UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MAURA O'NEILL, as administrator of the Estate of Madelyn E. Linsenmeir, Plaintiff, v. CITY OF SPRINGFIELD, *et al.* Defendants.	C.A. No. 20-30036-MGM

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF VERBATIM ELECTRONIC RECORDINGS OF WITNESS STATEMENTS AND CLINICAL MORTALITY REVIEW RECORDS

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INTRODUCTION

In October 2018, Madelyn Linsenmeir died in custody from sepsis arising from a heart infection. The complaint alleges, among other things, that Madelyn repeatedly informed staff at defendant Hampden County Sheriff's Department ("HCSD") of her serious medical needs, and that HCSD's staff were deliberately indifferent to those needs for almost five days. The complaint also alleges that there are significant gaps in the HCSD's written records concerning Madelyn, including a series of "Daily Medical Rounds" that are simply blank pages. Consequently, eyewitness testimony about what Madelyn said and did while in HCSD's custody—including the testimony of women incarcerated with Madelyn in HCSD's Women's Correctional Center (the "WCC")—will be a particularly important part of this case.

HCSD's privilege log discloses that, in 2020, HCSD took statements from 27 women who were incarcerated with Madelyn in the WCC. HCSD made verbatim electronic audio recordings of 26 of these statements. HCSD expects to use these recordings at trial. Specifically, if these witnesses testify at trial, HCSD may introduce these recordings to impeach them with any perceived inconsistencies.

Even though HCSD expects to use these recordings at trial, it refuses to produce them in discovery. Instead, HCSD asserts that these verbatim electronic recordings are shielded by work-product protection. They are not. A verbatim electronic recording of a third-party witness's statement is not, itself, shielded by the work-product privilege. And, even if these recordings were privileged (which they are not), HCSD cannot not have it both ways: It cannot withhold them from discovery *now*, and then *later* introduce them at trial to surprise the Estate and the witnesses. The civil rules do not contemplate a trial by ambush. Accordingly, the plaintiff Estate is moving to compel production of these recordings.

The Estate is also moving to compel production of records relating to the "Clinical Mortality Review" performed by HCSD about month after Madelyn died. This review was part of the standard procedure required by HCSD's regulations after every custodial death. HCSD is withholding the records of this Review under claims of work product, attorney-client, and Massachusetts medical peer review privileges. These privileges do not shield correctional functions from scrutiny. Accordingly, the Estate respectfully requests that the Court order HCSD to produce both the witness recordings and the Mortality Review records forthwith.

FACTUAL AND PROCEDURAL BACKGROUND

A. Madelyn died in custody after her requests for medical attention were refused.

While Madelyn was in the defendants' custody, her body was gradually overwhelmed by a progressive infection arising in her heart, until she ultimately became septic and died. The Office of the Chief Medical Examiner identified her cause of death as "complications of methicillin-resistant *staphylococcus aureus* septicemia in the setting of tricuspid valve endocarditis." *See* Ex. A (Report of Autopsy). By the time of her death on October 7, 2018, the infection had spread to tissues throughout her body: there were growths on her heart's tricuspid valve of "up to 3.5 centimeters in greatest dimension;" "septic emboli and cavitary lesions" throughout her lungs; "septic arthritis of the right knee;" and "septic emboli and infarctions of the kidneys." *See id*.

Madelyn's endocarditis was a life-threatening infection, but it could have been successfully treated through medications and/or surgery—and Madelyn would have survived—if the defendants had provided her with timely and appropriate medical attention while she was in their custody. *See* Complaint (D.E. 1) ¶¶20, 76-78. They did not. Instead, the defendants disregarded Madelyn's serious medical needs for nearly a week—five days of which she was in HCSD custody—as the infection progressed and spread.

Madelyn was first arrested by the Springfield Police Department (the "SPD") on September 29, 2018, at which time she told the booking staff that she needed medical help. Among other things, she said:

- "I'm very ill right now. I can't even think straight. I'm gonna like literally pass out from pain."
- "I have a really really really bad chest, like I don't know what happened to it, it feels like it's caving in, I can't even breathe."
- "I can't breathe, my chest really hurts."
- "I'm in so much pain right now."

