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-16-00695DN

REPLY TO API OPPOSITION TO MOTION TO AMEND REQUEST AND FOR A DECISION

In its Opposition to Motion to Amend and for a Decision (Opposition) the Alaska Psychiatric Institute (API) does not oppose that portion of Dr. Gøtzsche's Motion to Amend Request and for a Decision (Motion) pertaining to amending his Information Request to consist of the 30 most recent applicable court files. With respect to that part of the Motion requesting the Information Request be granted, API makes four arguments, which will be addressed in turn.

I. Breach of Confidentiality Concerns, If Any, Can Be Addressed

API dredges up the 12 year old Zyprexa Papers injunction in which the U.S. District Court for the Eastern District of New York (EDNY) enjoined counsel from further dissemination of the Zyprexa Papers he had received pursuant to a subpoena issued to an expert witness to suggest Counsel cannot be trusted to protect confidentiality. Counsel does not think it useful to extensively re-litigate that case, but will make a couple of points.

First, that decision largely rested on the EDNY's conclusion Eli Lilly's hiding serious adverse effects of Zyprexa "bore no relevance to" counsel's representation of his

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client and therefore a pretense.[1] In fact, however, counsel's client had been drugged with Zyprexa against his will a couple of weeks before the subpoena as well as a couple of months later[2] and thus secret documents showing the great harm caused by Zyprexa was very relevant to whether counsel's client should be drugged with Zyprexa against his will.

Second, counsel was pursuing interests independent of the expert, and since he was not a party to the protective order, did not believe he was subject to it as illustrated by the following testimony:

> Q: [Y]ou had told Dr. [Egilman] repeatedly that he should send the second subpoena to Lilly, correct?
>
> [Mr. Gottstein]: Yes.
>
> Q: And you knew he planned not to send it to Lilly, correct?
>
> [Mr. Gottstein]: Yeah, I think—he told me he didn't see that it made any difference.
>
> Q: And you decided that it was not important for you to send the subpoena to Lilly either, correct?
>
> [Mr. Gottstein]: My ... position is that it was his responsibility under the [protective order] and not mine.[3]

It is true the EDNY and Second Circuit decided otherwise.

Counsel has assured this Court that he will redact the Court files before transmitting them to Dr. Gøtzsche and not otherwise distribute them. Should the Court have any concerns about counsel breaching confidentiality, it can simply adopt the

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[1] *In re Zyprexa Injunction*, 474 F.Supp.2d 385, 392 (2007).
[2] In *Ely Lilly & Co., v. Gottstein*, 617 F.3d 186, 197 (2d Cir. 2010) the Second Circuit denied counsel's motion to take judicial notice of these facts.
[3] *In re Zyprexa Injunction*, 474 F. Supp.2nd at 401.

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second alternative proposed by Dr. Gøtzsche, which is to have court personnel redact identifying information before delivering the documents to counsel.

II. Administration Rule 37.7 Heavily Favors Granting the Information Request

Administration Rule 37.7 provides access should be granted if the requestor's interest in disclosure outweighs the potential harm to the person whose interests are being protected, including consideration of (1) risk of injury to individuals, (2) individual privacy rights and interests, (3) proprietary business information, (4) the deliberative process, or (5) public safety. API's Opposition does not address these factors at all.

Instead, API asserts that Dr. Gøtzsche analyzing 30 consecutive involuntary medication petitions to evaluate if:

1. the petitions comply with the requirements of *Bigley* in Alaska and Danish requirements in Denmark,
2. information is provided that documents that the patient cannot provide informed consent,
3. information about the psychiatric drugs the patient takes or will be forced to take is accurate,
4. a less intrusive alternative is available,
5. the combination of drugs the patient takes is safe,
6. the arguments for using force are reasonable and documented,
7. the patients' rights have been respected, and
8. [whether] there are striking similarities from case to case considering that patients are different,

is irrelevant because he is a critic of the drugs commonly administered to people against

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their will.[4]

More particularly, API objects because Dr. Gøtzsche, after analyzing the scientific evidence, affied:

> 38. In my opinion, which is solidly based on scientific facts, administering a psychotropic medication or medications to a patient against his or her will is not in his or her best interest.

But this is not what the Research Protocol is to study.

For example, in *Bigley v. Alaska Psychiatric Institute,*[5] the Alaska Supreme Court required involuntary medication petitions to:

> include information about the patient's symptoms and diagnosis; the medication to be used; the method of administration; the likely dosage; possible side effects, risks and expected benefits; and the risks and benefits of alternative treatments and nontreatment.

The Research Protocol will examine if the petitions include this information.

