

Bishop/Fuller Replaced with New Protocol
Privileged Records

Commonwealth v. Dwyer
Supreme Judicial Court, December 29, 2006

The SJC has announced a new protocol governing requests by defendants to inspect statutorily privileged records that are in the possession of a third party. This new protocol replaces the Bishop-Fuller protocol, and applies prospectively to all criminal cases tried after the issuance of the rescript of this case, which is expected to be January 26, 2007.

The defendant was charged with rape of a child and filed a motion to review the victim's therapy records. The motion was denied and the defendant appealed, specifically challenging the *Bishop-Fuller* protocol. After extensive review, the SJC granted the defendant a new trial and issued the following new protocol which is designed to provide "a reasonable opportunity for defense counsel to inspect pretrial presumptively privileged records produced by a third party, subject to a stringent protective order." The following summarizes the protocol, which is detailed in an appendix to the opinion.

The Dwyer Protocol

Step 1. The Defendant's Filing, and the Commonwealth's Service, of a Motion Pursuant to Rule 17(a)(2) and Lampron:

- The defendant who seeks documentary evidence and/or objects held by a third party files a motion and affidavit as required by Rule 13(a)(2). The motion must identify:
 - the name and address of the custodian of the records;
 - the name, if any, of the person who is the subject of the records; and
 - as precisely as possible, the records sought.
- The Commonwealth forwards copies of the motion and affidavit to the record holder and (where applicable) to the third-party subject, notifies them of the date and place of the (*Lampron*) hearing on the motion, and also informs them that:

- the hearing shall proceed regardless of their presence;
- the hearing shall be the third-party subject's only opportunity to address the court;
- any statutory privilege shall remain in effect unless and until the third-party subject affirmatively waives it; and
- if the third-party subject is the victim, s/he has the opportunity to confer with the prosecutor prior to the hearing.

Step 2. The *Lampron* hearing and findings:

- At the hearing, the court must determine whether the moving party made a showing that:
 - the documents are relevant and have evidentiary value;
 - the documents cannot otherwise be reasonably procured in advance of trial;
 - 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
 - the request is made in good faith and is not intended as a "fishing expedition."
- The judge shall make oral or written findings as to whether:
 - the defendant has satisfied the requirements of Rule 17(a)(2), as explained in *Lampron*; and
 - the records sought are *presumptively privileged*. Presumptively privileged records are records prepared in circumstances suggesting that some or all of the records are likely protected by a statutory privilege.
- Note that neither the custodian of the records nor the third-party subject need be present, nor shall the third-party subject be required to assert any statutory privilege. *Dwyer* specifies that all records likely to be covered by a statutory privilege are presumptively privileged unless and until the privilege holder actually waives the privilege. There is no requirement at this stage that a judge determine that the summonsed records are in fact privileged.

Step 3. Summons and Notice to Record Holder and Inspection of the Records:

- If the judge finds that the records are not presumptively privileged, or the third-party subject has waived the privilege, a

summons shall issue 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.
- **If part or all of the records sought are presumptively privileged,** the summons shall require 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 specified in the summons.
 - 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. This order must specify that any violation of its terms shall be reported to the Board of Bar Overseers by anyone aware of the violation.
 - The records shall not be available for public inspection unless and until the defendant seeks to introduce the records in evidence at trial, by motion *in limine*, at or before any final pretrial conference, where the Commonwealth would have the opportunity to review the records and respond to the motion.
 - Disclosure of the contents to the defendant or any other person shall be permitted if, and only if, a judge allows a motion for a specific, need-based written modification of the protective order.

Step 4. Challenge to Privilege Designation:

- If, on inspection of the records, defense counsel believes they are not privileged, then in lieu of or in addition to a motion to disclose or introduce at trial, counsel may file a motion to release the records (or portions thereof) from the strictures of the protective order.
 - Counsel shall provide notice of the motion to all parties.
 - Prior to the hearing, the Commonwealth may review the records, subject to the same protective order discussed above.
- If a judge determines that the records are not privileged, they shall

be released from the terms of the protective order and may be inspected and copied in the manner provided for non presumptively privileged records.

Step 5. Disclosure of Presumptively Privileged Records:

- If defense counsel believes that copying or disclosure of presumptively privileged materials to other persons is necessary to prepare for trial, s/he shall file a motion to modify the protective order to permit disclosure to specifically named individuals.
 - The motion shall be accompanied by an affidavit explaining with specificity the reason why disclosure is necessary;
 - the motion and the affidavit shall not disclose the content of any record; and
 - counsel shall provide notice of the motion to all parties.
- After a hearing, and an *in camera* inspection of the records by the judge where necessary, a judge may allow the motion only on making oral or written findings that the copying or disclosure is necessary for the defendant to prepare for trial.
 - The judge shall consider alternatives to full disclosure, including stipulations or disclosure of redacted portions of the records.
 - Before disclosure is made to any person specifically authorized by the judge, that person shall sign a copy of the court order authorizing disclosure.
 - The court order must clearly state that a violation of its terms shall be punishable as criminal contempt.
- All copies of any documents covered by a protective order shall be returned to the court upon resolution of the case.

Step 6. The Use of Presumptively Privileged Records at Trial:

- A 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.

Step 7. Preservation of Records for Appeal:

All records produced in response to a Rule 17(a)(2) summons shall be retained by the clerk of the court until the conclusion of any direct appeal following a trial or dismissal of a case.