



## JUDICIAL TRAINING & EDUCATION UPDATE

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### “PARADEE” MOTIONS – WHAT JUDGES NEED TO KNOW SEVEN BASIC FACTS & TWO SAMPLE COURT ORDERS

**1. What is a *Paradee* Motion and What Standard Must the Court Apply?** Criminal defendants have a broad right to discovery in order to prepare and present a defense. When a defendant requests records that are subject to the Minnesota Government Data Practices Act or other legislation, the court may screen the confidential records *in camera* to balance the right of the defendant to prepare and present a defense against the rights of victims and witnesses to privacy. See *State v. Paradee*, 403 N.W.2d 640, 642 (Minn.1987).

#### HOWEVER

This *in camera* review is not a right and defendant must first establish a “plausible showing” that the information sought would be “both material and favorable to his defense.” The standard on appeal is abuse of discretion. *Id.*

**NOTE – Court’s partial order denying disclosure upheld – no abuse of discretion:** *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012) (The court performed an exemplary and thorough examination of the records. We have reviewed the specific documents at issue and are satisfied that all of the documents that were not disclosed are either “irrelevant” or accessible through other means (copies of the complaint, for example). We therefore conclude that the district court did not abuse its discretion in deciding to disclose some documents but not others to appellant.)

**2. Rationale:** In establishing the “*Paradee* process” the Supreme Court stated:

We believe that the *in camera* approach of these cases is superior to the approach taken by [previous courts], an approach which....[allowed].....defense counsel easy access to various types of privileged and confidential records simply by asserting that the records might contain material relevant to the defense. The *in camera* approach strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence that might help in his defense. We believe that trial courts, who by training and experience are qualified for the task of determining matters of relevancy, are capable of determining what if any of the information in the records might help in the defense. *State v. Paradee* at 349-50; 403 N.W.2d at 642.

**3. The *Paradee* Paradox: How can the defense show what they don't have?** The district courts initial dilemma is deciding whether defendant has established a "plausible showing" that the information sought would be "both material and favorable to his defense," or is the defense request for confidential records based on speculation and conjecture (i.e. a mere fishing expedition). Case law does not give the trial bench a great deal of guidance in this area. The court's determination of whether the defense has met their threshold burden of proof is a decision best left to the discretion of the presiding judge. Many successful defense presentations are based on specifically tailored motions supported by thorough and effective investigation and evidence gathering (i.e. copies of exhibits, testimony of others, affidavits, etc.).

**4. Burden of proof is on the defense:** Although the *Paradee* standard does not give trial courts detailed guidance, the Supreme Court makes it absolutely clear that *some* showing is required before *in camera* review is granted. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (request for *in camera* review denied – defendant's motion and brief gave the trial court no theories on how the file could be related to the defense or why the file was reasonably likely to contain information related to the case.) Having the trial court review confidential material is NOT a right. It is a discovery option, but only after certain prerequisites are satisfied. *Id.* at 72.

**5. When is evidence "material"?** Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998), quoting *U.S. v. Bagley*, 473 U.S. 667, 682 (1985).

**6. The trial court has an on-going duty to disclose:** The duty of the trial court to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial. *Paradee*, at 641; *Pennsylvania v. Ritchie*, at 52 & 60. The right to cross-examination includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable (i.e. the type of evidence that could make the difference between conviction and acquittal.) *Id.* at 52.

**7. If a *Paradee* motion is granted – suggested language for the court order – Protective Order:**

1. Defendant's Motion for disclosure of the alleged victim's records is GRANTED IN PART AND DENIED IN PART. Attached to this Order is Exhibit A – documents which contain relevant or material evidence that would be favorable to the defendant in this case following the Court's *in camera* review and which are not redundant. The documents are "Confidential – Attorneys Eyes Only" and shall only be reviewed by counsel and their appropriate staff. Court Administration shall place these documents in the non-public, "Confidential" section of the file.
2. At the conclusion of this matter and after the time to appeal has expired, within thirty days, counsel shall return the "Confidential – Attorneys Eyes Only" documents to Court administration, where they shall be destroyed. In the event either party files an appeal in this matter, the documents shall be returned to Court Administration within thirty days after the final resolution of this matter.
3. The original documents received by the Court from \_\_\_\_\_ shall be placed in a confidential folder and maintained by Court Administration. These documents are confidential and shall not be reviewed, copied or distributed without further order of the Court.
4. Court Administration shall set this matter on for an Omnibus Hearing at the next available date and provide notice to counsel for both parties.

**RESOURCE:** Ryan Pacyga, P & M Trial Lawyers, 333 South 7<sup>th</sup> Street, Suite 2850, Mpls, Mn 55402.

**Hon. Alan F. Pendleton, Anoka County District Court, Anoka, Mn 55303; 763-422-7309**

SAMPLE ORDER APPROVING *IN CAMERA* REVIEW – Hon. Kathleen Mottl, Wright Co.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF [REDACTED]

[REDACTED] JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

**ORDER GRANTING  
DEFENDANT'S MOTION FOR  
*IN CAMERA* REVIEW OF  
MEDICAL RECORDS**

Court File No.: [REDACTED]

Defendant.

The above-entitled matter came on for a contested omnibus motion hearing on February 13, 2014, before the Honorable [REDACTED], Judge of District Court, at the [REDACTED] County Government Center, [REDACTED], Minnesota.

The State was represented by Assistant [REDACTED] County Attorney [REDACTED]. Defendant appeared personally and was represented by Anthony Bussa, Esq., and Ryan Pacyga, Esq.

The Court provisionally received into evidence, Exhibit 1, excerpts of the alleged victim's medical records, two signed statements from the alleged victim's mother and a memorandum of an investigator retained by Defendant. The Court allowed the State to object to the submission of Exhibit 1 in the State's written brief.<sup>1</sup>

The parties stipulated to a briefing schedule. Pursuant to that schedule, the Court took this matter under advisement on April 24, 2014. The parties also stipulated to waive the seven business day under advisement deadline and provide the Court with up to ninety days to issue its Order.

Based upon all the files, records, and proceedings herein, the Court, being duly advised in the premises, now makes the following:

**FILED**  
[Signature]  
DISTRICT COURT  
[REDACTED] COUNTY, MINNESOTA  
by [Signature]

86 – CR – 13 – 3859  
ORD  
Order – Other  
1657905



<sup>1</sup> For the reasons set forth in this Order, the Court overrules the State's objection to the submission of Exhibit 1.

FINDINGS OF FACT

1. The State charged Defendant with one count of malicious punishment of a child, in violation of Minnesota Statute § 609.377, subd. 2, from an incident allegedly occurring on or about May 3, 2013.

2. On May 6, 2013, the State alleges P.M.L.J., born [REDACTED], reported that three days earlier, on May 3, 2013, she was struck on the back and buttocks by Defendant, who is P.M.L.J.'s mother's significant other.

3. Defendant allegedly admitted to being home alone with P.M.L.J. on May 3, 2013, for approximately one hour, but denied any responsibility for P.M.L.J.'s injuries.

4. Defendant has now brought a contested omnibus motion requesting the Court perform an *in camera* review of P.M.L.J.'s medical records, specifically requesting social services, mental health and behavioral health records.

5. Defendant requests an *in camera* review because he asserts P.M.L.J.'s credibility and propensity for self-injury are at issue in this case and the limited record submitted as Exhibit 1 sets forth a plausible showing that the additional information sought would be both material and favorable to his defense.

6. The State opposes the Motion and argues P.M.L.J.'s records are absolutely privileged and should not be subject to discovery.

Based on the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. An alleged crime victim's medical records generally are protected from disclosure by the physician-patient privilege. Minn. Stat. § 595.02, subd. 1(d) & (g).

2. However, "the medical privilege, like other privileges, sometimes must give way to the defendant's right to confront his accusers." *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn.1984).

3. "[T]he proper procedure is generally for the trial court to review the medical records at issue *in camera* to determine whether the privilege must give way." *State v. Reese*, 692 N.W.2d 736, 742 (Minn.2005).

4. "The *in camera* approach strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in

obtaining all relevant evidence.” *State v. Hummel*, 483 N.W.2d 68, 72 (Minn.1992) (quoting, *State v. Paradee*, 403 N.W.2d 640, 642 (Minn.1987)).

5. In *State v. Evans*, 756 N.W.2d 854 (Minn.2008), the Court found that in order to be entitled to *in camera* review of confidential medical records, the defendant must first, “make some plausible showing that the information sought would be both material and favorable to his defense.”

6. “Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *State v. Wildenberg*, 573 N.W.2d 692, at 697 (Minn.1998), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985).

7. Exhibit 1 demonstrates P.M.L.J has a history of aggression toward others, a diagnosis of ADHD and Oppositional Defiant Disorder and behavior described as hostile, challenging and uncooperative.

8. A diagnostic assessment completed on August 29, 2012, concludes:

The above described child meets the State of Minnesota definition of a child with a Severe Emotional Disturbance because...[a] mental health professional has determined that he/she is at risk of harming self or others as a result of their emotional disturbance...

Exh. 1, p. 4.

9. Outpatient progress notes in the Fall of 2012 note that P.M.L.J’s mother reported that P.M.L.J had threatened to throw herself down the stairs on more than one occasion, was aggressive towards her and that she tends to run away when bored.

