

MASSACHUSETTS

MASS. GEN. LAWS ch. 233, § 20J

Type of Privilege: Qualified by judicial decision

Privilege:

- A sexual assault counselor shall not disclose any confidential communication in any civil or criminal proceeding without written consent from the victim
- Confidential records are not subject to discovery and are inadmissible in any criminal or civil proceeding without written consent from the victim MASS. GEN. LAWS ch. 233, § 20J

Statutory Exceptions to Privilege: None specified

In Camera Review: Provided for by judicial decision

- Commonwealth v. Two Juveniles, 491 N.E.2d 234, 238 (Mass. 1986)
 - Although the sexual assault counselor-victim privilege is absolute on its face, this case was the first to determine that, in certain circumstances, the absolute privilege must yield to the constitutional right of a criminal defendant to have access to the privileged records
 - The court will conduct an in camera review of the privileged records if the defendant shows a legitimate need for the records
- After the *Two Juveniles* case, the Massachusetts Supreme Judicial Court further modified the standard and procedure for judicial in camera review of privileged records in Commonwealth v. Bishop, 617 N.E.2d 990 (Mass. 1993) and Commonwealth v. Fuller, 667 N.E.2d 847 (Mass. 1996)
- However, recently, the Supreme Judicial Court replaced the *Bishop-Fuller* procedure with a new protocol that allows defense counsel direct access to privileged records
 - The new protocol applies in every criminal case in which a defendant seeks pretrial inspection of statutorily privileged records of any third party under Massachusetts Rule of Criminal Procedure 17 (a) (2), which governs all pretrial access to books, papers, documents, or other objects not in possession of the Commonwealth
- Commonwealth v. Dwyer, 859 N.E.2d 400, 418-22 (Mass. 2006)
 - Defense counsel subpoenas records pursuant to Rule 17 (a) (2)
 - A hearing is held at which the judge hears from all parties, the record holder, and the subject of the records
 - The judge will order the issuance of the Rule 17 (a) (2) subpoena only if the defense has satisfied four requirements with respect to the records:
 - They are evidentiary and relevant
 - They are not otherwise obtainable
 - The moving party cannot properly prepare for trial without them
 - The application for the records was made in good faith and was not a fishing expedition
 - The judge also decides whether the records are presumptively privileged; i.e. whether the records were prepared in circumstances suggesting that they are covered by a statutory privilege
 - If the requirements for a Rule 17 (a) (2) subpoena are met but there is no finding that the requested records are presumptively privileged, the records must be handed over to the clerk and will be made available for inspection to defense counsel who originally subpoenaed them
 - If the requirements for a Rule 17 (a) (2) subpoena are met and the judge finds that the requested records are presumptively privileged, the records must be handed over to the clerk and will be made available for inspection to defense counsel who originally subpoenaed them, but only after defense counsel signs a protective order prohibiting the disclosure or dissemination of any part of the privileged records



- If defense counsel believes that disclosure of presumptively privileged records is necessary to prepare adequately for trial, the judge will conduct an in camera inspection of the records to determine whether to authorize disclosure
- If defense counsel wishes to introduce presumptively privileged records at trial, he must file a motion and the judge will decide whether introduction of the records is necessary in order for defendant to obtain a fair trial

Holder of Privilege:

- Only victim may waive privilege MASS. GEN. LAWS ch. 233, § 20J

Waiver of Privilege:

- Consent to disclosure must be in writing MASS. GEN. LAWS ch. 233, § 20J

DEFINITIONS:

Confidential Communication:

- Information transmitted in confidence between a victim of sexual assault and a sexual assault counselor
- Includes all information received by the sexual assault counselor in the course of counseling including reports, records, working papers, and memoranda MASS. GEN. LAWS ch. 233, § 20J
- Commonwealth v. Neumyer, 731 N.E.2d 1053, 1058 (Mass. 2000)
 - The portion of the records that sets forth the time, date, and fact of a communication is not protected by the sexual assault counselor-victim privilege

Rape Crisis Center:

- Any institution that assists victims of sexual assault and their families through crisis intervention and medical and legal counseling. MASS. GEN. LAWS ch. 233, § 20J

Sexual Assault Counselor:

- A person who is employed or volunteers at a rape crisis center, who works under the supervision and control of a licensed professional, and who gives advice, counseling, and assistance to victims of sexual assault MASS. GEN. LAWS ch. 233, § 20J

Training Requirements for Sexual Assault Counselors:

- 35 hours of training MASS. GEN. LAWS ch. 233, § 20J