 2, does not require proof that the recipient of the threat is also the victim of the threatened crime. *Commonwealth v. Hamilton*, 459 Mass. 422 (2011).

The Context and Circumstances Are Material to Determining Threat:
A threat must be more than a mere statement of intention; it must represent "both intention and ability in circumstances which would justify apprehension on the part of the recipient of the threat." *Robinson v. Bradley*, 300 F. Supp. 665, 668 (D. Mass. 1969).

A conviction for threats under G.L. c. 275, § 2 was upheld after the circumstances surrounding the defendant's behavior were viewed, including the defendant's demeanor and tone of voice. (Defendant's statement to prosecutor, "Watch out counselor," was threatening in light of defendant's menacing gesture and history of conflict with the court.) The court stated that the **assessment of "a threat is not confined to a technical analysis of the precise words uttered," but can include "the context in which the allegedly threatening statement was made and all the surrounding circumstances**." *Commonwealth v. Sholley*, 432 Mass. 721 (2000).

"Language properly may be understood and treated as a threat even in the absence of an explicit statement of intention to harm the victim as long as circumstances support the victim's fearful or apprehensive response." *Commonwealth v. Chou*, 433 Mass. 229 (2001). Chou was prosecuted for disorderly conduct pursuant to G.L. c. 275, § 53 (accosting and annoying a person of the opposite sex with offensive and disorderly acts or language). After the victim broke up with the defendant, the defendant snuck into school and hung "Missing Person" flyers he had produced with her name, photograph, and vicious, sexualized descriptions of her. The veiled threat that the victim would become a "Missing Person," and/or that "some sexually violent harm would befall her" was found by the court to support the her apprehensive response. *Id.*

"**The victim's fear, although neither necessary nor determinative, is material** in finding the defendant guilty." The elements include the expression of intent to inflict a crime on another and the ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat. *Commonwealth v. Robicheau*, 421 Mass. 176, 182 (1995).

Ability to Carry Out the Threat / Imminence:
A 12 year-old was adjudicated delinquent for threatening to commit a crime based on pictures and a statement. (The student drew a picture of himself shooting the teacher and, after the picture was confiscated, drew a second picture showing him pointing a gun at the teacher. As he showed the second picture to the teacher he asked in a defiant tone, "Do you want this one too?") The court applied a *Sholley* analysis and restated the principle that there must be sufficient evidence showing that the accused has expressed an intent to commit the threatened crime and an ability to do so in circumstances justifying apprehension on the part of the target. **While the court admitted that there was no evidence that the student possessed an immediate ability to carry out the threat at the time of his drawing, "this does not mean that the juvenile could not have carried out his threat at a later time."** Significantly, the Court took

judicial notice of the actual and potential violence in public schools as a rationale for the victim's apprehension. *Commonwealth v. Milo M.*, 433 Mass. 149 (2001).

That a defendant **might not carry out a threat** is immaterial if his words reasonably cause apprehension on the part of their recipient. *Commonwealth v. Strahan*, 39 Mass. App. Ct. 928, 930 (1995).

The inability to inflict ***immediate* harm** does not preclude a conviction for threats. Conviction may be based on the victim's reasonable apprehension that the threat may be carried out in the future. Although the defendant was incarcerated, the victim could reasonably have believed that he had the ability to cause bodily harm either upon his release or by means of accomplices. *Commonwealth v. Ditsch*, 19 Mass. App. Ct. 1005 (1985) (lack of present ability to carry out threat of bodily injury no bar to conviction based on reasonable apprehension that threat may be carried out in the future).

<u>*Communication of Threat to the Intended Victim*</u>:
A threat does not have to be communicated directly to the intended victim, as long as the defendant intended the threat to be conveyed to the victim. *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280 (2003).

In circumstances where a threat is relayed to its ultimate recipient by a third party, the Commonwealth must prove beyond a reasonable doubt that the defendant intended that the threat be communicated through the intermediary. *Comonwealth v. Meier*, 56 Mass. App. Ct. 278 (2002), *rev. den.,* 438 Mass. 1105 (2003). It does not matter whether the threat was actually conveyed to the victim, but rather whether it was the defendant's intent that the threat be conveyed. *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280 (2003). A defendant may be criminally responsible for making a threat even if it fails to reach the intended victim. See *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433 (2004), where defendant looked at the victim in court and threatened her, which was overheard by police officer, but not the victim, who was pre-occupied.

Violation of Restraining Order c. 209A, § 7

see section 1.2, supra, ("Background Information on Restraining Orders") for a summary of Mass. General Laws ch. 209A that there was a clear, outstanding court order (to refrain from abuse and/or to vacate the household) that the defendant knew of that order that the defendant clearly disobeyed that order (in circumstances in which he was able to obey it)	$5,000, 2 1/2 yrs. house, or both and $25 fine and treatment at a certified batterer's treatment program and may order treatment for substance abuse and may order payment of damages
and if the violation is in retaliation for the plaintiff having reported the defendant for failing to pay child support or for the establishment of paternity	$1,000-$10,000 and min./mand. 60 days imprisonment

<u>*Generally*</u>:

Violations of restraining orders pursuant to 209A may be prosecuted and punished within the court that issued the restraining order, as well as the court within whose jurisdiction the violations were committed. G.L. c. 277, § 62A.

In *Commonwealth v. Shea*, the Supreme Judicial Court ruled that Massachusetts law governs a violation of an abuse prevention order, even if the order was issues by another jurisdiction. 467 Mass. 788 (2014).

Actions constituting a criminal violation of Chapter 209A are limited to those enumerated in § 7; all other violations of 209A order cannot be prosecuted as a statutory offense, rather, they can be prosecuted as criminal contempt. *Commonwealth v. Delaney*, 425 Mass. 587, 596 (1997).
A violation of (1) an order to refrain from abuse; (2) an order to vacate the household. *Commonwealth v. Gordon*, 407 Mass. 340, 345 (1990); (3) an order to surrender guns, ammunition, licenses to carry firearms and FID cards; and (4) a "stay away" provision of an abuse prevention order, will constitute a criminal offense. *Commonwealth v. Finase*, 435 Mass. 310 (2001).

Defendant's Intent:
Commonwealth must prove there was a clear, outstanding order of court, that the defendant knew of that order, and that the defendant clearly and intentionally disobeyed that order in circumstances in which he was able to obey it. *Commonwealth v. O'Shea,* 41 Mass. App. Ct. 115 (1996). ***But see***: *Commonwealth v. Delaney*, 425 Mass. 587 (1997), *cert. den.*, 522 U.S. 1058 (1998): The Commonwealth need not prove that the defendant intended to violate a 209A order, merely that the defendant knew of the order and violated a criminal provision of the order. Intent is an element of criminal contempt proceedings, but not of the criminal violations enumerated by § 7 of ch. 209A -- "the statute requires no more knowledge than that the defendant knew of the order. We decline to read any additional mens rea requirements into the statute." *Id*. at 596-97**. "To the extent that [the decision in *O'Shea*] is inconsistent with our decision today, it is incorrect." *Id*. at 597, n.9.**

Where the evidence fairly raises an issue as to the defendant's intent (whether directly or indirectly) or acquiescence in the conduct of a third party, the Commonwealth must prove that the defendant intended to violate the restraining order and the jury should be instructed that the defendant cannot be convicted unless he intends to commit the act that resulted in the violation of the restraining order. *Commonwealth v. Collier*, 427 Mass. 385 (1998).

Sufficiency of the Evidence for "Refrain from Abuse" Violations:
The elements of proof for a criminal violation for "attempting to cause . . .physical harm" are the same as other criminal attempt offenses . . . there must be an overt act towards the substantive offense. *Commonwealth v. Fortier*, 439 Mass. 1104 (2003).

The standard for determining whether actions constitute abuse under ch. 209A is an objective one – the plaintiff's subjective beliefs are an insufficient basis for granting a restraining order. *Carroll v. Kartell*, 56 Mass. App. Ct. 83 (2003).

A plaintiff's "generalized apprehension" of abuse is insufficient to support a finding that the defendant presents a threat of "imminent serious physical harm" to the plaintiff, as required under ch. 209A, § 1. *Dollan v. Dollan*, 55 Mass. App. Ct. 871 (2002).

A party violates an order to refrain from abuse when he: (1) attempts to cause or causes physical harm; (2) places another in fear of imminent serious physical harm; or (3) causes another to engage involuntarily in sexual relations by force, threat of force, or duress. *Commonwealth v. Gordon*, 407 Mass. 340, 348 (1990) (citing G.L. c. 209A, § 1).

"The relevant definition of abuse provided by G.L. c. 209A, § 1, 'placing another in fear of imminent serious physical harm,' closely approximates the common law description of assault. ... Under the common law, 'it is well established ... that an act placing another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault.' *Commonwealth v. Delgado*, 367 Mass. 432, 437 (1975), and cases cited. In determining whether an apprehension of anticipated physical force is reasonable, a court will look to the actions and words of the defendant in light of the attendant circumstances. *Id.* at 436-37. ... In a criminal assault, the Commonwealth need not prove that the victim was in fear. '(N)either fear, nor terror nor apprehension of harm is an essential ingredient of the common law crime of assault.' *Commonwealth v. Slaney*, 345 Mass. 135, 139 (1962)." *Commonwealth v. Gordon*, 407 Mass. 340, 349 (1990).

Threats not protected by First Amendment: Threats made in violation of a protective order, particularly where the language and conduct rise to the level of placing the victim in fear of imminent serious physical harm, are not constitutionally protected, even if the language was not "fighting words." Any "right to respond" to the victim's statements would not encompass the right to threaten or assault. *Commonwealth v. Robicheau*, 421 Mass. 176, 182-83 (1995).

The crime of threats does not by definition constitute "abuse" as defined in Chapter 209A, § 1; police cannot make a warrantless arrest for threats. Police should determine whether the conduct rises to an assault, which may justify a warrantless arrest for violation of the order. *Commonwealth v. Jacobsen*, 419 Mass. 269 (1995).

Sufficiency of Evidence for "Stay Away" Violations:
Defendant dropped the victim's son off in front of her residence; after the victim admonished the defendant for being in violation of the order he got out of the car, swore at the victim, gave her the finger, and told her he would do as he pleased; he drove away with a loud, aggressive display, telephoned the victim, and threatened to kill her. The victim testified she was scared, upset and thought the defendant was going to kill her. "The victim's fear, although neither necessary nor determinative, is material in finding the defendant guilty." *Commonwealth v. Robicheau*, 421 Mass. 176, 182 (1995).

Defendant was ordered to stay away from the victim's workplace pursuant to a valid restraining order. The defendant violated the order when he drove within forty yards of the workplace, honked his horn, yelled obscenities, and made threats against the victim's new boyfriend/co-worker. The fact that the victim was home sick that day was not a valid defense because violation of the order was not dependent on the victim's presence in the workplace. *Commonwealth v. Habenstreit*, 57 Mass. App. Ct. 785 (2003).

The defendant was ordered to stay at least 100 yards away from the victim and he failed to do so. The Court held that a violation of the stay away order was a violation of the broader provision that he not contact the victim and was thus prosecutable under G.L. c. 209A, § 7. *Commonwealth v. Finase*, 435 Mass. 310 (2001).

Defendant was required to stay at least 100 yards away from the plaintiff and to stay away from the plaintiff's residence and workplace. Defendant parked within 100 yards of the plaintiff's workplace, when she was not present, and walked by, to a nearby coffee shop. *Commonwealth v. O'Shea*, 41 Mass. App. Ct.

115 (1996). Unlike *Habenstreit*, *supra*, there was no evidence the defendant shouted obscenities, threatened anyone or engaged in any behavior that would violate the order other than parking his car near the plaintiff's workplace when she was not present.

Sufficiency of the Evidence for "No Contact" Violations:
The defendant was convicted of violating a no contact order that protected his ex-wife and son. The charges arose from a chance encounter where the defendant responded to his son's greeting. When the plaintiff reminded the defendant about the restraining order, he called her a derogatory name. The Court held that the defendant's "brief, civil, conversation-ending response" to his son's greeting did not violate the no contact order as long as the response does not invite further conversation. However, the defendant violated the order when he used the occasion to further abuse the plaintiff by calling her a name. *Commonwealth v. Consoli*, 58 Mass. App. Ct. 734 (2003).

