#2016-014

New Hampshire Appellate Defender Program

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April 3, 2017

Advisory Committee on Rules
c/o New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Proposed Rule relating to procedure for *in camera* review of confidential records

To the Supreme Court Advisory Committee on Rules:

I write in response to a request to provide some information about other states, and the extent to which any have adopted procedures that involve the lawyers in a phase of the *in camera* review. I have not undertaken a comprehensive, fifty-state survey of the procedures. Nevertheless, my sense is that a majority of states employ a procedure similar to the one presently used in New Hampshire. See, e.g., State v. Norman P., 151 A.3d 877 (Conn. App. 2016); Burns v. State, 968 A.2d 1012 (Del. 2009); State v. Johnson, 102 A.3d 295 (Md. 2014). I do not have a clear sense of the extent to which, in those jurisdictions, the courts have considered whether the limited involvement of counsel in the *in camera* review process would improve the procedure.

A few states have followed a strikingly different approach in that the doctor/therapist-patient privilege is regarded as absolute, such that a patient-witness's records may not be examined without the patient's consent. In Michigan and Wisconsin, though, if the patient does not consent after the defendant has made a sufficient triggering showing of a need to examine the records, the court will bar the patient-witness's testimony. See People v. Stanaway, 521 N.W.2d 557, 572-74, 577 (Mich. 1994) (adopting such a rule at least with respect to psychiatric records and citing Wisconsin as having such a rule; noting also that Illinois and Pennsylvania likewise recognized the privileges as absolute and the records thus as not subject even to a judicial *in camera* review).

In at least two states – Iowa and Massachusetts – courts have adopted a procedure that, like the proposed rule, involves counsel in a phase of the *in camera* review of such records. Because of the pertinence of the experience in those states, I will attempt to summarize the development of the law in some

detail.

In State v. Cashen, 789 N.W.2d 400 (Iowa 2010), the Iowa Supreme Court adopted a procedure that involved counsel even more deeply than would the procedure embodied in the proposed rule. After reviewing its prior decisions, the Cashen court acknowledged both the important interest of the patient in the privacy of such records, and the interest of a defendant in the "right to produce evidence that is relevant to his or her innocence. . . ." Id. at 407. The procedure adopted by the court required the defendant to make an initial triggering showing: "a showing to the court that the defendant has a reasonable basis to believe the records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt." Id. at 408. The court later summarized that showing as requiring "a good faith factual basis indicating how the records are relevant to the defendant's innocence." Id. at 408.

Once the defendant has filed, under seal, a motion seeking access to the records, the prosecutor consults with the witness in question to learn whether the witness consents to, or opposes, the disclosure of the records. Id. If the witness opposes disclosure, the court holds a hearing on the defendant's request for access to the records. Id. If the court finds, after the hearing, that the defendant has made the requisite triggering showing, the court issues a subpoena to the custodian of the records, requiring that they be filed under seal in the court. Id.

Unlike the procedure embodied in the proposed rule, the Cashen court's procedure did not have the court make an initial *in camera* review of the records. Instead, albeit subject to a protective order, the Cashen rule has counsel examine the records at the courthouse. Id. at 409. The court dispensed with judicial *in camera* review, reasoning that an "*in camera* review of the records by the court is insufficient. Only the attorneys representing the parties know what they are looking for in the records. The court cannot foresee what may or may not be important to the defendant." Id.

Under the Cashen procedure, after examining the records at the courthouse, defense counsel could file a motion, under seal, identifying the information in the records that the defense believes to be exculpatory. Id. The court would then convene a closed hearing to determine whether the information identified by counsel should be made available for use at trial. Id.

I emphasize that the Cashen procedure differs from that embodied in the proposed rule in that the Cashen procedure does not involve the court in an initial phase of the *in camera* review, during which the court would screen even from counsel's eyes materials in the records that plainly could not be relevant to the defense. Rather, the procedure more closely resembles that rejected by the New Hampshire Supreme Court in Petition of the State (State v.

MacDonald), 162 N.H. 64 (2011), in which the trial court, upon receipt of the records, simply delegated to counsel the task of reviewing them in the first instance.

Subsequently, the Iowa legislature enacted a statute abrogating the Cashen rule. See State v. Thompson, 836 N.W.2d 470, 481 (Iowa 2013). Among other modifications, the statutory procedure replaced counsel's review of the records with a judicial *in camera* review. Id. at 481-82. The Thompson Court upheld the constitutionality of the statutory procedure, noting that the legislature had simply made a different policy choice than the Court had made in Cashen. Id. at 486-87.

Massachusetts law in this area is marked by significant evolution and complexity. In Commonwealth v. Two Juveniles, 491 N.E.2d 234 (Mass. 1986), the Supreme Judicial Court (SJC) established a procedure similar to New Hampshire's current procedure, in that it required a defendant to make an initial, triggering showing, and then provided for judicial *in camera* review of privileged records. Id. at 239-40.

Just a few years later, in Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991), the SJC held, under the Massachusetts Constitution, that the judicial *in camera* review procedure was inadequate. Id. at 1000-03. In so ruling, the SJC quoted the United States Supreme Court's observation that

> it is extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the information that would be useful in impeaching a witness . . . . Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment . . . would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.

Id. at 1001 (quoting Dennis v. United States, 384 U.S. 855, 874-75 (1966)).

