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

In The Matter of the Necessity for the Hospitalization of William Bigley,	)
Respondent	)

Case No. 3AN 08-1252PR

OPPOSITION TO MOTION QUASH

Respondent opposes the Motion to Quash filed by the Alaska Psychiatric Institute (API).[1]

I. ATTEMPTS TO MEET & CONFER[2]

At page 3 of its Motion to Quash, API asserts Respondent has not attempted to meet and confer with API to set a discovery schedule prior to serving the notices. This assertion is patently untrue. The following is a chronology of e-mails between counsel, starting on October 21, 2008:

October 21, 2008, 6:30 pm from Jim Gottstein to Laura Derry.

> I need a copy of everything in Mr. B's API chart for 2007 and so far in 2008 in order to be in a position to prepare if we get to the forced drugging petition.[3]

[1] The last sentence of API's Motion to Quash and the accompanying proposed order imply Respondent is or will be asking to delay the hearing scheduled for Wednesday, November 5, 2008, at 9:00 am. Respondent has not asked to continue the hearing and doesn't anticipate he will be doing so.

[2] This section is substantially similar to that contained in Respondent's Qualified Opposition to Motion for Protective Order, filed contemporaneously herewith.

[3] Exhibit A, page 1.

October 23, 2008, at 9:58 am from Jim Gottstein to Counsel for API:

> Receiving no response to my demand for a complete copy of Mr. B's chart from the beginning of 2007, I will just go ahead and subpoena the records. If you want input into who and when, you should let me know immediately.[4]

October 23, 2008, at 8:03 pm from Jim Gottstein to Counsel for API:

> Not having heard from you, I am going to try and arrange a court reporter for Wednesday morning to take the deposition of Dr. Khari and then subpoena her. I will try and be accommodating as I can to your schedule, but without knowing what time frame I might be dealing with, I feel I need to get this done as soon as possible. Will you accept service of Dr. Khari's subpoena?[5]

The next day, Friday, October, 24, 2008, Counsel for API informed Counsel for Respondent that API was going to withdraw the forced drugging petition and Counsel for Respondent wrote a confirming e-mail to that effect:

> This is to confirm our discussion that API is going to dismiss the forced medication petition in 3AN 08-1252 PR and in reliance on this, I am canceling the deposition of Dr. Khari.[6]

Ms Derry confirmed this as follows:

> I am writing the motion right now, and will have it filed in superior court before noon.[7]

The forced drugging petition was indeed withdrawn that day and the deposition cancelled. However, a new one was filed the following Monday, October 27, 2008. Therefore, after the hearing held October 28, 2008, Counsel for Respondent began anew to obtain the information he needed to defend against the new forced drugging petition.

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[4] Exhibit A, page 2.
[5] Exhibit A, page 3.
[6] Exhibit A, page 4.
[7] *Id.*

October 28, 2008, at 11:00 am e-mail from Counsel for Respondent to Counsel for API.

> Hi Laura,
>
> A few things:
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> - I need to schedule depositions, but I will need to have the chart for at least a day or so before that.
> - I don't see any reason why I shouldn't get all his 2007 & 2008 chart by the end of tomorrow.
> - Since it seems like a focus is going to be on the emergency justification, please provide *ex post hasto* (a Latin phrase I made up) all documentation pertaining to AS 47.30.838 medication against Bill for 2007 and 2008. I don't see why this shouldn't be available by the end of today because special record keeping is required.
> - I need a copy of API's policy on emergency medication. Will you provide it or do I need to subpoena it.
> - Who is in charge of/does training with respect to emergency medication?
> - What witnesses other than Dr. Khari do you intend to call? I will need to take their depositions.
> - Could you please give me your direct phone number?[8]

October 30, 2008, at 2:55 pm e-mail from Jim Gottstein to Laura Derry:

> I will ask you again if you will accept service of subpoenas for API employees? We have served the deposition subpoena on Dr. Khari, but Mr. Adler was not there. His assistant said he was at a conference today and tomorrow and would be out of town on Monday. As I wrote you and left voice mail earlier, I will work with you on the schedule as I can. So, maybe we should do it Saturday or Sunday. I think you are obligated to work with me on this. I will object to your calling any witness(es) whose deposition I was unable to take, especially due to your refusal to accept service.[9]

Counsel for API responded:

> I'm sorry if I have inconvenienced you. It is not the practice of the Human Services section to accept service on behalf of our clients. Mr. Adler will be available tomorrow morning for you to serve him with your subpoena—at a reasonable time—around 9 am.