The trial judge improperly denied the defendant's request for an instruction on incidental contact where the jury could have found from the evidence that the defendant was not aware of the victim's presence prior to the point of contact. *Commonwealth v. Raymond*, 54 Mass. App. Ct. 488 (2002)(possible defenses are that the contact was incidental to a permitted activity, or an accidental, mistaken, or unknowing violation, or even a coerced violation).

Defendant violated no contact when he **called the victim from Bridgewater State Hospital.** The Commonwealth was not required to prove that the call placed the victim in fear, only that the contact violated a valid no contact order. Even if the defendant had the right to call the victim to obtain information about his family or grandchildren, his verbal abuse and threats transformed his contact into a "substantive violation" of the order. *Commonwealth v. Mendonca*, 50 Mass. App. Ct. 684 (2001).

A no contact order permitted the defendant to contact his children at his former wife's house at certain times, but the defendant violated the order when he **went beyond permissible incidental contact by using abusive and threatening language** directed at his former wife. The Commonwealth was not required to prove that the defendant had an unlawful purpose in making the calls. The order was not ambiguous; a reasonable man could not have thought the order sanctioned his abusive behavior. *Commonwealth v. Silva*, 431 Mass. 194 (2000).

Where police knew of no contact order and had reason to believe defendant was present, and where witness had seen the two arguing earlier that evening, **officers permissibly entered victim's house without a warrant and against victim's will.** *Commonwealth v. Morrison*, 429 Mass. 511 (1999).

The **no contact provision of ch. 209A is not unconstitutionally vague**. *Commonwealth v. Butler*, 40 Mass. App. Ct. 906 (1996). Evidence that defendant **anonymously sent roses** to the victim was sufficient to prove defendant violated a protective order. Florist identified defendant at trial. This case "fits well within" *Gordon,* 407 Mass. 340 (1990) and is "different from" *Kwiatkowski*, 418 Mass. 543 (1994). *Id.*

"No contact" provision was not marked on the restraining order. Judge's instruction that defendant could be found guilty if the jury found abuse or contact erroneous, verdict vacated. *Commonwealth v. Johnson Sr.*, 45 Mass. App. Ct. 473 (1998).

Defendant found not guilty because evidence of phone company records that defendant placed phone calls to a number listed as his wife's employer insufficient to prove defendant contacted her. "Attempted

contact" insufficient unless the restraining order specifically states as such. *Commonwealth v. Cove*, 427 Mass. 474 (1998).

No violation of 209A order where no proof that defendant came within 100 yards of victim, or within 100 yards of victim's workplace when she was there, or into victim's workplace. Discussion of need for precision in 209A orders. *Commonwealth v. O'Shea*, 41 Mass. App. Ct. 115 (1996).

May Be A Probation Condition: Defendant violated the no contact condition of probation when he spoke to the victim and looked at her from the top of a street located approximately a ten minute walk from where the victim lived. The judge was not required to credit the defendant's innocent exculpatory explanations for the conduct. *Commonwealth v. Tate*, 34 Mass. App. Ct. 446, *further appellate rev. den.,* 415 Mass. 1106 (1993).

No contact provision not protected by the First Amendment as free speech because an abuser has no right to place a victim of abuse in apprehension of harm. See *Commonwealth v. Thompson*, 45 Mass. App. Ct. 523, *further appellate rev. den.*, 428 Mass. 1108 (1998) (dicta).

Sufficiency of Notice:
The trial judge erroneously excluded an abuse prevention order from evidence based on improper service. The officer attempted to notify the defendant, who was homeless, by calling one of the phone numbers for the defendant provided by the plaintiff. The officer asked for the defendant, the person on the other end answered affirmatively, and then the officer read the terms of the order verbatim. Generally, Chapter 209A, § 7 requires that the defendant must be served with copies of the complaint, order and summons unless otherwise ordered by the court; however, failure to do so does not make the order inadmissible. The order is still relevant to whether the defendant had the requisite knowledge of the order and should have been admitted. *Commonwealth v. Griffen*, 444 Mass. 1004 (2005).

Incarcerated defendant received adequate notice of extension of the temporary order: he was initially served with the temporary order, which contained language that the order may be extended or modified if the defendant did not appear at the ten day hearing. For this reason, personal service of the extended order was not required. In addition, the defendant made no attempt to attend the ten day hearing through requesting habeas corpus, was familiar with the process and was represented by counsel at all times. *Commonwealth v. Henderson*, 434 Mass. 155 (2001).

A showing the defendant was served with the 209A order is "strong evidence" that the defendant knew what conduct was prohibited by the order. Even assuming failure of service, evidence that the victim told the defendant a few times that he was not supposed to call and the defendant responded that he "didn't believe" in restraining orders was sufficient to prove actual knowledge of the terms of the order. *Commonwealth v. Mendonca*, 50 Mass. App. Ct. 684 (2001).

Evidence from police that the defendant's mother said she would give the defendant the 209A and that the defendant was already aware of the order sufficient to prove defendant had knowledge. *Commonwealth v. Silva*, 431 Mass. 401 (2000).

Where officer failed to mark on the 209A form how he served the defendant, evidence of notice was inferred from a completed return of service notice; the officer marked three hours as the time it took to

serve, and the officer had knowledge of the defendant's address. *Commonwealth v. Crimmons*, 46 Mass. App. Ct. 489 (1999).

Notice requirement is met where defendant received notice of the 209A order even though it was not accompanied by the required summons and complaint. Defendant received in-hand service of the order in the courthouse, and defendant had knowledge of the 209A process. *Commonwealth v. Munafo*, 45 Mass. App. Ct. 597, *further appellate rev. den.*, 428 Mass. 1110 (1998).
The failure to serve a copy of the extended order on the defendant is not a bar to charging him with violating that order. Failure to serve the defendant with a copy of the extended order is however, relevant to a determination as to whether the defendant possessed the knowledge required to convict him of violating the order. **Evidence that the ex parte order delivered to the defendant's last and usual address was actually received warrants the conclusion that the defendant had actual knowledge of the terms of the extended order** (as does the defendant's testimony that he was aware there was a protective order against him). *Commonwealth v. Delaney*, 425 Mass. 587, 593 (1997), *cert. den.*, 522 U.S. 1058 (1998).

Defendant was served with the preliminary order and did not appear at the ten day hearing when the court extended the order for one year. The court reiterated its holding in *Delaney* and stated "He cannot, by avoiding the hearing and, thereby, further notification, defend on the basis of lack of notice." *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758 (1997).

Bosse v. Bosse, No. 91-493, Supreme Judicial Court, Single Justice (Dec. 10, 1991): When a defendant receives the initial order by personal service he is automatically put on notice of the next hearing in the case, and this prior notice satisfies due process. "Section 3 allows, following the initial temporary order, extensions of orders or entry of permanent orders. It requires prior 'notice to the defendant,' G.L. c. 209A, sec. 3(c), before such action, but does not define the character of this notice. I rule that, where in-hand service is not reasonably possible, prior notice by mail to last known address and by publication satisfies section 3(c). ...I rule that, where in-hand service is not reasonably possible, post facto notice by mail to last known address and by publication is consistent with section 7. ... Mandating personal service where the defendant has, by disappearing, made personal service impossible would enable defendants, the perpetrators of abuse, to deny their victims the protection of our courts under G.L.c. 209A."

The Commonwealth presented insufficient evidence that the defendant had notice, either actual or constructive, of the restraining order where the defendant was not served with the order either in hand or at his last known address, and the victim's testimony regarding telephone conversations in which she and the defendant discussed the order was not sufficiently detailed to prove that the defendant had actual knowledge of the order. *Commonwealth v. Welch*, 58 Mass. App. Ct. 408 (2003).

At a trial for violation of a protective order that had been extended four times, the Commonwealth failed to demonstrate that the defendant either was served a copy of the final extended order or had actual or constructive knowledge of its existence and terms. The Comm. has the burden to prove that the defendant knew the terms of the order in question. *Commonwealth v. Malloy*, 44 Mass. App. Ct. 306, *further appellate rev. den.*, 427 Mass. 1107 (1998).

Service/ Notice Excused: When the appropriate law enforcement agency has made a conscientious and reasonable effort to serve the statutorily specified documents on the defendant, but has nevertheless failed, the agency should promptly notify the court so that a judge, if satisfied after a hearing that an appropriate

effort has been made, may order that service be made by some other identified means reasonably calculated to reach the defendant. Where such substituted service appears unlikely to notify the defendant, the judge may excuse service. *Zullo v. Goguen*, 423 Mass. 679. 680-81 (1996).

Evidentiary Issues in Restraining Order Violation Cases:
A properly completed and returned G.L. c. 209A return of service is admissible under the official or public records exception to the hearsay rule, and its admission at trial without the presence of the officer who completed it does not violate the confrontation clause of the Sixth Amendment. *Commonwealth v. Shangkuan*, 78 Mass. App. Ct. 827 (2011).

Lacking the victim's participation, the Commonwealth tried to proceed with testimony of her spontaneous utterances, but the victim had not named the defendant aloud. Commonwealth sought to use the restraining order application, in which she had given his name, but the documents were inadmissible hearsay and the identification testimony of the police officer who served the defendant with the order was held to be indirect hearsay, also inadmissible. *Commonwealth v. Kirk*, 39 Mass. App. Ct. 225 (1995).

Evidence that defendant told victim to "shut the f--- up and he'd do exactly as he pleased," "gave her the finger," telephoned her and threatened to kill her, and evidence of defendant's prior misconduct admissible where victim testified defendant's conduct scared and upset her and she believed he would kill her. Victim's fear not necessary or determinative in prosecution of 209A order, specifically "Refrain from Abuse," but is material. *Commonwealth v. Robicheau*, 421 Mass. 176 (1995).

At trial for viol. of 209A and mal. destruction of property, evidence of prior harassing conduct was admissible to show the defendant's pattern or course of conduct toward the victim to give the jury "the whole picture." However, a limiting instruction by the judge was needed. Prior convictions violations of 209A orders under G. L. c. 233, § 21 admissible for impeachment purposes but not substantively. *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758 (1997).

Where the issue at trial was identification (whether the defendant had contacted the victim), the Court erred in allowing testimony regarding the basis for the underlying 209A order; it was highly inflammatory and not probative. *Commonwealth v. Picariello*, 40 Mass. App. Ct. 903 (1996).

The affidavit of a restraining order may be offered as substantive evidence when the restraining order is written in the declarant's own words and the declarant is available for cross-examination. *Commonwealth v. Belmer*, 78 Mass. App. Ct. 62 (2010) (affidavit offered to show difference in the reluctant victim's testimony on the day of trial).

Redaction:
Prior to publishing a restraining order to the jury, care should be taken to redact any language that may be perceived as propensity evidence. For example, in *Commonwealth v. Reddy*, the court indicated that the language that appears in capital letters on the restraining order "THERE IS A SUBSTANTIAL LIKELIHOOD OF IMMEDIATE DANGER OR ABUSE…" "has no place in a criminal trial on charge of violating the abuse prevention order or assault and battery. This type of predictive or propensity evidence is not admissible to prove a crime." In this case, this section was selected by the judge issuing the restraining order and the language was used in the prosecutor's closing argument. *Commonwealth v. Reddy*, 85 Mass. App. Ct. 104 (2014).

For more information on the *Reddy* case, review the webinar at http://www.mass.gov/mdaa/trainings-and-conferences/understanding-the-appeals-courts-decision-in-reddy.html .

Defenses:
It may be a defense that the violation was incidental to a permitted activity; accidental; mistaken; or an unknowing or coerced violation. If the facts suggest one of these defenses, the defendant is entitled to an appropriate jury instruction. Commonwealth v. Raymond, 24 Mass. App. Ct. 488 (2002).

The defendant was entitled to an instruction on incidental contact where the defendant's wife had a valid "no contact" order against him that did not govern the defendant's contact with his daughter. Therefore, it was reversible error not to instruct the jury that if the defendant's contact with his wife was incidental to his attempt to speak to his daughter, such that the jury could find the defendant not guilty of violating the "no contact" order. The Court also noted that the incidental contact in this case was non-abusive. *Commonwealth v. Leger*, 52 Mass. App. Ct. 232 (2001).

