

# MASSACHUSETTS Lawyers Weekly

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## Victims' rights advocates hail ruling on counseling records

*'Lampron-Dwyer' standard applies to RI court's request*

By ERIC T. BERKMAN

The Supreme Judicial Court has ruled that the Superior Court could not order a Massachusetts rape crisis center to turn over, at the behest of a Rhode Island court, counseling records of the alleged victim of a sexual assault in Rhode Island without adhering to the so-called *Lampron-Dwyer* protocol.

The protocol, announced in the SJC's 2007 *Commonwealth v. Dwyer* decision, is a strict set of requirements under which defense counsel in a sexual assault case can access a victim's counseling records so as to adhere as much as possible to G.L.c. 233, §20J, the statutory privilege shielding such records, while protecting a defendant's due process rights.

In the present case, a defendant accused of molesting a minor in Rhode Island obtained an order from a Rhode Island court under the Uniform Law to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, G.L.c. 233, §13A-13D. The order demanded that Wayside Youth & Family Support Network, which provides sexual assault counseling to youths in Massachusetts, turn over the alleged victim's records.

The Uniform Law requires the Superior Court, when presented with a complying certificate from an out-of-state court, to designate a Massachusetts witness to attend an out-of-state proceeding.

While initially denying the request in light of the §20J privilege, a Superior Court judge issued an order compel-

ling production, citing the SJC's 1993 *Matter of a R.I. Grand Jury Subpoena* decision, which stated that, under the Uniform Law, the requesting state must make any privilege determinations. The judge also stayed the order and reported the case for appellate guidance.

The SJC reversed the order, invoking the commonwealth's "strong and clear public policy in favor of protecting victims of sexual assault," which compelled an exception to the R.I. Grand Jury Subpoena rule.



Justice Serge Georges Jr.

Georges Jr. wrote. "Therefore ... a Superior Court judge needed to ensure compliance with the *Lampron-Dwyer* protocol before ordering the release of Massachusetts sexual assault counseling records to the Rhode Island court."

The 20-page decision is in the *Matter of a Motion to Compel*, Lawyers Weekly No. 10-104-23.

### IMPORTANT PROTECTION

Anthony J. Cichello, lead attorney for Wayside Youth & Family Support Network, called the ruling a "big win" for sexual assault victims in Massa-



Anthony Cichello

chusetts because it closes a potentially substantial loophole regarding the commonwealth's strong protections for sexual assault victims' confidentiality.

"To not have the protections applied in Massachusetts

just because they happened to be assaulted out of state would have been really traumatic and would have been wrong," the Boston lawyer said.

The identity of the petitioner seeking the records and his counsel were not released by the court.

But Eric Burdette, a criminal defense lawyer in Andover, expressed concern that the ruling could infringe on the rights of other states and the rights of individuals being prosecuted in those states.

"The SJC concedes that its potential refusal to respond to subpoenas from other states is based on the 'commonwealth's strong and clear public policy,'" Burdette said. "It's likely that other states have different opinions on what their public policy should be."

However, Laura D. Gradel, a Boston attorney who co-authored an amicus brief for the Victim Rights Law Center, said the decision provides security for survivors who seek crucial counseling support.

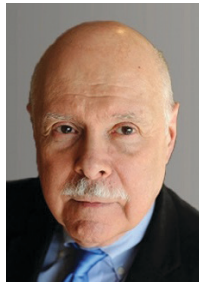
"They can do so without fear of their confidential counseling records being disclosed without proper process under Massachusetts law," she said.

Stephanie F. Holt, deputy director of operations at the Victim Rights Law Center, added that a decision to the contrary would have created ambiguity over survivors' privacy rights.

"Essentially, it would make it impossible for their attorneys and their providers to advise them on what could happen in one of these cases," she said. "It would render the rape crisis statute meaningless for anyone assaulted outside Massachusetts, which is both disturbing and could have a chilling effect on survivors wanting to talk honestly with providers that are there to support them the most."

Holt also emphasized that the *Lampron-Dwyer* standard entitles both victims and the keeper of records to receive advance notice of a records request and to have their own attorneys argue why they should not be released.

