

RESTRAINING ORDERS IN MASSACHUSETTS

Your rights whether you are a Plaintiff or a Defendant

**Prepared by the Mental Health Legal Advisors Committee
October 2012**

What is a restraining order?

A restraining order is a court order that may be granted to a person who believes s/he has been abused and wants protection from the abuse. An individual with a mental illness may be the Plaintiff, the person claiming they need protection from abuse, or may be the Defendant, the person having to defend against the restraining order because of allegations related to their mental illness. This flyer attempts to answer questions for individuals with mental illness in either situation.

The Plaintiff can apply for a restraining order to prevent further abuse if he or she has been physically assaulted, threatened, forced to have sex, or abused in other ways.

What can a restraining order do for the Plaintiff?

In a restraining order, a judge may order that the other person (the Defendant) to:

- stop abusing you, the Plaintiff;
- leave your home even if the person owns or pays rent for the home;
- not contact you and stay away from you, your home, your work, and/or your children;
- pay child support;
- pay living expenses if you are married;
- pay for expenses you have had because of the abuse, such as medical expenses, property damage, or lost wages;
- give up any firearms;
- attend a batterer's treatment program.

In addition, a judge can order for you, the Plaintiff, to have temporary custody of your children and if you are fleeing from abuse, that your address be "impounded", which means that it will not appear on court documents or be available to the Defendant from the court.

Who can apply for a restraining order?

You can apply for a restraining order if you have been abused by:

- your husband or wife (or ex-husband or ex-wife);
- a household member or former household member (including roommate);
- the other parent of your child;
- a blood relative or someone related to you by marriage (for example, siblings, parents, or in-laws);
- anyone with whom you have had a substantial dating or engagement relationship.

You also need to prove that this person abused you. Abuse is defined as:

- attempting to cause or causing you or your children physical harm;

- placing you or your children in fear of "imminent" (meaning something that is about to happen) serious physical harm;
- using force, threat or duress to cause you to have sexual relations.

In other words, you need to show the court that the person physically harmed you or that you have good reason to believe that the person will harm you in the near future.

Who issues restraining orders?

You can get a restraining order at your local District Court, Probate & Family Court, or Superior Court during regular business hours. (*Note that as of September 2011 many courts have limited their regular business hours but you can still go to the court until the building is closed for these kinds of emergency orders.*) You can also get restraining orders when the courts are closed. You can file for an emergency 24-hour restraining order at your local police station, or you may call the police and file for the order over the telephone. However, if you get this kind of order, you need to go to court the next business day. Deciding which court to go to (usually the District Court or the Probate & Family Court) depends on the circumstances of your case.

The District Court

The District Court can order the petitioner to have custody of the child(ren) but cannot order visitation between the defendant and his/her children. Therefore, if you do not want the court to order visitation, you should go to the District Court. However, if there is an existing Probate & Family Court order regarding custody/visitation, the District Court order can only last for several days so that the matter can get back into Probate Court.

The District Court also has staff called Victim-Witness Advocates who can assist victims of domestic violence with this process.

The Probate & Family Court

The Probate & Family Court is the only type of court that can order visitation between the defendant and his/her children. It may be important to you to decide issues of custody and visitation right away. In these cases, you should file for a restraining order in the Probate & Family Court. The Probate & Family Court can also modify the District Court's restraining order.

What steps are required to get a restraining order?

To get a restraining order at a courthouse, you need to do three things: (1) fill out a Complaint, (2) on that same day, go to a hearing to tell the judge why you want the restraining order, and (3) go back to the courthouse later for another hearing, often called a 10-day hearing, where the defendant will have a chance to tell his/her side of the story.

Application for Restraining Order

The first step is to go to the courthouse to fill out an application (complaint) for a restraining order. You should go to the Registry or Clerk's office where someone will show you how to fill out the forms. You must also complete an Affidavit, which describes the abuse. Domestic violence advocates or clerks are usually available to explain what to do.

Initial Hearing

After filling out the forms, you will go into the courtroom, be sworn in by a clerk, and appear before a judge for a hearing. The person who abused you will not be at this hearing, because s/he does not yet know that you are filing for a restraining order.

The judge may ask you questions about why you want a restraining order. With as much detail as possible, you should describe the most recent abusive event and also describe how the person has abused you or threatened you in the past. If your children witnessed the abuse or were also abused, it is important for you to tell the judge.

10-day Hearing

You will have to come back to court later for another hearing, usually called the 10-day hearing. In the meantime, the person who has abused you will get notice of this hearing, called service of process. At this hearing, this person will have an opportunity to tell the judge his/her side of the story.

If you have any witnesses who have seen the person's abusive behavior, you should bring them to court with you. If you have any documents that show you have been abused, you should bring them with you to court as well. For example, you might want to bring photographs of your injuries, your medical records, police reports, answering machine tapes with recorded threats, or letters that contain threats or admit the abuse. This evidence will be helpful if the person tries to claim that you are making up the abuse due to mental illness.

If you think the abusive person might try to claim that you are not fit to take care of your children, you could bring a letter from your doctor or therapist explaining that your illness does not affect your ability to parent. You may also want to bring a supportive person to court with you to strengthen your testimony, such as your advocate, your therapist, your coworker, or a friend or family member. The court often likes to hear a professional opinion to help make its decision easier.

As the Defendant, how do I defend against a restraining order?