Criminal Procedure Issues:
No double jeopardy: Contempt proceedings for violation of a protective order do not raise a double jeopardy bar to continuing criminal prosecutions. *Mahoney v. Commonwealth*, 415 Mass. 278, 283 (1993).

Threats: Conviction of threatening to commit a crime and violation of a protective order arising out of the same act are not duplicative because each crime requires proof of a separate and distinct element from the other crime. *Commonwealth v. Johnson Sr.*, 45 Mass. App. Ct. 473 (1998).

A violation of an abuse prevention order that contains the provision to refrain from abuse is not a lesser included offense of assault and battery. *Commonwealth v. Torres*, 468 Mass. 286 (2014).

Parental Kidnapping: Defendant argued that the Commonwealth used one act, the taking of the son, to prove both crimes. The court held that there were two distinct acts, taking the son and previously speaking to the son shortly before the taking, but even if there was one act, the crimes did not share the same elements and neither crime was a lesser included of the other. *Commonwealth v. Bachir*, 45 Mass. App. Ct. 204, *further appellate rev. den.*, 428 Mass. 1104 (1998).

Commonwealth allowed to join for trial six charges of violations of protective order, one charge of stalking, and one charge of intimidation of a witness because the incidents all demonstrated a pattern of conduct by the defendant toward the victim. There was evidence of the defendant's unhappiness that the relationship ended and the defendant demonstrated no prejudice from the joinder. *Commonwealth v. Delaney*, 425 Mass. 587 (1997), *cert. den.*, 522 U.S. 1058 (1998).

Cases on Granting, Terminating or Appealing a Restraining Order:
Definition of family or household member:
Household member does not include two individuals living together in a residential program with shared living space and house rules. *Silva, guardian v. Carmel*, 468 Mass. 18 (2014)(plaintiff and defendant were living together in a Department of Developmental Services residential program).

Includes ex-stepchildren. *Sorgman v. Sorgman*, 49 Mass. App. Ct. 416 (2000).

Includes paternal grandparent of a child whose parents were not married; the paternal grandparent is "related by blood to the child's mother," and thus, has a right to invoke protection against the mother. In interpreting the term 'related by blood,' we recognize a general term in a statute … takes meaning from the setting in which it is employed. We also bear in mind the importance of 'giving broad meaning to the words 'related by blood'" and considering whether the relationship puts the parties into contact with one another, even though they might not otherwise seek or wish for such contact. Interpreting "related by blood" to include this relationship would be consistent with the Legislature's purpose in enacting 209A; and is supported by sound public policy. We take judicial notice of the social reality that the concept of "family" is varied and evolving and that as a result, different types of "family" members will be forced into potentially unwanted contact with one another" (citations omitted). *Turner v. Lewis*, 434 Mass. 331 (2001). Dissent by Cowin: the appropriate procedure for protecting such a person is by legislative, not judicial amendment to ch. 209A.

Definition of "substantive dating relationship:"
The legal definition of "substantive dating relationship" includes relationships conducted electronically. In this case, the Court found that a "substantial dating relationship" existed between a 16-year-old girl and a 24-year-old man who communicated regularly for three months using email, instant messaging and Skype. The relationship involved "real-time" electronic exchanges and face-to-face interactions, which increased the level of intimacy in the relationship. The Court noted that its decision "reflects the changing nature of relationships and, specifically, the fact that an increasing number of relationships, including ones involving teenagers, are being conducted electronically….Chapter 209A must be interpreted to protect all who are in a substantive dating relationship from abuse, regardless of whether the relationship was developed or conducted by the use of technology." *ECO v. Compton,* 464 Mass. 558 (2013).

The statute does not "preclude the possibility of a complainant's being in more than one 'substantive dating relationship' at any one time"; commitment to the relationship may be one-sided. *Brossard v. West Roxbury Division of the District Court Department*, 417 Mass. 183 (1994).

The judge erred in finding that the plaintiff had met her burden of establishing her 15 year-old daughter was involved in a "substantive dating relationship" with the defendant where the evidence established they "went out" and the defendant had taken her to the movies. The court is obliged to follow the four criteria outlined in the ch. 209A statute when determining whether a "substantive dating relationship" exists, and should not substitute other factors, such as the age of the alleged victim or whether a criminal case is pending. *C.O. v. M.M*, 442 Mass. 648 (2004).

"Henceforth, to promote uniformity and consistency, review of orders entered under 209A shall be in the Appeals Court." *Zullo v. Goguen*, 423 Mass. 679, 681 (1996) (overruled *Flynn v. Warner*, 421 Mass. 1002, 1003 (1995) that appellate review must be by a petition under G. L. c. 211, § 3 seeking relief from a Single Justice, or the civil court that actually issued the order).

In any future matters involving domestic abuse prevention order complaints, the judge must consider whether the defendant has a record of domestic violence contained in the statewide domestic violence record-keeping system of the Dept. of Probation. *Frizado v. Frizado*, 420 Mass. 592 (1995). A district court judge has no statutory or other authority to order that a record of the issuance of a temporary 209A order be expunged from the statewide domestic violence registry. *Vaccaro v. Vaccaro*, 425 Mass. 153 (1997).

The defendant's imminent release from prison, viewed in the context of the entire history of the parties' hostile relationship (totality of the circumstances), warranted the extension of a restraining order, even though the defendant had no direct contact with the victim during the eight years he was incarcerated. Considering the defendant's criminal history toward the plaintiff and their children, the court found that the victim was in reasonable fear of imminent serious physical harm which warranted the issuance of a permanent restraining order. *Vittone v. Clairmont*, 64 Mass. App. Ct. 479 (2005).

The standard for granting an extension of an abuse prevention order is similar to the standard for granting the initial order. The plaintiff must show reasonable fear of imminent serious physical harm by a preponderance of the evidence. The judge must consider the totality of the conditions that exist at the time the plaintiff seeks an extension, viewed in the light of the initial abuse prevention order. The judge should consider: 1) the basis for the initial order; 2) defendant's violations of the order; 3) ongoing child custody or other litigation that engenders hostility; 4) the parties' demeanor in court; 5) the likelihood that the parties will encounter one another in the course of their usual activities; and 6) significant changes in the circumstances of the parties. *Iamele v. Asselin*, 444 Mass. 734 (2005).

When a party seeks to terminate an order, the judge must be satisfied by clear and convincing evidence "that the order is no longer needed to protect the victim from harm or the reasonable fear of serious harm . . .[and] should be set aside only in the most extraordinary circumstances." **When a party seeks to modify** an order, the judge must assess "the likelihood that the safety of the protected party may be put at risk by a modification." **When a party seeks to retroactively vacate an abuse prevention order on the ground of newly discovered evidence**, the judge must find that the new evidence was not available to the party seeking the relief at the initial hearing by the exercise of reasonable diligence, the new evidence is material, relevant and admissible, the new evidence would have likely affected the result had it been available at the time, and the new evidence constitutes more than evidence which only goes to impeach the credibility of a witness at the initial hearing. *Mitchell v. Mitchell*, 62 Mass. App. Ct. 769 (2005).

At a hearing involving the renewal of a ch. 209A protective order, the judge could not categorically refuse to exercise his discretion based solely on personal preference. In exercising its discretion, the judge must consider all of the available judicial options and make a fair and reasonable choice. *Lonergan-Gillen v. Gillen*, 57 Mass. App. Ct. 746 (2003).

A permanent restraining order should not be granted based solely on the fact that a judge previously found that the plaintiff required a Chapter 209A order to protect her from abuse. Instead, the reviewing judge must make a new finding that the plaintiff still requires protection from abuse. The burden is on the plaintiff to justify the continuance of the order. *Jones v. Gallagher*, 54 Mass. App. Ct. 883 (2002).

The statute explicitly grants the authority to issue a permanent order pursuant to Chapter 209A, § 3, at a renewal hearing. *Crenshaw v. Macklin*, 430 Mass. 633 (2000). The SJC also stated that *Champagne v. Champagne*, 429 Mass. 324 (1999), should be read to conform to its decision in *Crenshaw***.**

FEDERAL DOMESTIC VIOLENCE OFFENSES

There may be federal jurisdictions in domestic violence cases that involve the defendant crossing state lines in the course of criminal activity. Consider contacting the United States Attorney's Office in cases which there is federal jurisdiction and it seems appropriate to prosecute federally. The specific federal statutes are provided below.

1. Interstate Travel to Commit Domestic Violence, 18 U.S.C. § 2261 (2000)

a.) 18 U.S.C. § 2261(a)(1)

It is a federal crime for a person to travel interstate (or leave or enter Indian country) with the intent to injure, harass or intimidate that person's intimate partner when in the course of or as a result of such travel the defendant intentionally commits a violent crime and thereby causes bodily injury. The law requires specific intent to commit domestic violence at the time of interstate travel. The term "intimate partner" includes a spouse, former spouse, past or present cohabitant, and those who share a child, but may not include a girlfriend or boyfriend with whom the defendant has not resided. There must be bodily injury for prosecution under this statute.

b.) 18 U.S.C. § 2261(a)(2)

It is also a federal crime to cause an intimate partner to cross state lines (or leave or enter Indian country) by force, coercion, duress or fraud, during which or as a result of which there is bodily harm to the victim. Proof is required that the interstate travel resulted from force, coercion, duress or fraud. As in subsection 2261(a)(1), the defendant must intentionally commit a crime of violence during the course of or as a result of the travel and there must be bodily injury.

2. Interstate Stalking, 18 U.S.C. § 2261A

As of September 23, 1996, it is a federal crime to cross a state line with the intent to injure or harass another person, if in the course of or as a result of such travel, the defendant places such person in reasonable fear of the death of, or serious bodily injury to, that person or a member of that person's immediate family. The law requires specific intent to violate this subsection at the time of interstate travel. "Immediate family" includes a spouse, parent, sibling, child or any other person living in the same household and related by blood or marriage. It is also a federal crime to "stalk," as it is defined in § 2261A, within the special or maritime jurisdiction of the United States.

3. Interstate Travel to Violate an Order of Protection, 18 U.S.C. § 2262

a.) 18 U.S.C. § 2262(a)(1)

This law prohibits interstate travel with intent to violate a valid protection order that forbids credible threats of violence, repeated harassment, or bodily injury. To establish a violation of this statute, the Government must demonstrate that a person had the specific intent to violate the protection order at the time of interstate travel and that a violation actually occurred.

b.) 18 U.S.C. § 2262(a)(2)

It is also a federal crime to cause a spouse or intimate partner to cross state lines (or leave or enter Indian country) by force, coercion, duress or fraud, during which or as a result of which there is bodily harm to the victim in violation of a valid order of protection. The law requires that that interstate travel resulted from force, coercion, duress, or fraud. The Government must also prove that a person intentionally injured an intimate partner in violation of a protection order during the course of or as a result of the forced or coercive travel.

4. Penalties

Penalties for violations of §§ 2261, 2261A and 2262 hinge on the extent of the bodily injury to the victim. Terms of imprisonment range from five years for bodily injury to life if the crime of violence results in the victim's death.