See Complaint (D.E. 1) ¶¶37-45. The SPD refused Madelyn's pleas for help. *See id.* ¶60. The SPD's staff in the booking and lockup areas did not send Madelyn to hospital. *See id.* They did not give her any medical treatment of any kind. *See id.*

When Madelyn was transferred to the WCC the next day (September 30), she reported chest pain during her intake process. *See* Ex. B (Jail Management System "Medical Screening" entry recording Madelyn's report of "pain" in "torso (chest/back)"). And again, after arriving in her WCC housing unit, she reported chest pain and difficulty breathing, and requested medical attention. *See* Complaint (D.E. 1) ¶67. But rather than treat Madelyn's chest pain and difficulty breathing, the WCC instead placed her on a detox protocol[1] and left her to suffer. *See id.* ¶¶66-70. The complaint alleges that, from October 1 until the morning of October 4, the WCC did not provide Madelyn with any medical care, except for the detox protocol and a tuberculosis and STD screening. *See id.* ¶70. Her medical records for that time consist largely of "Daily Medical

[1] The complaint alleges this detox protocol consisted of Librium (a drug commonly used to treat symptoms of alcohol withdrawal), ibuprofen, ice, and a vitamin supplement. *See* Complaint (D.E. 1) ¶66.

Rounds" forms, all of which are blank. *See* Ex. C (October 1-4, 2018 medical records). Nobody even took her vital signs. *See id.*

By the morning of October 4, almost a week had passed since Madelyn had first asked the SPD and WCC for help. Madelyn's infection had progressed to the point where she was in "severe distress" and "unresponsive." *See id.* (October 1-4, 2018 medical records) at HCSD764-65. Her "Daily Medical Rounds" record for that day is blank like all the others. *See id.* at HCSD763. But, two nurses—who were reportedly in Madelyn's housing unit to evaluate other prisoners—observed that Madelyn was experiencing a "medical emergency" and called an ambulance. *See* Ex. D (Oct. 4, 2018 Incident Reports). Within hours after arriving at the hospital, medical staff had diagnosed Madelyn with tricuspid valve endocarditis, "innumerable" pulmonary emboli and cavitary lesions of the lungs, and acute hypoxemic respiratory failure, among other things. *See* Complaint (D.E. 1) ¶72. By that time, it had become too late for Madelyn's infections to be successfully treated, and she died—still in custody—on October 7. *See id.* ¶72.

Madelyn's Estate filed this lawsuit in March 2020, alleging the defendants broke the law and allowed her to die from an otherwise treatable infection. *See* Complaint (D.E. 1) ¶¶76-78. The case entered fact discovery last fall. Madelyn is no longer alive to provide testimony about her experiences in custody. And, as explained above, the WCC's medical records from the critical time period from October 1 to October 4 are largely blank pages. Consequently, other sources of information are critical to this case. These include surveillance video, the findings of any internal reviews of Madelyn's care, and the testimony of eyewitnesses who observed and interacted with Madelyn at the WCC. Those eyewitnesses include not only staff, but also the other prisoners housed with Madelyn.

B. HCSD conducted a "Clinical Mortality Review" after Madelyn's death.

As referenced above, after any death in custody, HCSD's "Core Policy" requires the staff to perform a "Clinical Mortality Review". *See* Ex. E (HCSD Core Policy 4.5.1: Health Services Governance and Administration) at 5, 17. "Its purpose is to identify any areas of patient care or the system's policies and procedures that can be improved." *See id.* at 17. "All deaths are reviewed," and the review must be completed "within 30 days." *See id.* The review "is utilized as an assessment of the clinical care provided and the circumstances leading up to a death," and the results of the review are shared with all treating staff. *See id.* at 17, 31; *see also* Ex. F (HCSD Policy 4.2.22: Individual Notification for Medical Emergencies) at 5 ("All deaths are reviewed to determine the appropriateness of clinical care; to ascertain whether changes to policies, procedures, or practices are warranted; and to identify issues that require further study."). The primary purpose of the Mortality Review is not for use of counsel in anticipation of litigation.

HCSD conducted its Mortality Review for Madelyn about a month after she died, on November 2, 2018. *See* Ex. G (HCSD Privilege log) at 1-2 (entries 1 & 2). Nine people participated. *See id.* Most of these people appear to be management and correctional staff, including the Superintendent, three Assistant Superintendents, and the Head of Security. *See id.* Only two of the nine participants appear to have been licensed medical professionals, the Medical Director (a physician) and the Director of Nursing (a registered nurse). *See id.* HCSD's General Counsel was also present. *See id.* The product of this review was a 5-page report, as well as a 2-page "Discussion" document. *See id.* As a matter of policy, these findings would not have been kept confidential within the review team, but rather were required to be distributed to all of HCSD's treating staff members. *See* Ex. E (HCSD Core Policy 4.5.1: Health Services Governance and Administration) at 17, 31.