[8] Exhibit A, page 5.
[9] Exhibit A, pages 7-8.

> As a second and equally important matter, API does not believe that discovery is proper for this type of proceeding, and this specific case. Should discovery occur, we wish to meet and confer with you regarding the depositions. Given the late notice, and the fact that you wish to depose psychiatrists on Monday, and they are responsible for the care of multiple patients, it will be difficult if not impossible to produce these witness at the times requested. Also, the 9pm deposition of Ron Adler is a time that should only be allowed, at the convenience of the witness. We would like to confer with you regarding alternate days and times as mutually agreeable between the witnesses and parties, furthermore the state requests that the transcripts from these requests be maintained as confidential.[10]

Before Counsel for Respondent could respond, Counsel for API sent another e-mail as follows:

> In my most recent email, I don't think I was as clear as I needed to be regarding our disagreement over discovery. We do not believe you are entitled to discovery under a variety of theories. I assume you disagree with that position and are not willing to withdraw your subpoenas. Assuming I am correct, I will be filing motions to quash tomorrow, under an expedited basis. As required by the Civil Rule 77, I am informing you of our intent to move on an expedited basis to quash your subpoenas and assume we can inform the court that we have discussed this matter and have agreed to disagree.
>
> If you are willing to withdraw your subpoenas please advise; if we don't hear from you by noon tomorrow, we will file the above mentioned motions.[11]

Counsel for Respondent attempted to respond to both e-mails as follows:

> Hi Laura,
>
> First, if Ron's subpoena said 9:00 pm, that was a mistake. Lisa was out sick yesterday and I sent her home today before I got your last e-mail because she is still sick and I hadn't located a copy of what we sent out in between your last e-mail and this one. So, that's why I hadn't responded yet.
>
> In any event, yes, your assumption that I don't intend to withdraw the subpoenas is correct. I am, of course, as I've repeatedly said, willing to work

[10] Exhibit A, page 7.
[11] Exhibit A, page 6.

with you with respect to the details.

> You may also represent that I would be willing to submit my opposition to your motion to quash orally, in argument if we can do it tomorrow afternoon. Otherwise, I should be able to get my opposition in by noon on Monday. With respect to your offer to meet and confer, I have been saying we should do that for days and had to issue the subpoenas (as I said I would) because I ran out of time.[12]

Then, early the next morning, realizing he had not responded to the issue of confidentiality, Counsel for Respondent e-mailed Counsel for API as follows:

> I have realized that when I responded to this as part of my response to your later e-mail, I didn't include a response about the confidentiality of the transcripts. You can move for a protective order and I will agree to keep it confidential (to the extent not used at trial) for a reasonable amount of time after the relevant deposition(s)--say a week--for you to file for such a protective order. If you want to draft up a stipulation to that effect for me to review, go ahead.[13]

Counsel for API responded, "I will call you mid-morning,"[14] and counsel for the parties did talk on the phone that morning. During that conversation, recognizing that API would not be willing to conduct Mr. Adler's deposition over the weekend, Counsel for Respondent indicated that if Mr. Adler was going to be out of town on Monday and the hearing going to take place on Wednesday, that the deposition needed to be taken Tuesday.

Counsel for Respondent is thus incredulous at API's complaint that he was unwilling to work with API with respect to scheduling the depositions.

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[12] Exhibit A, page 6.
[13] Exhibit A, page 7
[14] *Id*.

II. SCOPE OF DISCOVERY

Civil Rule 26(b) provides:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(A) Best Interests and Less Intrusive Alternatives

In its Motion to Quash, citing to AS 47.30.839(c), API states that the requested discovery is inappropriate because this Court's inquiry is limited to determining whether Respondent has the capacity to give or withhold consent to medication.[15] This is simply not true. With respect to the application under AS 47.30.839(c) (*Parens Patriae* Count), in *Myers v. Alaska Psychiatric Institute*,[16] the Alaska Supreme Court held AS 47.30.839(c) unconstitutional to the extent the enquiry was limited to capacity:

> [A] court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*.

(emphasis added). As Respondent pointed out in his Motion to Dismiss, over two years after *Myers*, API has not even changed its form petition to make conclusory allegations with respect to the additional required elements of best interests and no less intrusive

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[15] *See*, e.g., page 3 of API's motion to quash ("The documents requested are not limited to Bigley's capacity to consent to medication.").
[16] 138 P.3d 238, 254 (Alaska 2006).

alternative. Even though API may not be intending to present evidence on these two required elements, Respondent is entitled to conduct discovery in order to be in a position to defend if it does.[17]

The Supreme Court also held in *Myers*:

> Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider the information that our statutes direct the treatment facility to give to its patients in order to ensure the patient's ability to make an informed treatment choice. As codified in AS 47.30.837(d)(2), these items include:
>
> > (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
> > (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;
> > (C) a review of the patient's history, including medication history and previous side effects from medication;
> > (D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and
> > (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][18]

The Alaska Supreme Court then cited with approval the Supreme Court of Minnesota's requirement of consideration of the following factors:

> (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
> (2) the risks of adverse side effects;
> (3) the experimental nature of the treatment;
> (4) its acceptance by the medical community of the state; and
> (5) the extent of intrusion into the patient's body and the pain connected with the treatment.[19]

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[17] Respondent is also incredulous that API argues the only evidence the Court is to consider is the testimony of the Court Visitor, as it asserts at page 2 of its Motion to Quash.
[18] 138 P.3d 252.

Respondent intends to examine Dr. Khari at her deposition with respect to these best interest factors and ask questions about his chart.

(B)Emergency Drugging

In addition, the forced drugging petition filed herein seeks authorization to drug Respondent against his will under AS 47.30.839(a)(1), on the grounds there will be repeated crisis situations going beyond the limit imposed by AS 47.30.838(c) (.838 Count). Respondent intends to examine Dr. Khari about facts relating to the elements required to establish relief under the .838 Count.

III. THE 72 HOUR REQUIREMENT IN AS 47.30.839(e)

API repeatedly points to the provision in AS 47.30.839(e) that a hearing is to be held within 72 hours of the petition being filed as somehow limiting Respondent's discovery rights. This, of course, ignores *Myers's* due process invalidation of AS 47.30.839. Obviously, the Legislature did not set the time frame within which to hold a hearing on best interests and less intrusive alternatives because these are constitutional requirements it did not take into account.

In *Wetherhorn v. Alaska Psychiatric Institute*,[20] the Alaska Supreme Court held:

> The expedited process required for involuntary commitment proceedings is aimed at mitigating the infringement of the respondent's liberty rights that begins the moment the respondent is detained involuntarily. In contrast, so long as no drugs have been administered, the rights to liberty and privacy implicated by the right to refuse psychotropic medications remain intact. Therefore, in the absence of an emergency, there is no reason why the statutory protections should be neglected in the interests of speed.

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[19] *Id.*
[20] 156 P.3d 371, 381 (Alaska 2007).

This holding is based on the requirements of due process. At the October 28, 2008, hearing in this matter, this Court correctly recognized that due process would "trump" an inconsistent 72-hour statutory requirement.

In interpreting statutes, however, Alaska courts will, if possible, construe them so as to avoid the danger of unconstitutionality.[21] Respondent suggests there is a way to so construe AS 47.30.839(e)'s 72-hour requirement. It is this: if the report of the Court Visitor and the other evidence adduced at the hearing results in the court determining that the patient is competent to provide informed consent or was competent to provide informed consent at the time of previously expressed wishes, "the court shall order the facility to honor the patient's decision about the use of psychotropic medication."[22] The 72-hour rule has been turned on its head by API as a way to rush to judgment against psychiatric respondents, but it is obviously intended to be a protection to patients instead.

Respondent is suggesting the second step of *Myers's* and *Wetherhorn's* two-step process has an A part and a B part. If the Court determines the patient is competent to provide informed consent or was competent to provide informed consent at the time of previously expressed wishes those wishes must be honored and there is no need to proceed any further.

Otherwise, AS 47.30.839(e)'s 72 hour rule is unconstitutional under *Myers*.

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[21] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007), citation omitted.

[22] *See*, AS 47.30.839(d)(2), AS 47.30.839(e), and AS 47.30.839(f).

IV. PROCEDURE

API argues that discovery is not allowed under AS 47.30.839 and Probate Rule 1(e). However, Probate Rule 1(e) provides:

> (e) **Situations Not Covered by the Rules**. Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, including application of the Civil and Evidence Rules, applicable statutes, the Alaska and United States Constitutions or common law. Such a procedure may not be inconsistent with these rules and may not unduly delay or otherwise interfere with the unique character and purpose of probate proceedings.

Clearly this Court has authority under Probate Rule 1(e) to allow the discovery. Just as clearly the Court does not have authority to deny Respondent his right to due process.