11. APPENDIX B: SAMPLE MOTIONS

(1) SAMPLE FREEZE ORDER FOR PRESERVING DIGITAL EVIDENCE, 18 U.S.C. §2703(f)

(2) COMMONWEALTH'S MOTION IN LIMINE TO ADMIT THE RESTRAINING ORDER AFFIDAVIT AS SUBSTANTIVE EVIDENCE

(3) COMMONWEALTH's MOTION IN LIMINE TO ADMIT REBUTTAL SELF-DEFENSE EVIDENCE, *MORALES* EVIDENCE

(4) COMMONWEALTH'S MOTION *IN LIMINE* TO ADMIT STATEMENTS AS AN EXCITED UTTERANCE – 911 Call – Testimonial Per Se Analysis

(5) COMMONWEALTH'S MOTION *IN LIMINE* TO ADMIT STATEMENTS AS AN EXCITED UTTERANCE – Testimonial in Fact Analysis

(6) COMMONWEALTH'S MOTION IN LIMINE TO ADMIT VICTIM'S OUT OF COURT STATEMENTS INTO EVIDENCE BASED ON FORFEITURE BY WRONGDOING DOCTRINE

(7) MOTIONS FOR PRIOR BAD ACTS (2 MOTIONS PROVIDED)

(8) COMMONWEALTH'S MOTION IN LIMINE TO CONDUCT AN IN CAMERA EXAMINATION TO DETERMINE IF (VICTIM) HAS A VALID 5TH AMENDMENT PRIVILEGE

(9) MOTION and AFFIDAVIT FOR PROTECTIVE ORDER FOR VICTIM'S INFORMATION

(10) MOTION and MEMORANDUM OF LAW IN SUPPOR OF JOINDER

(11) COMMONWEALTH'S MOTION IN LIMINE AS TO DEFENDANT'S POTENTIAL CHARACTER AND/OR REPUTATION WITNESSES

(12) COMMONWEALTH'S MOTION IN LIMINE TO PRECLUDE REFERENCE TO ANY ALLEGED "BAD CHARACTER" OR "BAD REPUTATION" OF THE VICTIM AND (2) ANY ALLEGED "PRIOR BAD ACTS" OF THE VICTIM

[DATE]

Yahoo! Custodian of Records
701 First Ave
Sunnyvale, California 94089

Via facsimile to ###-###-####

RE: <u>Preservation of Records of</u>: XXXXX@yahoo.com

Request Pursuant to 18 U.S.C. §2703(f)- Preservation of Evidence for 90 days

Dear Custodian of Records:

Please be advised that our office is conducting an official criminal investigation into whether services offered by your company have been/are being used by one or more individuals to violate the laws of the Commonwealth of Massachusetts. We are in the process of reviewing the investigation to obtain a search warrant, grand jury subpoena or other applicable court order to obtain information believed to be in your possession. Pursuant to 18 U.S.C. § 2703 (f), we are requesting that your office take immediate steps to preserve any and all of the following information or material including, but not limited to:

Any and all subscriber records, log-on and log-off records, radius logs, open and unopened electronic mail (e-mail) and any attachments thereto, search engine requests, chat room or chat channel dialogues or logs, (buddy lists), customer service contact records and billing records and other records relative to or associated with the following accounts/persons:

XXXXX@yahoo.com

Because this is a criminal investigation, we are requesting that neither you nor your office disclose the fact or existence of our request, the investigation and/or any compliance or action made with respect thereto.

If you have any questions concerning this request, please feel free to contact me.

Sincerely,

COMMONWEALTH OF MASSACHUSETTS

_____, SS

SUPERIOR COURT DEPARTMENT
_____ DIVISION
INDICTMENT NO.##-####

COMMONWEALTH

V.

COMMONWEALTH'S MOTION IN LIMINE TO ADMIT THE RESTRAINING ORDER AFFIDAVIT AS SUBSTANTIVE EVIDENCE

Now comes the Commonwealth and in the above entitled matter and respectfully requests that this Honorable Court allow the victim's affidavit to restraining order ##-#### be admitted as substantive evidence, if the victim testifies in an inconsistent manner.

In Commonwealth v. Belmer, 78 Mass App 62 (2010), *review denied,* 459 Mass. 1101, the Supreme Judicial Court ruled that 209A affidavits carry an indicia of reliability because:

1) They are made under the pains and penalties of perjury;
2) 209A affidavits are in writing; and
3) "the affidavit comprises part of a complaint for protection that must be brought in court before a judge, see G. L. c. 209A, § 3, which conveys even more formality than grand jury proceedings." *Id*. at 65.

After acknowledging their inherent reliability, the Court extended the rule announced in *Commonwealth v. Daye*, 393 Mass. 55, 74-75 (1984) and held that a sworn prior inconsistent statement in a restraining order affidavit may be admitted in evidence at a criminal trial for its full probative value, so long as the declarant was subject to cross-examination at trial. *Id*.

In the instant case the Commonwealth asserts the following facts:

1. Statement by [Victim] in her affidavit to Restraining Order ##-#### specifically that the defendant [accusation in the RO]. (see full statement in attached restraining order)

2. Statement by [Victim] in her affidavit to Restraining Order ##-####, specifically that "[Detail Statements in RO]." (see full statement in attached restraining order)
3. After speaking with the victim, the Commonwealth anticipates that the victim will testify at trial in a manner that is inconsistent with the statements in the restraining order affidavit.

Accordingly, the Commonwealth in advance of trial respectfully requests that this Honorable Court admit into evidence the restraining order affidavit completed on [DATE] by [VICTIM NAME], if and when, the victim testifies in a manner that is inconsistent with the statements provided therein.

Respectfully submitted,
FOR THE COMMONWEALTH,

Date:

COMMONWEALTH OF MASSACHUSETTS

_____, SS

_____ COURT DEPARTMENT
_____ DIVISION
NO. _____

COMMONWEALTH

v.

_____

COMMONWEALTH'S MOTION OF ITS INTENT TO OFFER EVIDENCE OF SPECIFIC VIOLENT ACTS OF THE DEFENDANT

_____

Now comes the Commonwealth in the above-entitled action, and respectfully requests that this Honorable Court permit [name self-defense witness] to testify to [detail specific incident of defendant's violent past with date provided] to provide the jury with a complete picture as to the issue of first aggressor.

Discussion

When a defendant raises a claim of self-defense pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649 (2005) and has been permitted to introduce evidence of the victim's prior violent acts, the Commonwealth should also be permitted to introduce evidence of the defendant's prior violent acts. *Commonwealth v. Morales*, 464 Mass. 302 (2013). "[W]here the judge has determined that the jury may hear evidence of violent acts on the part of the victim to assist in their assessment of who initiated the fight or confrontation at issue in the case, the jury also should be able to hear evidence (if it exists) of specific violent acts of the defendant." *Id*. at 310. "This approach serves the goal of providing the jury with 'as complete a picture of the (often fatal) altercation as possible before deciding on the defendant's guilt.'" *Id*.

To admit evidence pursuant to *Commonwealth v. Morales*, the Commonwealth must give "notice well before the trial begins" of its intent and the particular evidence at issue. *Id*. at 311-312. The Court must find that the evidence is more probative on the issue of first aggressor than prejudicial to the defendant. *Id*. at 310-311. Further, upon admitting this evidence, "the trial judge must instruct the jury specifically on the proper and limited use of such evidence both contemporaneously with the introduction of the evidence at the end of the case." *Id*. at 311.

In the instant case, the defendant provided notice of its intent to offer self-defense evidence on [date of notice]. In that notice, the defendant specified [his/her] intent to offer evidence that the victim was the first aggressor. Accordingly, the Commonwealth seeks to offer evidence of

[defendant's specific incidents of violence w date specified] through the testimony of [name of witness] pursuant to *Commonwealth v. Morales*. This evidence is probative on the issue of first aggressor [more details here] and the risk of prejudice does not outweigh the benefit of providing the jury with a complete picture of the altercation. Additionally, the jury will hear an instruction on the limited purpose of this testimony both at the time the evidence is offered, as well as, at the conclusion of the case.

Conclusion

In this case, the Commonwealth contends that [witness name] should be permitted to testify to [specific incident of defendant's violent past] on or around [date] to provide the jury with a complete picture as to the issue of first aggressor.

Respectfully Submitted:
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS

_____ COURT DEPARTMENT
_____ DIVISION
NO. _____

COMMONWEALTH

v.

COMMONWEALTH'S MOTION *IN LIMINE* TO ADMIT STATEMENT AS AN EXCITED UTTERANCE

Now comes the Commonwealth in the above-entitled matter and respectfully requests that this Court admit the statement of [NAME], the victim in this case, as substantive evidence. More specifically, the Commonwealth seeks to introduce the statement ["…"] as an excited utterance through the testimony of [WITNESS TESTIFYING TO THE STATEMENT].

After *Crawford v. Washington*, the admissibility of an out-of-court statement is determined using a two-step inquiry: 1) the statement must be admissible pursuant to the rules of evidence; and 2) the statement must be admissible under the confrontation clause. *Commonwealth v. Simon*, 456 Mass. 280, 295 (2010).

The Statement is Admissible as an Excited Utterance

A witness's out of court statement is admissible as a spontaneous utterance if "there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer and the declarant's statement was a spontaneous reaction to the occurrence or event and not the product of reflective thought." *Id.* at 296 (internal citations omitted).

In this case, the victim's statement [APPLY FACTS THAT SUPPORT EXCITED UTTERANCE]

Therefore, the statement is admissible as an excited utterance.

The Statement is Not Testimonial and Does Not Violate the 6th Amendment Confrontation Clause

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that a *testimonial* out-of-court statement is admissible only if there is an opportunity to cross-examine the declarant. *Id*. at 59 (emphasis added). In determining whether a statement is testimonial, it is first necessary to consider whether the statement is testimonial per se and second to determine whether it is testimonial in fact. First, "[a] statement is testimonial per se if it was made in a formal or solemnized form (such as deposition, affidavit, confession, or prior testimony) or in response to law

enforcement interrogation." *Commonwealth v. Simon*, 456 Mass. at 297. However, a statement is not testimonial per se if made to secure a volatile scene or to determine the need for medical care. *Id.* Second, a statement is testimonial in fact if "a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting the crime." *Id.* (quoting *Commonwealth v. Gonsalves*, 445 Mass. 1, 12-13 (2005)).

In this case, the Commonwealth seeks to admit a statement made to a 911 dispatcher. Since the statement is in response to law enforcement interrogation, "for the statements to be non-testimonial, there must be an ongoing emergency, and the primary purpose of the interrogation must be to meet that emergency, not to prove past events that may be relevant to criminal investigation or prosecution." *Commonwealth v. Beatrice*, 460 Mass. 255, 259 (2011). "The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." *Id.* (citing *Michigan v. Bryant*, 131 S.Ct. 1143, 1157 n.8 (2011)). "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 260. If a statement falls within the ongoing emergency exception to testimonial in fact, it will never become testimonial in fact under any circumstance. *Commonwealth v. Simon*, 456 Mass. at 298.

In this case, [APPLY FACTS FROM CASE]

- Davis v. Washington/Commonwealth v. Galicia: 1) Is the event(s) ongoing or in the past? 2) Whether a reasonable listener would recognize the speaker is facing an ongoing emergency 3) Whether the questions and responses were necessary to resolve a present emergency rather than collect information about past events 4)Level of formality of the interrogation
- Is there an ongoing danger to the victim, public, or responding law enforcement?
- Is the defendant still at large?
- Nature of the argument? (private dispute v. unknown)
- Was a weapon used? What type?
- Is the *primary purpose* of the questioning to secure the scene?
- Is there serious injury and a witness in need of medical care?

The primary purpose of the statement to the 911 dispatcher was to secure an ongoing scene and request medical care; therefore the statement is not testimonial and admitting it will not violate the defendant's right to confrontation.

Conclusion

For all the foregoing reasons, [NAME's] statement [" …"] should be admitted as substantive evidence.

Respectfully Submitted
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____ COURT DEPARTMENT
_____ DIVISION
NO. _____

COMMONWEALTH

v.

COMMONWEALTH'S MOTION *IN LIMINE* TO ADMIT STATEMENT AS AN EXCITED UTTERANCE

Now comes the Commonwealth in the above-entitled matter and respectfully requests that this Court admit the statement of [NAME], the victim in this case, as substantive evidence. More specifically, the Commonwealth seeks to introduce the statement ["…"] as an excited utterance through the testimony of [WITNESS TESTIFYING TO THE STATEMENT].

After *Crawford v. Washington*, the admissibility of an out-of-court statement is determined using a two-step inquiry: 1) the statement must be admissible pursuant to the rules of evidence; and 2) the statement must be admissible under the confrontation clause. *Commonwealth v. Simon*, 456 Mass. 280, 295 (2010).

The Statement is Admissible as an Excited Utterance

A witness's out of court statement is admissible as a spontaneous utterance if "there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer and the declarant's statement was a spontaneous reaction to the occurrence or event and not the product of reflective thought." *Id.* At 296 (internal citations omitted).

In this case, the victim's statement [APPLY FACTS THAT SUPPORT EXCITED UTTERANCE]

Therefore, the statement is admissible as an excited utterance.