Similarly, Dr. Gøtzsche will review the court files to see if information about the psychiatric drugs it is proposed be forced on the patient is accurate. Having an internationally recognized researcher on drugs in general and psychiatric drugs in particular review this and the other items in the Research Protocol will be invaluable. It is respectfully suggested, for this reason and the reasons stated in the original motion, application of the Rule 37.7 factors weigh heavily in favor of granting the Information Request.

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[4] API refers to an affidavit by Dr. Gøtzsche in the original request, but it probably refers to the copy of an affidavit listed as an enclosure to API's June 30, 2016, letter to the Court opposing the Information Request. The affidavit was not included in the courtesy copy of API's letter sent to Dr. Gøtzsche.

[5] 208 P.3d 168, 182 (Alaska 2009).

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III. No Additional Service Should be Required

A. Service on the Public Defender Agency is Service on Its Clients

Administration Rule 37.7(b), provides in part that "Any request to allow access must be made in writing to the court and served on all parties to the case unless otherwise ordered." Under Civil Rule 5(b), service on a party is accomplished by service on their attorney:

> **(b) Service—How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court.

No compelling reason has been advanced here to deviate from the principle that service on a party's attorney is service on the party.

Instead, API asserts, on behalf of the Public Defender Agency in its Opposition that the Public Defender Agency's representation stops as a matter of law under AS 18.85.100 once the commitment proceedings are over except for appeals.[6] API reaches for this conclusion by asserting that under AS 18.85.100, Public Defender Agency representation is only allowed "in connection with commitment proceedings" and once the proceeding is over, there is no connection. It is respectfully suggested this fails on its face. The Information Request is connected with the commitment proceedings because it arises directly out of the commitment proceeding.

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[6] Dr. Gøtzsche has not been served with an opposition to the instant motion by the Public Defender Agency, but the Public Defender Agency did assert this at the November 1, 2017, status conference.

Counsel did not find any cases interpreting what "in connection with" means in AS 18.85.100 as it applies to commitment proceedings. However there are cases in which the Supreme Court takes an expansive view of the Public Defender Agency's representation authority/obligation. *See*, *State v. Carlin*[7] (Public Defender Agency obligated to represent deceased defendant on appeal), *Alex v. State*[8] (Public Defender Agency obligated to continue to represent defendant for untimely post-conviction relief if there is a basis for claiming the time was tolled), and *Public Defender Agency v. Superior Court, Third Judicial Dist.*[9] (Public Defender Agency empowered to represent person charged with contempt for non-support, which is neither totally civil nor totally criminal).

Dr. Gøtzsche is not asserting these cases establish anything more than the Alaska Supreme Court's expansive interpretation of the Public Defender Agency's authority and obligation to represent people. Here, the point is merely to recognize that service on the Public Defender Agency is service on its clients under Administration Rule 37.7.

In addition, *Cozzetti v. Madrid*[10] might be of some help. There, the Alaska Supreme Court decided that under the Unfair Trade Practices and Consumer Protection Act " 'in connection with' should include post-sale conduct that is related to the sale."

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[7] 249 P.3d 752, 765-766 (Alaska 2011).
[8] 210 P.3d 1225, 1229 (Alaska 2009).
[9] 534 P.2d 947 (Alaska 1975).
[10] 2017 WL 6395736 (Alaska, December 13, 2017), also available in a publicly accessible database at https://scholar.google.com/scholar_case?case=14796450617900104166. Dr. Gøtzsche cites this unpublished Alaska Supreme Court decision because he believes it has persuasive value in relation to this issue and that there is no published opinion he has found that would serve as well. *See*, Appellate Rule 214(d).

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Here, the Information Request is for post-decision action (the Information Request) that is related to the commitment proceeding, to wit: the court file of the commitment proceeding. Again, Dr. Gøtzsche is not asserting this is directly applicable, but it is the only Alaska case that was found defining "in connection with."

Looking farther afield, in *Simula, Inc. v. Autoliv, Inc.*,[11] the Ninth Circuit had occasion to interpret "in connection with" in an arbitration clause. First it held, "the plain meaning of the phrase 'arising in connection with' suggests a broader scope than a phrase such as 'arising out of' or 'arising under.,' " and then held " 'arising in connection with' reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract." Here, the Information Request has a significant relationship to the commitment proceeding as well as having its origin or genesis in the commitment proceeding. API's "in connection with" argument is not well taken. The Public Defender Agency is representing all of the respondents that would be subject to the Information Request and service on it is service on its clients.

B. Applying Civil Rule 81(e) Would Not Interfere With the Unique Character of Probate Proceedings

API also asserts that applying Civil Rule 81(e) would interfere with the unique nature of probate proceedings and therefore under Probate Rule 1(e) should not be applied. The reason put forth by API is confidentiality is part of the unique character of mental commitment proceedings unless the respondent elects to have it open. It is respectfully suggested this is actually a reason for applying Civil Rule 81(e) rather than

[11] 175 F.3d 716, 721 (9th Cir. 1999).