Meaningful notice and a meaningful opportunity to be heard are the hallmarks of procedural due process.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2648-9 (2004) ("a citizen-detainee . . . must receive notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

API hasn't provided the required information in the petition. It hasn't otherwise provided it. Therefore, Respondent is entitled to conduct discovery to obtain it. Respondent's discovery efforts have been very focused, are well within the limits set forth in Civil Rule 26(b) and hardly causing undue delay. This Court could no doubt fashion some different discovery plan that meets constitutional due process requirements, but it is

respectfully suggested Respondent has proceeded very reasonably and sensibly here and is entitled to conduct the discovery sought. Any new plan would merely serve to delay the proceedings, although perhaps still not unduly.

V. STATUS OF DISCOVERY

It seems helpful to also report the status of discovery at this time.

(A) API Document Production

(1) Respondent's Charts

At the October 28, 2008, hearing, the Court ordered API to provide Respondent with a copy of his chart and update it on a reasonably frequent basis. API delivered a box of copies of his chart on October 29, 2008, faxed an update on October 31, 2008, and indicated it would fax another update Monday morning November 3, 2008, and every business morning thereafter.

(2) Emergency Drugging Policy

As set forth in the e-mails above, Respondent has also been seeking a copy of API's policy(ies) regarding emergency drugging under AS 47.30.838 since at least October 28, 2008. API has failed to provide it and this was included in the subpoena of Mr. Adler.

(B) Depositions

(1) Ron Adler, CEO of API

If API had just produced the emergency drugging policy(ies) requested by Respondent, or advised him who was in charge of training on the subject, as API had been requested, Mr. Adler's deposition probably wouldn't have been noticed. However, failing that it was noticed for 9:00 am, Monday, November 3, 2008. Mr. Adler was served with

the subpoena, and Respondent believes he has an understanding with Counsel for API that the deposition will take place election day, November 4, 2008. If API would just provide the requested documents and advise Respondent who conducts training on emergency drugging Mr. Adler's deposition could probably be cancelled.[23]

(2) Dr. Stallman

At 11:50 am on October 30, 2008, Counsel for Respondent attempted to reach Dr. Stallman at the telephone number listed on API's witness list and left a voice mail requesting Dr. Stallman call him back and advising him that Respondent would try to work something out on the scheduling, consistent with the demands of the expedited proceeding. Dr. Stallman was served with the deposition subpoena. Dr. Stallman did not return Counsel for Respondent's call, but late Friday afternoon, October 31, 2008, John Bodick, Alaska Assistant Attorney General representing the Alaska Department of Corrections, for whom Dr. Stallman works, called Counsel for Respondent to advise him that Dr. Stallman would neither appear for the deposition, nor testify at the hearing. He suggested that if all Respondent wanted was Respondent's Department of Corrections mental health records, Respondent should obtain a court order to that effect. Counsel for Respondent asked Mr. Bodick to write him a letter confirming both Dr. Stallman's refusal to attend the deposition and hearing and obtaining a court order to retrieve Respondent's Department of Corrections mental health records. Mr. Bodick said he would do so Monday morning, November 3, 3008.

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[23] It would probably be beneficial to take the deposition of the emergency drugging trainer(s), but that doesn't seem feasible in the time frame at this point.

(3) Wendi Shackelford

When Counsel for Respondent called the number listed for Ms. Shackelford on October 30, 2008, he was told she was out of town until the 10th and left a message requesting that she call Counsel for Respondent. No such call has been received. The Anchorage Police Department accepted the subpoena for Ms. Shackelford.

(4) Dr. Khari

Dr. Khari has been served with the subpoena and her deposition is scheduled for 1:00 pm Monday, November 3, 2008.

(5) Leslie Palmer

Document(s) in Respondent's chart indicate Anchorage Community Mental Health Services (ACMHS) is or was recently providing services to Respondent. Counsel for Respondent contacted Jerry Jenkins, Executive Director of ACMHS, who advised him to issue the subpoena to Leslie Palmer, ACMHS's records custodian and such was done and served. The deposition is scheduled for 11:00 am Monday, November 3, 2008, and Respondent expects to obtain the subpoenaed records at that time.

(6) Candice Siciliano

A review of Respondent's chart revealed that Candice Siciliano filed an *ex parte* petition against Respondent on September 30, 2008, and a deposition scheduled for 11:30 am Monday, November 3, 2008, to obtain Respondent's records from the Providence Psychiatric Emergency Room. Ms. Siciliano has been served with the subpoena. It is unknown if she will appear at the deposition with the records.

VI. CONCLUSION

For the foregoing reasons, API's Motion to quash should be **DENIED**.

DATED: November 3, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein
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