10. Exhibit 1 also contains a statement from P.M.L.J’s mother who asserts that on November 10, 2013, P.M.L.J told her that P.M.L.J lied about Defendant spanking her and causing the bruises on her back.

11. According to the statement provided by P.M.L.J’s mother, P.M.L.J’s father allegedly instructed P.M.L.J to lie to investigators about the bruises on her back so that he would be awarded custody of P.M.L.J.

12. The statement provided by P.M.L.J’s mother is further supported by a statement obtained by an investigator hired by Defendant.



13. The investigator, who claims to have spoken to P.M.L.J, also claims that P.M.L.J was informed him that she was instructed by her father to falsely assert that the bruises on her back were caused by Defendant.

14. Based on the records submitted as Exhibit 1, Defendant has made a plausible showing that the information sought would be both material and favorable to his defense.

15. P.M.L.J's credibility is critical to the allegations in the Complaint. The records set forth in Exhibit 1 demonstrate P.M.L.J has previously been diagnosed ADHD and Oppositional Defiant Disorder and has a history of acting out.

16. It is plausible that the records sought by Defendant will materially support Defendant's theory that P.M.L.J caused her own injuries and fabricated the cause of the injury at the request of her father.

17. The State's contention that the records sought are subject to absolute privilege and not subject to discovery is contrary to established case law.

18. The State argues that since the Minnesota Supreme Court decided *State v. Paradee*, 403 N.W.2d 640 (Minn. 1987), the United State Supreme Court abrogated that decision in *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987).

19. However, in *State v. Hummel*, 483 N.W.2d 68, 71 – 72 (Minn. 1992), the Minnesota Supreme Court explained it adopted the *Ritchie* Court's analysis in *Paradee* and reaffirmed that where the defendant has made some plausible showing that the information sought would be both material and favorable to his defense, the medical privilege must give way to the defendant's right to confront his accuser.

20. The Minnesota Supreme Court recently, in *State v. Hokanson*, 821 N.W.2d 340 (Minn. 2012), reaffirmed the *Ritchie* and *Paradee* standard.

21. Case law supports an *in camera* review of P.M.L.J's medical records based on the plausible showing made by Defendant that the records may contain information that is both material and favorable to his defense.

22. Accordingly, Defendant's motion for an *in camera* review shall be granted.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court now makes the following:

ORDER

1. Defendant's Motion for an *in camera* of P.M.L.J's medical records is **GRANTED.**
2. Defendant shall, within fifteen (15) days from the date of this Order, serve a copy of this Order on the following providers who allegedly provided treatment to P.M.L.J:
  - i. Central Minnesota Mental Health Center – Buffalo MN
  - ii. Nystrom & Associates, Ltd. – Otsego, MN
  - iii. Prairie Care – Maple Grove, MN
  - iv. Allina Health Systems, Buffalo Hospital – Buffalo, MN
  - v. Fairview Riverside Hospital – Minneapolis, MN
3. The above-listed providers shall, within forty-five (45) days, provide a copy of P.M.L.J's medical records to the Court for an *in camera* review pursuant to Minnesota Rule of Criminal Procedure 9.03, subd. 6. P.M.L.J's identifying information is set forth on the attached Appendix 1, which shall be marked and filed by Court Administration as confidential.

**BY THE COURT:**

Dated: April 29, 2014

  
Judge of District Court

## SAMPLE PARADEE ORDER – Hon. Kathleen Mottl, Wright County

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF [REDACTED]

DISTRICT COURT  
[REDACTED] COUNTY, MINNESOTA  
by [REDACTED]

[REDACTED] JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal  
Court File No. [REDACTED]

Plaintiff,

-v-

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW &  
ORDER PARTIALLY  
GRANTING DISCLOSURE &  
ORDER PARTIALLY DENYING  
DISCLOSURE**[REDACTED]  
Defendant.

The above-entitled matter came on before the Honorable [REDACTED], Judge of District Court, at the [REDACTED] County Government Center, [REDACTED], Minnesota, on February 13, 2014, pursuant to Defendant's Motion for *In Camera* Review of Medical Records.

Assistant [REDACTED] County Attorney [REDACTED] appeared on behalf of the State. The Defendant was present and appeared with his attorneys Anthony Bussa, Esq., and Ryan Pacyga, Esq.