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the other way around. API recognizes the role the Public Defender Agency plays in its clients' election about whether commitment proceedings are open or closed to the public. Dr. Gøtzsche respectfully suggests this role is similar to the Public Defender's role in the Information Request.

C. API Did Not Dispute Dr. Gøtzsche's Analysis That There Are Practical Obstacles to Individual Service And It Would Jeopardize Confidentiality More Than His Proposed Approach

In his Motion, Dr. Gøtzsche pointed out that (1) individual service has many practical obstacles, and (2) the Court endeavoring to provide service on each individual respondent involved is far more likely to cause a breach of confidentiality than the redaction approach proposed by him. API does not dispute this, nor was it disputed by API or the Public Defender Agency at the November 1, 2017, status conference. It is also respectfully suggested this Court recognized at least the obstacles. Dr. Gøtzsche pointed out that the risk to confidentiality was far greater through the process of attempting to provide individual service than under either of Dr. Gøtzsche's proposed procedures. All of this is unrebutted. It is respectfully suggested individual service beyond the Public Defender Agency should not be required. Even if this Court does not agree that service on the Public Defender Agency is service on its clients, Administration Rule 37.7 specifically allows this Court to not require individual service. It is respectfully suggested the problems associated with individual service here is just the sort of circumstance, for which Administration Rule 37.7 allows the Court to not require

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individual service if this Court determines service on the Public Defender Agency is not service on its clients.

IV. The Constitution is Applicable

The heading of Section IV of API's Opposition is, "The constitution does not override privacy." This is an astounding proposition. Of course the constitution is applicable. In his Motion, Dr. Gøtzsche addressed at some length the interplay between privacy rights and the public's right to access to judicial proceedings. API does not address this at all. Instead, it cites the recent Alaska Supreme Court decision, *In re: Naomi B*[12] overruling its mootness jurisprudence under *Wetherhorn v. Alaska Psychiatric Institute*,[13] as somehow being comparable because all appeals will now be heard on the merits. Appellate review of individual involuntary medication decisions would simply not yield the same information. Both are valuable, but have far different purposes and result in far different products. Appellate development of the law is unsystematic, depending on what cases are appealed with what issues and upon what basis the appellate court decides the appeals. The chance the appellate process will address the same questions as the Information Request is vanishingly small.

V. Conclusion

In its Conclusion, API states that if any respondent wants to turn over their file to Dr. Gøtzsche that is their business and if Dr. Gøtzsche has difficulty contacting them, that

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[12] Opinion No., 7328, 2019 WL 167223 (January 11, 2019), *Rehearing Pending.*
[13] 156 P.3d 371 (Alaska 2007).

is no one's problem but his.[14] This, however, is not what Administration Rule 37.7 provides. Administration Rule 37.7 requires this Court balance the respondents' interests against Dr. Gøtzsche's. API does not address this at all. As set forth in the Motion, the Administration Rule 37.7 factors heavily favor granting the Information Request.

For the foregoing reasons Dr. Gøtzsche respectfully requests this Court to:

1. **GRANT** his motion to amend the Information Request to consist of the 30 most recent applicable court files,

2. **Order** the Clerk of the Probate Court to deliver to counsel within 30 days (a) a copy of the Court files of the 30 most recent cases with a decision under AS 47.30.839 regarding whether the Petition for Court Approval of Administration of Psychotropic Medication is granted or denied, and (b) audio recordings of all hearings in such cases,

3. **Order** Dr. Gøtzsche's counsel to redact the court files and transcripts of the hearings to remove the names of the respondents prior to forwarding them to Dr. Gøtzsche, and make no other distribution of the files or transcripts, and

4. **Order** that costs shall be paid by Dr. Gøtzsche pursuant to Admin Rule 9(e)(1) and (5).

DATED April, 20, 2019.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein, ABA # 7811100

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[14] No one has heretofore proposed Dr. Gøtzsche contact the respondents.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this date a copy of

1. Reply to Opposition to Motion to Amend Information Request and for a Decision, and
2. this Certificate of Service

were mailed to:

Steven Bookman
Department of Law
1031 W 4th Ave #200
Anchorage, AK 99501

Linda Beecher
Public Defender Agency
900 W 5th Ave, Ste 200
Anchorage, AK 99501

and a chambers copy delivered to:

Judge William F. Morse
Courtroom 601
825 W 4th Ave.
Anchorage, Alaska 99501

DATED, April 20, 2019.

Jim Gottstein,

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