C. HCSD recorded statements from 26 prisoners after Madelyn's death.

In addition to conducting its "Clinical Mortality Review," HCSD took statements about Madelyn from 27 former and then-current prisoners in the fall of 2020. *See* Ex. G (HCSD Privilege log) at 6 (item 13). HCSD made verbatim electronic recordings of 26 of these statements. *See id.* HCSD was represented in these meetings by its investigators and/or counsel. *See id.*

HCSD has provided the names of the 26 prisoners who were recorded. HCSD contends these names constitute Criminal Offender Record Information ("CORI"). The Estate does not agree with that contention but has nevertheless agreed to treat the names as confidential under the Protective Order entered by the Court in this matter (D.E. 64). The names and rosters showing their custody during the relevant time period can be submitted to the Court under seal, if necessary. However, the Estate understands that there is no dispute that the 26 recorded statements are from prisoners who were incarcerated at the WCC with Madelyn, and who are therefore potential eyewitnesses to Madelyn's physical condition and interactions with WCC personnel during her custody. At least one of the recorded witnesses was Madelyn's cellmate.

D. HCSD is withholding the "Clinical Mortality Review" records and the 26 recorded statements under claims of privilege.

When discovery began last Fall, HCSD served the Estate with Rule 26 Initial Disclosures indicating that it might rely on "any" documents "related to Ms. Linsenmeir's incarceration at the WCC." *See* Ex. H (HCSD Initial Disclosures) at 5. Notably, for the required list of documents that "the disclosing party . . . may use to support its claims and defenses," HCSD specifically listed both the "Mortality Review" and "[a]ny and all sound or video recordings related to Ms. Linsenmeir's . . . custody." *See id.* at 5 (Rule 26(a)(1)(A)(ii) disclosure). HCSD also disclosed as potential witnesses "[a]ll inmates housed in Ms. Linsenmeir's housing unit at the WCC during the time of Ms. Linsenmeir's incarceration." *See id.* at 5.

The Estate served HCSD with Requests for Production of Documents (the "Requests"). *See* Ex. I (Estate RPDs). These Requests sought essentially all of HCSD's records concerning Madelyn's custody and medical treatment, including from any subsequent investigation or inquiry. *See, e.g.*, *id.* at Requests 1-8. In its responses, HCSD refused to produce the "Mortality Review" records on the grounds that they are purportedly "protected by the attorney-client privilege, the Massachusetts medical peer-review privilege (M.G.L. c. 111, § 204), and were prepared in anticipation of litigation or for trial." *See* Ex. J (HCSD First Suppl. RPD Responses) at Objection to Request 1. HCSD also produced a privilege log that asserted the "Mortality Review" records are subject to these same privileges, and additionally listed the 26 verbatim electronic recordings of other prisoners' statements. *See* Ex. G (HCSD Privilege Log) at 1, 2, 6 (items 1, 2, and 13). Although the privilege log states that the recorded statements are being withheld due to CORI concerns (which are now resolved by the protective order), HCSD's counsel subsequently informed the Estate by electronic mail that HCSD is asserting work product protection over these recordings even though they were not so identified in the privilege log.[2]

HCSD and the Estate have met and conferred on multiple occasions in an attempt to narrow or resolve their dispute over the withholding of these records. Among other things, counsel for HCSD (Thomas Day) and counsel for the Estate (Daniel McFadden, Areeba Jibril, and/or Michael Nzoiwu) conferred by telephone on February 9, February 18, March 4, and March 11, each time for between 20 and 90 minutes. The parties' current positions are:

- HSCD is withholding all 26 recordings of the prisoner witnesses' statements (privilege log item 13) based on a claim of work product protection. HCSD has stated that it may use the recorded statements at trial to impeach prisoner

[2] HCSD has been aware for some time that this motion was forthcoming. *See, e.g.*, Mot. to Extend Amendment Deadline (D.E. 67) ¶9. The Estate has encouraged HCSD on several occasions, including on March 10 and March 11, to serve any supplement or amendment to its privilege log as soon as possible. HCSD has not done so.

witnesses, if it contends there are inconsistencies between their testimony and their prior recorded statements. HCSD has stated it will not use these recordings at trial for any other purpose.

- HCSD is withholding the "Mortality Review" records (privilege log items 1 & 2) based on a claim of "Massachusetts medical peer review privilege," the attorney-client privilege, and work product protection. HCSD has stated that it will not use these records at trial for any purpose.

- The Estate contends that verbatim electronic recordings of third-party witness statements are not work product and, in addition, cannot be withheld if HCSD intends to use them at trial.

- The Estate also contends that the records arising from the Clinical Mortality Review are not privileged because the review was required by HCSD policy in the ordinary course of business for the stated purpose of improving HCSD operations, not for any litigation or legal purpose.

Consequently, although the parties have made extensive efforts in good faith to resolve their dispute without motion practice, these issues remain in dispute and are ripe for judicial resolution.

ARGUMENT

I. Legal Standards

The Federal Rules of Civil Procedure permit discovery of "any nonprivileged matter that is relevant to a party's claim or defense and proportional to the needs of the case . . . ." *See* Fed. R. Civ. P. 26(b)(1). "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* When a party withholds relevant information from discovery based on claims of privilege, it is well established that "[t]he burden is on the party asserting a privilege . . . to establish the existence and applicability of the privilege." *See Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991). "[T]he assertion of a privilege . . . must also be accompanied by sufficient information to allow the court to rule intelligently on the privilege claim." *Id.* Finally, "[i]n federal civil rights cases, an assertion of privilege must 'overcome the fundamental

importance of a law meant to insure each citizen from unconstitutional state action." *Williams v. City of Bos.*, 213 F.R.D. 99, 102 (D. Mass. 2003) (citation and internal quotation marks omitted).

II. The Court should compel HCSD to produce the 26 recorded witness statements.

As noted above, HCSD has disclosed that it may call as witnesses "[a]ll inmates housed in Ms. Linsenmeir's housing unit at the WCC during the time of Ms. Linsenmeir's incarceration," *see* Ex. H (HCSD Initial Disclosures) at 5, as may the Estate. There is no dispute that the 26 prisoner recordings are relevant, responsive, and (if not privileged) discoverable. Indeed, HCSD expects to introduce them at trial to impeach these witnesses through purported inconsistencies. The Estate would also make use of them. These recordings would be integral to the Estate's trial planning; they would inform the Estate's judgment of which witnesses are credible, and which are subject to cross-examination by prior inconsistent statement. And the Estate might also use these recordings as affirmative evidence to the extent they contain non-hearsay or admissible hearsay, *see* Fed. R. Evid. 801, 803, & 804, or, if necessary, for impeachment by contradiction of witnesses called by HCSD.

HCSD contends, however, that it may withhold these recordings based solely on the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3)(A). HCSD is wrong, for three reasons. First, verbatim electronic recordings of a third-party witness statements are not work product. Second, HCSD cannot withhold information from discovery that it expects to use at trial. And third, even if these recordings were work product (which they are not), the Estate has shown a substantial need to discover them—including because reasonable and responsible trial planning requires knowledge of the witnesses' prior statements.

To be clear, the Estate is not seeking to compel production of any records containing an attorney's or investigator's protected mental impressions, such as interview notes or memoranda.

However, for the reasons further described below, the verbatim electronic recordings of the witness's own words should be produced forthwith.

a. The verbatim electronic recordings of statements by third parties are not work product.

Although the First Circuit does not appear to have directly addressed the issue,[3] other courts have held that a verbatim electronic recording of a third party's statement is not an attorney's work product. This is so because the work product protection "encompasses 'work done by an attorney in anticipation of litigation.'" *See Blattman v. Scaramellino*, 891 F.3d 1, 4 (1st Cir. 2018) (quoting *In re Grand Jury Subpoena (Newparent)*, 274 F.3d 563, 574 (1st Cir. 2001) (ellipses omitted)). Consequently, courts have concluded that verbatim witness statements are not work product because they merely record the "knowledge possessed by third parties," rather than the work or thoughts of the attorney. *See Dobbs v. Lamonts Apparel, Inc*., 155 F.R.D. 650, 653 (D. Alaska 1994) (compelling production of questionnaire responses from third parties).[4] In the District of Massachusetts, for example, Judge Hillman and Magistrate Judge Hennessy both recently rejected a claim of work product protection over a witness statement obtained by counsel because it contained "nothing more than statements of facts within the [witness's] personal knowledge." *See Diaz v. Devlin*, 327 F.R.D. 26, 28-30, 32 (D. Mass. 2018) (overruling objection to Magistrate Judge's disclosure order, collecting case, and concluding that the "majority view" is

[3] "While a judge in this Court has previously recognized that an attorney's verbatim recordation of a witness statement may be discoverable, . . . the issue has never been decided by the First Circuit." *Diaz v. Devlin*, 327 F.R.D. 26, 30 (D. Mass. 2018).

that "attorney prepared affidavits comprised of factual statements are not protected by the work-product doctrine").[5]

The reasons why a witness's statement of facts captured in writing is not work product apply with greater force to a witness's statement of facts that is captured in real-time by verbatim electronic audio and video recordings. By definition, verbatim recordings memorialize the witness's exact words without reflecting any embellishment, commentary, or opinions of any attorney. For example, in 2016, in *The Manitowoc Company v. Kachmer*, a corporate party's counsel interviewed five corporate employees and recorded the interviews "through an application on his personal cell phone." *See* No. 14-9271, 2016 WL 2644857, at *1 (N.D. Ill. May 10, 2016). The attorney later inserted his "notes and impressions into the interviews." *See id.* The opposing party moved to compel production of the recordings, and the corporate party argued that they were protected work product. *See id.* at *2. The court reviewed the recordings *in camera* and found nothing "that would show that [the attorney's] mental impressions and theories about the case are so 'inextricably intertwined'" with his line of questioning that [the court] can reasonably characterize the [witnesses'] statements as the work product of [the attorney] himself." *See id.* at *3. "[B]y using an audio recording device [the attorney] has done nothing to make the resulting 'document' his own work product," as would be the case if the attorney "[h]ad . . . taken the . . . statements by hand, or summarized the interviews in his own words, or in some way filtered or

[5] *See also U.S. E.E.O.C. v. ABM Indus., Inc.*, 261 F.R.D. 503, 513 (E.D. Cal. 2009) (holding that questionnaire responses "are essentially verbatim witness statements made by third parties" and as such "are not protected by the work product doctrine"); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 422-23 (D. N.J. 2009) (ordering disclosure of a third-party affidavit because it only contained a "recitation of facts" within the witness's knowledge); *Murphy v. Kmart Corp.*, 259 F.R.D. 421, 428-30, 431-32 (D.S.D. 2009) (noting the "majority rule" is that signed third-party affidavits that merely recite facts within the third-party's knowledge are not work product); *Schipp v. Gen. Motors Corp.*, 457 F.Supp.2d 917, 924 (E.D. Ark. 2006) ("[V]erbatim non-party witness statements are neither privileged nor work product and must be produced.").

recorded only what he perceived to be the most important or relevant parts . . . ." *See id.* The Court concluded that because "[t]he recordings contain the verbatim statements of third-party witnesses . . . the work-product doctrine does not shield them from discovery," and ordered the recordings produced (with the attorney's later-added notes redacted). *See id.* at *3-4.

Here, as in *Diaz* and *Manitowoc*, the 26 recorded statements are not work product. They are factual statements of third party witnesses who were incarcerated with Madelyn. Although the Estate has not been permitted to hear what questions were asked, HCSD has not offered any evidence that witnesses were asked any questions beyond the obvious inquiries into what the witnesses saw and heard. Indeed, it would be rather extraordinary if HCSD's counsel communicated mental impressions or legal opinions to HCSD's current and former prisoners. In all events, even to the extent that HCSD's counsel might contend that counsel's mental impressions or theories about the case are "'inextricably intertwined' with [counsel's] line of questioning," the Court could review the recordings *in camera* and determine whether any of counsel's questions (but not the answers) should be redacted. *See Manitowoc*, 2016 WL 2644857, at *3; *see also Jones v. Secord*, No. 11-91101, 2011 WL 2456097, at *2 (D. Mass. Jun. 15, 2011) (if appropriate, non-work product statements can be produced with other material redacted).

Either way, the 26 recorded witness statements themselves are not work product and are clearly relevant and discoverable as verbatim factual statements by percipient witnesses of what they did and did not observe about Madelyn while she was in the defendant's custody. The motion to compel should be allowed, and the statements should be produced forthwith.

b. HCSD cannot withhold evidence it expects to use at trial.

Regardless of the basis for HCSD's attempts to shield these recordings, it cannot withhold the recorded witness statements from discovery, and then introduce them at trial to impeach the

witnesses. Federal civil practice neither contemplates nor permits "trial by ambush." *See, e.g., Klonoski v. Mahlab*, 156 F.3d 255, 271, 276 (1st Cir. 1998).[6] Here, the existence of the recordings is known to HCSD, their existence has been disclosed to all parties, they fall within the scope of Rule 26(b) discovery, and their disclosure has been properly demanded by Rule 34 document requests. In these circumstances, HCSD "cannot have it both ways; [it] cannot seize upon the privilege to withhold relevant information and evidence during pretrial discovery and then testify or otherwise offer into evidence at trial the same information and documents." *See RL BB Fin. v. Robinette*, No. 11-49, 2013 WL 11521681, at *3 (E.D. Tenn. Mar. 26, 2013)); *see also Diesel Mach., Inc. v. The Manitowoc Crane Grp.,* No. CV 09-4087-RAL, 2011 WL 13353139, at *2 (D.S.D. Jan. 14, 2011) ("[A party] cannot both withhold from discovery attorney client privilege evidence and then try to use it at trial."). HCSD's position that these recordings are fair game at trial waives any conceivable work product protection. *Compare Columbia Data Prods. v. Autonomy Corp.*, No. 11-12077, 2012 WL 6212898, at *18-19 (D. Mass. Dec. 12, 2012) (waiver of work product protection where audit placed at issue in litigation), *with Mass. Mut. Life Ins. v. Merrill Lynch*, 293 F.R.D. 244, 253 (D. Mass. 2013) (no waiver where party "explicitly eschewed any use of the [work product] as evidence at trial).[7]

