IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE ESTATE OF STEVEN RUNDEL
by Special Administrator Karen McBride, and
RICHARD RUNDEL,

ORDER

Plaintiffs,

v.

07-C-509-C

LAWRENCE KANE
in his individual capacity,

Defendant.

Before the court is defendant's motion to protect him from plaintiffs' use in this case of information contained in a peer review document that is privileged under state statute. *See* dkts. 7-9. For the reasons stated below, I am denying this motion to the extent that defendant seeks to bar plaintiffs from using the peer review at all in this lawsuit, but granting it to the extent that the peer review is to be sealed and treated as a confidential document.

On December 20, 2005, Steven Rundel hanged himself while incarcerated at the Wisconsin Secure Program Facility. Rundel's father and Rundel's estate filed this federal § 1983 lawsuit against defendant, a psychologist at WSPF, alleging that he wilfully, wantonly and recklessly violated Rundel's Fourth and Eighth Amendment rights and violated Rundel's right to due process because defendant knew or should have known that Rundel was mentally ill and suicidal but did not act on this knowledge. On January 5, 2006, the Wisconsin Department of Corrections' Committee on Inmate/Youth Deaths conducted a peer review of Rundel's suicide, pursuant to Wis. Stats. §§ 146.37-38 and DOC's Feb. 22, 2005 Executive Directive #58. The committee prepared a report of its review, which the state has maintained in confidence.

Notwithstanding the confidentiality of this peer review, plaintiffs obtained a copy and already have been using it in this case. Defendant opposes this, asserting that *he* never waived *his* privilege and therefore still has a statutory right to confidentiality accorded by the State of Wisconsin. Defendant concedes that most federal courts do not recognize the peer review privilege, but contends that the situation presented here falls squarely within the heartland of the privilege.

I agree with defendant that he has not waived the privilege and that his motion is not moot as a result of what has transpired up to this point. I also agree that the peer review privilege serves logical and worthwhile goals. *See generally*, "Pitfalls of Peer Review: the Limited Protection of State and Federal Peer Review Law for Physicians," 24 J. Legal Med. 541 (2003). Further, "a strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." *Memorial Hospital for McHenry Co. v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981). "Where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule." *Id.*

That said, most federal courts have declined to recognize the privilege. *See, e.g., Shadur*, 664 F.2d at 1063 (state's peer review privilege does not apply where the peer review itself is claimed to be part of the antitrust conspiracy). *See also Atteberry v. Longmont United Hospital*, 221 F.R.D. 644, 648 (D. Col. 2004); *Sunnino v. Univ. Kansas Hospital Auth.*, 220 F.R.D. 633, 644 (D. Kan. 2004); *Nilaver v. Mercy Health System, Western Ohio*, 210 F.R.D. 597, 601-06 (S.D. Oh. 2002); *Patt v. Family Health Systems, Inc.*, 189 F.R.D. 518 (E.D. Wis. 1999); *Syposs v. United States*, 63 F.Supp. 2d 301, 303-05 (W.D. N.Y.); *Burrows v. Redbud Comm. Hospital Dist.*, 187 F.R.D. 606, 611 (N.D. Cal. 1998). Although each case presents a slightly different scenario, the heart of the federal courts' position encompasses these points: (1) Where the lawsuit presents

a federal question, the existence of an asserted privilege is a federal question to be determined in accordance with F.R. Ev. 501; (2) A case that would be litigated as medical malpractice in state court nonetheless presents a federal question if the lawsuit arises under a federal statute such as the Emergency Medical Treatment and Active Labor Act, *(e.g. Burrows*, 187 F.R.D. at 611); (3) The Supreme Court rejected the peer review privilege in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201-02 (1990)(Title VII case); Congress declined to include a peer review privilege in the Health Care Quality Improvement Act of 1986; (4) Because evidentiary privileges operate to exclude relevant evidence, thereby blocking the judicial fact-finding function, they are disfavored and when recognized must be narrowly construed; and, (5) Variations among state statutes cast doubt on whether these statutes would serve as useful guides to a uniform federal privilege.

Here, plaintiffs bypassed state court to file a federal lawsuit alleging only constitutional claims under the Fourth and Eighth Amendments and the Due Process Clause. Establishing any of these claims would require plaintiff prove elements substantially more rigorous than those required to prove medical malpractice. *See, e.g.*, *Belcher v. Norton*, 497 F.3d 742, 748, 753 (7th Cir. 2007)(Fourth Amendment claim requires proof of an unreasonable seizure, while substantive due process claim requires proof of abusive government conduct that shocks the conscience); *Johnson v. Doughty*, 433 F.3d 1001, 1017 (7th Cir. 2006)(Eighth Amendment is not a medical malpractice statute; establishing its violation requires proof that prison official knew of and disregarded a substantial risk of serious harm to an inmate, that is, that official was deliberately indifferent to victim's known and objectively serious medical needs).

As a result, this lawsuit presents federal questions that are legally and factually distinguishable from state law on medical malpractice. Therefore, federal law provides the rule of decision. Where, as here, plaintiffs have assumed the burden of proving deliberate

misconduct by defendant, the search for relevant facts should not be hobbled by protecting the DOC's peer review from disclosure. Therefore, the review is discoverable in this federal § 1983 lawsuit and plaintiffs may use the review for appropriate purposes in this case. These limitations are important and will be enforced by this court because defendant did not surrender his legitimate expectation of privacy in this report as a result of plaintiffs' choice of forum.

I understand that plaintiffs already have obtained a copy of the peer review; the circumstances are outside this court's purview. All this court can do is seal the document and maintain its confidentiality in this lawsuit. The parties and their attorneys shall maintain the peer review in confidence. They shall not disclose the review or its contents to anyone who does not need to know its contents. Within these constraints, plaintiffs may use the peer review as otherwise allowed by the federal rules of civil procedure and evidence.

ORDER

It is ORDERED that defendant's motion for protection is GRANTED IN PART and DENIED IN PART in the manner and for the reasons stated above.

Entered this 31st day of January, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge