

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

**MEMORANDUM IN SUPPORT OF
MOTION TO STAY POLICE POWER FORCED DRUGGING ORDER**

Respondent has moved to stay this Court's December 3, 2008, Order Granting Motion for Clarification of Order (Police Power Forced Drugging Order).

Standard for Granting Stay Pending Appeal

The Alaska Supreme Court's Order granting the stay in S-13116, sets forth the standard for deciding whether a stay pending appeal should be granted:

It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, the movant "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" *State, Div. of Elections v. Metcalfe*, 110 P.3d 976,978 (Alaska 2005). On the other hand, if the movant's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a "clear showing of probable success on the merits."

Respondent meets both tests here.

A. This Court Lacked Subject Matter Jurisdiction to Issue the Police Power Forced Drugging Order.

As a threshold matter, however, this Court did not have subject matter jurisdiction to issue the Police Power Forced Drugging Order since Respondent had already filed an appeal to the November 25, 2008 order. Appellate Rule 203, provides:

The supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with the clerk of the appellate courts, except as otherwise provided in these rules.

In *Noey v. Bledsoe*,¹ the Supreme Court held an appeal in another case didn't deprive the Superior Court of jurisdiction in the case at question, but otherwise affirmed Appellate Rule 203 grants exclusive jurisdiction over the matter on appeal to the appellate court unless some exception applies. Here, there is no such exception and this Court's dramatic addition to its decision after it had been appealed is exactly what Appellate Rule 203 prohibits.

B. Respondent Can Show Probable Success on the Merits

Substantive Due Process Requirements

In *Myers v. Alaska Psychiatric Institute*, the Supreme Court held the right to be free from the unwanted administration of psychotropic medications is a fundamental constitutional right² and:

When a law places substantial burdens on the exercise of a fundamental right, we require the state to articulate a compelling state interest and to demonstrate the absence of a less restrictive means to advance that interest.³

The compelling interest in *Myers* was the *parens patriae* doctrine involving "the inherent power and authority of the state to protect "the person and property" of an individual who

¹ 978 P.3d 1264, 1275 (Alaska 1999).

² 138 P.3d 238, 248 (Alaska 2006)

³ 138 P.3d at 245-246, internal quotes and citations omitted.

"lacks legal age or capacity,"⁴ while the compelling state interest invoked under the police power is "imminent threat of harm."⁵

Alaska's Statutory Implementation of the Police Power Justification

AS 47.30.838 is Alaska's statutory implementation of the police power justification for forced psychiatric drugging. AS 47.30.838(a)(1) permits such forced drugging only if

there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person.

It then goes on to require the behavior or condition of the patient giving rise to a crisis to be documented in the patient's medical records, which also must "include an explanation of alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient."

Under AS 47.30.838(c) API can unilaterally invoke the police power justification for only three crisis periods without superior court approval under AS 47.30.839(a)(1).

Respondent Was Denied Due Process

The order granting expedited consideration of the motion to "clarify," states:

The Court has ruled on this and the underlying substantive motion without further input from William Bigley and James Gottstein because the issues were fully addressed at the recent hearing and should have been more clearly articulated by the Court in its decision.

This is not truthful as the transcripts from the October 28, 2008 and November 3, 2008 hearings demonstrate.

⁴ *Myers* 138 P.3d at 249.

⁵ *Myers*, 138 P.3d at 248.

Believing that if it granted the forced drugging petition based on the *parens patriae* justification under AS 47.30.839(2) (*Parens Patriae* Count) it would eliminate the need for considering the Police Power Count, this Court ruled it would not hear any evidence on the Police Power Count until after it ruled on the *Parens Patriae* Count and if there was then a need to consider the Police Power Count, further evidence would be taken from both sides, after allowing Respondent some discovery.⁶

The issue was first raised by Respondent at the October 28, 2008, status conference:

MR. GOTTSTEIN . . . Your Honor, in the past, API has administered medication pursuant to 838 without the legal predicate . . . existing. And I'd be very surprised if the actual legal requirement for that medication exists. And so that's one of the things that I really need to be able to discover, is what actually --what actually happened. So,. . . it really puts me in a difficult position because. . . they come in and say all these things and then many times it turns out not to be true, and so I really have to have an opportunity to be able to explore that.⁷

It was then discussed at some length during the November 3, 2008, status conference, including:

THE COURT: So let's assume, just for purposes of walking it through, that I grant the 839 petition because he's incapable of giving informed consent and I meet all the other Meyer/Weatherhorn criteria. Doesn't that moot out the 838 -- the 839(a)(1) petition?

MS. DERRY: Yes, Your Honor.⁸

* * *

THE COURT: Doesn't it make sense for the State to proceed under 839(a)(2) in the first instance and present only the information it thinks is necessary

⁶ Exhibits A & B, culminating at Exhibit B, p 6, Tr. 19-20 (November 3, 2008).

⁷ Exhibit A, p. 6; Tr. 18 (October 28, 2008).

⁸ Exhibit B, p. 6, Tr. 14 (November 3, 2008).

there? If I grant that petition, then any need for 839(a)(1) authorization is moot?

MS. DERRY: Yes. I believe that, Your Honor.

THE COURT: And then if, on the other hand, I deny your 839(a)(2) request, then the State can, if it wants, present whatever additional information is necessary to seek 839(a)(1) authority.⁹

* * *

THE COURT: . . . So do you see any problem, Mr. Gottstein, if we -- if the State goes under 839(a)(2) first, under whatever it thinks is a smaller subset of evidence, you respond to that, I'm going to make a ruling, if I grant it, doesn't that moot out the (a)(1) request?

MR. GOTTSTEIN: I think that, Your Honor, this is where the Supreme Court stay really comes into effect, because the Alaska Supreme Court issued a stay on essentially the same evidence that I presented to you, Your Honor, and then you indicated --

THE COURT: Forget the stay. Just forget that there's a stay for purposes of this discussion, and then we'll go back to what the stay brings. If there was no stay in place, doesn't the granting of the 839(a)(2) petition, if that's what I do, moot out the (a)(1)?

MR. GOTTSTEIN: Yes, Your Honor.¹⁰

Respondent then pointed out, however, that because of the stay, API was going to run out of its limited authorization to utilize the police power justification for forced drugging under AS 47.30.838 without obtaining court approval under AS 47.30.839(a)(1).¹¹ Assuming this Court would follow through on its statements that a later hearing would be held on the Police Power Count before forced drugging would be

⁹ Exhibit B, p. 5, Tr. 15 (November 3, 2008).

¹⁰ Exhibit B, p. 5, Tr. 17 (November 3, 2008).

¹¹ Exhibit B, pp 5-6, Tr. 17-18 (November 3, 2008).

authorized under AS 47.30.839(a)(1), Respondent thought limiting the hearing to the *Parens Patriae* Count benefitted him,¹² and this Court said:

THE COURT: Okay. We're both in agreement. . . . [T]he State will present what it thinks is necessary under 839(a)(2).

Respondent then raised the question of how much time he would have to prepare for a hearing on the Police Power Count "if we end up going to that?"¹³ This Court responded:

THE COURT: . . . I'm going to issue an order in the first instance on the 839(a)(2) petition, and if I grant that, then everything else is moot. If I don't grant it, then I'm going to grant the State an opportunity right then to supplement its evidentiary basis for the second type of authorization. And then, Mr. Gottstein, you can tell me when the time comes why you think you might not have been prepared. If you're not, you're not. I'll deal with that assertion when it's given to me and when I've had a chance to see the evidence that both sides present.¹⁴

The problem was, just as Respondent had advised this Court, everything else was not going to be moot when this Court issued the *Parens Patriae* Forced Drugging Order.

Then, as set forth above, this Court granted API's motion to "clarify," but which was really a back door granting of the Police Power Count without allowing Respondent to be heard on the matter. It is hard to imagine a more clear denial of due process. As the United States Supreme Court has recently held, a meaningful opportunity to be heard is one of the fundamental hallmarks of Due Process.¹⁵ Respondent has demonstrated probable success on the merits because of this due process violation.

¹² Exhibit B, p. 6, Tr. 18 (November 3, 2008).

¹³ Exhibit B, p. 6, Tr. 19, (November 3, 2008).

¹⁴ Exhibit B, p 6, Tr. 19-20 (November 3, 2008).

¹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2648-49 (2004).

The Factual and Legal Predicates for the Police Power Forced Drugging Order Are Extremely Unlikely to Be Present

Respondent was not able to conduct much discovery with respect to the true facts surrounding API's police power drugging of him, but there is already enough to demonstrate the factual and legal predicates justifying granting the Police Power Count are highly unlikely to exist. First, following a prior emergency motion to this Court to stop the improper purported police power forced drugging of Respondent in Supreme Court Case No. S-12851, Dr. Worrall advised Respondent's counsel that there was no API policy on implementing the police power justification as embodied in AS 47.30.838, or otherwise, he had received no training on the topic, and he had had no idea of the requirements before Respondent pointed them out in connection with S-12851.¹⁶ Respondent's counsel understands from the same source that the Attorney General's office then started working on a policy.

During the deposition of Ron Adler, API's CEO, over counsel for API's objection, Respondent asked Mr. Adler about this and he promised to provide the new policy,¹⁷ but API has failed to do so. Mr. Adler also testified that there was now training, that he couldn't identify who did the training, but he would subsequently provide that information "through our attorneys,"¹⁸ which he has failed to do.

¹⁶ Dr. Worrall asked that his e-mail so advising Respondent's counsel be kept private, but he would so testify if subpoenaed. It may be necessary to make that e-mail public at some later date if Dr. Worrall testifies contrary to it, but Respondent is respecting his request at this time and it is not attached it hereto.

¹⁷ Exhibit C, page 4, Transcript page 12.

¹⁸ Exhibit C, page 3, Transcript pages 8-9.

A deposition was also taken of Dr. Khari, and over, API's objection, Respondent also questioned her about police power justification forced drugging procedures at API.¹⁹ This transcript demonstrates API's practice of administering police power forced drugging does not comply with AS 47.30.838, nor does it comply with constitutional requirements.²⁰

Thus, Respondent has also demonstrated probable success on the substantive merits as well due process grounds.

C. Respondent Faces the Danger of Irreparable Harm

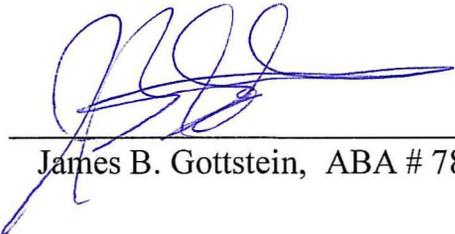
The unrebutted written testimony of Dr. Jackson and Robert Whitaker demonstrates Respondent faces the danger of irreparable harm if the police power forced drugging of Respondent is not stayed pending appeal.

D. Conclusion

For the foregoing reasons, Respondent's Motion to stay the Police Power Forced Drugging Order should be **GRANTED**.

DATED: December 6th, 2008.

Law Project for Psychiatric Rights

By: 
James B. Gottstein, ABA # 7811100

¹⁹ Exhibit D, pages 5-7, Transcript pages 15-25.

²⁰ Respondent sought the names of the nurses who decide whether the conditions for administering police power forced drugging exist and Dr. Khari said she would get Respondent a list of names the next day if not by fax that afternoon (Exhibit __, page 7, Transcript page 23), which she failed to do.

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 S. Bigley)
)
)
Case No. 3AN-08-01252 PR

TRANSCRIPT OF PROCEEDINGS
BEFORE
THE HONORABLE WILLIAM MORSE

Pages 1 - 26, inclusive
October 28, 2008
9:39 a.m.

APPEARANCES:

For William Bigley: James Gottstein, Esq.
For the State of Alaska: Laura Derry, Esq. (by telephone)

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1 ANCHORAGE, ALASKA; TUESDAY, OCTOBER 28, 2008; 9:39 a.m.
2 ---oOo---
3 (9:39:39)
4 THE COURT: We're on the record in
5 3AN-08-01252 PR. Mr. Gottstein is in the courtroom, and
6 on the telephone I have whom?
7 MS. DERRY: This is Laura Derry from the
8 attorney general's office. I represent the psychiatric
9 institute.
10 THE COURT: All right. Let me articulate my
11 understanding of where we are and see if I'm procedurally
12 accurate. Okay?
13 MR. GOTTSTEIN: Your Honor, there's a
14 preliminary matter first, which is, I notice that the --
15 it was noted that it's a closed proceeding, and actually
16 this is a public proceeding.
17 THE COURT: What is the -- is there a statute or
18 a court rule that says one way or the other whether it's a
19 public proceeding?
20 MR. GOTTSTEIN: There is -- with respect to
21 AS 47.30.839 petition, there's no rule one way or the
22 other. AS 47.30.735(b)(3) --
23 THE COURT: Wait. Slow down, slow down.
24 MR. GOTTSTEIN: 839.
25 THE COURT: On a -- there's nothing in 47.30.839

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1 regarding --
2 MR. GOTTSTEIN: Having it open or closed.
3 THE COURT: -- open or not?
4 MR. GOTTSTEIN: Correct.
5 THE COURT: Is there a fallback one that applies
6 generally to --
7 MR. GOTTSTEIN: Well, we're going to go through
8 the whole thing. I've actually briefed this to the
9 Supreme Court recently --
10 THE COURT: I know. But just talk more slowly
11 because I don't -- I can't hear the numbers that come
12 rattling out.
13 MR. GOTTSTEIN: Okay. So AS 47.30.735(b)(3) --
14 THE COURT: Okay. (B)(3). Okay.
15 MR. GOTTSTEIN: Okay. At the -- and that's
16 pertaining to involuntary commitments. At the hearing
17 before Master Lack, it was determined that the hearing
18 would be open to the public pursuant to that.
19 THE COURT: Does the State have any -- any
20 disagreement with this being an open procedure -- an open
21 hearing today?
22 MS. DERRY: No, Your Honor.
23 THE COURT: All right. It will be open. I will
24 ask the parties at future hearings their position on
25 whether it should be open or closed.

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1 MR. GOTTSTEIN: Your Honor, if I may, could the
2 sign be removed from the --
3 THE COURT: Is it up there? Yes. Why don't you
4 do me the favor of taking it down.
5 MS. DERRY: Your Honor, is Mr. Bigley in the
6 courtroom?
7 THE COURT: No, he's not.
8 As I understand where we are, is several days
9 ago, I think the 20th perhaps, there was a hearing before
10 Master Lack on the State's petition for a 30-day
11 commitment. And that was -- he recommended that that take
12 place, that that petition be granted, and there was at the
13 time a petition for court approval of the administration
14 of psychotropic medication pursuant to 47.30.839, and he
15 did not issue any ruling on that.
16 I then listened to the procedure -- listened to
17 the CD of the hearing and granted the petition, and
18 knowing there was a -- the commitment petition, and then
19 knowing that there was a petition regarding medication,
20 set out a hearing for tomorrow. I'm not sure exactly when
21 it happened, but sometime over the weekend, or perhaps
22 first thing yesterday, the State, as I understand it,
23 withdrew that original petition for medication.
24 And I have been given a faxed copy of a petition
25 that was filed yesterday, which I assume is a brand new

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1 petition, and Master Duggan ordered that there would be a
2 hearing on the petition using tomorrow's date that was
3 already in place, then appointed the public defender
4 agency as counsel for the respondent and appointed OPA as
5 the visitor, which -- and then this morning I was handed a
6 packet from Mr. Gottstein asking for a variety of things,
7 but most imminently, an order requesting that tomorrow's
8 hearing be canceled on this new petition.
9 So I guess I need to back up a little bit here.
10 I probably need to get the public defender agency on the
11 phone.
12 Mr. Gottstein, go ahead.
13 MR. GOTTSTEIN: A couple things. I noticed as I
14 was looking in the courtroom that Ms. Derry mentioned
15 that -- or asked about Mr. Bigley, and I think he's
16 actually entitled to be here. I'm, with some reluctance,
17 willing to proceed without that, but anyway, note that.
18 THE COURT: I won't go forward on anything
19 substantively without Mr. Bigley being present, but given
20 the fact that we just had to figure out what are the
21 operative petitions and documents and what is the State's
22 intent and what do we do with tomorrow's hearing, I
23 thought it made sense just to at least have this status
24 hearing.
25 MR. GOTTSTEIN: Yes. And I understand that, and

1 that's why I'm willing to go forward with some reluctance.
2 I have not, as far as -- I have not received a
3 copy of the new petition, at least as of when I headed
4 over here.

5 THE COURT: Let's wait three seconds and I will
6 give you a copy.

7 And has the State received Mr. Gottstein's
8 packet of motions?

9 MR. GOTTSTEIN: Your Honor, yes. I
10 hand-delivered it about -- I don't know -- 8:45, I
11 believe.

12 MS. DERRY: I haven't received it to my office,
13 Your Honor. I'm sorry.

14 THE COURT: Well, I'll tell you what it
15 contains. Obviously we're not -- there's a motion to
16 vacate tomorrow's hearing.

17 MS. DERRY: Uh-huh.

18 THE COURT: Based on -- well, it sort of lays
19 out the sequence of events in more detail than I've just
20 described. In essence it says it's happening too quickly.

21 MS. DERRY: Uh-huh.

22 THE COURT: And there is also a motion for
23 summary judgment and a variety of affidavits and materials
24 in support of the motion for summary judgment. That's
25 obviously something that we're not quite going to deal

1 with.

2 What does the State -- does the State have a
3 position regarding the timing of the hearing for the most
4 recent petition? And let me just throw one other thing
5 in. My -- I'm looking at 47.30.839 itself, which seems to
6 require this hearing to take place within 72 hours after
7 the petition has been filed.

8 MS. DERRY: Yes, yes --

9 THE COURT: What's the State's position of
10 when -- when this hearing should take place?

11 MS. DERRY: Your Honor, I would first just like
12 to back up so that you understand what happened on Friday,
13 was that on Friday I did ask that the petition for the
14 medications be withdrawn. It was our intention to help --
15 well, the API's position was to help Mr. Bigley hopefully
16 restabilize and then to be released and to continue on
17 with the life that he has been leading as of late, but --

18 THE COURT: Actually, yesterday I signed the
19 order dismissing the first petition.

20 MS. DERRY: Right. Okay.

21 THE COURT: I have not distributed that yet.

22 MS. DERRY: Okay. And then yesterday I called
23 to check to see what had happened over the weekend, and
24 the hospital, Dr. Khari, was actually very worried about
25 him and concerned and he had decompensated and was doing

1 things that actually required that she followed the
2 statutory guidelines and emergency medicated Mr. Bigley
3 early in the morning on Monday.

4 THE COURT: That was yesterday?

5 MS. DERRY: Yes, Your Honor. I'm sorry. Was
6 that Your Honor? I'm not sure who was speaking to me.

7 THE COURT: Yes.

8 MS. DERRY: And so -- and that was yesterday.
9 And so we actually have to move forward because the doctor
10 and API's position is that Mr. Bigley will continue to be
11 in crisis and will continue to need treatment. And based
12 on the statute, we do need to proceed with the medications
13 petition in order to protect the due process interests of
14 Mr. Bigley because emergency medications have been
15 given --

16 THE COURT: Just let me read 838. I've skimmed
17 it before, but I'm not sure what happened.

18 Am I reading this correctly? This says that the
19 facility can, in an emergency, give him an initial dosage
20 and may authorize additional, as-needed doses, and then --
21 the physician can act in the emergency first for 24 hours
22 and then renew it for 72.

23 MS. DERRY: Yes, Your Honor.

24 THE COURT: And so --

25 MS. DERRY: And the way that I interpret that

1 statute is that the doctor could authorize several dosages
2 within that first 24-hour period and make that be, you
3 know, a scheduled dosage in order to maintain that crisis
4 period within that 24 hours, and then so essentially there
5 could be three 24-hour crisis periods, but in honor of
6 protecting Mr. Bigley's interests and the fact that we are
7 having legal issues with this matter, the doctor hasn't
8 been doing that.

9 What she has been doing is trying to get him to
10 the point where he could sleep and eat and not because
11 he's been doing things that are actually harmful to
12 himself. And so she hasn't been requesting that multiple
13 medications be given to him. She just gave him one dosage
14 yesterday in order to try to help stabilize him and get
15 him sleep.

16 THE COURT: So we're about to pass the 24-hour
17 period, and we're about to move into the second period,
18 which is the second two-thirds of the 72 hours?

19 MS. DERRY: Yes, Your Honor.

20 THE COURT: Okay. I see nothing in 838 that has
21 anything to do with when the Court has to hold an 839
22 petition. So when does the State think there has to be a
23 hearing on the 839 petition?

24 MS. DERRY: Well, we -- the State's position is
25 that we would try to move within that 72 hours because if

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1 you are -- if we continue to hold Mr. Bigley and try to
2 offer him other modalities for treatment, yet he continues
3 to be in crisis, that we would be worried that we're
4 looking outside of protecting his due process and we would
5 have to continue to issue emergency medications until
6 there were a hearing and --
7 THE COURT: So when was the -- when was the
8 second petition filed? I mean, I've got it the 27th. But
9 what time?
10 MS. DERRY: Yesterday morning, probably by
11 10:00.
12 THE COURT: If we just use that as a tentative
13 time, 10:00 a.m. yesterday, so the 72 hours passes at
14 10:00 a.m. on the 30th.
15 MS. DERRY: Yes. And our concern, Your Honor,
16 is that in trying to protect the best interests and the
17 staff at API of what they feel they need to do, is
18 medically necessary for them, and they are obligated to
19 protect life and to try to treat him, that just relying on
20 emergency medications is actually -- that that becomes a
21 legal question of are we actually violating his due
22 process by not having a hearing, but then in order to try
23 to help him, the emergency medications are being given.
24 THE COURT: So you want the hearing to take
25 place tomorrow?

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1 MS. DERRY: I would like the hearing to take
2 place tomorrow, Your Honor, yes.
3 THE COURT: And what happens, Mr. Gottstein, in
4 your view if I'm stuck with a statute that says the
5 hearing has to take place within 72 hours and you're
6 telling me that that's too soon for you to be able to
7 prepare?
8 MR. GOTTSTEIN: Your Honor, I think that that
9 statute needs to be read in light of Myers and
10 Weatherhorn, and Weatherhorn I cited in my motion,
11 basically says that Mr. Bigley's liberty interests with
12 respect to the forced medication is in not having it, and
13 therefore, the protections should not be sacrificed in the
14 interests of speed. Okay.
15 THE COURT: When do you think is the soonest
16 that we can have the petition hearing?
17 MR. GOTTSTEIN: I -- I believe I -- I think
18 next -- a week from today, Your Honor, because I need to
19 conduct discovery.
20 THE COURT: What do you need to do?
21 MR. GOTTSTEIN: I need to -- I need to review
22 the chart and I need to take some depositions of --
23 THE COURT: What -- have you -- I know you've
24 been involved with Mr. Bigley at some point in the past,
25 and I don't know the details of that, so -- and I

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1 appreciate that his condition apparently is changing
2 weekly and possibly daily. So have you had access to
3 charts up to some point?
4 MR. GOTTSTEIN: I've got some of 2007 charts and
5 I don't believe I've had any 2008 charts in spite of --
6 THE COURT: Has he been -- has he been at API,
7 let's say, in October, other than just the last couple of
8 days, that you know of?
9 MR. GOTTSTEIN: I don't know. Well, it's been
10 about a week, I think, that he's been there, so a little
11 over a week.
12 THE COURT: So are you going to be requesting
13 essentially the charts that have been generated in, what,
14 the past month?
15 MR. GOTTSTEIN: 2007 and 2008.
16 THE COURT: And you already have it up to where,
17 roughly? I realize you're going from memory.
18 MR. GOTTSTEIN: I don't -- I don't know, Your
19 Honor. I have a fair amount through -- till the first of
20 September 2007, but there may be gaps in it.
21 THE COURT: Let's assume that you need
22 everything from the past year. Do you have any sense as
23 you stand here now of how many admissions that might be?
24 Is it one or two or is it 50? I'm trying to get a rough
25 sense of how large these charts might be.

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1 MR. GOTTSTEIN: Your Honor, first off, I would
2 really like to have two thousand -- all of 2007 and
3 2008 so I get a good picture.
4 THE COURT: Well, let me ask you --
5 MR. GOTTSTEIN: I don't know -- I don't know how
6 many admissions that he's had. It may be -- and Ms. Derry
7 might know.
8 THE COURT: I'm going to ask her.
9 MR. GOTTSTEIN: I think it's probably -- in the
10 past how long did you ask?
11 THE COURT: Let's say in the last year. Or tell
12 me if you only know in the last six months. I don't care.
13 MR. GOTTSTEIN: I think it's probably half a
14 dozen in 2008, but I'm not sure.
15 THE COURT: All right. That gives me --
16 MR. GOTTSTEIN: A lot of them were very short,
17 though.
18 THE COURT: Do you think that that's roughly
19 right? Half dozen admissions, some a matter of a day or
20 two and others perhaps longer?
21 MS. DERRY: I'm sorry. Was that addressed to
22 me, Your Honor?
23 THE COURT: Yes.
24 MS. DERRY: Your Honor, it's actually -- my
25 concern here, the date that I would like to really worry

1 about is the date from April 2008 to the present, which is
 2 what the --
 3 THE COURT: The question I posed to you is, do
 4 you know how often he has been admitted in the past year?
 5 MS. DERRY: Well, I can tell you with certainty
 6 that since April of this year that he has been there at
 7 least ten times, at API.
 8 THE COURT: And are those -- to your current
 9 knowledge, do you think that those are mostly 24, 48-hour
 10 admissions or are they longer?
 11 MS. DERRY: Of those ten that I mentioned, Your
 12 Honor, they -- I'm not sure. I couldn't tell you the
 13 exact amount of time that he was there. Some of them were
 14 two or three days for sure, and others were simply
 15 screenings, because all ten of those were initiated by the
 16 police department because those were after Mr. Bigley had
 17 been arrested.
 18 THE COURT: Okay. Let's assume that I order at
 19 least that API turn over the last year of charts.
 20 MS. DERRY: Uh-huh.
 21 THE COURT: Is that something that you think
 22 API could comply with in the next day?
 23 MS. DERRY: Would it be possible to give
 24 Mr. Gottstein access to them and not have the staff
 25 necessarily make the copies? Because we -- as far as the

1 State's position, Mr. Gottstein is entitled to those
 2 records as Mr. Bigley's attorney for the medications
 3 position, and we have nothing to hide. It's a matter
 4 of -- I can't tell you what the staffing situation is for
 5 making copies, but having access to the files would be
 6 appropriate.
 7 THE COURT: What do you want?
 8 MR. GOTTSTEIN: Your Honor, I need copies to
 9 work with.
 10 THE COURT: I'm going to give him immediate
 11 access, but I'm also going to require API to start
 12 generating copies.
 13 MS. DERRY: Yes, Your Honor.
 14 THE COURT: And just let me ask: It's not clear
 15 to me -- Mr. Gottstein, what's your position in terms of
 16 the role of the public defender agency? I know Master
 17 Duggan appointed them, probably as a matter of routine.
 18 Is your relationship with Mr. Bigley such that you are his
 19 exclusive and sole attorney going forward or are you here
 20 on a more limited basis?
 21 MR. GOTTSTEIN: I'm his attorney, his exclusive
 22 and sole attorney with respect to any forced medication
 23 petitions or even efforts.
 24 THE COURT: So I'm going to have the public
 25 defender appear as well because whatever happens at these

1 various hearings will likely impact his commitment status
 2 and thus -- if I'm understanding you, the PDs are his
 3 commitment lawyers and you're his medication lawyer?
 4 MR. GOTTSTEIN: That's correct, Your Honor.
 5 THE COURT: So I'm going to have the PDs
 6 participate -- require them to participate unless they
 7 balk, because I think that there's an overlap. So
 8 let's -- let's say that Mr. Gottstein says, due process
 9 trumps the 72-hour statutory provision and we should have
 10 a hearing next Tuesday, the 4th of November, is the State
 11 prepared to respond to that assertion now?
 12 MS. DERRY: Your Honor, I would ask for it not
 13 to be on a Tuesday because then I have all of the other
 14 API cases in the afternoon and it's very difficult for me
 15 to find coverage.
 16 However, the State's position on this is that if
 17 that's what the Court should find that it indeed -- that
 18 the due process does trump the 72 hours, that the
 19 hospital's position will be to continue to treat
 20 Mr. Bigley as they see medically appropriate following the
 21 typical standard of care which may include --
 22 THE COURT: You're putting it in the wrong
 23 sequence.
 24 MS. DERRY: I'm sorry?
 25 THE COURT: Your position can't be whatever the

1 Court rules. Your position has to be, here's your
 2 position, and then I'm going to hear your position, I'm
 3 going to hear Mr. Bigley's position, and then I'm going to
 4 make a decision.
 5 MS. DERRY: Okay. My position, Your Honor, is
 6 that the hospital would like to move forward as quickly as
 7 possible because our concern that Mr. Bigley's due process
 8 rights actually may be at risk because emergency
 9 medications may have to be continued after the 72 hours
 10 runs out on Wednesday morning, and so we would ask that we
 11 could move forward tomorrow.
 12 THE COURT: Let's assume, just for purposes of
 13 my sort of thinking through these conflicting due process
 14 assertions, that I say the hearing takes place next Monday
 15 or next Wednesday.
 16 MS. DERRY: Uh-huh.
 17 THE COURT: I -- am I correct in assuming that
 18 the State will basically medicate Mr. Bigley to the extent
 19 that they think is medically appropriate and legally
 20 authorized under 838 between now and then?
 21 MS. DERRY: If that is the -- what's absolutely
 22 necessary, Your Honor, because that has -- that is what
 23 occurred, is that in honor of this question about the stay
 24 and trying to work through the legal side of this but also
 25 to protect Mr. Bigley's health and mental illness, the

1 hospital has made it so that the emergency medication is
2 absolutely the last resort when they feel they can't do
3 anything else to protect him.

4 MR. GOTTSTEIN: Your Honor, in the past, API has
5 administered medication pursuant to that 838 without the
6 legal predicate being -- existing. And I'd be very
7 surprised if the actual legal requirement for that
8 medication exists. And so that's one of the things that I
9 really need to be able to discover, is what actually --
10 what actually happened. So, I mean, it really puts me in
11 a difficult position because, you know, they come in and
12 say all these things and then many times it turns out not
13 to be true, and so I really have to have an opportunity to
14 be able to explore that.

15 THE COURT: I'm going to give you an opportunity
16 to certainly gather the charts, to immediately inspect the
17 charts, and to get physical copies of them in a short but
18 reasonable period of time. Obviously there's a little bit
19 of copying turnaround time, but you can certainly have
20 access to what I assume will be the most relevant ones.
21 The ones that are generated here in the last 24 hours,
22 72 hours, three weeks, are clearly more -- are likely to
23 be more significant than the ones that were generated in
24 January of '08, but you can have access to all of them.

25 And what the State does under 838 authority

1 is -- I'm not going to make any rulings in advance,
2 because by definition there's at least the possibility
3 that his medical state changes, and what might be
4 appropriate yesterday may or may not be appropriate
5 tomorrow, and I'm not going to do anything on the 838
6 thing yet. But is there a preference from the State's
7 perspective over Monday or Wednesday?

8 MS. DERRY: One moment, Your Honor.

9 THE COURT: I'm going to -- Mr. Gottstein, the
10 same to you. Is there a preference?

11 MR. GOTTSTEIN: Yes. I think I need to have it
12 Wednesday because --

13 THE COURT: Okay. All right.

14 MS. DERRY: Wednesday is fine, Your Honor, if
15 that's what Mr. Gottstein would prefer.

16 THE COURT: I'm going to grant Mr. Bigley's
17 motion to cancel tomorrow's hearing. I'm going to set
18 that up at API for Wednesday the 5th of November on the
19 existing petition filed October 27th. Mr. Gottstein
20 has -- shall be granted access to the charts immediately,
21 and that's -- he will have access to them as they continue
22 to be generated. I realize he can't stand there and watch
23 them while they write things down, but as they are
24 written, he needs to be -- as they are created, he gets
25 pretty rapid access to them, as long as he's not

1 interfering with the physicians on the floor.

2 MS. DERRY: Uh-huh.

3 THE COURT: But he can get them within a matter
4 of hours as they're generated. And I'll leave it to you,
5 Mr. Gottstein, unless you want me to play some role. You
6 are going to conduct some discovery, and I will leave it
7 to you and the State to arrange that.

8 MR. GOTTSTEIN: Thank you, Your Honor. It does
9 seem like I should say one other thing, which it concerns
10 me to proceed in the face of the Supreme Court stay, and
11 my --

12 THE COURT: Let me tell you my thoughts on that.
13 I'm going to hold this hearing on Wednesday. I'm going to
14 make a decision based on the now current medical world
15 that Mr. Bigley finds himself in. If I deny the petition,
16 I don't have to deal with the stay. If I grant the
17 petition, I'm going to then hear from each side about what
18 is the impact of the earlier stay, which I think is five
19 months old, based on -- based on whatever happens five
20 months ago, whether that stay has any legal impact on the
21 current -- or on my granting of the petition, if that's in
22 fact what I do. So we'll address the relationship of the
23 old stay and any current medication or -- only after I
24 grant the order.

25 And I've been thinking, let's -- I'm not making

1 any ruling, but obviously if I were to say, petition
2 granted, I have two basic options. I either say the old
3 stay trumps, or this order and the new facts situation
4 trumps. If I do that, if I say the latter, that the new
5 order supercedes the stay of an old order, because the old
6 order is obsolete, if you will, then I'm likely to grant a
7 very brief stay to allow Mr. Bigley, if he chooses, to go
8 to the Supreme Court and say stay the new medication
9 order. And that way the Supreme Court will have the
10 benefit of a more current record and can decide what it
11 wants to do with a new medication order, if that's in fact
12 what I do. Okay?

13 So I'm saying that just so both sides can sort
14 of know that's my thinking. I'm not ruling that way, but
15 since this is all going to be happening relatively
16 quickly, I think it's better for me to reveal my tentative
17 thoughts so that you folks can inform me of any applicable
18 facts, statutes, court rules, you know, constitutional
19 provision that I should know about.

20 MS. DERRY: Yes, Your Honor.

21 MR. GOTTSTEIN: Thank you, Your Honor. That all
22 seems very reasonable.

23 I -- one other thing that's actually written
24 down, and it occurred to me, it seems to me that in light
25 of this being a public proceeding, that really any hearing

1 should be held here, because it's not really possible for
2 a public hearing to be held behind the locked doors at
3 API.

4 THE COURT: As of now the hearing is going to
5 take place at API. I'm not familiar with the -- his
6 particular needs or the logistical ability of API. But as
7 of now it's taking place at API. I will explore at least
8 that possibility of having it done here. Obviously that
9 would require him being transported over here. I'm not
10 sure that's appropriate and/or necessary, but I'll let --
11 as of now, it's at API, and if you want to present to me
12 additional facts between now and then as to why it should
13 be here, I'll consider them.

14 THE CLERK: What time?

15 THE COURT: Oh, the hearing that was set for
16 tomorrow was starting at 9:00 a.m. I'm going to, at least
17 at this point, say the hearing on the 5th starts at
18 9:00 a.m. as well. I'm going to simply contact API, see
19 if that works. I realize that there's a hearing room over
20 there that is used occasionally for other purposes, so I
21 need to see if that room is available. If it is not, then
22 I'll do something else and I will also hold in abeyance
23 and request that the hearing take place in the
24 Nesbit courtroom building.

25 Is there anything else from the State?

1 MS. DERRY: No, Your Honor.

2 THE COURT: And Mr. Gottstein, from you?

3 MR. GOTTSTEIN: Your Honor, it does seem to me
4 that the State should respond to the motion for a summary
5 judgment. It seems to me I'm entitled to file one and
6 entitled to have them respond.

7 THE COURT: The State --

8 MS. DERRY: Your Honor --

9 THE COURT: -- I mean, since you haven't seen
10 the document, I'm not going to require you to make a
11 motion as to the timing of your response, but let's do
12 this. The State presumably will receive it in your -- I
13 mean, in the attorney's hands here later on today.

14 MS. DERRY: Uh-huh.

15 THE COURT: So I would like a response from the
16 State tomorrow at noon -- by noon as to when your response
17 ought to be due.

18 MS. DERRY: When it's due -- yes, Your Honor.

19 THE COURT: Okay. And then I will let
20 Mr. Gottstein reply briefly as to the due date, and I'll
21 rule on the due date for the motion.

22 MS. DERRY: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. GOTTSTEIN: Your Honor, it -- the attorney
25 general's office tends to mail things to me even when

1 they're --

2 THE COURT: Both parties will hand-deliver
3 pleadings to each other and file pleadings in chambers,
4 and that means in the Superior Court, not at API, not in
5 probate court. Superior Court. Upstairs in my chambers.

6 MS. DERRY: And I'm sorry. I missed that last
7 part. You said to hand-deliver also to your chambers,
8 Your Honor?

9 THE COURT: You need to -- both sides need to
10 file any documents in chambers, and both sides need to
11 hand-deliver documents -- or hand-deliver documents to the
12 other parties.

13 MS. DERRY: Yes, Your Honor.

14 MR. GOTTSTEIN: Your Honor, is it permissible
15 for us to file it probate and then --

16 THE COURT: You can file it probate --

17 MR. GOTTSTEIN: -- and provide a chambers copy?

18 THE COURT: That's fine. That's fine. But I
19 want them in my hands, at least a copy, by any deadlines.
20 Okay?

21 MR. GOTTSTEIN: And, Your Honor, one other
22 thing. I was a little confused about the ruling on the
23 motion to dismiss. Was that denied?

24 THE COURT: The motion to dismiss, the earlier
25 petition is moot because the State pulled it.

1 MR. GOTTSTEIN: May I just resubmit it?

2 THE COURT: You can file whatever you want to
3 file.

4 MR. GOTTSTEIN: Do you want me to file a new
5 one? I mean it's -- the only -- I can file a new one, but
6 it's -- the petition seems --

7 THE COURT: They're going to be exactly the
8 same, right?

9 MR. GOTTSTEIN: There's one other point that I
10 could probably add to it, which I --

11 THE COURT: You can -- I don't need to have you
12 generate paper for the sake of me having paper. So if you
13 want to file a piece of paper that's saying you're
14 refile the old motion and adding another paragraph, you
15 know, that one-page document will suffice.