The Statement is Not Testimonial and Does Not Violate the 6th Amendment Confrontation Clause

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that a *testimonial* out-of-court statement is admissible only if there is an opportunity to cross-examine the declarant. *Id*. at 59 (emphasis added). In determining whether a statement is testimonial, it is first necessary to consider whether the statement is testimonial per se and second to determine whether it is testimonial in fact. First, "[a] statement is testimonial per se if it was made in a formal or solemnized form (such as deposition, affidavit, confession, or prior testimony) or in response to law

enforcement interrogation." *Commonwealth v. Simon*, 456 Mass. at 297. However, a statement is not testimonial per se if made to secure a volatile scene or to determine the need for medical care. *Id.* Second, a statement is testimonial in fact if "a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting the crime." *Id.* (quoting *Commonwealth v. Gonsalves*, 445 Mass. 1, 12-13 (2005)).

In this case, the Commonwealth seeks to admit a statement from [NAME] to a civilian witness. Therefore, the statement is not testimonial per se and the inquiry must turn to whether it is testimonial in fact. "[T]he focus of the testimonial-in-fact inquiry is not on those who heard the statements but, rather, on an objective view of a reasonable person in the declarant's position." *Commonwealth v. Figueroa*, 79 Mass. App. Ct. 389, 398 (2011).

In this case, [APPLY FACTS FROM CASE]

- **Demeanor of the Declarant**
- **Timing**
- **Primary Purpose of the Statement**
- **Age of the Declarant**
- **Injury to the Victim**
- **Setting of the inquiry (formal v. informal)**

Based on these facts, it is evident that a reasonable person in [NAME's] position would not have anticipated the statement being used to investigate and prosecute a crime. Therefore, the statement is not testimonial and admitting the statement into evidence will not violate the confrontation clause.

Conclusion

For all the foregoing reasons, [NAME's] statement [" …"] should be admitted as substantive evidence.

Respectfully Submitted
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS

DISTRICT COURT DEPARTMENT
DOCKET NO: _____

COMMONWEALTH

v.

COMMONWEALTH'S MOTION IN LIMINE TO ADMIT VICTIM'S OUT OF COURT STATEMENTS INTO EVIDENCE BASED ON FORFEITURE BY WRONGDOING DOCTRINE

Now comes the Commonwealth in the above-entitled matter and respectfully requests this Court *in limine* to allow the statements of _____, the victim in this case, as substantive evidence pursuant to the forfeiture by wrongdoing doctrine set forth in *Commonwealth v. Edwards*, 444 Mass. 526 (2005) and *Giles v. California*, 129 S. Ct. 2678 (2008). The Commonwealth seeks to introduce the statements _____ made to the responding Police Officer, through the Officer's testimony. The Commonwealth anticipates that the victim will be unavailable for trial based on an assertion of her marital privilege.

It has long been acknowledged that "no one shall be permitted to take advantage of his own wrong…" *Reynolds v. U.S.*, 98 U.S. 145, 159 (1878). Based on this principle, the Supreme Judicial Court adopted the forfeiture by wrongdoing doctrine in 2005 in *Commonwealth v. Edwards*. In that decision, the Court held that a "defendant is deemed to have lost the right to object (on both confrontation and hearsay grounds) to the admission of the out-of-court statements of a witness whose unavailability the defendant has played a meaningful role in procuring." *Commonwealth v. Edwards*, 444 Mass. at 540.

When one party alleges forfeiture by wrongdoing, the parties should be given the opportunity to present evidence at an evidentiary hearing, including live testimony, outside the jury's presence. Hearsay evidence, including the unavailable witness's out-of-court statements, may be considered. *Id.* at 545. At that hearing, the moving party must show by a preponderance of the evidence that: "1) the witness is unavailable; 2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and 3) the defendant must have acted with the intent to procure the witness's unavailability." *Id.* at 540. The wrongdoing need not necessarily constitute a criminal act, the "wrongdoing in forfeiture by wrongdoing is simply the intentional act of making the witness become unavailable to testify or helping the witness become unavailable." *Commonwealth v.*

Szerlong, 457 Mass. at 858, 861 (2010). In cases involving collusion between the victim and the defendant, "[w]here a defendant actively assists a witness's efforts to avoid testifying, with the intent to keep the witness from testifying, forfeiture by wrongdoing may be established *regardless of whether the witness already decided on her own not to testify*." *Id*. (internal citations omitted; emphasis added). The Supreme Court acknowledged the connection between domestic violence and forfeiture by wrongdoing in *Giles v. CA*:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution-rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. 129 S. Ct. at 2693.

In this case, at the evidentiary the Commonwealth will prove by a preponderance of the evidence that the witness is unavailable due to

_____

_____

_____.

The Commonwealth will also prove by a preponderance of the evidence that the defendant was involved in procuring the unavailability of the witness and acted with the intent to procure the witness's unavailability. Specifically, the Commonwealth will show that

_____

_____

_____.

In sum, the statements should come in substantively against the defendant as _____ is unavailable to testify due to forfeiture by wrongdoing by the defendant. *Commonwealth v. Edwards*, 444 Mass. 526 (2005); *Giles v. California,* 129 S. Ct. 2678 (2008).

The Commonwealth respectfully requests an evidentiary hearing on these issues.

Respectfully Submitted
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS

DISTRICT COURT DEPARTMENT
DOCKET NO: _____

COMMONWEALTH

V.

COMMONWEALTH'S MOTION IN LIMINE TO ADMIT EVIDENCE OF PRIOR BAD ACTS AND HOSTILE RELATIONSHIP BETWEEN THE DEFENDANT AND THE ALLEGED VICTIM

The Commonwealth moves this Honorable Court in limine to rule admissible at trial evidence of certain ―bad acts evincing the hostile relationship between the defendant and the alleged victim during a period of time prior to the incident at issue in the underlying case. The Commonwealth seeks to introduce this evidence during its case in chief.

The specific evidence on which the Commonwealth seeks an in limine ruling is as follows:

(establish the time frame and relate as much detail as possible about the expected testimony—details of the specific bad acts evidence, and details of the alleged crimes)

As grounds therefore, the Commonwealths states that evidence of such ―prior bad act is being offered:

(1) to establish the hostile nature of the relationship between the defendant and the alleged victim, as such evidence bears on the defendant's possible motives and state of mind on the date of the alleged offense, *Commonwealth v. Hunter*, 416 Mass. 831, 837 (1994), *Commonwealth v. Leonardi*, 413 Mass. 757, 764 (1992); *Commonwealth v. Robertson*, 408 Mass. 747, 749-752 (1990); *Commonwealth v. Nardone*, 406 Mass. 123, 128 (1989); and *Commonwealth v. Jordan* (No. 1), 397 Mass. 489 (1986);

(2) to help establish the defendant's modus operandi and pattern of conduct toward the alleged victim, and his identity as the person responsible for the alleged attack.

Commonwealth v. Crimmins, 46 Mass. App. Ct. 489, 494-495 (1999); *Commonwealth v. Helfant*, 398 Mass. 214, 224-229 (1986);

(3) to present as full a picture as possible of the events surrounding the incident itself *Commonwealth v. Bradshaw*, 385 Mass. 244, 269-270 (1982),

Commonwealth v. Chalifoux, 362 Mass. 811, 816 (1973); and *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758, 760-761 (1997).

(4) to negate any claim of accident or self-defense, see *Commonwealth v. Barrett*, 418 Mass. 788, 795 (1994);

(5) to prove the objective reasonableness of the alleged victim's fear, see *Commonwealth v. Gordon*, 407 Mass. 340 (1970).

Respectfully Submitted
For the Commonwealth,

Date:_____

COMMONWEALTH OF MASSACHUSETTS

_____, SS. _____ DISTRICT COURT
DOCKET NO.

COMMONWEALTH
v.

COMMONWEALTH'S MOTION IN LIMINE TO ADMIT EVIDENCE OF THE DEFENDANT'S MISCONDUCT

INTRODUCTION

Now comes the Commonwealth and moves this Honorable Court to rule the Commonwealth may introduce evidence of the defendant's misconduct in its case-in-chief. As grounds therefore, the Commonwealth asserts that the evidence is admissible because it bears on the defendant's motive and state of mind on the dates of the alleged offenses, *Commonwealth v. Robertson*, 408 Mass. 747, 749-752 (1990); establishes the defendant's modus operandi and pattern of conduct toward the alleged victim, *Commonwealth v. Helfant*, 398 Mass. 214, 224-229 (1986); negates any claim of accident, *Commonwealth v. Barrett*, 418 Mass. 788, 795 (1994); and shows the defendant's common course of conduct. The Commonwealth seeks this ruling in advance so that the trial of this matter may proceed smoothly.

PROCEDURAL HISTORY

The defendant has been charged… .

STATEMENT OF FACTS

The defendant and the alleged victim

PRIOR MISCONDUCT

In addition to the facts above, the Commonwealth seeks to introduce the following incidents of abuse:

1. List specific incidents

2.

STATEMENT OF LAW

It is settled law that evidence of a defendant's bad acts is not admissible to show criminal propensity or bad character; such evidence is admissible, however, for the proper purpose of showing intent and motive. *Commonwealth v. Irving*, 51 Mass. App. Ct. 285, 292 (2001); Mass. G. Evid. § 404 (2012). Before such evidence can be admitted, the Commonwealth must satisfy the judge that the jury could reasonably conclude that the act occurred and that the defendant was the actor; the Commonwealth need only show these facts by a preponderance of the evidence. *Commonwealth v. Leonard*, 428 Mass. 782, 785 (1999); *Commonwealth v. Rosenthal*, 432 Mass. 124, 126-127 (2000). It is for the trial judge to determine whether the value of the evidence for relevant probative purposes is not substantially outweighed by unreasoned prejudice. *Commonwealth v. Maimoni*, 41 Mass. App. Ct. 321, 328 (1996). The judge's decision will not be disturbed on review absent palpable error. *Commonwealth v. Brousseau*, 421 Mass. 647, 650 (1996); *Commonwealth v. Loach*, 46 Mass. App. Ct. 313, 317 (1999).

As a general rule, the Commonwealth is entitled to introduce all evidence that is relevant to prove motive. *Commonwealth v. Weichell*, 390 Mass. 62, 73 (1983), cert. denied, 465 U.S. 1032 (1984) (citation omitted). "Evidence of a hostile relationship between a defendant and his spouse may be admitted as relevant to the defendant's motive to kill the victim spouse." *Commonwealth v. Gil*, 393 Mass. 204, 215 (1984). Moreover, evidence of hostility close in time to the murder renders relevant earlier evidence of physical abuse of the victim by the spouse. *Id*. at 217.

I. Evidence of misconduct is admissible to put the instances of abuse in a comprehensible context by providing a view of the entire relationship between the defendant and the alleged victim.

Both the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court have repeatedly held that the Commonwealth may introduce evidence of the defendant's prior abuse of the victim to "put the single instance of abuse charged into a comprehensible context by providing the jury with 'a view of the entire relationship between the defendant and the [victim].'" *Commonwealth v. Calcagno*, 31 Mass. App. Ct 25, 28 (1991), quoting *Commonwealth v. Young*, 382 Mass. 448, 463 (1981). See generally*, Commonwealth v. Helfant*, 398 Mass. 214, 224 (1986). The evidence of prior bad acts by the defendant that the Commonwealth wishes to admit is "inextricably intertwined with the alleged offenses and is therefore highly relevant. *Commonwealth v. Hoffer*, 375 Mass 369, 373 (1978).

The decision whether to admit evidence of the defendant's prior and/or subsequent misconduct is committed to "the sound discretion of the judge." *Commonwealth v. Hoffer*, 375 Mass 369, 373 (1978). A judge's admission of such evidence will not be disturbed on review absent palpable error."

Commonwealth v. Brousseau, 421 Mass. 647, 650 (1996) *Commonwealth v. Loach*, 46 Mass. App. Ct. 313, 317 (1999).

In *Commonwealth v. Leonardi*, 413 Mass. 757, 758-760 (1993), for example, the Commonwealth introduced evidence of a restraining order sought by the defendant's former girlfriend which was issued five months prior to the attack. Testimony was also introduced by a police officer who had repeatedly responded to domestic disturbances between the former girlfriend and the defendant approximately two months prior to the issuance of the 209A order. *Id*. at 763. The Court found that, "[w]ithout the challenged evidence, [the crime] could have appeared to the jury as an essentially inexplicable act of violence," *Commonwealth v. Bradshaw*, 385 Mass. 244, 269 (1982). The court found that admission of the prior acts "enables the prosecutor to present a full picture of the incident." *Id*.