[6] The First Circuit has suggested that *Klonoski*'s discussion on the overall scope of Rule 26 discovery was partially superseded by subsequent amendments to the rule that refined the definition of "relevance" for discovery purposes. *See In re Subpoena of Witzel*, 531 F.3d 113, 118 (1st Cir. 2008). Here, of course, the statements of witnesses who observed Madelyn's condition and interactions in the WCC would be relevant under any construction of Rule 26(b)(1).

[7] *See also* Wright & Miller, 8 Fed. Prac. & Proc. Civ. § 2016.6 (3d ed. 2021) (explaining that "most cases" hold that "discovery is permissible of privileged matter to the extent it is contemplated that the privilege will be waived at trial").

Any other outcome would allow lawyers to stockpile recorded witness interviews, conceal their substance from opposing counsel as "work product", and then (generally years later) surprise their opponent with them at trial after the witness testifies. That state of affairs would not only create chaos at trial, but also unfairly prejudice the opposing party's trial preparation. That party's counsel could not make reasonable judgments about what witnesses to call since their credibility would be unknown. Counsel will not know whether a particular witness previously contradicted herself in a statement recorded by their adversary. These outcomes would offend the underlying purposes of Rule 26, and the motion to compel should be allowed. *See Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992) (explaining that the purpose of modern discovery procedures to "make trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent").

c. Even if the recordings were work product, the Estate has a substantial need to discover them that would overcome this qualified protection.

Even if the 26 recordings were protected as work product, the recordings are mere fact work product, not mental impressions, and should be produced because the Estate has a substantial need for these recordings to prepare its case and has no other means to acquire them. *See* Fed. R. Civ. P. 26(b)(3)(A)(i)-(ii). As explained above, the testimony of witnesses who were incarcerated will be a key part of this case, such that it will be virtually impossible for the Estate to prepare a reasonable trial strategy without knowing whether these witnesses made prior recorded statements that contradict their anticipated testimony. *See Duck v. Warren*, 160 F.R.D. 80, 82-83 (E.D. Va. 1995) (finding substantial need to discover prior witness statements that may be used for impeachment); *see also Jones*, 2011 WL 2456097, at *3 (finding substantial need and lack of substantial equivalent where plaintiff cannot otherwise obtain a prior statement addressing a "critical fact in the litigation"). Similarly, without disclosure, the Estate will have no opportunity

to investigate in discovery *the reasons* for any such inconsistencies: whether the witnesses felt tacit pressure not to displease their jailors if they were interviewed while still incarcerated, whether the witnesses perceived any inducements or threats at the time of their interviews, or whether their memory has simply been refreshed or diminished by the natural effects of the passage of time. *See Dobbs,* 155 F.R.D. at 652 (noting that, when a person is asked the same question more than once over substantial time intervals, "almost anyone will answer the question differently"); *Lopez v. City of New York*, No. 05-CV-3624, 2007 WL 869590, at *4 (E.D.N.Y. Mar. 20, 2007) ("The City has substantial need for the statements because they were taken in June and September of 2005, much closer to the events on May 1, 2003 and are therefore more likely to reflect the witnesses' recollections than any testimony the City could elicit now, almost four years after the incident.").[8]

Further, beyond the Estate's needs, the Court can no doubt foresee that the surprise appearance at trial of a potentially large volume of previously undisclosed recordings would present substantial case management concerns. Among other problems, it would invite complex objections that may interrupt the trial, and may unnecessarily threaten the finality of the proceeding. *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988) (when courts weigh disclosure of work product, "the relationship is triangular, with the court itself as a third, important, player," and "the efficient use of scarce judicial resources" must be "factored into the equation"); *see also Klonoski*, 156 F.3d at 276 (trial result vacated for failure to

[8] The First Circuit's 1981 decision in *Gay v. P.K. Lindsay Co.* is not to contrary—there, the Court concluded there was no "substantial need" to discover a "statement" by the defendant corporation's president in order to cross-examine an expert, where the expert had not relied upon the document, and where the witnesses who actually testified could be impeached by their own separate deposition testimony on the exact issue. *See* 666 F.2d 710, 713 (1981). The First Circuit did not analyze whether the "statement" document was work product (an issue apparently not raised by the plaintiff on appeal), and it is not clear whether it was actually prepared or adopted by the corporate president (as opposed to the insurance company he was talking to). *See id.*

exclude previously undisclosed impeachment evidence). Given these substantial needs of both the Estate and the Court, the motion to compel should be allowed, and the 26 verbatim recorded witness statements should be produced forthwith.

III. The Court should compel HCSD to produce the Clinical Mortality Review records.

In addition to the recorded statements, the Court should also compel HCSD to produce the records of its Clinical Mortality Review regarding Madelyn's death (privilege log items 1 and 2). *See* Ex. G (HCSD Privilege Log) at 1 & 2. As explained below, none of the three asserted privileges are applicable. Although HCSD asserts the "Massachusetts medical peer review privilege," that privilege is inapplicable to this federal civil rights case, and in any event HCSD has not and cannot prove key elements necessary to invoke the privilege. And the attorney-client privilege and work-product protection do not apply to a correctional function required in the ordinary course by HCSD's own policies. Much as HCSD cannot manufacture a privilege over routine communications by cc'ing its general counsel, it cannot shield meetings undertaken for non-legal purposes by stationing its counsel in the room. The Court should consequently compel production of the records of the Clinical Mortality Review.

a. The Massachusetts medical peer review privilege does not apply in federal civil rights cases, and in any event HCSD has not established the elements necessary to invoke the privilege.

HCSD cannot withhold the Clinical Mortality Review records under the Massachusetts medical peer review privilege, because that privilege does not apply in federal civil rights actions. The privilege is a creation of state statute, which provides that "the proceedings, reports and records of a medical peer review committee shall be confidential and . . . shall not be subject to subpoena or discovery." *See* G.L. ch. 111, §§ 204(a), 205(b). Consequently, federal courts have concluded that the privilege is inapplicable in federal cases that allege violations of federal civil

rights laws. *See, e.g.*, Fed. R. Evid. 501; *Gargiulo v. Baystate Health, Inc.*, 826 F. Supp. 2d 323, 326 (D. Mass. 2011) (declining to apply the privilege where plaintiff raised discrimination claims under the federal ADA and ADEA); *Krolikowski v. Univ. of Mass.*, 150 F. Supp. 2d 246, 249 (D. Mass. 2001) (declining to apply the privilege where plaintiff raised discrimination claims under multiple federal laws, including Title VII of the Civil Rights Act of 1964).

Here, too, the complaint alleges that HCSD discriminated against Madelyn because of her disability in violation of the federal Americans with Disabilities Act, and also that HCSD employees unreasonably denied adequate medical care for Madelyn's serious medical needs in violation of her federal constitutional rights and Section 1983. *See* Complaint (D.E. 1) ¶¶95-111 (counts II & III). There is also a particularly strong federal interest in disclosure in this case, where any other result would essentially permit the state to pass laws to shield its own actors (*i.e.*, HCSD, a state entity) from disclosing evidence in federal litigation to enforce federal rights against the state. *See Gargiulo*, 826 F. Supp. 2d at 326-27; *Krolikowski*, 150 F. Supp. 2d at 249. In cases concerning the death of prisoners, courts from around the country have refused to apply state-law medical peer review privileges. *See, e.g.*, *Johnson v. Dart*, 309 F. Supp. 3d 579, 581-82 (N.D. Ill. 2018) (declining to apply Illinois medical peer review statute) (collecting cases). As one court explained, "[c]ompared to a civilian mortality review, a mortality review of a deceased inmate is likely to contain far more 'nonmedical' information such as whether and when jail officials notified medical officials of a particular problem, whether there was a reason for nonmedical officials to have monitored a situation more closely, and perhaps provide insight into jail customs or policies." *Id.* at 582.

Moreover, even assuming the Massachusetts medical peer review privilege theoretically applied in a federal civil rights case, HCSD has not demonstrated the elements necessary to invoke

the privilege here. The privilege applies to two categories of documents with a close nexus to a "medical peer review committee": (a) "the proceedings, reports and records of a medical peer review committee," *see* G.L. ch. 111, § 204(a); and (b) "[i]nformation and records which are necessary to comply with risk management and quality assurance programs established by the board of registration in medicine and which are necessary to the work product of medical peer review committees," *see id.* § 205(b). A "medical peer review committee" is narrowly defined as (in summary) "a committee of a state or local professional society of health care providers . . . or of a medical staff of a public hospital or licensed hospital or nursing home or health maintenance organization," "a committee of physicians established [by the state medical director]" for certain specified purposes, and certain committees of pharmacists. *See* G.L. ch. 111, § 1. For purpose of Section 204(a), a "medical peer review committee" also includes "a nonprofit corporation, the sole voting member of which is a professional society having as members persons who are licensed to practice medicine." *See id.*

Here, the group that conducted the Clinical Mortality Review was not a "Medical Peer Review Committee" within the meaning of the statute, nor is there any evidence (for purposes of § 205(b)) that the group was formed "to comply with risk management and quality assurance programs established by the board of registration of medicine." *Compare* G.L. ch. 111, §§ 1, 204(a); 205(b), *with* Ex. G (HCSD Privilege Log) at 1 & 2. HCSD's staff were not acting as part of any state or local professional society, nor any public hospital, licensed hospital, nursing home, or health maintenance organization, nor any committee formed by the state medical director. Ex. G (HCSD Privilege Log) at 1 & 2. Indeed, it appears that the vast majority of the group were not medical professionals at all. Rather, seven of the nine participants appear to be prison administrators, including the Superintendent, three Assistant Superintendents, and the Head of

Security—underscoring that this review was not by a "Medical Peer Review Committee" as defined by the statute. *See id.; see also Johnson*, 309 F. Supp. 3d at 582 (quoting *Agster v. Maricopa Cty.,* 422 F.3d 836, 839 (9th Cir. 2005)) (declining to apply privilege, noting that "[w]hereas in the ordinary hospital it may be that the first object of all involved in patient care is the welfare of the patient, in the prison context the safety and efficiency of the prison may operate as goals affecting the care offered.") Without showing the existence of a "Medical Peer Review Committee," the statute does not apply. HCSD's assertion of the Massachusetts medical peer review privilege fails for this reason as well.

b. The Clinical Mortality Review is not entitled to attorney client privilege or work product protection because it was prepared for correctional purposes.

Lastly, neither the work product protection nor attorney client privilege shields the Clinical Mortality Review records from discovery. As explained above, HCSD's "Core Policy" requires this review to occur in the ordinary course of HCSD's correctional business after any death in custody. *See* Ex. E (HCSD Core Policy 4.5.1: Health Services Governance and Administration) at 5, 17. The purpose is not to prepare for litigation or secure legal advice, but rather is expressly for "an assessment of the clinical care provided and the circumstances leading up to death" in order to "identify any areas of patient care or the system's policies and procedures that can be improved." *See id.*; *see also* Ex. F (HCSD Policy 4.2.22) at 5. The review is not kept confidential, but rather must be shared "with all treating staff." *See* Ex. E (HCSD Core Policy 4.5.1) at 17, 31.

Records that are prepared in the ordinary course of business for non-legal purposes are not work product, even though litigation might be active or anticipated. *See, e.g.*, *United States v. Textron*, 577 F.3d 21, 30 (1st Cir. 2009) (en banc) (holding no work product protection for materials "assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes"). Similarly, the mere presence of

HCSD's General Counsel in the room does not cause a routine administrative or correctional activity to fall within the attorney-client privilege. *See Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997) ("[R]outine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda."); *see also Kinzer v. Whole Foods Market, Inc.*, No. 20-11358, 2022 WL 355777, at *1 (D. Mass. Feb. 7, 2022) (ordering production of emails on which in-house counsel was copied); *see also Hebert v. Vantage Travel Service, Inc.*, No. 17-10922, 2019 WL 2514729, at *1-2 (D. Mass. June 18, 2019) (ordering production of notes from meetings, even though general counsel was present). And, notably, HCSD has not asserted that the records of the review reflect any legal advice from counsel, nor any legal inquiries directed specifically to counsel. Nor has HCSD asserted that the records were intended to be kept confidential, and indeed it appears they were required to be distributed to all treating staff. *Compare* Ex. E (HCSD Core Policy 4.5.1) at 5, 17, *with Cavallaro v. United States*, 284 F.3d 236, 245-46 (1st Cir. 2002) (attorney client privileged communications must be made in confidence). Consequently, neither the work product protection nor the attorney client privilege applies to these records, and the Court should order them produced.

CONCLUSION

For all the foregoing reasons, the Estate respectfully requests that the Court order HCSD to produce both the 26 witness recordings and the Mortality Review records forthwith.

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Respectfully submitted,

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