16 MR. GOTTSTEIN: Thank you, Your Honor.

17 THE COURT: Okay. Is there any questions at
18 all?

19 MS. DERRY: No, Your Honor.

20 THE COURT: All right. Thank you. We'll be in
21 recess.

22 MS. DERRY: Thank you.

23 (End of recording)

24 (10:15:03)

25

TRANSCRIBER'S CERTIFICATE

1
2
3 I, Deirdre J.F. Radcliffe, hereby certify that the
4 foregoing pages numbered ____ through ____ are a true and
5 accurate transcript of proceedings in Case No.
6 3AN-08-01252 PR, In the Matter of WB, transcribed by me
7 from a copy of the electronic sound recording, to the best
8 of my knowledge and ability.

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Date Deirdre J.F. Radcliffe, Transcriber

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 S. Bigley)
)
)
_____)
Case No. 3AN-08-01252 PR

TRANSCRIPT OF PROCEEDINGS
BEFORE
THE HONORABLE WILLIAM MORSE

Pages 1 - 23, inclusive
November 3, 2008
8:47 a.m.

APPEARANCES:

For WB: James Gottstein, Esq.
For the State of Alaska: Laura Derry, Esq. (by telephone)

1 ANCHORAGE, ALASKA; MONDAY, NOVEMBER 3, 2008; 8:47 a.m.
 2 ---oOo---
 3 (8:47:35)
 4 THE COURT: We're on record in 3AN-08-01252.
 5 Mr. Gottstein is in the courtroom.
 6 Ms. Derry, you're on the phone?
 7 MS. DERRY: Yes, Your Honor.
 8 THE COURT: I set this on earlier this morning
 9 simply to issue rulings on various pending motions. There
 10 have been a flurry of filings, so I also want to use this
 11 opportunity to see if there are -- if I'm missing
 12 something. So -- and I just received a packet of
 13 documents filed five minutes ago from Mr. Gottstein.
 14 There was an original petition filed on the 21st
 15 of October for commitment and medication, a second
 16 petition for medication on October 27th. There is a
 17 motion to dismiss the 838 petition, the commitment
 18 petition, which was filed on October 30th.
 19 MR. GOTTSTEIN: Your Honor, may I clarify? Do
 20 you mind if I interrupt?
 21 THE COURT: Go ahead.
 22 MR. GOTTSTEIN: The motion to dismiss 838
 23 count -- Your Honor, I think it's count -- the forced
 24 drugging petition really has two bases. One is the basis
 25 that was under reviewing Myers, and then the second one is

1 MS. DERRY: Yes, Your Honor. I ran it over
 2 before the close of business on Friday.
 3 THE COURT: All right. Did you file it in
 4 chambers?
 5 MS. DERRY: Your Honor, I filed it in the
 6 probate and supplied a chambers copy.
 7 THE COURT: All right. I haven't seen that, so
 8 I won't rule on it until I get the opposition, but it
 9 seems to me that it is highly unlikely that I'm going to
 10 grant a motion for summary judgment, because it seems to
 11 me that there's almost certainly a dispute over facts.
 12 But I haven't read the opposition yet, so I won't rule,
 13 but I will certainly rule here in the next -- shortly so
 14 that the parties know whether the hearing on the 5th is
 15 going forward.
 16 I am denying the motion to hold the hearing at
 17 the courthouse. It will take place, at least the initial
 18 hearing -- on the assumption that it might be longer than
 19 one day, the first day is going to take place at API. I
 20 will review the request to have any subsequent hearings at
 21 the courthouse based on my observation of several
 22 things: Mr. Bigley's then current mental state and
 23 apparent ability to control himself and to -- and to
 24 minimize any risk to the public; and secondly, since I
 25 have not personally seen the API's new -- not so much the

1 the police power emergency medication under AS 47.30.838,
 2 and so that's what that motion to dismiss 838 motion is
 3 about. It's still about the forced drugging petition.
 4 THE COURT: The eight -- the motion to dismiss
 5 838 is denied because I have issued an order committing
 6 him already, and the State's second motion to commit is,
 7 as far as I can tell, duplicative for an effort to perhaps
 8 extend the timing, and so he's committed.
 9 MR. GOTTSTEIN: Your Honor --
 10 THE COURT: The second petition is dismissed.
 11 The second petition by the State for commitment is moot,
 12 as far as I can tell.
 13 MR. GOTTSTEIN: Your Honor, we're not -- none of
 14 this is about commitment. It's about forced drugging.
 15 THE COURT: I appreciate that. But you filed a
 16 motion to dismiss the 838 petition.
 17 MR. GOTTSTEIN: The 838 count, which is part one
 18 of two counts of the forced drugging petition, but has
 19 nothing to do with the commitment. It has to do with
 20 emergency --
 21 THE COURT: The motion to dismiss is denied.
 22 The motion for summary judgment, I have just
 23 received from Mr. Gottstein a reply to an opposition that
 24 I haven't seen yet. So I assume that the State filed an
 25 opposition to the motion for summary judgment?

1 room itself, but I haven't been into API in quite some
 2 time. I will review that request after I experience the
 3 entry process and the publicness, if you will, of the
 4 entire setting.
 5 The motion for expedited consideration of the
 6 various motions concerning the depositions and discovery,
 7 the motion for expedited consideration is granted.
 8 The motion for a protective order, to the extent
 9 that it asserts that there is no discovery permissible, is
 10 denied. Discovery is not only permissible implicitly by
 11 825(b) and 839(d), but also the respondent has access to
 12 information by court order which, by virtue of
 13 AS 47.30.852 and 3 and probate rule 1(e) says that if a
 14 probate rule is not specific to a particular procedural
 15 issue, then the civil rules apply.
 16 I think that the civil discovery rules are
 17 applicable, at least the concept of discovery is
 18 applicable. They may need to be modified to reflect the
 19 timing requirements that are unique to these proceedings.
 20 But nonetheless, there is a due process right to discovery
 21 of information that is going to be used against you in any
 22 hearing and particularly in one in which the requested
 23 remedy, the medication, the involuntary psychotropic
 24 medication, clearly requires that sort of disclosure of
 25 information.

1 And the motion to quash the deposition notices
2 is denied with one caveat. And I think that this has
3 actually been corrected or there is a reference in the Ron
4 Adler notice of a 9:00 p.m. time, and then I saw in some
5 of the filings this morning that that was conceded to be a
6 typographic error. The State has not requested me to
7 change the specific timing of any deposition. I will
8 require the parties to coordinate the, I believe, three
9 depositions to accommodate, to the extent that is
10 reasonable, the three deponents.

11 And I don't know what the 9:00 p.m. Adler
12 deposition actually was intended to be. 9:00 p.m. might
13 not be reasonable, although the reason I'm hedging is that
14 I don't know what the shift schedules are of those three
15 individuals. I assume that the State's attorney normally
16 doesn't work at 9:00 p.m.

17 Have the two of you been able to rearrange
18 deposition times? Mr. Gottstein.

19 MR. GOTTSTEIN: Your Honor, I think we have an
20 understanding that if the Court denies the motion to
21 quash, that we would hold Mr. Adler's deposition tomorrow,
22 and it was meant to be 9:00 a.m., not 9:00 p.m., but --

23 THE COURT: That's fine. And that's supposed to
24 be on the 4th of November?

25 MR. GOTTSTEIN: Correct.

1 THE COURT: And Ms. Derry, are there any -- does
2 that resolve the scheduling problems of the three
3 depositions?

4 MS. DERRY: I'll -- it definitely resolves
5 Mr. Adler's problem as long as -- he's down on the Kenai
6 Peninsula today, Your Honor, and so I won't be able to
7 speak to him, but I think that that will work for Ron, for
8 Mr. Adler, and I think that Mr. Gottstein and I can -- if
9 there are any other scheduling problems, can meet to
10 discuss that.

11 THE COURT: All right. Purely for scheduling
12 purposes, if I'm recalling, we're to begin at -- is it
13 9:00 a.m. Wednesday morning?

14 MS. DERRY: Yes, Your Honor.

15 THE COURT: And the State has filed a lengthy
16 witness list. As a practical matter, how long do you
17 think the State's case-in-chief, setting aside
18 cross-examination, will last?

19 MS. DERRY: If I feel like I need to call most
20 of those witnesses, Your Honor, it would definitely take a
21 day.

22 THE COURT: And that's direct only, without
23 cross?

24 MS. DERRY: Yes.

25 THE COURT: Mr. Gottstein, I appreciate that

1 this depends on what the State presents, but do you know
2 now whether you will have a direct testimony
3 case-in-chief? I appreciate you will have
4 cross-examination, but do you think you will have your own
5 affirmative, direct testimony?

6 MR. GOTTSTEIN: Yes, Your Honor. And I did file
7 a witness list, a preliminary witness list on Friday --

8 THE COURT: Maybe you have.

9 MR. GOTTSTEIN: -- and I assume you've got it
10 somewhere.

11 THE COURT: It's somewhere.

12 MR. GOTTSTEIN: I've got it somewhere too.
13 Yeah, you know, I think we might assume a day too. I
14 filed a lot of testimony, actually, in writing, written
15 testimony, and using that, I think can shorten things, but
16 I think still it will be a day.

17 THE COURT: Some of that testimony -- I mean, I
18 know that there's a packet that just showed up today that
19 includes affidavits and some articles and a variety of
20 other things, and some prior testimony in prior cases. So
21 the State's going to have to sort of go through that and
22 raise whatever objections it wants. But at this point, if
23 we do go Wednesday and we need at least an additional day,
24 it's my understanding that Thursday is the normal day
25 for -- or Tuesdays and Thursdays are normal days for

1 API hearings?

2 MS. DERRY: No. Your Honor, it's Tuesday
3 afternoon and Friday afternoon.

4 THE COURT: All right. So would the parties be
5 ready to go Thursday in the day?

6 MS. DERRY: Yes, Your Honor.

7 MR. GOTTSTEIN: Yes, Your Honor.

8 THE COURT: I'll have to look and see what
9 exactly -- I don't remember whether I have this trial
10 that's about to start scheduled for Thursday or whether I
11 have something else. But obviously this case has time
12 requirements that will likely trump anything else. We'll
13 assume at that point that we're going both Wednesday and
14 Thursday. I will give you information to the contrary as
15 soon as I receive it, if I do receive it.

16 MS. DERRY: And Your Honor, my -- I would like
17 to ask that the Court keep the hearing on Wednesday and
18 Thursday, if we go into that, to the four issues at hand
19 that Mr. Gottstein has brought up and that are clear in
20 both the statute and under Myers and Weatherhorn, that
21 the issues are whether or not the patient refused --
22 whether or not the patient is capable of informed consent
23 and whether or not the medicating is within the best
24 interest and the less restrictive alternative to protect
25 the patient.

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1 And if we could agree that those are the issues
 2 and not the extraneous issue of whether -- of the
 3 controversial issue of whether or not medications are
 4 appropriate or the other things been adjudicated that are
 5 going to appeal now. If we can stick to the four issues
 6 that are actually at hand of whether or not we can care
 7 for Mr. Bigley, then this hearing -- my witness list would
 8 become markedly shorter, Your Honor.
 9 THE COURT: I assume that we will be delineating
 10 those four issues. Are there other issues?
 11 MS. DERRY: It's -- the way that I'm reading the
 12 multiple --
 13 THE COURT: Let me -- let Mr. Gottstein speak,
 14 because he'll tell us what the issues are beyond those
 15 four.
 16 MS. DERRY: Yes, Your Honor.
 17 THE COURT: If any.
 18 MR. GOTTSTEIN: Your Honor, as an initial
 19 matter, I note that the harm of the drugs and the relative
 20 lack or -- lack of benefit or effectiveness, of course, is
 21 an extremely important part of the best interests finding.
 22 Okay. So -- but that's with respect to what I'm calling
 23 the parens patriae account. With respect to the police
 24 power account that they've also asserted under 47.30.838,
 25 there's a lot of issues about that, whether or not they're

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1 entitled to -- entitled to an order, and there's been no
 2 reported decision on that statute, and so I think we'll
 3 have to sort out exactly what the requirements of that --
 4 that statute are.
 5 THE COURT: I'm not sure I understand what
 6 you're saying.
 7 MR. GOTTSTEIN: Excuse me?
 8 THE COURT: I'm not sure I understand what you
 9 are...
 10 Okay. Maybe I misunderstood something when I
 11 was referring to the 838. The 838 is the provision
 12 regarding emergency psychotropic -- the administration of
 13 emergency medication. Can I assume that at least going --
 14 that the State simply wants to proceed on its 839?
 15 MS. DERRY: Yes, Your Honor. What's happening
 16 is that because Mr. Bigley has been committed, the
 17 hospital is doing everything they can to help him, and
 18 because of his condition, he is so severely psychotic that
 19 he requires a tremendous amount of care and another option
 20 would be to actually strap him down and restrain him on a
 21 bed, and that is absolutely something that the hospital is
 22 unwilling to do because Mr. Bigley isn't capable of
 23 informed consent and he's not capable of rationalizing
 24 things.
 25 The hospital actually sees that as a form of