The Appeals Court applied the same reasoning in *Commonwealth v. Myer*, 38 Mass. App. Ct. 140, (1995). The Appeals Court upheld a district court ruling allowing the Commonwealth to introduce evidence of the background of the relationship between the defendant and the victim, including events that occurred several months after the date of offense. *Id*. at 141-144. Specifically, the Appeals Court noted that where the victim's decisions to "bring or drop charges against the defendant" may appear "whimsical," the Commonwealth is entitled to show that the charges were credible. *Id.* at 142, 144. Where the credibility of a critical witness is at stake, the Commonwealth can show that her apparent vacillation is part of a larger pattern of hostility in the relationship between the victim and defendant; indeed, that the defendant's hostility toward the complainant was a vital aspect of his state of mind, which was relevant to the Commonwealth's case. *Id*. at 143-144.

The court reached the same result in *Commonwealth v. Hallinan*, 92-P-986, (1992) aff'd 34 Mass. App. Ct. at 1122, where prior acts of violence were found to "shed light on the defendant's actions which might otherwise have appeared as incomprehensible acts of violence." The Court reasoned:

> If you give the jury the impression there had been no ups and downs in this relationship at all, all had been serene, and this is a fluke, and really never happened because she imagined it, that to me is painting a very faulty picture. However, if you give the jury a pretty clear picture of the stormy reconciliations, the fights and battles, then they are in a much better position to judge the truth both of the complaining witness and of the defendant if he takes the stand.

A number of other cases have affirmed that evidence of misconduct may be admitted to give the jury a picture of the entire relationship between the defendant and victim. See, e.g., *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758, 761 (1997) (evidence of prior harassing conduct was admissible to show defendant's pattern or course of conduct toward the victim and to give the jury the "whole picture"); *Commonwealth v. Walker*, 33 Mass. App. Ct. 915, 916 (1992) (rescript) (evidence that nine months prior to rape defendant flew into a rage when he saw the victim with a

rose was admissible to show defendant's possessive attitude and propensity to be violent towards her); *Commonwealth v. Martino*, 412 Mass 267, 279-281 (1992) (evidence that prior to victim's murder she had changed her house locks and telephone number, applied for and received a restraining order; communicated her desire to be apart from the defendant; and had been injured in a physical altercation with the defendant was relevant to show entire relationship between defendant and victim and depth of victim's fear); *Commonwealth v. Cordle*, 404 Mass 733, 744 (1989) (same); *Commonwealth v. Young*, 382 Mass at 463 (same).

The Commonwealth recognizes that "evidence of a defendant's [uncharged] criminal or wrongful behavior [may not be introduced] to show a tendency of bad character or propensity to commit the crime charged." *Commonwealth v. Leonardi*, 413 Mass. at 763. "If, however, such evidence is relevant for some other purpose, it is not rendered inadmissible merely because it indicates the possible commission of another offense." *Commonwealth v. Bradshaw*, 385 Mass. at 269, citing *Commonwealth v. Young*, 382 Mass 448, 462-463 (1981); *Commonwealth v. Hoffer*, 375 Mass. at 372.

II. Evidence of the defendant's abusive behavior is admissible to show the victim's fear of the defendant.

The prior acts of the defendant are admissible to show the victim's state of mind and her level of fear of the defendant. In assessing whether the defendant's conduct reasonably caused the victim to be fearful of the defendant, it is necessary for the jury to have a sense of the defendant's prior abusive and violent acts towards her. See *Commonwealth v. Martino*, 412 Mass at 279-281 (1992); *Commonwealth v. Gordon*, 407 Mass. 340, 351 (1990); *Commonwealth v. Martin*, 357 Mass. 190, 192 (1970).

The victim's state of mind, i.e., her fear of the defendant, is highly relevant with respect to all of the complaints. See *Commonwealth v. Matchett*, 386 Mass. 492 (1982). In the instant case, …

III. Evidence of the defendant's prior abusive behavior is relevant and highly probative of the defendant's motive to commit the crimes.

Massachusetts courts have repeatedly admitted evidence of prior bad acts to demonstrate a hostile relationship between the defendant and the victim because this hostility is relevant to the defendant's motive to harm or kill the victim. *Commonwealth v. Fordham*, 417 Mass. 10, 22-23 (1994) (evidence of defendant's prior assault on victim admissible as "highly probative of attitude toward her" and "resulting anger and hostility").

In *Commonwealth v. Jordan* (No. 1), 397 Mass. 489, 492 (1986) the Court found that evidence of beatings which occurred five to seven months prior the murder of the victim were admissible because the evidence was "probative of the defendant's mental state and his intent at the time of the offenses." *Id.* The Court considered this evidence as indicative of the defendant's hostility and actual malice toward the victim. *Id*. See also *Commonwealth v. Myer*, 38 Mass. App.

Ct. at 144; *Commonwealth v. Robertson*, 408 Mass. 747, 751 (1990)(admission of pimp's prior beatings of victim/prostitute was admissible to showed actual malice toward the victim and hostility toward the victims which pointed to a motive to kill them); *Commonwealth v. Mora*, 402 Mass. 262, 268 (1988) (where fact that intended victim had obtained a restraining order against defendant was relevant "as supplying a possible motive for the defendant's [threat to take] violent action against" the victim).

In *Commonwealth v. Rosenthal*, 432 Mass. 124, 126 (2000), the Commonwealth introduced evidence of a black eye the defendant caused to the victim three years before her murder. Because there was evidence of additional difficulties between the defendant and victim in the months leading up to the murder, the testimony concerning the victim's black eye "became relevant by virtue of a continuing hostility between [the Rosenthals] during a time in much closer proximity to the killings." *Commonwealth v. Rosenthal*, at 128, quoting *Commonwealth v. Gil*, 393 Mass. 204, 217(1984).

Courts have generally allowed evidence of the defendant's prior hostilities toward the alleged victim when it is indicative of the defendant's motive and criminal intent. See e.g., *Commonwealth v. Ashman*, 430 Mass. 736, 741 (2000) (where prior altercation between defendant and victim one month before the murder was admissible to show the defendant's state of mind, intent and relationship with the victim); *Commonwealth v. Nardone*, 406 Mass. 123, 129 (1989) (evidence that the victim-spouse went to a woman's shelter two years before shooting was properly admitted on the issue of the defendant's hostility and motive); *Commonwealth v. Person*, 400 Mass. 136, 143 (1987) (evidence of defendant's assault on victim seven months before murder properly admitted to show that relationship was deteriorating).

In this case, …

IV. **The highly probative value of evidence of the defendant's misconduct outweighs the danger of prejudice, and therefore should be admitted**.

While evidence of misconduct may result in some prejudice to the defendant, any prejudice that results is clearly outweighed by the probative value of such evidence. Where the Commonwealth has a substantial and legitimate purpose in proffering evidence of misconduct, and that evidence is in the nature of a "pattern" and relevant to a critical issue at stake (i.e., the credibility of a complainant), its probative nature is compelling. See *Commonwealth v. Helfant*, 398 Mass. at 224.

The court may give instructions as to the limited purposes for which the jury may consider the evidence presented. *Commonwealth v. Thabit Qiyam Madyun*, 17 Mass. App. Ct. 901, 902 (1984). For example, the court may give a limiting instruction that the prior bad act "was not admitted as tending to prove the commission of the crime charged, but only as evidence of the defendant's state of mind." *Commonwealth v. Myer*, 38 Mass. App. Ct. at 145 n.3. The instruction to the jury should "offset any improper prejudicial effect of evidence that might be thought to show

the defendant's bad character or propensity for violent acts and focuses the jury's attention on the proper application of the evidence." *Commonwealth v. McGeoghean*, 412 Mass. 839, 842 (1992). See also *Chartier*, *supra*.

The evidence that the Commonwealth seeks to present in this case is limited in scope and detail; it falls squarely within the exceptions to the general rule against "bad character" or "propensity" evidence. *Id*.

CONCLUSION

The Commonwealth should be permitted to introduce in its case-in-chief the defendant's charged physical violence and emotional abuse against [victim's name] as highly probative of his intent, state of mind and motive. Accordingly, the Commonwealth's Motion in Limine Regarding Defendant's Misconduct should be allowed and the evidence admitted.

For the foregoing reasons, the above-referenced instances of the defendant's prior misconduct should be deemed admissible at trial.

Respectfully submitted
for the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____ COURT DEPARTMENT

NO. _____

COMMONWEALTH

V.

COMMONWEALTH'S MOTION *IN LIMINE* TO CONDUCT AN IN CAMERA EXAMINATION TO DETERMINE IF (VICTIM) HAS A VALID 5TH AMENDMENT PRIVILEGE

Now comes the Commonwealth and requests this Honorable Court conduct an in camera examination of NAME, the victim in this matter, to determine if she has a valid 5th Amendment claim against self-incrimination. As reason therefore, the Commonwealth asserts the following:

"A witness must show a real risk that his answers to questions will tend to indicate his involvement in illegal activity, and not a mere imaginary, remote, or speculative possibility of prosecution." *Commonwealth v. Martin*, 423 Mass. 496, 502 (1996). It is for a judge, rather than a witness or his attorney, to decide whether a witness' silence is justified. *Id.* at 502. " A proper use for an in camera hearing is to allow a witness to impart sufficient facts in confidence to the judge to verify the privilege claim." *Id*. at 504.

The Commonwealth contends that an in camera examination is necessary to determine the validity of a 5th Amendment claim and to determine if any limitation on testimony is needed.

For the above stated reasons, the Commonwealth respectfully requests this motion be allowed.

Respectfully Submitted

For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____COURT DEPARTMENT

NO. _____

COMMONWEALTH

V.

COMMONWEALTH'S MOTION FOR A PROTECTIVE ORDER

Now comes the Commonwealth in the referenced case and respectfully moves, pursuant to Mass. R. Crim. P. 14 (a) (6), that the Court order discovery or inspection of the following be denied:

___Witness's name
___Witness's address
___Witness's phone number
___Witness's date of birth
___Witness's social security number
___Witness's workplace information (name, address, phone number)
___Witness's or witness's child(ren) school, daycare, babysitter information
___Witness's health [HIV status, etc], medical, or mental health information
___Videotape of interview with witness
___Names of parents that identify the victim

As reasons therefore, the Commonwealth states that the order is sought by the witness and is necessary to effectuate the witness's well-established interests in his/her privacy and safety as well as the court's duty to ensure those interests are protected. *See Commonwealth* v. *Clancy*, 402 Mass. 664, 669 (1988) (witness' execution of waivers or releases to enable the Commonwealth to use the material in charging the defendant with criminal violations does not constitute relinquishment of the individual's privacy rights); *Ward* v. *Peabody*, 380 Mass. 805, 819 (1980) (where relevant evidence is sought as part of a legitimate investigation, the "privacy interests of the [witness] and possibly of others should be considered"); G.L. c. 258B, §§ 2, 3(d) (victim's right to receive protection from harm arising out of cooperation with law enforcement and prosecution efforts); and 3 (h) (victim's

right to request confidentiality in the criminal justice system). The witness's name and the specific reasons relating to this protective order are outlined in the attached affidavit, which the Commonwealth has moved to impound.

In the alternative, the Commonwealth requests this Court to order disclosure be made to counsel for the defendant only, and to enter such other order or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of the witness and others referenced in the affidavit.

An affidavit in support of this motion is attached.

Respectfully Submitted
For the Commonwealth,

Dated: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____COURT DEPARTMENT

NO. _____

COMMONWEALTH

V.

AFFIDAVIT IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

I, _____, state that the following is true to the best of my knowledge, information and belief:

1. I am an Assistant Attorney General Attorney and have been assigned to prosecute the referenced case.

2. I have been informed that _____, a [victim] [witness] [family member of a victim] [family member of a witness], wishes to request confidentiality in accordance with the provisions of G.L. c. 258B, § 3 (d) & (h) and wishes that [his/her/their] name(s) and other identifying information not be disclosed publicly or to the defendant for the following reasons:

Respectfully Submitted
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____COURT DEPARTMENT
NO. _____

COMMONWEALTH

V.

