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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of A Request for Information	Case No. 3AN-16-00695 DN

OPPOSITION TO MOTION TO AMEND AND FOR A DECISION

The Department of Health and Social Services has no objection to amending the information request, but the court should deny the request itself. The respondents in these cases are people, not mere research subjects. They should be asked, individually, if they would like their files opened up.

I. There is a significant risk that confidentiality could be breached.

The undersigned has had nothing but pleasant interaction with Mr. Gottstein. But it must be said: In 2006, Mr. Gottstein carried out a scheme for obtaining and disseminating confidential documents sealed by a protective order in a case in the United States Court for the Eastern District of New York.[1] The documents originated with Eli Lilly & Co. and concerned the psychotropic medicine Zyprexa, which the company manufactures. Mr. Gottstein learned about the documents from a plaintiff's witness and conspired with the witness to subpoena them from the witness and disseminate them widely.[2] The United States District Court found that Mr. Gottstein knew the documents were confidential and under protective order, and that they had no relevance to Mr. Gottstein's Alaska case.[3] The United States District Court found that Mr. Gottstein had deliberately kept the defendant in the dark about the subpoena (to prevent a reply to it) and had immediately sent the confidential documents to a

1 *Zyprexa Litig.*, 474 F. Supp. 2d 385, 392 (E.D.N.Y. 2007)

2 *Id.*

3 *Id.*

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New York Times reporter and to contacts who immediately published the documents to the internet.[4] In light of these findings, the United States District Court permanently enjoined Mr. Gottstein from disseminating the documents and demanded their return.[5] On appeal, the Second Circuit affirmed the permanent injunction and held that Mr. Gottstein's acquiring and disseminating the documents involved his aiding and abetting a violation of the court's protective order through sham subpoenas.[6] Given this history, the court should view any assurance of patient confidentiality with great caution.

II. Administrative rule 37.7 counsels against disclosure.

The motion defines the purported public interest as

> The opportunity to have such an internationally recognized research analyze the extent to which proceedings under AS 47.30.839 comply with the requirements of *Bigley v. Alaska Psychiatric Institute* will be extremely valuable. If the conclusion is that they have complied with legal requirements; good. If, on the other hand, the analysis shows that people's rights are being violated it is critically important to know so that corrections can be made.

Dr. Goetsche is not a legal expert. He is not an appropriate person to analyze if an Alaska Statute or an Alaska Supreme Court decision has been violated. An Alaska Superior Court Judge, or the Alaska Supreme Court, make those determinations. Dr. Gotzsche's "analysis" is irrelevant.

Dr. Gotzsche's "analysis" is unnecessary, because has already made up his mind. In a sworn affidavit in the original request, Dr. Gøtzsche stated that "administering a psychotropic medication or medications to a patient against his or her will is not in his or her best interest," that this conclusion is "solidly based on scientific facts," and that "there are feasible less intrusive alternatives to administering a psychotropic medication or medications against a patient's will." [7] These statements can be true only if court

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4 *Zyprexa Litig.*, 474 Supp. 2d 385 at 392-93.

5 *Zyprexa Litig.*, 474 Supp. 2d 385 at 428.

6 *Eli Lilly & Co. v. Gottstein.*, 617 F.3d 186, 191 (2d Cir. 2010)

7 Gøtzsche, Affidavit, page 9.

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ordered administration of psychotropic medication is never in a person's best interest and a less intrusive alternative to court ordered psychotropic medication is always available. Thus, Dr. Gøtzsche has already concluded, with respect to *any* case of court ordered psychotropic medication, that the medications are not in the respondent's best interests and that a less intrusive alternative is available. We already know what Dr. Gotzsche's "analysis" is going to say. This request does not offer any additional benefit to the public.

III. The request should be served on the actual patients.

Administrative Rule 37.7 assumes that the actual parties will be served with the request. It is not the actual patient's burden to prove otherwise. The request states that Civil Rule 81(e)(2) means that the Public Defender Agency remains the patient's attorney until one year has elapsed, and so service on the Public Defender Agency means that the patient has been served. This is incorrect. Civil Rule 81(e) addresses when an attorney *withdraws* from representation, and (e)(2) explains that even if none of the procedures in (e)(1) have been followed, after a year, the attorney is withdrawn. Here, the Public Defender Agency is not "withdrawing" as that term is understood in Civil Rule 81(e). Instead, the Public Defender Agency's representation stops as a matter of law: under AS 18.85.100, *Right to representation, services, and facilities*, a respondent is entitled to representation in connection with commitment proceedings. There has to be a *connection*. Once the commitment proceedings are over, either by voluntary admission or release, there can be no connection (except for appeals, *cf.* Alaska Bar Association Ethics Opinion 2011-4, "Duties of an Attorney in a Criminal Appeal When the Client Cannot be Contacted"). Because there is no connection, there is no representation.

Even if Civil Rule 81(e) could apply, it could not apply as suggested. Probate Rule 1(e) explains that where the Probate Rules do not directly address a situation, the court may proceed in any lawful manner, including by the Civil Rules, as long as the procedure does not "interfere with the unique character and purpose of probate proceedings." Given that mental commitment proceedings are confidential, with special

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rules for records and court files, and special rules for hearings being open or closed, confidentiality is part of the unique character of mental commitment proceedings unless the particular respondent explicitly chooses to have the proceedings be public. *Cf.* AS 47.30.735(b)(proceedings open or closed as respondent elects). Interpreting Civil Rule 82(e) as is suggested would interfere with the unique character of probate proceedings.

IV. The constitution does not override privacy.

Finally, there is no issue of constitutionality here. The public will be informed about these sorts of proceedings through regular judicial action. The Alaska Supreme Court held recently in *In re the Necessity of the Hospitalization of Naomi B.*, Op. No. 7328 (January 11, 2019) that it will no longer apply the mootness doctrine in civil commitment appeals. Thus, every appeal will be decided on the merits, and publically available as either a published opinion or publically available MO&J.

Conclusion

The respondents/patients in these cases are real people. They are entitled to dignity and as much self-determination as possible, even if they have had commitment orders or medication orders entered against them. If any individual person would like to turn over their file to Dr. Gotzsche, that is their business. But it should be up to them. That it might be difficult for Dr. Gotzsche to contact them is no one's problem but Dr. Gotzsche's.

The request for information should be denied.

DATED: March 29, 2019.

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CERTIFICATE OF SERVICE

I certify that on this date, true and correct copies of the O***pposition to Motion to Amend and for a Decision*** and this ***Certificate of Service*** were served to the following parties via **courier**:

Linda Beecher
Public Defender Agency
900 West Fifth Avenue, Suite 200
Anchorage, AK 99501

And to the following party via **U.S. Mail**:

James B. Gottstein
Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, AK 99501

Katherine Osborne-Hightower 03/29/2016
Katherine Osborne-Hightower Date
Law Office Assistant II

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