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1 torture, something from a horror movie from the 1950s, and
 2 that's the position that we're in right now, Your Honor,
 3 and we're asking that this can move forward and that we
 4 can look to just simply sticking to what the statute says,
 5 rather than bringing up the extraneous constitutional
 6 issues that are really controversial and up in the air.
 7 And Mr. Gottstein --
 8 THE COURT: Ms. Derry, the question was, are you
 9 proceeding under 838 and seeking emergency powers, which
 10 would seem to be unnecessary if I granted your 839
 11 petition?
 12 MS. DERRY: Oh, no, Your Honor, I'm not
 13 seeking -- the 838 motion, that's strictly Mr. Gottstein.
 14 I have -- I have to seek an 839 petition because the
 15 hospital is having to emergency medicate.
 16 THE COURT: Are you asking me to do anything
 17 under 838 or to somehow ratify whatever emergency
 18 medication API is administering?
 19 MS. DERRY: Your Honor, what's -- no. I'm
 20 asking whether or not -- I'm asking to move forward on the
 21 medications petition under 839, which is required by
 22 838 --
 23 THE COURT: That's fine.
 24 MS. DERRY: -- because --
 25 THE COURT: So now let's assume I either -- I

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1 have two options. I deny the 839 petition, in which case
 2 Mr. Gottstein, are you then seeking some additional
 3 request under -- that would restrict API's 838 authority?
 4 MR. GOTTSTEIN: Your Honor, I think there's some
 5 confusion. There's certainly some confusion in my mind.
 6 If you look at the petition, forced drugging petition,
 7 there's two checked boxes, checked, one under the 838
 8 ground -- but they're both made under AS 47.30.839. And
 9 one is if the patient is incapable of giving or
 10 withholding informed consent, and it seems that's what
 11 Ms. Derry is speaking about.
 12 There's another one that says if the hospital
 13 seeks authority to administer emergency medications for
 14 longer than a certain period of time, it has to get court
 15 approval to do so. And so that's also under -- that
 16 application is made under 47.30.839, but the standards
 17 applicable to that are under AS 47.30.838, and that's why
 18 I called it the 838 count.
 19 THE COURT: Let me look at 839 again.
 20 839(a) allows API to seek court approval of the
 21 administration of psychotropic medication in one of two
 22 circumstances: Either that there will be repeated crisis
 23 situations that would nominally authorize API on its own
 24 to issue emergency medication, or if they want to use the
 25 psychotropic medication in a noncrisis situation and he's

1 incapable of giving informed consent, the State -- correct
2 me if I'm wrong -- the State clearly is seeking that
3 second authority, that there is a noncrisis situation and
4 he's not capable of giving informed consent. That at
5 least in the first instance that's true, right?

6 MS. DERRY: Yes, Your Honor. But also we're
7 referring -- what we're required to do under 838(c) is
8 that because they aren't continually medicating Mr. Bigley
9 in a noncrisis situation, they're having to wait for him
10 to go into a crisis, and then if they can't use any other
11 form of treatment in order to help him get calmed down and
12 to ensure the safety of the other people, the other
13 patients at API, they've had to now, since this has gone
14 longer than 72 hours without making a decision, they are
15 required under Section C of 838 to seek this court order,
16 because it says that they can't administer psychotropic
17 medications during no more than three crisis periods
18 without the patient's informed consent, only with Court
19 approval.

20 THE COURT: So let's assume, just for purposes
21 of walking it through, that I grant the 839 petition
22 because he's incapable of giving informed consent and I
23 meet all the other Meyer/Weatherhorn criteria. Doesn't
24 that moot out the 838 -- the 839(a)(1) petition?

25 MS. DERRY: Yes, Your Honor. It's -- my

1 understanding is that the hospital has done what's
2 necessary. They were adhering to the statute and
3 requesting a medications petition within the appropriate
4 amount of time under 838, which says that they couldn't
5 medicate without appropriate court order after the three
6 crisis periods, but they also were required to do anything
7 it takes in order to protect Mr. Bigley as well as the
8 other patients at the hospital, and because of that, they
9 have continued to emergency medicate if that is the last
10 resort without causing any harm to Mr. Bigley who has done
11 several things that are definitely disconcerting and have
12 caused his primary treating psychiatrist to be very, very
13 concerned about his well-being. And so the hospital
14 has --

15 THE COURT: Doesn't it make sense for the State
16 to proceed under 839(a)(2) in the first instance and
17 present only the information it thinks is necessary there?
18 If I grant that petition, then any need for 839(a)(1)
19 authorization is moot?

20 MS. DERRY: Yes. I believe that, Your Honor.

21 THE COURT: And then if, on the other hand, I
22 deny your 839(a)(2) request, then the State can, if it
23 wants, present whatever additional information is
24 necessary to seek 839(a)(1) authority. Is that fair from
25 the State's perspective?

1 MS. DERRY: It is. It also -- Your Honor,
2 between the two, of 839 (1) or (2), that's basically what
3 the hospital is having to do right now, that whether
4 they're --

5 THE COURT: But I'm talking about your comment
6 that you want to somehow restrict the evidence.

7 MS. DERRY: Yes, Your Honor. I want to simply
8 stick to the statute which is saying that we are asking
9 the Court to grant us the ability to treat Mr. Bigley
10 within the appropriate standard of care as seen all across
11 the United States and --

12 THE COURT: That's fine rhetoric, but you don't
13 get to say -- all I'm trying to figure out is how we focus
14 your presentation so that we deal with one set of evidence
15 rather than all sets of evidence, because that's what
16 you're asking for.

17 MS. DERRY: Yes.

18 THE COURT: So if you proceed under the
19 839(a)(2) criteria, that's a smaller set of evidence,
20 according to you, right?

21 MS. DERRY: Yes.

22 THE COURT: Okay. And then if I grant that
23 petition, it moots out the necessity for the broader set
24 of testimony?

25 MS. DERRY: Yes, Your Honor.

1 THE COURT: Okay. Now, Mr. Gottstein gets to
2 make whatever constitutional arguments he wants under
3 whatever theory the State chooses to pursue first. So do
4 you see any problem, Mr. Gottstein, if we -- if the State
5 goes under 839(a)(2) first, under whatever it thinks is a
6 smaller subset of evidence, you respond to that, I'm going
7 to make a ruling, if I grant it, doesn't that moot out the
8 (a)(1) request?

9 MR. GOTTSTEIN: I think that, Your Honor, this
10 is where the Supreme Court stay really comes into effect,
11 because the Alaska Supreme Court issued a stay on
12 essentially the same evidence that I presented to you,
13 Your Honor, and then you indicated --

14 THE COURT: Forget the stay. Just forget that
15 there's a stay for purposes of this discussion, and then
16 we'll go back to what the stay brings. If there was no
17 stay in place, doesn't the granting of the 839(a)(2)
18 petition, if that's what I do, moot out the (a)(1)?

19 MR. GOTTSTEIN: Yes, Your Honor. May I --

20 THE COURT: Okay.

21 MR. GOTTSTEIN: May I just say one other thing
22 about that. And, you know, in a lot of ways what you're
23 suggesting, you know, I could say that that really
24 benefits my client because the State is going to run out
25 of its authorization to use the police power authorization

1 to emergency drug him during -- you know, during that
2 pendency because the statute gives them three -- basically
3 three 72-hour periods, and if they don't have a court
4 order at the end of three 72-hour crisis periods, they can
5 no longer do it. So I think that actually their petition
6 makes sense in that regard, and I'm perfectly fine to
7 limit it to the 839 -- you know, just the 839 -- what is
8 it?

9 THE COURT: (A)(2)

10 MR. GOTTSTEIN: (A)(2). You know, if that's the
11 ruling and we're going to limit it to that, I'm very --
12 I'm very happy with that.

13 THE COURT: Okay. We're both in agreement.
14 We're going -- we'll go with -- the State will present
15 what it thinks is necessary under 839(a)(2). If I grant
16 the petition, then I have to deal with the subsequent
17 question of what do I do with the Supreme Court stay in
18 effect in May in a different case with a different set of
19 facts. Not a different set of facts, but a set of facts
20 that ended in May.

21 And one of the things that I am going to want
22 the State to tell me is where Mr. Bigley has been or when
23 he has been at API, if at all, since May '08. And the
24 reason I want that is I want the Supreme Court, if I grant
25 any of the State's requests and authorize medication, I'm

1 going to have to deal with the issue of the prior stay.
2 And if I rule that the prior stay is, in essence, obsolete
3 and overridden by subsequent events, I'm going to give
4 Mr. Bigley, Mr. Gottstein an opportunity to go to the
5 Supreme Court and petition for a stay of that
6 authorization order.

7 And I want the Supreme Court to have in this
8 record a history of when he's been -- at a minimum, when
9 he's been at API, if at all, since the first authorization
10 order and the first stay.

11 MS. DERRY: Yes, Your Honor.

12 THE COURT: Is there anything else?

13 MR. GOTTSTEIN: Your Honor, may I have an idea
14 of how much time I might have to prepare for an 838
15 hearing if we end up going to that?

16 MS. DERRY: Your Honor, Mr. Gottstein is arguing
17 that we're running out of time, and what's happening is
18 that we're actually being forced to deviate from the
19 statute as well as deviate from protecting Mr. Bigley's
20 due process because this case continues to be delayed
21 because of Mr. Gottstein --

22 THE COURT: This case is going to be done, if
23 not Thursday, then shortly after Thursday, at least from
24 the Superior Court's perspective. I'm going to issue an
25 order in the first instance on the 839(a)(2) petition, and

1 if I grant that, then everything else is moot. If I don't
2 grant it, then I'm going to grant the State an opportunity
3 right then to supplement its evidentiary basis for the
4 second type of authorization. And then, Mr. Gottstein,
5 you can tell me when the time comes why you think you
6 might not have been prepared. If you're not, you're not.
7 I'll deal with that assertion when it's given to me and
8 when I've had a chance to see the evidence that both sides
9 present.

10 MR. GOTTSTEIN: Your Honor, I think I'll
11 probably just continue preparation.

12 MS. DERRY: I'm sorry. I didn't hear you,
13 Mr. Gottstein.

14 THE COURT: He's going to continue preparation.
15 That doesn't surprise me, given the several hundred pages
16 of documents that have shown up already. But I'm not
17 being -- I'm not being -- I expected that. I'm not being
18 sarcastic.

19 At any rate, is there anything else out there
20 that -- any motion that someone thinks has been filed that
21 I haven't now dealt with, other than the motion for
22 summary judgment?

23 MS. DERRY: I also had a motion for the
24 protective orders to protect the people that Mr. Gottstein
25 is going to depose from him issuing anything on his Web

1 site or making them look bad.

2 THE COURT: Is there any -- I'm not -- if you
3 filed a response to that, I just haven't had a chance to
4 read it.

5 So is there an objection to me issuing an order
6 that says that the depositions and the paperwork generated
7 in this case cannot be disseminated to the -- to the
8 public outside of the courtroom setting?

9 MR. GOTTSTEIN: Yes, Your Honor. I do object to
10 that. And I have filed a response to that. And what I --
11 what I proposed to Ms. Derry was that -- first off, her
12 request is with respect to depositions. And what I said,
13 that I'll hold those confidential for a week, and that she
14 can then make an application under Civil Rule 26 -- I
15 think it's C -- for a protective order. At that point
16 we'll know actually what the testimony is and the judge --
17 and Your Honor will have a factual basis to make a
18 determination whether or not a protective order is
19 warranted.

20 THE COURT: Is there any objection to me issuing
21 a protective order that says, no deposition, no materials
22 can be disseminated to any member of the public except in
23 open court at least until November 12th, and then once we
24 actually identify what all that information is, we'll
25 fine-tune the protective order? State opposed to that?

1 MS. DERRY: No, Your Honor.
 2 THE COURT: All right. That's the order.
 3 Anything else?
 4 MS. DERRY: Not from the State, Your Honor.
 5 THE COURT: Thank you.
 6 (End of recording)
 7 (9:19:26)

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TRANSCRIBER'S CERTIFICATE

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 2
 3 I, Deirdre J.F. Radcliffe, hereby certify that the
 4 foregoing pages numbered ____ through ____ are a true and
 5 accurate transcript of proceedings in Case No.
 6 3AN-08-01252 PR, In the Matter of WB, transcribed by me
 7 from a copy of the electronic sound recording, to the best
 8 of my knowledge and ability.

9
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 11

12 Date Deirdre J.F. Radcliffe, Transcriber

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

IN THE MATTER OF THE NECESSITY)
FOR THE HOSPITALIZATION OF)
WILLIAM S. BIGLEY,)
)
Respondent.)

Case No. 3AN-08-1252 PR

DEPOSITION OF RON ADLER

Tuesday, November 4, 2008
9:00 a.m.

Taken by Counsel for William S. Bigley
at
The Offices of Law Project for
Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska

A-P-P-E-A-R-A-N-C-E-S

1
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4 James B. Gottstein
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1 ANCHORAGE, ALASKA; NOVEMBER 4, 2008
2 9:00 A.M.

3 -o0o-
4 RON ADLER,
5 deponent herein, being sworn on oath,
6 was examined and testified as follows:

7 MS. POHLAND: The state would like to make
8 an objection. The state does not believe that discovery
9 is permissible in this matter.