COMMONWEALTH'S MOTION FOR JOINDER
PURSUANT TO MASSACHUSETTS RULE OF CRIMINAL PROCEDURE 9(a)(3)

Pursuant to Mass. R. Crim. P. 9(a)(3), the Commonwealth moves for joinder of indictment numbers _____ and _____ relative to the above named defendant. As reason therefore, the Commonwealth states:

1. The offenses are related;
2. Joinder is in the best interest of justice;
3. Both sets of indictments are scheduled for _____ on _____.

In support of this motion, a Memorandum of Law is attached.

Respectfully Submitted
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____COURT DEPARTMENT
NO. _____

COMMONWEALTH

V.

COMMONWEALTH'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR JOINDER PURSUANT TO MASS. R. CRIM. P. 9(a)(3)

STATEMENT OF THE FACTS

In domestic violence cases involving the same defendant and the same victim:

- *summarize the facts of the two offenses to show they are, in effect, one stream of events; emphasize any chronological connection; relate statements and actions which show connected motives or responses (e.g. defendant assaults victim the day after being served with a restraining order)*
- *be sure to include any details which are identical or similar in both incidents*
- *include general information about the relationship between the defendant and the victim – not just the specific conduct giving rise to the charges*

ARGUMENT

Massachusetts Rule of Criminal Procedure 9(a)(3) requires joinder of related offenses for trial unless joinder is not in the best interests of justice. Criminal offenses are related where they are "based on the same criminal conduct or episode or arise out of a course of conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan." Mass. R. Crim. P. 9(a)(1). In determining whether offenses are "related," the Court should consider "whether the crimes are similar in nature and whether the same evidence would be admissible to prove each charge." *Commonwealth v. Montanez*, 410 Mass. 290, 303 (1991); *Commonwealth v. Mamay*, 407 Mass. 412, 417 (1990). Joinder is a matter to be resolved by the trial judge in his discretion. *Commonwealth v. Hoppin*, 387 Mass. 25, 32 (1982); *Commonwealth v. Mamay*, 407 Mass. 412, 414 (1990).

"The defendant bears the burden of demonstrating that prejudice will result from a failure to sever the charges. *Commonwealth v. Gallison*, 383 Mass. 659, 671 (1981). Indeed, Mass. R.Crim.P. 9(a)(3), provides that where offenses are related, "[t]he trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice." *Commonwealth v. Delaney*, 425 Mass. 587, 593-594 (1997).

"In addition to applying the 'technical requirements' of Rule 9 … a judge must decide the question in the context of the guarantee of a fair trial for every defendant*." Commonwealth v. Sylvester*, 388 Mass. 749, 758 (1983). "In particular, the propriety of joining any one of the indictments, turns, in large measure, on whether evidence of the other offenses would have been admissible at a separate trial on each indictment." *Commonwealth v. Gallison*, 383 Mass. 659, 672 (1981). It is settled that evidence of other criminal conduct is inadmissible to prove the propensity of the defendant to commit the charged offense. *Id.* Such evidence can be used, however, to show a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive. *Commonwealth v. Helfant*, 398 Mass. 214, 224 (1986). *Commonwealth v. Mamay*, *supra* at 417; *Commonwealth v. Pillai*, 445 Mass. 175 (2005).

Domestic violence is, by definition, an escalating course of violent, criminal conduct, used by the abuser as part of a scheme to intimidate and control the victim. It is proper to join for trial domestic violence charges. See *Commonwealth v. Delaney*, 425 Mass. 587, 594 (1997). In Delaney, the trial judge joined for trial the charges of violating a c. 209A order, stalking, and intimidating a witness. The Supreme Judicial Court upheld the joining of the cases, stating that "the offenses charged demonstrated a pattern of conduct by the defendant toward the victim because of his unhappiness with the ending of their relationship and his desire to reunite with her." *Id*; See also *Commonwealth v. Feijoo*, 419 Mass. 486, 495 (1995) (joinder appropriate where the offenses indicated a scheme whereby the defendant used his position as a karate teacher to induce students to engage in homosexual activity); *Commonwealth v. Mamay*, 407 Mass. 412, 416 (1990) (joinder appropriate where the offenses indicated a scheme whereby the defendant used his position of authority and trust to commit sexual crimes on female patients visiting his office).

Here, the Commonwealth's evidence supports several related criminal episodes of domestic violence. All of the incidents are interconnected, involved the same victim, and occurred within months of one another. Separate trials of these indictments would necessarily include the same testimony from the Commonwealth's police and civilian witnesses, and the same documentary evidence of past restraining orders.

Juries in both cases will be entitled to consider evidence of the parties' interaction beyond the specific conduct related to the indictments. See *Commonwealth v .Young*, 382 Mass. 448,

463 (1981) (rev'd on other grounds). ("It is well for the jury to have a view of the entire relationship between the defendant and the victim.")

Trial of the second case would include evidence elicited in the trial of the first case, as evidence of the prior bad acts of the defendant, to establish his state of mind and pattern of conduct toward the victim. See *Commonwealth v. Jordan* (No. 1), 397 Mass. 489, 492 (1986) ("Evidence of prior beatings and mistreatment of the victim was probative of the defendant's mental state and his intent at the time of the offenses."); *Commonwealth v. Walker*, 33 Mass. App. Ct. 915, 916 (1992) (Evidence of prior incidents is admissible "in the discretion of the trial judge to show the defendant's possessive attitude toward the victim and his propensity to be violent toward her.")

Similarly, trial of the first case would include some of the same evidence of violence toward the victim that the Commonwealth would offer in the second case. See *Commonwealth v. Myer*, 38 Mass. App. Ct. 140, 144 (1995) (Holding that a subsequent, violent episode "would tend to prove that assaulting the complainant was a critical element of the defendant's hostile relationship with her … and that his hostility toward the complainant … was a vital aspect of his 'state of mind'"); See also, *Commonwealth v. Nardone*, 406 Mass. 123, 128 (1989); and *Commonwealth v. Robertson*, 408 Mass. 747, 751 (1990). "Indeed, if these charges were tried separately, much testimony would be duplicated at each trial merely establishing the relationship between the victim and the defendant." *Delaney*, 425 Mass. at 594.

The defendant will not be unfairly prejudiced by joinder of these indictments. Both indictments are scheduled for trial, and the defendant was provided with all discovery. "The defendant bears the burden to show that prejudice will result from the failure to sever and that such prejudice is beyond the curative powers of the court's instructions." *Helfant*, 398 Mass.at 230. This burden is not satisfied by showing merely that the defendant's chances for acquittal would be better if the indictments were tried separately. *Commonwealth v. Montanez*, 410 Mass. 290, 304 (1991).

CONCLUSION

For all of the foregoing reasons, including the interests of promoting justice, promoting judicial economy, and allowing the Commonwealth to demonstrate the defendant's pattern of conduct towards the victim, the Commonwealth respectfully requests that the Court join these related offenses for trial pursuant to the requirements of Mass. R. Crim. P. 9(a)(3).

Respectfully Submitted
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____COURT
DEPARTMENT

NO. _____

COMMONWEALTH

V.

COMMONWEALTH'S MOTION *IN LIMINE* AS TO DEFENDANT'S POTENTIAL CHARACTER AND/OR REPUTATION WITNESSES

Now comes the Commonwealth in the above-captioned matter and respectfully moves this Honorable Court *in limine* to conduct a *voir dire* of any potential character and/or reputation witnesses to be called by the defendant in order to determine whether their testimony is admissible before the jury.

As grounds therefore, the Commonwealth states that any such testimony as to the defendant's (or the victim's) alleged character and/or reputation may not be admissible under the requirements of applicable statutory and case law. See e.g., *Commonwealth v. Healey*, 27 Mass. App. Ct. 30, 39-40 (1989). Evidence of irrelevant character traits is not admissible. *Commonwealth v. De Vico*, 207 Mass. 251 (1911). The court has broad discretion to exclude character evidence that is too remote or based upon the opinion of too limited a group. *Commonwealth v. Phachansiri*, 38 Mass. App. Ct. 100, 109 (1995).

Respectfully Submitted
For the Commonwealth,

Date: _____

COMMONWEALTH OF MASSACHUSETTS

_____, SS _____COURT DEPARTMENT
NO. _____

COMMONWEALTH

V.

COMMONWEALTH'S MOTION *IN LIMINE* TO PRECLUDE REFERENCE TO (1) ANY ALLEGED "BAD CHARACTER" OR "BAD REPUTATION" OF THE VICTIM AND (2) ANY ALLEGED "PRIOR BAD ACTS" OF THE VICTIM

Now comes the Commonwealth in the above-captioned matter and respectfully moves this Court *in limine* to order counsel for the defendant to refrain from making any reference before the jury to (1) any alleged "bad character" or "bad reputation" of the victim/witness, and (2) any alleged "prior (or subsequent) bad acts" of the victim/witness. Specifically, the Commonwealth requests that the court order defense counsel to refrain from any such reference during the opening statement, during cross-examination of the victim or any other Commonwealth witness, during direct examination of the defendant's witnesses, or during closing argument.

As grounds therefore, the Commonwealth states that "Massachusetts practice does not permit opinion evidence from W2 regarding W1's truthfulness…. Indeed, it is the longstanding rule that a witness, either lay or expert, may not offer an opinion regarding the credibility of another witness." M.S. Brodin & M. Avery, Massachusetts Evidence § 6.16.1, at 347 (8th ed. 2007). Evidence of prior bad conduct may not be used to impeach a witness's credibility except by production of records of criminal convictions pursuant to the limitations and requirements of G.L. c. 233, §21. *Commonwealth v. Clifford*, 374 Mass. 293 (1978), citing *Commonwealth v. Turner*, 371 Mass. 803 (1977), *Commonwealth v. Binkiewicz*, 342 Mass. 740, 755 (1961), and *Commonwealth v. Dominico*, 1 Mass. App. Ct. 693, 713 (1974).

Specific acts of misconduct showing W1 to be untruthful but which did not result in a criminal conviction may not be used either on cross-examination or through extrinsic evidence to impeach a witness under Massachusetts Practice. M.S. Brodin & M. Avery, Massachusetts Evidence § 6.16.3, at 363 (8th ed. 2007). "The reasons generally given [for the rule against impeachment by bad acts] are: That proof of separate instances of falsehood

may have existed without impairing his general reputation for truthfulness. Or that the impeached witness is not required to be prepared to meet particular acts of which he has had no notice, although he is presumed to be capable of supporting his general reputation. Or that the attention of jurors will be distracted from the real issue to be tried by the introduction of collateral issues, which also would tend to prolong the trial unduly." *F.W.Stock & Sons v. Dellapenna*, 217 Mass. 503, 506, 105 NE 378, 379 (1909), Brodin & Avery, *supra*, at 363.

In *Commonwealth v. Weichel*, 403 Mass. 103 (1988), the defendant (an inmate) sought to cross-examine one of the alleged victims (a prison guard) about whether he had taken a watch from the defendant in the year before the underlying alleged assault and battery. The judge properly excluded the testimony: "the evidence, had it been admitted, might well have led the jury to discount [the guard's] testimony, not on the ground of bias, but on the ground that the taking of the watch was a prior bad act that demonstrated [the guard's] lack of character and consequent unreliability as a witness. Impeachment of a witness in that manner is improper…. Thus, because the proffered evidence had little, if any, legitimate value, and invited misuse by the jury, the judge clearly did not abuse his discretion in excluding it." *Id*. at 106. See *Commonwealth v. Mandell*, 29 Mass. App. Ct. 504, 507-508 (1990) (evidence that the victim seemed "impaired" or "accident prone" was properly excluded).

In *Commonwealth v. Adjutant*, 443 Mass. 649 (2005), the SJC held that if a self-defense theory is raised and the identity of the first aggressor is legitimately in dispute, evidence of the victim's aggressive and violent character is admissible, regardless of when the defendant learned of it. *Id.* However, the evidence must be in the form of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated. *Id.* at 665. While the court has the discretion to admit specific instances of violence that the victim is reasonably alleged to have initiated, it must decide whether the probative value of the evidence outweighs its prejudicial effect in the context of the facts and issues presented. *Id.*at 650.