After the parties briefed the matter following the hearing, the Court issued an Order Granting Defendant's Motion for *In Camera* Review of Medical Records on April 29, 2014. Paragraph 2 of the April 29, 2014, Order directed Defendant to serve the following agencies – Central Minnesota Mental Health Center, Nystrom & Associates, Ltd., Prairie Care, Allina Health Systems and Fairview Riverside Hospital – with a copy of the Order within fifteen days. Those agencies were then given forty-five to provide a copy of P.M.L.J.'s medical records to the Court. The Court subsequently received records from Nystrom & Associates, Ltd., Prairie Care, Central Minnesota Health Center, Fairview Riverside Hospital and from Allina Health Systems.<sup>1</sup>

Based upon all of the reports, files and records herein, the Court makes the following:

<sup>1</sup> These documents were received by the Court during the week of May 19, 2014, and the week of June 2, 2014.



FINDINGS OF FACT

1. The State charged Defendant with one count of malicious punishment of a child, in violation of Minnesota Statute § 609.377, subd. 2, from an incident allegedly occurring on or about May 3, 2013.

2. On May 6, 2013, the State alleges P.M.L.J., born [REDACTED], reported that three days earlier, on May 3, 2013, she was struck on the back and buttocks by Defendant, who is P.M.L.J.'s mother's significant other.

3. Defendant allegedly admitted to being home alone with P.M.L.J. on May 3, 2013, for approximately one hour, but denied any responsibility for P.M.L.J.'s injuries.

4. In his motion, Defendant requests the Court conduct an *in camera* review of all medical records pertaining to P.M.L.J., born [REDACTED]

5. As the Court set forth in its April 29, 2014, Order, "Defendant requests an *in camera* review because he asserts P.M.L.J.'s credibility and propensity for self-injury are at issue in this case and the limited record submitted as Exhibit 1 sets forth a plausible showing that the additional information sought would be both material and favorable to his defense." Findings of Fact, ¶ 5.

6. The Court found Defendant made a plausible showing P.M.L.J.'s medical records may be both favorable and material to Defendant's defense and directed Central Minnesota Mental Health Center, Nystrom & Associates, Ltd., Prairie Care, Allina Health Systems and Fairview Riverside Hospital to produce P.M.L.J.'s medical records for an *in camera* review.

7. The Court subsequently received records from Nystrom & Associates, Ltd., Prairie Care, Central Minnesota Health Center, Fairview Riverside Hospital and from Allina Health Systems, which the Court has now reviewed *in camera*.

Based upon the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. A crime victim's medical records generally are protected from disclosure by the physician-patient privilege. Minn.Stat. § 595.02, subd. 1(d) & (g) (2006).

2. But "the medical privilege, like other privileges, sometimes must give way to the defendant's right to confront his accusers." *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn.1984).

3. “[T]he proper procedure is generally for the trial court to review the medical records at issue *in camera* to determine whether the privilege must give way.” *State v. Reese*, 692 N.W.2d 736, 742 (Minn. 2005).

4. “The *in camera* approach strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence.” *State v. Hummel*, 483 N.W.2d 68, 72 (Minn.1992) (*quoting State v. Paradee*, 403 N.W.2d 640, 642 (Minn.1987)).

5. *Paradee* provides that the proper procedure for determining the relevance and materiality of confidential documents is a district court's *in camera* review of the records.

6. After review of all of the records submitted for review, the Court finds there is relevant or material evidence that would be favorable to Defendant in this case, pursuant to a *Paradee* analysis. *Paradee*, 403 N.W.2d at 640.

7. However, the majority of the pages reviewed are not relevant or material evidence that would be favorable to the defendant in this case, pursuant to a *Paradee* analysis, or are redundant. *Id.*

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court now makes the following:

#### ORDER

1. Defendant's Motion for disclosure of the alleged victim's records is **GRANTED IN PART AND DENIED IN PART**. Attached to this Order is Exhibit A – documents which contain relevant or material evidence that would be favorable to the defendant in this case following the Court's *in camera* review and which are not redundant. The documents are “Confidential – Attorneys Eyes Only” and shall only be reviewed by counsel and their appropriate staff. Court Administration shall place these documents in the non-public, “Confidential” section of the file.

2. At the conclusion of this matter and after the time to appeal has expired, within thirty days, counsel shall return the “Confidential – Attorneys Eyes Only” documents to Court Administration, where they shall be destroyed. In the event either party files an appeal in this matter, the documents shall be returned to Court Administration within thirty days after the final resolution of this matter.

3. The original documents received by the Court from Nystrom & Associates, Ltd., Prairie Care, Central Minnesota Health Center, Fairview Riverside Hospital and Allina Health Systems shall be placed in a confidential folder and maintained by Court Administration. These documents are confidential and shall not be reviewed, copied or distributed without further order of the Court.

4. Court Administration shall set this matter on for an Omnibus Hearing at the next available date and provide notice to counsel for both parties.

**BY THE COURT**

Dated: June 18<sup>th</sup>, 2014



Judge of District Court