10 The state will be filing a motion for
11 reconsideration on its motion to quash, and,
12 additionally, file a motion for protective order to keep
13 these deposition transcripts confidential.

14 The state also believes that notice was
15 improper in these depositions.

16 EXAMINATION
17 BY MR. GOTTSTEIN:

18 Q. I noticed you gave me -- first off, have you ever
19 had your deposition taken before?

20 A. With you, no.

21 Q. Does that mean you have otherwise? So you know
22 what a deposition is all about?

23 A. Yes.

24 MR. GOTTSTEIN: And then before we get
25 going, will you accept subpoenas for API employees at

1 this point?
2 MS. DERRY: No, it's not the practice of the
3 human services department, the division.

4 MR. GOTTSTEIN: So that's a no.
5 BY MR. GOTTSTEIN:

6 Q. And you handed me, Mr. Adler, a copy of -- is
7 this your resume?

8 A. Yes, sir.

9 MR. GOTTSTEIN: Could we mark this as
10 Exhibit A?

11 (Exhibit A marked.)

12 Q. You were also ordered to bring a copy of the
13 training materials relating to emergency drugging,
14 weren't you?

15 A. I don't understand. I don't know what the word
16 "emergency drugging" means.

17 Do you want to refer to these questions per the
18 statute and the law?

19 Q. Sure. This is a copy of the subpoena that was
20 served on you, wasn't it?

21 A. Uh-huh.

22 Q. And on the other side, this was an attachment to
23 it?

24 A. Uh-huh.

25 MR. GOTTSTEIN: Could we mark this as

1 Exhibit B?

2 (Exhibit B marked.)

3 Q. So what it is is basically paragraph two here.

4 MS. DERRY: I object to the subpoena demand
5 because it was not timely noticed. Mr. Adler wouldn't
6 have had time to prepare that amazing amount of
7 documents from January 1st, 2007 to date, and then
8 saying that in September 2007 the policy may have
9 changed.

10 And Mr. Adler isn't responsible for creating
11 any discovery for you. Because of the timeliness of the
12 notice, he wasn't able to prepare those documents for
13 you.

14 BY MR. GOTTSTEIN:

15 Q. Do you understand what question two was asking
16 for, or what item two, I guess, was asking for?

17 A. It's my understanding that you already have
18 these.

19 Q. No, I don't have them. I mean, if I do, I don't
20 know that I do. So can you -- can you provide those to
21 me within the next day or so?

22 A. I will be glad to provide them to our legal
23 counsel who can then make arrangements to have them
24 delivered to you.

25 Q. All right. Well --

1 MS. POHLAND: The notice has to be proper.
2 The request has to be proper. If you would like to file
3 a document request or a request for production, the
4 state would be happy to reply as it sees fit, whether it
5 be objection or through the proper documentation.

6 MR. GOTTSTEIN: Well, luckily, we're not
7 holding a hearing on this tomorrow, so we have a little
8 time, but you can take your reason for not complying
9 with the subpoena to the judge.

10 BY MR. GOTTSTEIN:

11 Q. Okay. So who does training in emergency drugging
12 procedures? Do you have anybody that does training?

13 MS. DERRY: Objection; relevance. I'm also
14 going to make a second objection that Mr. Adler has
15 asked you to refer to the administration of emergency
16 medications as per the statute and to not continue to
17 call them "forced drugging".

18 MR. GOTTSTEIN: Objection noted.

19 BY MR. GOTTSTEIN:

20 Q. Do you have someone who trains your personnel on
21 drugging under AS 47.38.38?

22 A. Yes.

23 Q. Who is that?

24 A. In the past, it has been our -- a combination of
25 our medical director and the assistant attorney general

1 from the Alaska Department of Law who is assigned to
2 API.

3 Q. Can you give me the names of those people from
4 January 1st, 2007 to date?

5 MS. POHLAND: Can I make a continuing
6 objection as to relevance? I'm not sure what the
7 drugging under 838 has to do with the hearing at hand,
8 which is for court-ordered medication.

9 MR. GOTTSTEIN: You can have a continuing
10 objection.

11 A. Previously, it was Dr. R. Dwayne Hobson, who is
12 no longer with the hospital. And I would have to go
13 back and research who the assistant attorney general was
14 who was providing us consultation on this.

15 I just -- I have to go back and look at our
16 medical staff minutes.

17 Q. Does Elizabeth Russo, Tim Twomey and now Ms.
18 Derry sound right?

19 A. Pardon me?

20 Q. Was Elizabeth Russo doing it initially?

21 A. I have to go back and read -- I don't attend
22 every medical staff meeting, so I would have to go back
23 and read the minutes.

24 Q. So can you provide that to me?

25 A. I will provide anything you request through our

1 attorneys.

2 Q. All right. Well, this deposition is for you to
3 do that. Now, my understanding is that the policy
4 changed sometime after September of 2007; is that
5 correct?

6 A. Again, I don't have all of the dates and
7 timelines. I would have to research that.

8 Q. Okay. Well, what I'm looking for is just kind of
9 a chronology or at least something that will let me
10 understand the policy and how people were getting
11 trained in it before September of 2007, and then I
12 understand that policy changed after 2007.

13 MS. POHLAND: Object to form. Objection;
14 asked and answered.

15 Q. I'm trying to explain what I'm looking for.
16 Okay.

17 And then how that -- as I understand that, it did
18 change after September of 2007, and then so what I want
19 is what the policy was before that.

20 And then, you know, I actually do have -- excuse
21 me. I have an old one. I have one from when I was on
22 the mental health board from -- when was it I got off
23 the board? In 2003 or something like that.

24 You know, maybe that was the one before 2007. I
25 don't know. Although, frankly, I didn't see one.

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1 MR. GOTTSTEIN: Can we go off record for a
 2 minute?
 3 (There was a short break.)
 4 Q. Sorry about the delay. We have got Exhibits A
 5 and B, right? I'm going to show you a copy of what
 6 looks like the table of contents of your policies and
 7 procedures; is that right?
 8 A. Uh-huh.
 9 Q. I'm not going to hold you -- I mean, that's just
 10 -- I mean, that's what I had.
 11 MR. GOTTSTEIN: So could we mark this as
 12 Exhibit C?
 13 (Exhibit C marked.)
 14 A. Just for the record, can I read that once again?
 15 Q. It's out of date.
 16 A. Yeah. I just wanted to make sure that it's noted
 17 in this hearing that this is probably very much out of
 18 date.
 19 Q. That's why I didn't -- you know, when you said
 20 you thought I had them, I didn't think I did, but this
 21 is what I have.
 22 A. Okay.
 23 Q. What I did then is go through and find really --
 24 could you identify that?
 25 MS. DERRY: I object to this. This is

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1 dangerous testimony because this is so out of date.
 2 This one is dated effective 8/17/2000.
 3 And we do know that the policy not only has
 4 changed, but also since the statute has changed since
 5 the Myers and Weatherhorn cases that any testimony that
 6 Mr. Adler gives on this could be conceived as something
 7 that isn't actually going to prove any of the substance
 8 of what's at hand in the case.
 9 MR. GOTTSTEIN: This was --
 10 MS. DERRY: Can we move on away from the old
 11 policy manuals?
 12 BY MR. GOTTSTEIN:
 13 Q. Does this look like a copy of the policy, what
 14 date, like, was it 2000?
 15 A. Jim, you and I know each other. Why are you
 16 giving me Title 12 stuff when we're talking about a
 17 Title 47 hearing?
 18 Q. Here is what I did --
 19 A. I mean --
 20 Q. I'm just trying to -- here is what I did is I
 21 looked through the --
 22 A. Are there things substantial that you want to get
 23 to that we can just go right to the --
 24 Q. I'm trying to. All I'm saying is that this is
 25 the only thing that I identified on emergency medication

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1 in this policy, so what I'm looking for is the current
 2 policies as they existed.
 3 A. We will get that to you.
 4 MR. GOTTSTEIN: So let's mark this as
 5 Exhibit D.
 6 (Exhibit D marked.)
 7 BY MR. GOTTSTEIN:
 8 Q. Now, what's the current daily rate that gets
 9 charged out for patients at API?
 10 MS. POHLAND: Objection; relevance.
 11 A. I don't know.
 12 Q. Who would know?
 13 A. I would have to look that up.
 14 Q. Could you get that to me?
 15 A. Do you want the Medicaid rate? You have to be
 16 clearer, Jim.
 17 Do you want our established Medicaid rate or do
 18 you want the cost because you know that we're an IMD and
 19 we don't bill for the population 22 through 65, so, once
 20 again, this doesn't have any relevance to the --
 21 Q. I don't understand. 22 through 65, what is that?
 22 A. Well, we are classified as an Institution for
 23 Mental Disease, and as an IMD, we have a certain
 24 exclusion according to CMS.
 25 And we are --

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1 Q. Could you say what "CMS" means?
 2 A. The Center for Medical Services. It's a branch
 3 of the United States Government.
 4 And we're not allowed to bill for Medicaid
 5 patients between the ages of 21 and 65, so --
 6 Q. But my understanding is that there is a daily
 7 rate?
 8 A. Yes.
 9 Q. And that's what I'm asking for.
 10 A. Okay.
 11 Q. And that -- my understanding is that actually
 12 patients get a bill and then you, of course, don't
 13 collect on most of them, but don't you actually send out
 14 bills?
 15 A. Once again, we are required by law to make a good
 16 faith effort to make a collection.
 17 Q. So that's the rate we're talking about?
 18 A. On that rate, yes.
 19 Q. So that's just what I'm looking for.
 20 A. I can tell you it is approximately \$1,018, and
 21 that is approximate, Mr. Gottstein.
 22 Q. And my last question is, you know, I made a
 23 number of attempts to try and sit down and talk to you
 24 about working things out with respect to Mr. Bigley.
 25 And I am just wondering why you never agreed to

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

IN THE MATTER OF THE NECESSITY)
FOR THE HOSPITALIZATION OF)
WILLIAM S. BIGLEY,)
)
Respondent.)

Case No. 3AN-08-1252 PR

DEPOSITION OF KAHNAZ KHARI, M.D.

Tuesday, November 4, 2008
10:00 a.m.

Taken by Counsel for William S. Bigley
at
The Offices of Law Project for
Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska

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1 A-P-P-E-A-R-A-N-C-E-S
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1 ANCHORAGE, ALASKA; NOVEMBER 4, 2008
 2 10:00 A.M.
 3 -o0o-
 4 KAHNAZ KHARI,
 5 deponent herein, being sworn on oath,
 6 was examined and testified as follows:
 7 MS. POHLAND: The state would like to object
 8 that discovery is taking place. We believe discovery is
 9 impermissible under the statute, and that, furthermore,
 10 notice was improper for these depositions.
 11 The state is going to be filing a motion for
 12 reconsideration on its motions to quash, and the state
 13 will also be filing an additional protective order to
 14 maintain the confidentiality of these deposition
 15 transcripts.
 16 EXAMINATION
 17 BY MR. GOTTSTEIN:
 18 Q. What's your name?
 19 A. Kahnaz Khari.
 20 Q. I'm going to give you a copy of the subpoena.
 21 Does that look familiar?
 22 A. Yes, it does.
 23 Q. And then the back side had this attached to it.
 24 A. Yes, I do.
 25 MR. GOTTSTEIN: Could we mark that as

Page 5

1 EXHIBIT A.
 2 (Exhibit A marked.)
 3 Q. It listed a number of things for you to bring.
 4 Did you bring any of those?
 5 A. The only thing that I thought that is appropriate
 6 to bring was my resume and my board certification, and
 7 my resume is not the most update.
 8 It's the one that I wrote two years ago, but very
 9 much everything is the same. And my board certification
 10 is the most recent one.
 11 Q. Okay. But you have been employed at API since
 12 then, right; is that correct?
 13 A. Yes.
 14 MR. GOTTSTEIN: Could we mark that as B, I
 15 guess?
 16 (Exhibit B marked.)
 17 Q. And then the third thing is -- the second thing
 18 is a chart, but API provided me a copy of that, so
 19 that's fine.
 20 Then the third one, so you don't have -- you
 21 didn't bring a report, right?
 22 A. No, I did not.
 23 Q. Have you ever had your deposition taken before?
 24 A. No. I don't recall. I think this may be my
 25 first deposition.

1 Q. Do you know what it's for? I should have started
2 that out --

3 A. No. If you would educate me, that would be
4 great.

5 Q. Of course, you filed, or API has filed a petition
6 to give the respondent drugs against his wishes, and so
7 I'm his attorney.

8 This part is what's called discovery, which
9 Ms. Pohland doesn't think that I'm entitled to do, but
10 in any event, the idea is for me to get a chance to find
11 out what -- well, you know, what your version of the
12 facts are, let us say, in order to allow me to prepare.

13 So this is -- it's like testimony in court,
14 except that, you know, the idea is that we will kind of
15 hone things down so we don't have to take that much time
16 with everybody in the courtroom, so that's the way I
17 would describe it.