"When you're looking at out-of-state requests, it gets scary and ambiguous because the rape crisis center may not have the right to have that attorney, and it also may not be the right of the survivor to have their own attorney as well," Holt said. "Plus, you don't have the four-prong Dwyer test to make sure it's a narrowly tailored request and not a fishing expedition."



Carmen Durso

Carmen L. Durso, a Boston attorney who represents sexual assault victims in civil suits, said cases like Motion to Compel are becoming increasingly common.

"We're far more mobile than we used to be," he said. "You more frequently see cross-state situations like this come up, and it's important to have an established rule so judges will know what to do, how to do it, and how to provide [the victim] adequate protection."

Newton attorney Andrea C. Kramer, who co-authored an amicus brief for the Women's Bar Association of Massachusetts, noted that Massachusetts has a high number of students from out of state. Among them may be students who have been assaulted at home or on an in-

### ***In the Matter of a Motion to Compel***

**THE ISSUE:** Could a Superior Court judge order a Massachusetts rape crisis center to turn over, at the behest of a Rhode Island court, the counseling records of the alleged victim of a sexual assault in Rhode Island without adhering to the so-called Lampron-Dwyer protocol?

**DECISION:** No (Supreme Judicial Court)

**LAWYERS:** Anthony J. Cichello and Allison A. Lennon, of Krokidas & Bluestein, Boston (appellant)

ternship in another state and who seek counseling when they return to school.

"Massachusetts residents also have second homes in other states, and if you look at our neighboring states, only two of five have a comparable privilege," Kramer added. "If the court hadn't ruled as it did, survivors and rape crisis counseling centers would face the anomalous and unworkable situation where some survivor records are privileged and others are not."



Andrea Kramer

### **OUT OF STATE ORDER**

The petitioner was charged with child molestation in Rhode Island. Wayside represented that the alleged victim has received ongoing counseling from one of its sexual assault counselors.

A Rhode Island magistrate issued a certificate pursuant to the Uniform Act seeking to obtain the alleged victim's medical records from Wayside.

The certificate described the magistrate's conclusions that Wayside's keeper of records was a "material witness" in the Rhode Island prosecution and that the documents were relevant to trial and necessary for presentation of a defense.

A month later, the petitioner filed the petition and a motion to compel with the Superior Court. Wayside opposed the motion.

Judge J. Gavin Reardon Jr. denied the motion without prejudice, noting Wayside's objections based on §20J and citing a lack of information as to whether Rhode Island would afford the same protections as Massachusetts.

He also suggested his concerns would be satisfied by a *Lampron-Dwyer* hearing either in Superior Court or by a showing that the equivalent would be held in Rhode Island.

A month later, a second Rhode Island magistrate ordered that the records in question be viewed in camera before being turned over to counsel.

The petitioner presented the order to Superior Court on a motion for reconsideration. At a hearing, Wayside argued the *Lampron-Dwyer* protocol had not been met in either jurisdiction and that it was not given notice of the Rhode Island proceedings.

Reardon, while expressing concern about those issues, applied R.I. Grand Jury Subpoena and concluded that the privilege issue had to be litigated in Rhode Island. He thus allowed the motion to compel but stayed his order pending an appellate ruling on the issue.

### **EXCEPTION TO THE RULE**

The SJC acknowledged the rule it laid out in R.I. Grand Jury Subpoena.

Regardless, Georges said, "we hold that this Commonwealth's strong and clear public policy in favor of protecting victims of sexual assault compels an exception to this rule. This exception is specific to records or testimony presumptively privileged by G. L. c. 233, § 20J."

To receive the protection, the justice continued, the objecting party had the burden of establishing substantial likelihood that the protections of privilege as expressed in the *Lampron-Dwyer* protocol would be abrogated in the requesting state.

In this instance, Georges added, Rhode Island does not specifically privilege sexual assault counseling records and there are material differences between its levels of protection and those under the *Lampron-Dwyer* protocol.

"For the foregoing reasons, we vacate the order allowing the motion to compel," he said.