Like the Cashen procedure, the Stockhammer procedure provided that counsel would initially examine the records, after which the court would conduct a hearing to assess the extent to which any information contained in the records would be available for use at trial. Id. at 1003. However, as articulated in Stockhammer, the Massachusetts procedure did not require the defendant first to make a threshold triggering showing of particularized need, beyond a demonstration of the critical importance of the testimony of the witness in question, before obtaining and reviewing such records. See Commonwealth v. Figueroa, 595 N.E.2d 779, 785 (Mass. 1992) (so noting, and holding that Stockhammer procedure applied retroactively). In both respects, the Stockhammer procedure differs from that embodied in the proposed rule.

As described below, Stockhammer marked the farthest extension of the role of counsel, in allowing counsel to review such records without a prior judicial *in camera* screening review, and without having to make a substantial triggering showing of entitlement to review the records.

In Commonwealth v. Bishop, 617 N.E.2d 990, 996-99 (Mass. 1993), the SJC modified the Stockhammer procedure so as to require the defense to make an initial triggering showing that "records privileged by statute are likely to contain relevant evidence." Upon such a showing, the court would then, without the assistance of counsel, review the records *in camera* "to determine whether the communications, or any portion thereof, are indeed relevant." Id. at 996. In that regard, the Bishop court observed that, "[h]ere, we call upon the judge to review and identify only *relevant* materials, a task and term with which every judge is familiar." Id. at 997 (emphasis in original). Upon a finding that the records do contain relevant information, the court would then disclose such information to counsel for review and for further litigation as to the extent to which disclosure of any information in the records is required to ensure a fair trial. Id. at 997. In its structural outlines, the Bishop procedure closely resembles the procedure embodied in the proposed rule. See also Commonwealth v. Fuller, 667 N.E.2d 847, 855 (Mass. 1996) (applying Bishop procedure; clarifying content of initial triggering showing, incorporating concept of materiality).

In Commonwealth v. Dwyer, 859 N.E.2d 400, 414-23 (Mass. 2006), the SJC revised the procedure again, this time in the direction of greater involvement of counsel, though without returning entirely to the Stockhammer protocol. In particular, and unlike the Stockhammer rule, the SJC retained a requirement that a defendant make a substantial triggering showing of probable relevance and need, though now under the authority of Criminal Procedure Rule 17(a)(2), governing pre-trial access to documents held by a third party. Id. at 415. In Dwyer, the SJC also dispensed with the Bishop rule's initial, judicial *in camera* review, in favor of having the records reviewed by defense counsel. By way of explanation, the SJC noted that

> experience has also confirmed that trial judges cannot effectively assume the role of advocate when examining records. Requiring judges to take on the perspective of an advocate is contrary to the judge's proper role as a neutral arbiter. . . . Despite their best intentions and dedication, trial judges examining records before a trial lack complete information about the facts of a case or a defense to an indictment, and are all too often unable to recognize the significance, or insignificance, of a particular document to a defense. The absence of an advocate's eye may have resulted in overproduction, as well as underproduction, of privileged records, and has repeatedly contributed to trial delays and appeals,

jeopardizing the rights of defendants, complainants, and the public.

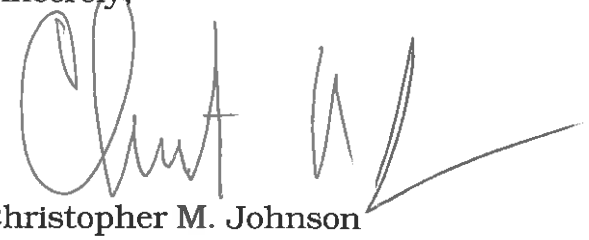
Id. at 418 (citation omitted).

The Dwyer procedure has the following steps after the defense has made the requisite triggering showing. First, "before a judge determines whether a summons for records may issue to any person or institution, the custodian of the records (record holder) and the third party who is the subject of the records (third-party subject), where applicable, shall be afforded notice and an opportunity to be heard on whether the records sought are relevant or covered by a statutory privilege." Id. In addition, "unless and until the privilege holder waives the privilege, all records likely to be covered by a statutory privilege shall remain and shall be treated as presumptively privileged. . . ." Id. at 418-19. Second, when the judge issues a summons for presumptively privileged records, the records "shall be retained in court under seal, and shall be inspected only by counsel of record for the defendant who summonsed the records." Id. at 419. The protective order contains "stringent nondisclosure provisions," including a bar on disseminating the contents of any record to the defendant. Id. After reviewing the records, defense counsel may initiate further litigation with a view to establishing the availability for use at trial of information in the records. Id. at 422-23. As far as I can tell, the Dwyer procedure remains the rule in Massachusetts. See Commonwealth v. Sealy, 6 N.E.3d 1052, 1059-60 (Mass. 2014) (reaffirming procedure); Commonwealth v. Olivier, 57 N.E.3d 1, 7-8 (Mass. App. 2016) (applying procedure).

With respect to the role of counsel, the Dwyer procedure occupies an intermediate position between Stockhammer, which featured neither a substantial triggering showing nor a prior judicial *in camera* screening review, and Bishop, which featured both. As noted above, the proposed rule tracks most closely the Bishop protocol. It thereby seeks to obtain the benefits of the involvement of counsel in the review of confidential records, while still keeping effective constraints on the access even of counsel to such records.

If I can provide further information, please let me know.

Sincerely,



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