18 You filed a petition -- I think -- did you sign
19 the petition?

20 A. Yes.

21 Q. So did you consider -- do you know about the
22 Myers case?

23 A. To some level. To some level, but if you want to
24 review it, that would be great.

25 Q. So I guess my question is what factors under

1 his wishes and he did not want that and that went to the
2 court.

3 Q. What medications are you -- medication or
4 medications are you seeking authorization to use to
5 administer to the respondent, Mr. Bigley, under that
6 petition, not counting the emergency medications, just
7 the regular ones?

8 A. I think it's still early. I still would like to
9 see if I could bring it up to discuss it, even though
10 Bill or Mr. Bigley is in a state that cannot make a
11 rational thinking, but I would like to bring it up
12 before I start any medication to give him a chance and
13 discuss a few options that I have in mind, and then to
14 finalize my decision.

15 Q. So at this point, you don't really know what
16 medication you are going to ask the court to authorize?

17 A. No, I'm not saying that. I am considering both,
18 more favoring towards the typical antipsychotic, the new
19 antipsychotic medication, which is newer, but, again, I
20 would like to give that opportunity to Mr. Bigley and
21 then give him a few options of the old antipsychotic
22 medication versus new antipsychotic medication.

23 And I am favoring more towards new antipsychotic
24 medication because the record has indicated some
25 sensitivity to the older antipsychotic medication.

1 Myers did you consider before filing the petition?

2 MS. POHLAND: Objection. The deponent has
3 already stated that she is not that familiar with the
4 case.

5 Can you rephrase the question, please? She
6 is not an attorney.

7 Q. Are you unfamiliar with the Myers' requirements?

8 A. As I said, I am familiar to the superficial
9 level, so in order for me to answer that question,
10 probably I would ask you to review in the summary of a
11 few statements then I would be more comfortable.

12 Q. Have you ever consulted -- I'm not asking about
13 any content, but have you ever consulted with anybody at
14 the attorney general's office about the requirements of
15 Myers?

16 A. Actually, I should be honest, API is very good at
17 it, continuously updates us with some of these cases.

18 But for me, I need to recall it again, review it
19 and make sure my understanding is exactly what API
20 educated me about.

21 Q. What did they educate you about --

22 A. As I said --

23 Q. -- with respect to --

24 A. It had to do -- the case had to do with that
25 individual, with Myers, who has taken medication against

1 Q. Here is my problem is that under Myers, and your
2 lawyers may disagree with you, that -- or with me, I
3 should say, that you need to seek specific authorization
4 to administer specific drugs against his wishes with
5 specific doses, and so -- and I'm trying to find out
6 what you're going to ask the court tomorrow.

7 What I understand is that you don't really know
8 at this point?

9 A. No, I do know. As I said, to be specific, at
10 this point, I am focusing more on Risperidone, or second
11 choice is probably I go to Zyprexa.

12 And the main part of it is sticking more with
13 Risperidone versus Zyprexa is because Mr. Bigley has a
14 long-standing medication noncompliance, and the
15 Risperidone comes in the long-acting form, which he
16 could receive some injection form, could say more stable
17 and then helps him be more compliant.

18 So in that aspect, as I said, probably that is
19 what I'm focusing on, but just like any of my other
20 patients, I like to give them that opportunity to
21 discuss it with them to see if they could give a
22 rational thought and give me choices that is more
23 favorable to them versus what I recommend to them.

24 Q. Would Risperidone be basically the same as what
25 you were asking for in May?

1 A. I believe so, but I have to look at that record,
 2 but high probability it was Risperidone.
 3 Q. That dosages and stuff?
 4 A. Well, dosages probably would be the same.
 5 However, the long-acting form is very fixed. You start
 6 with 25 milligrams. The next one is 37 and a half, and
 7 then 50 milligram every two weeks.
 8 Just like any other patient, I try to start low
 9 dose. Even though he has been exposed to that
 10 medication in the past, still I like to go very safe,
 11 very conservative, low dose, and then gradually increase
 12 it based on how he responds to the first initial dose.
 13 Q. What side effects would you consider in making
 14 that decision?
 15 A. Well, overall with the newer antipsychotic
 16 medication, I would disclose to the patient that they
 17 have lower possibility of tardive dyskinesia and EPS
 18 that they have faced with older antipsychotic
 19 medication, and this is the side effect, the TD.
 20 I haven't seen it, but his old chart indicated
 21 that he may have shown or he has shown some sensitivity,
 22 so keeping that in mind that they have a lower risk, the
 23 possibility is a lot lower.
 24 But the side effect of Risperidone specifically
 25 would be weight gain, which in this case for Mr. Bigley

1 probably would be beneficial; some sedation, which,
 2 again, giving it perhaps it improves his sleep. And I
 3 said about weight gain.
 4 Hypertension, some mild headache and
 5 hyperprolactinemia. Those are some of the main
 6 significant side effects that I would be concerned and I
 7 would be monitoring very closely.
 8 And if Bill has the threshold to listen and be
 9 able to rationally process, I would share it with him.
 10 And along with the other side effects which I mentioned,
 11 but is not as -- of course, every side effect is
 12 significant, but is not -- the percentage of it is kind
 13 of in a lower rate.
 14 Along with those side effects, with every
 15 patient, we do monitor for any other side effects
 16 because every individual may respond to a medication and
 17 have a different side effect that may not have been --
 18 have not been observed in other individuals.
 19 Q. Okay. So if Mr. Bigley agreed to take the
 20 medications then that would be -- then that's what you
 21 would give him?
 22 MS. DERRY: Objection. That's a leading
 23 question that is going to one of the elements of the
 24 charge.
 25 MR. GOTTSTEIN: It's not --

1 MS. DERRY: Mr. Gottstein, are you asking
 2 her -- for my own clarification to decide whether or not
 3 she should answer the question -- whether or not if she
 4 asks him if he would take a medication that that means
 5 he is capable of informed consent?
 6 Are you asking her that in the guise of a
 7 hidden question?
 8 MR. GOTTSTEIN: No, I think that's the -- I
 9 think that's a legal conclusion from it, so I asked her
 10 if he agreed to it, would she give it to him. That was
 11 the question.
 12 MS. DERRY: Without a court order? I would
 13 like this question to be more specific.
 14 MR. GOTTSTEIN: Yeah, without a court order.
 15 A. Well, I'm not clear without court order. As far
 16 as I understand right now, my patient is in a psychotic
 17 state. He doesn't have any insight to his mental
 18 illness.
 19 He cannot give me informed consent from my
 20 evaluation, so I respect the statute. I cannot give any
 21 medication against their wishes unless it's an emergency
 22 situation, so until the court really does grant me that,
 23 I cannot make any conclusion from my approach.
 24 Q. Okay. What do you consider Mr. Bigley's
 25 prognosis with and without the medication?

1 A. Unfortunately, based on his long-standing mental
 2 illness and long history of hospitalization, and long
 3 history of non-medication compliance, he continues to
 4 deteriorate, and every time his baseline is changing.
 5 So putting those together, and then his lack of
 6 psychosocial support is really declining his symptoms,
 7 so prognosis is gradually declining, and is already,
 8 unfortunately, not very promising, very favoring.
 9 But definitely with medication, he has shown some
 10 level of stability and was able to have a higher quality
 11 of life.
 12 Q. So is it fair to say that his condition has
 13 declined over time?
 14 A. It's very difficult for me to answer that
 15 question from the aspect of since I have not known Bill
 16 -- I got to know Bill for a year or two years, so I'm
 17 just only judging based on the record and based on my
 18 evaluation.
 19 And definitely since I have been working with
 20 him, with more time, admission to API, I have not --
 21 definitely I have seen him deteriorated more by him
 22 going more to the prison, not having a stable home
 23 setting.
 24 Even the Paradise Inn, which is his residential
 25 state, it seems like that is also a challenge, so

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1 putting that on the picture, so I think the answer is
2 that it's not very positive.
3 Q. So when you say "review his record," how far back
4 did you go?
5 A. I can't pinpoint -- I could say I have seen it
6 from 2006, but from past, I may have gone further, but
7 I'm not really sure. I have to look at my note.
8 Every day I look at all of my patients, try to go
9 as far back as I can, so I cannot really specifically
10 say how far back, but, definitely, I have seen his chart
11 sometime from 2006 up to this date.
12 MR. GOTTSTEIN: You know, let's mark this as
13 C.
14 (Exhibit C marked.)
15 Q. So on page one there, it's kind of -- the footer
16 is right in some handwriting there, which I didn't
17 notice before I printed it out.
18 Is that a record from API?
19 MS. DERRY: Objection.
20 A. It looks familiar.
21 MS. DERRY: Dr. Khari doesn't have personal
22 knowledge of this. This is not the record that she has
23 created herself.
24 Q. Does it look -- is it a record from API?
25 A. It says -- it looks like API record. It says

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1 Alaska Psychiatric Institute and our form looks like
2 that, so I would imagine it should be.
3 Q. Now, down at the bottom there is an asterisk.
4 Again, it got covered up a little bit.
5 A. Uh-huh.
6 Q. Can you read what it says?
7 A. It says, "No emergency IM medication."
8 Q. So why would that be put there?
9 MS. DERRY: Objection; speculation. Do not
10 answer that question.
11 MS. POHLAND: I'm going to object on the
12 relevance given that --
13 MR. GOTTSTEIN: Are you instructing her not
14 to answer?
15 MS. DERRY: Mr. Gottstein, if she didn't
16 create this record, how do you expect her to answer that
17 question?
18 BY MR. GOTTSTEIN:
19 Q. Let me ask a different question. Reading that,
20 what would you understand that to mean?
21 MS. POHLAND: Object to relevance. This is
22 for -- it appears to be from April 2008. The hearing at
23 issue is for an October 2008 indication.
24 Q. You can go ahead and answer that.
25 A. So as I said, I did not write that order and I do

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1 not -- this is basically -- it means to me that this
2 individual should not be given emergency IM medication.
3 Usually what that means that if this individual,
4 the crisis does come to the point that it becomes a
5 concern of safety for himself and others, then they need
6 to contact the clinician who is assigned to him or who
7 is on call to be contacted.
8 Q. So why should it be different for Mr. Bigley than
9 other patients?
10 A. I don't know if it is different or not. I cannot
11 answer that question.
12 Q. If it's not different, why would it be written
13 there?
14 A. Like I say, I cannot answer that question at the
15 present time.
16 Q. Turning to the second page.
17 A. Uh-huh.
18 Q. The second entry.
19 A. Uh-huh.
20 Q. Can you read that to me?
21 MS. POHLAND: Object to relevance. Can we
22 just do a continuing objection based on relevance?
23 MR. GOTTSTEIN: Sure.
24 A. Are you talking about the handwritten?
25 Q. Yeah. The order part. It's 5/6/08, 12:20 is the

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1 time. And then just what does the order say? It's on
2 the back side.
3 A. It says on 5/6/2008, 12:20, it says, "Haloperidol
4 five milligrams IM every six hours PRN for severe
5 agitation and psychosis, emergency IM, and 24 hours, I
6 think."
7 Then they are saying Dr. Hobson, who was our
8 medical director at that time, has ordered that
9 medication.
10 Q. So what does "PRN" mean?
11 A. It means on a needed base.
12 Q. As needed?
13 A. Uh-huh.
14 Q. So it says -- what -- so does that mean as needed
15 for severe agitation?
16 A. For severe agitation and psychosis, yes.
17 Q. So what does "severe agitation" mean?
18 A. Well, for every -- I don't know what you mean
19 severe agitation, from what aspect you are discussing
20 it.
21 Q. Well, would that include yelling and screaming
22 and slamming doors, for example?
23 A. It is a combination of things. Every individual
24 is different. So every individual is different, and the
25 meaning just doesn't go for yelling and screaming.

1 Q. So have you been given training on emergency
2 medication?

3 A. I think that is --

4 MS. POHLAND: Objection to relevance.

5 A. I don't really know what you mean by "training".
6 As a physician, as a clinician, you're trained for
7 everything that is necessary to manage a patient.

8 Q. Did you get any training from API on emergency
9 medication?

10 A. Well, in what aspect? We do have P&P, which
11 talks about emergency medication, and the statute or
12 limitation, and what situation is considered more of an
13 emergency than non-emergency.

14 Q. And then what's your understanding of what
15 constitutes an emergency under the statute?

16 MS. POHLAND: Objection; relevance.

17 A. Emergency is, as I said, every individual patient
18 is different. You cannot just put -- you cannot take it
19 under -- you have to look at the whole aspect of the
20 situation, but in most cases, as the situation comes in,
21 or to be specific for Mr. Bigley, when he is showing
22 marked psychotic symptoms to the point that he may put
23 himself in a vulnerable situation or other people around
24 himself in a vulnerable situation, or become a concern,
25 severe concern that he may hurt himself by, in his case

1 MS. POHLAND: Which are irrelevant given
2 that they don't relate to the admission at issue.

3 MR. GOTTSTEIN: Well, you can prolong this
4 as long as you want.

5 BY MR. GOTTSTEIN:

6 Q. So it starts -- I think the first word is
7 "Abilify"?

8 A. It says, "Abilify 9.75 milligrams IM. Benadryl
9 50 milligrams IM every six hours PRN for severe
10 agitation, psychosis. Emergency IM times 24 hours if
11 --" I can't read the other word -- "is still agitated,
12 give --"

13 Probably it is "continues to be still agitated
14 give Ativan 1 milligram times one IM," and so phone
15 order by Dr. Gomez.