If someone has obtained a temporary restraining order against you, you are referred to as the Defendant and will be served by the police or by mail. However, you will not be served with a copy of the complaint application, or the Affidavit, so you should get a copy of both at the courthouse before the hearing. You have the right to appear at the hearing, present evidence, testify, and cross-examine (question) witnesses. In other words, you have the opportunity to tell your side of the story.

If you are served with a restraining order, you should appear at the hearing if you want to contest the order. The judge and the court staff pay close attention to the behavior of everyone in the courtroom. The judge will observe what time you arrive, what you wear, how you act towards the other person, and your attitude towards the court.

In order to issue a restraining order against you, the judge must find that you caused or attempted to cause physical harm, or that you put someone in fear of imminent serious physical harm, or that you caused someone to have sexual relations with you by using force, threat or duress. If none of these standards are met, the judge should not issue a restraining order against you.

How you defend yourself depends on the circumstances of your case. If you believe that someone is trying to get a restraining order against you solely because you have a mental illness, but s/he cannot meet the legal standard, you should argue that s/he is not entitled to a restraining order. Simply having a mental health diagnosis or taking (or not taking) medication for a psychiatric illness is not enough to prove abuse. If the person seeking the restraining order has attempted to be in contact with you or otherwise has behaved as if he or she were not afraid of you, tell the judge this as it undermines the argument that the petitioner is in fear of you.

Perhaps the person seeking the restraining order against you actually has been abusive to you. In that case, you would want to bring to the hearing old or current restraining orders that *you* filed against the person. You may also want to bring medical records, police reports, photographs, or witnesses that document the past abuse. If someone is abusing you however, and you fight back in defense, you too may be held accountable.

You should try to get an attorney to come to the hearing with you, but if you cannot obtain an attorney, you should try to bring a doctor, therapist, case manager, advocate, family member, or friend with you to strengthen your testimony. You should also present evidence on your own behalf that balances the judge's view of you, and informs the judge that mental illness does not necessarily make you unstable, violent, or a bad parent. For example, you might show that you have steady employment, clubhouse membership and/or participation in a day program; that you have strong family support; that you have consistent and loving relationships with your children; that you consistently pay child support for your children; or that you are involved in your community.

Restraining orders that are extended past the temporary review date generally last for one year. If you believe that the judge is going to issue a restraining order against you, you could ask that the order be issued for a shorter period of time, such as three or six months. You could also ask the judge to make sure that the order does not apply to your children, so that you can have regular contact with them. (You still need to get orders for visits from the probate court.)

What are the consequences of a restraining order if you are the Defendant?

A major consequence is that the restraining order is likely to require you, the Defendant, to leave your home, if you live with the person who receives the order. If you have children, a restraining order could prevent you from getting custody of or having visitation with your children.

In addition, the issuance of a restraining order automatically enters your name into the Statewide Registry of Civil Restraining Orders. This could potentially affect you later when you try to apply for certain jobs or try for a promotion, for example. It is very difficult to remove your name from this registry, even if the restraining order against you is later terminated. In certain cases you can ask the judge to vacate the order "*nunc pro tunc*" which means that the order will be dismissed back to the date it was originally issued. This will *only* be granted if you can prove that the petitioner committed fraud on the court in obtaining the restraining order. If the judge does vacate the order based on fraud, your name should be removed from the registry.

What is a violation of a restraining order?

A violation of a restraining order by the Defendant will often result in arrest of the Defendant, and is a criminal offense. It is important to note that you, the Defendant, will be in violation of the order if you do ANYTHING that the order prohibits you from doing. For example, if the order prohibits you from contacting your spouse and child, you will be in violation of the order if

you send your child a gift, or call your spouse to tell him/her you are sorry. You are not even allowed to have someone talk to the person for you. The courts look at every violation as a violation and it does not matter that you had good intentions.

If you are the Plaintiff, to report a violation of a restraining order by the Defendant, you need to call the police or go to the police station. If there is a restraining order against you, but the person who filed the order, the Plaintiff, repeatedly tries to have contact with you, you may go to court to ask the judge to vacate the restraining order, but the Plaintiff cannot violate the restraining order in the same way the as the Defendant.

Whether you are seeking a restraining order or defending yourself against one, it is important to seek legal advice before you go to court.

What can I do if I can't get a 209A restraining order but I still feel I need protection?

In addition to restraining orders, there is also something called a **harassment prevention order** (also called **258E**, the statute that created it). In February 2010, the harassment prevention order was created to protect individuals who do not meet the relationship requirements for 209A orders. You may apply for a harassment prevention order if you have been abused by:

- Anybody you know as long as they have harassed you.
- Harassment is defined as 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 one act that:
 - (A) by force, threat or duress causes another to involuntarily engage in sexual relations, or
 - (B) constitutes a violation of certain other statutes (mostly indecent assault and battery, rape, or drugging persons for sexual intercourse).

The courts you can go to for a 258E are Boston Municipal Court, District Court, Juvenile Court (only if both parties are under age 17), and Superior Court.

What are the remedies under harassment prevention order?

A 258E can order that the defendant refrain from abusing or harassing the petitioner, refrain from contacting the petitioner, remain away from home and workplaces of the petitioner, and pay “money compensation” for losses suffered as a result of the harassment. Note that a 258 cannot provide an order to vacate the home, or custody, visitation, or support orders.

What are the consequences of a violation of a harassment prevention order?

Any violation of a harassment prevention order is punishable by a fine (up to \$5,000) or by imprisonment for up to two and a half (2 ½) years, or by both a fine and imprisonment.

Also, if the court finds that the order was violated it may order that the defendant to complete an appropriate treatment program, and certain other fines.