

Protecting Victims' Privacy in Sensitive Criminal Cases

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After telling his parents that a teacher had touched him inappropriately, “Drew,” who was then an elementary school student, was less open about his experiences during a Sexual Assault Intervention Network (SAIN) interview held during the formal investigatory process. To explore his reluctance, Drew’s parents sent him for counseling with a licensed clinical social worker. Drew later made more detailed allegations, claiming the teacher had sexually abused him numerous times. When the teacher was ultimately indicted on criminal charges involving these claims, his counsel filed a motion for a subpoena to examine the social worker’s privileged treatment records pertaining to Drew, a common remedy in similar criminal cases. Although the court approved the motion, the parties learned several months later that the records had been inadvertently shredded when the social worker closed her private practice — setting in motion a nearly three-year-long legal battle about the privacy rights of victims in criminal cases.

Opposing an Intrusive Judicial Remedy

Throughout much of 2020, the court held a series of hearings about possible remedies for the defendant in light of the records destruction. As the case progressed, Drew’s counsel at the Victim Rights Law Center (VRLC) reached out to attorney Katharine Foote, who had previously handled other pro bono cases for the organization. Katharine initially worked behind the scenes to provide guidance on a motion, but after the court ordered the social worker to produce a written summary of her treatment of Drew, the firm and Katharine officially joined the case in July 2020.

A few months later, the case took another unusual turn after defense counsel reviewed the summary and updates the social worker had sent to Drew’s mother shortly after treating him.

Dissatisfied with the written information, the defendant asked the court to choose between two extraordinary options — to allow his counsel to depose the social worker or to bar allegations Drew made during the SAIN interview from use at trial. When the court agreed to allow the requested deposition, the VRLC asked Katharine to pursue an appeal with the state’s highest court.

Securing a Precedent that Protects Victims' Rights

They drafted a single justice petition and filed it with the Massachusetts Supreme Judicial Court (SJC) in January 2021. Following Katharine's argument at a single justice hearing, the judge issued a ruling in Drew's favor. However, the defense attorney quickly sought a hearing before the full SJC. The same team marshaled forces to prepare briefs, and in April 2022, Katharine again presented arguments about the importance of protecting victims' privacy rights, this time in front of six justices.

Although the SJC's December 2022 ruling allows a very limited deposition of the social worker in this case, the court emphasized that such depositions are not supported by the applicable rules of criminal procedure, establishing important precedent about the privacy of treatment records and victims' rights.

"For future cases that have strange evidentiary issues, it protects survivors, and it safeguards the privileged records. This will prevent a treating therapist or other potential witness protected by privilege from being deposed in many, many future criminal cases," said Katharine, who later received the Shining Star award from the VRLC, in part for her work on this case.

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