In this case, the defendant provided notice that they seek to admit evidence that the victim:_____
_____.
This Court should preclude this evidence from being admitted. First, there is no issue of self-defense or first aggressor in this case. The only evidence put forth is the defendant's statements to _____ which is contradicted by the defendant's statements to _____. Second, the prior instance of violent conduct the defendant seeks to admit is too remote in time to be relevant to the facts of this case. When the court in *Adjutant* discussed the judge's discretion in allowing the prior acts of the victim, it compared the judge's discretion in allowing prior bad acts of a defendant. *Id.* at 663 and 664. Therefore, it follows that when the court is weighing the probative value of the proffered act, the same factors and standards would apply. "Evidence of prior misconduct . . . is admissible if

'substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it . . . .' " *Commonwealth v. Yelle*, 19 Mass. App. Ct. 465, 471-472 (1985), citing *Harper v. United States*, 239 F.2d 945, 946 (D.C. Cir. 1956). The proposed bad act evidence the defendant seeks to admit is insignificant and should be inadmissible since

_____

_____

_____

_____. Should the court find that it is a borderline case, one such factor that courts have historically evaluated in weighing the probative value of a prior bad act of a defendant is the remoteness of said act. See *Commonwealth v. Gollman*, 436 Mass. 111 (2002); *Commonwealth v. Jackson*, 417 Mass. 830 (1994). There is no "bright-line test" to determine whether a prior bad act is too remote to be admitted for a permissible purpose. However, courts have routinely made that determination by weighing the elapsed time period with the similarity of the act to the act charged. *Id*. at 842. "[W]here the logical relationship between the . . .offenses is more attenuated, a time span of fifteen minutes may be too much." *Commonwealth v. Anderson*, 439 Mass. 1007, 1008 (2003), citing *Commonwealth v. Helfant*, 398 Mass. 214, 228 n. 13 (1986). Further, "[w]here the prior misconduct is merely one instance in a continuing course of related events, the allowable time period is much greater." *Id.* at 228. In this case, the proposed "bad acts" the defendant seeks to offer is too remote and there is no similarity between the offenses. Specifically, _____

_____

_____

_____.

For all the reasons stated above, the Commonwealth seeks to preclude any reference to the victim/witness' "bad character," "bad reputation" or "prior bad acts." Because such evidence would be inadmissible, any reference to such alleged evidence in the presence of the jury would be improper.

Respectfully Submitted
For the Commonwealth,

Dated: _____

12. APPENDIX C: DIRECT EXAMINATION OF THE RECANTING VICTIM

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There are a number of goals for your examination of the victim: establishing the nature of the relationship as characterized by defendant's acts of control; admitting prior arguments and violent acts of the defendant; confirming her testimony about the incident; admitting the nature of the relationship since defendant's arrest, especially any contact he might have had or attempted; and, impeaching testimony where necessary.

When fashioning your examination always keep in mind your knowledge about why this particular victim might be reluctant to testify, or might recant or minimize the abuse. In many ways the victim is asked to walk an impossible high-wire act: she wants the abuse to end, but perhaps not the relationship. Most witnesses are reluctant to outright lie, but they are very afraid to tell the truth in front of the defendant, who will continue and escalate the abuse if he is acquitted, or may continue and escalate the abuse after he's convicted and served his sentence. Some victims want to make the defendant and the court happy, but most of all they want it all to be right, to just go away. Because of this you need to act compassionately toward even the most hostile victim. If you do, you will find that victims will often answer truthfully many questions about the prior relationship or defendant's acts and behaviors. They may then still recant or minimize the incident. In their minds they are successfully walking that tight-rope.

12.1. *SHOULD YOU CALL THE VICTIM AS A WITNESS?*

The victim's safety is important in deciding whether to call the victim. Deciding to call the victim when it's not necessary to the case may force the victim to choose between truthful testimony and her personal safety. It may add to the appearance that she, not the State, is pushing the case. The batterer may use that as an excuse to continue the abuse later if he has the opportunity to do so.

Testifying may well expose the victim to significant emotional trauma. It may bring out facts that would compromise the victim's position in subsequent divorce, custody, or child protection proceedings.

You must balance these considerations against the need for the testimony to maximize the chances that the batterer will be held accountable. In some instances, considerations of safety will outweigh the need to call the victim.

12.2. *SAMPLE QUESTIONS FOR A RECANTING VICTIM*

From the sample questions that follow you can see that you can achieve several goals with reluctant witness. Simple things can and should be confirmed, like identification, time and place.

Other more substantive goals, like eliminating alternate explanations, can be reached by asking simple questions of the victim about what she did after the police left.

Keep in mind that these sample questions are suggestions. They are not roadmaps to guaranteed victory in every case, nor do they fit every prosecutor's style. You must adapt the questions to your particular case and style.

Be mindful, too, of inadvertently perpetuating stereotypes about victims of domestic violence. Not all victims are smaller than their abusers. In a case where the victim is bigger, the issue is not the difference in size but the difference in strength. In that kind of case, the sample questions about physical size difference should be changed to get the information you need. The same is true for questions about financial dependence. While a good many cases involve victims who make less than their batterers, many also involve victims who are employed and earn as much or more than the batterer. That doesn't mean that the batterer does not employ some abusive tactics to use the family finances to control the victim. It may be, for instance, that while the victim earns a higher wage the batterer may insist that she turn over her earnings to him. Or the batterer spends more than the victim earns, keeping the family – and thus the victim – in a state of financial instability. In those instances you must tailor the question to get that testimony from the witness.

The victim's first telling of the events is usually what really happened. Take some time to review the first statement made by the victim. Keep asking yourself: is this a logical response? Does this line up with the physical evidence at the scene? Would most people behave like this in this circumstance? Get the victim to tell her story, structured with the traditional open ended questions of direct examinations. Then make the decision whether to impeach the victim with prior statements, or proceed line-by-line through her first version to get her to confirm or deny making each individual statement.

Living Arrangements

- The man seated at the table in front of you is your husband, boyfriend, and/or father of your child?
- Currently, you are married and/or living with defendant?
- How long have you been married and/or living together?
- Have children? How many? Ages? Is defendant the father?
- At the time of the incident, were you married to or living with defendant?
- Since the incident, have you continuously lived with defendant?
- Any separations? What about right after the incident?
- How did you get to court today?
- Are the people sitting in the hallway outside with you defendant's relatives/friends?
- Did you all come to court together? Including defendant?
- How will you get home from court today?

Financial Dependence

- Are you currently working outside the home?
- Have you ever worked outside the home since you have been with defendant? If so, did he ask you to quit work and stay home?
- Is defendant currently working?
- Does he make more money than you do?
- Are you worried that he might lose his job if he is convicted?
- Are you renting? Do you have a mortgage payment?
- Who's responsible for paying the rent/mortgage?
- Do you rely on defendant for rent, groceries, utilities, bills?
- Rely on defendant to help around the house? With kids?
- Does defendant's family help you take care of the kids? Provide any financial support?

Prior History of Violence

- This wasn't the first time defendant frightened you, was it?
- This wasn't the first time defendant threatened you, or scared you, was it?
- This wasn't the first time defendant was violent with you, was it?
- This wasn't the first time defendant injured you, was it?
- You told Officer that defendant had been violent with you/scared you/threatened you at least __times prior to this incident, didn't you?
- You also told the 911 operator/prosecutor's office that he had been violent with you before, didn't you?
- When was the first time he was violent with you/scared you/threatened you? What happened?

NOTE: Prepare to impeach victim with police reports, 911 calls and/or statements of prior violent incidents.

- When was the next time he was violent with you? etc.
- Did you stay with him even after he had been violent? Why?
- Did you call the police? Why not?
- Did he apologize to you?
- Did he tell you it was your fault he hit you because you made him upset/angry?
- Were you afraid you would not be able to support yourself or your children if you left him? Or if he was arrested?
- Did he promise it would never happen again? But it did?

The Charged Incident

- In this case, you had an argument with defendant on _____.
- You were the only two people in the house?
- Kids there?
- Where in the house were the kid(s)?
- Same room?
- They could see you?
- They hear you?
- The argument was about ____ right?
- He was mad?
- He raised his voice?
- He scared you?

NOTE: Usually about now victims start denying or minimizing the incident. May need to impeach victim at this point (See following section). If not, keep going.

- Defendant caused those marks, right?
- You didn't have those marks before that date?
- Do you think he meant to hurt you when he touched/hit/pushed/kicked you?
- Have you talked to defendant about what happened on that day/night?
- Has he apologized to you for what he did? When?
- Did he call you from jail after he was arrested?
- Did he tell you he was sorry?
- Did he tell you he didn't mean to hurt you?
- Did he tell you it would never happen again?

If victim says "no" to above questions:

- So he told you he was not sorry? He told you he meant to hurt you? Threatened it would happen again?

NOTE: If victim left Defendant after incident, find out more.

- Did you leave Defendant after incident?
- Did you go to a shelter?
- Stay with friends? Relatives?
- Did you take your children with you?
- Did you leave because you were afraid?
- Why fearful? Prior incidents or subsequent incidents?
- Afraid he would be mad because he was arrested? Retaliate?
- Afraid he would take the kids away from you?
- Physical Size Difference
- How tall are you?
- You told the officer that you weighed only ____ ?
- How tall is the defendant?
- Approximately how much did he weigh on the day of the incident?
- So he is bigger than you are?
- And he is much stronger than you are? Even though he is smaller?

Status of Relationship with Defendant

- You testified you are now back with defendant?
- But you initially left him?
- Separated for how long?
- You took him back?
- Did he intimidate you to come back?
- Harass you to come back?
- Promise you he would change?
- Was that before or after he learned of the pending criminal case?
- Defendant called you from jail? When? How many times?
- Was he angry at you?
- Tell you to drop charges?
- Tell you to get him out of jail?

- Tell you to say that you started the fight? You hit him first?
- Threaten you with what would happen to you if you didn't help him?
- As you testify today, are you saying defendant sat in jail for something you now say he did not really do?
- And he never called you from jail?
- He never got angry at you?
- He never told you to get the police or prosecutor to drop "false" charges against him?86.

Discussion of Pending Charges

- When did you first learn this case was being prosecuted?
- When was the first time you talked about this case with defendant?
- When was the first time you talked about this case with his family/friends?
- Were they angry at you that defendant was in jail?
- When did you first talk to him about the case? While he was in jail?
- When he came home from jail?
- What did he say to you?
- Did he blame you? Apologize? Admit he was wrong?
- Did you come with him to court?
- Did you go with him to the defense attorney's office?
- Have you spoken with his attorney?
- Did he/she tell you what you should say in court?
- Did you speak with an investigator from the defense attorney's office? When?
- Did you call the Prosecutor’s office?
- Receive information in the mail from the Prosecutor’s office?
- Fill out any victim questionnaire?
- Did you show him the questionnaire?
- Did he help you fill it out?
- Did you show it to him before you filled it out?
- Did he tell you what to write?
- Did he try to remind you what happened?
- Did you show it to him after you filled it out?
- Did he approve it before you sent it to the Prosecutor’s office?
- Are you trying to forget that this incident ever happened?
- Would you rather everyone left your personal relationship with him alone?
- Have you ever asked the Prosecutor’s office to drop charges against him?
- You waited until you came to court weeks/months after the incident to tell anyone that you had lied/the police were wrong/you had started it?
- How many times since he was arrested have you talked about the case with him?

Attitudes and Feelings about Testifying

- Were you reluctant to testify today?
- Why? Are you comfortable with the court process?
- Has he threatened or intimidated you in any way?
- Has his family or friends threatened or intimidated you?
- Did he tell you what to say today?

- Did you tell him what you were going to say today?
- Do you understand it is the Prosecutor's office, not you, that is prosecuting Defendant?
- Do you understand that you cannot make the decision to drop charges against Defendant when he has violated the Penal Code?
- Do you understand why?
- Are you nervous because he is sitting in this courtroom so close to you while you testify?
- Are you anxious that if you say the wrong thing, he might get mad at you when you get home tonight?
- Are you afraid of him now?
- Were you afraid of him then?
- Do you still love him?
- Want him to help raise the kids with you?
- You do want him to know you still love him, right?
- You don't want anything bad to happen to him?
- You do want him to stop hurting you?
- Do you want him to take responsibility for his actions?

Adapted from Gael Strack, Assistant City Attorney, San Diego City Attorney's Office, presented by the National District Attorney's Association, 1997.