16 Q. What does "IM" mean?

17 A. Intramuscular, the injection.

18 Q. What does one milligram times one IM mean?

19 A. That means only one time. They could give Ativan
20 one milligram only one time.

21 Q. When it says "Emergency IM times 24," that means
22 what?

23 A. That means that emergency, it said "every six
24 hours," so that means within 24 hours if another
25 emergency crisis comes and the consent continues to

1 recently, like hitting his body against the wall may
2 cause a fracture, or through posturing it may invite
3 another individual, another patient to bring harm to
4 him.

5 So those are in summary of it. And also when the
6 individual is not responding to de-escalation that the
7 hospital takes when the oral medication is offered, when
8 time out is offered, when quiet room is offered, all of
9 those is not -- is not directly -- due to his state of
10 mind at that time, that he cannot process and he cannot
11 evaluate to see the vulnerability that he is putting
12 himself and others basically for his safety and others,
13 then at that situation emergency medication would take
14 place.

15 Q. So down at the bottom there -- 5/15, 2300 -- and
16 I'm sorry. I just have a hard time reading this, so if
17 you could read that one.

18 MR. POHLAND: You understand that Dr. Khari
19 did not actually make these?

20 MR. GOTTSTEIN: But if she can read it, that
21 would be great because then I can understand it.

22 MS. POHLAND: Is that the point of the
23 deposition though to have her read it for you?

24 MR. GOTTSTEIN: I'm asking questions about
25 the chart.

1 exist, then another IM -- another order can be given.

2 Q. So this was written by Dr. Gomez; is that right?

3 A. The phone order by Dr. Gomez.

4 Q. And so now, who acts on this?

5 A. The nursing staff, the staff in the hospital.

6 Q. And who is that on Taku?

7 A. I don't know at that time what was under Taku.

8 Q. Who is it now on Taku?

9 A. Right now, we have Monica. I forgot her last
10 name. I'm not very good with names.

11 Q. "Atanik" or something like that?

12 A. That's his social worker.

13 Q. Monica something or another. Who else?

14 A. What do you mean "who else"?

15 Q. This is telling staff that you can do -- you
16 know, administer these drugs under these conditions, and
17 I want to know who it is that makes those decisions that
18 those conditions exist.

19 A. The doctor makes the decision to give the order
20 and the nurses give the medication to the patient.

21 Q. Right. And then I want to know who the nurses
22 are. It's the nurses that decide whether or not the
23 person is severely agitated?

24 A. No. It's the doctor evaluates -- the doctor gets
25 the information. The doctor decides if the patient

1 needs the medication or not, but the medication is given
2 by the nurses.

3 And then the different shifts, different dates we
4 do have different nurses in the unit.

5 Q. But this says "as needed," so who decides whether
6 it's as needed?

7 A. Well, for that situation, the order is given by
8 the doctor. When they review the chart, they review the
9 patient, they understand the patient, then they give
10 that.

11 Yes, at that time, based on the criteria that the
12 hospital follows, then the nurses would take the action
13 to give the medication.

14 Q. And so what I'm looking for is the names of the
15 nurses that --

16 MS. DERRY: Objection. Dr. Khari wasn't the
17 doctor who signed this order and cannot tell you who
18 gave that injection that day.

19 MR. GOTTSTEIN: Well, currently on Taku.

20 MS. DERRY: What does that have to do with
21 this record though, Mr. Gottstein?

22 MR. GOTTSTEIN: That's not the question.

23 MS. DERRY: You're asking her questions
24 about --

25 MS. POHLAND: Mr. Gottstein, if you would

1 A. No. No. As I said, you just cannot take it
2 lightly just because what is there. They have to look
3 at the whole aspect.

4 IM medication usually is not given very lightly
5 to a patient. It's been evaluated and taken very
6 seriously before they consider to give IM medication, so
7 it's not as simple as somebody is agitated or somebody
8 cannot sleep, okay, we give him an IM medication.

9 API staff have a lot more respect for the patient
10 than to just lightly give that medication in the IM
11 form.

12 Q. So does that mean that all three of those have to
13 exist?

14 A. It's not actually exactly just all those three
15 have to exist. Those three exist, plus they look at the
16 whole global aspect of the thing, but sometimes you
17 cannot write three pages of a chart to name everything.

18 And they are trained, they know, they are
19 trained, and every specific patient is individualized,
20 so it is discussed in the treatment team with the staff.

21 So every patient we look at differently, but,
22 however, that pneumonic is, as I said, stands for
23 agitation, anxiety and insomnia.

24 Q. Actually, I think you said aggression.

25 A. Anxiety, agitation.

1 would like the names of employees who work on Taku, you
2 are more than welcome to serve interrogatories upon API
3 to get that.

4 Dr. Khari has already testified that she is
5 not good with names. She gave you the name of one nurse
6 that she recalled.

7 BY MR. GOTTSTEIN:

8 Q. But I'm asking you now, what are the names of
9 other nurses?

10 MS. POHLAND: Objection; asked and answered.

11 A. I can get you the names by tomorrow's court
12 hearing. I would be happy to get the list of all the
13 nurses, different shifts, and it can be provided to you.

14 Q. Can you do that by fax this afternoon?

15 A. I will see what the hospital could do.

16 Q. The next page, it's page 3 of 37, it says, "5/15/
17 Lorazepam."

18 A. Uh-huh.

19 Q. No, up above that, "Six hours PRN AAI." What
20 does "AAI" mean?

21 A. For agitation, aggression and psychosis -- no,
22 insomnia.

23 Q. Now, does that mean if either one of those exist?
24 In other words, if someone is -- can it be given just
25 for insomnia?

1 Q. Initially, you said agitation, aggression and
2 insomnia.

3 A. Agitation, aggression and insomnia.

4 Q. Which one is it?

5 A. I look at it as agitation, aggression and
6 insomnia.

7 Q. So someone else might interpret that as
8 agitation, anxiety and insomnia?

9 MS. DERRY: Objection; calls for
10 speculation.

11 A. No. Usually, the pneumonic is very standard.

12 Q. I'm just asking because you just said anxiety, so
13 I was just asking.

14 So there is -- so let me say, if someone was
15 extremely agitated, but not aggressive or have insomnia,
16 would that apply?

17 A. Again, it depends on the level of anxiety. As I
18 said, we talked about before what causes the -- what
19 pertains for the emergency medication, so it's not only
20 just because somebody is anxious or anxiety qualifies
21 them to get antipsychotic medication in the IM form.

22 Very much it stays with what I stated earlier
23 when you asked the question how we give the emergency IM
24 medication.

25 Q. So the nurses decide when that exists?

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1 MS. POHLAND: Objection; asked and answered.
2 A. I think I answered that before also.
3 Q. That was PRN, so this is the same thing?
4 A. Yeah. This is very much the same thing.
5 Q. It says "PRN" here too.
6 A. Yes.
7 Q. I mean, I don't want to necessarily raise the eye
8 of your lawyers, so it depends basically, is that fair?
9 A. What do you mean by "depends"?
10 Q. Depends on the patient?
11 A. What I tried to say is that the care for every
12 patient is individualized, and it has to be
13 individualized because everybody presents themselves
14 clinically different.
15 So just because one person -- as I said, every
16 individual person presents different. So in that case,
17 you do go for individualized care, but the emergency
18 medication at the end would conclude very much in a way
19 that then becomes the concern of the safety of that
20 individual or how they put themselves or others around
21 themselves in a high risk of the safety.
22 Then emergency medication would come when all the
23 other aspect has not -- not able to de-escalate them.
24 It is exactly very much what I mentioned earlier.
25 Q. I understand that, let's say, with aggression.

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1 Okay. So it seems to me that at a certain level of
2 aggression clearly raises a safety issue, right?
3 A. Uh-huh.
4 Q. So let's leave that aside for now, but maybe
5 we'll come back to it. But it's very hard for me to see
6 how insomnia is a safety issue.
7 MS. POHLAND: Objection to form.
8 A. I did not say that. Actually, when you asked me
9 earlier about it, I said agitation by itself, insomnia
10 by itself does not -- just because somebody is not
11 sleeping qualifies us to give them IM medication.
12 I also mentioned earlier do not take that
13 definition lightly. Not just because somebody has
14 insomnia medication is forced.
15 In that case, if that is the case, probably
16 90 percent -- I'm just making -- that is not a solid
17 90 percent. I'm saying a lot of individuals do have
18 problems with sleep, so that means every individual gets
19 IM medication? No.
20 That is why I mentioned earlier don't get that
21 small word of AAI as a whole global aspect of giving a
22 patient IM medication.
23 Q. So it seems like it's up to the discretion of the
24 nurse; is that correct?
25 A. It's not the discretion. At the end it comes

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1 back, when the IM medication comes into the picture, the
2 significant consent exists that individuals could hurt
3 themselves or somebody around themselves, when that is
4 very vivid and seen by every individual with the team,
5 with the nursing, with the other staff that are working
6 on providing care in that unit for that patient.
7 MS. POHLAND: Mr. Gottstein, could we move
8 onto perhaps something that Dr. Khari actually authored
9 and/or the admission at question?
10 (There was a short break.)
11 MS. POHLAND: Note my continued objection to
12 all of this questioning on emergency medication and
13 admissions that don't relate to the current admission.
14 BY MR. GOTTSTEIN:
15 Q. Okay. The second one down, that's 5/16?
16 A. Uh-huh.
17 Q. 0100. I think that is actually you that signed
18 that one, isn't it?
19 A. Yes.
20 Q. Now, I read that -- how do you say that,
21 Thorazine?
22 A. Thorazine.
23 Q. "50 milligrams IM, now AAI, locked seclusion."
24 A. Uh-huh.
25 Q. So what does "now" mean?

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1 A. It means at that time.
2 Q. So does that mean give it then?
3 A. Yes. That means there is no time. The patient
4 is so psychotic -- it always is like that, but, however,
5 that means we need to act on it immediately.
6 Q. Okay. And is that -- is that -- I have seen that
7 in other places.
8 Is that standard? When you see "now" on it, that
9 means it's not like a PRN, it's do it now?
10 A. Exactly.
11 Q. I'm just trying to understand.
12 MS. DERRY: Mr. Gottstein, can we clarify
13 here? Are we looking at -- you just mentioned "locked
14 seclusion".
15 Are we looking at the second entry or the
16 first?
17 MR. GOTTSTEIN: Second.
18 A. Also, I want to clarify. That order, I cosigned.
19 Actually, it was ordered by Dr. Gomez, but I cosigned
20 that order.
21 Q. Why was that?
22 A. Well, usually it is very common in every
23 hospital, for example, when the doctor -- this has
24 happened in the morning, 1:00, so Dr. Gomez was on call,
25 so they have contacted him and they have expressed the

1 concern and they presented his clinical symptom.

2 And Dr. Gomez found it appropriate for the
3 patient to get medication at that time. And the next
4 day, as I was his clinician who provided care for him --
5 of course, you know, every morning, I review to see
6 where my patients are and how they are doing and what
7 has happened the night before.

8 I recognized that, and then I confirmed that I
9 have seen that order and that is how it goes.

10 Q. Okay. Now, what does "locked seclusion" mean?

11 A. That means the patient has been -- was not
12 following -- from the aspect he was so agitated, he was
13 so psychotic -- again, I wasn't there. I don't know.

14 But in an aspect of a picture, by seeing that,
15 probably he was markedly psychotic, he was not
16 responding to redirection, he was not taking oral
17 medication, he was not following all the aspects that I
18 talked earlier about emergency medication.

19 And still they decide to put him in the quiet
20 room, which is different than the room that they stay,
21 and then they locked it because they could not restrain
22 him.

23 And he was probably putting himself in a more
24 vulnerable situation, so they decided that probably he
25 would benefit from the medication, plus in a place that

1 the door could be locked that he put himself inside
2 instead of coming out and put himself in more vulnerable
3 state.

4 Q. So I'm a little confused. Did this authorize
5 locked seclusion or did it ratify locked seclusion?

6 MS. DERRY: Objection.

7 A. Explain to me what you mean by "ratify".

8 Q. Did they -- was he put in locked seclusion and
9 then you signed and say, "Yes that was okay," or does
10 this signing this say it is okay to put him in locked
11 seclusion?

12 A. This tells me that Dr. Gomez ordered this
13 medication should be given to the patient and he should
14 be put in the quiet room, and then, for that moment, the
15 door should be locked.

16 Usually, that doesn't mean they stay locked for a
17 long time. It all depends when the patient is calm and
18 could be safe again to come out of that room.

19 For that moment, it just meant for that moment.
20 Of course, in 10 minutes or 15 minutes or 1 hour later
21 the setting may happen totally different.

22 As the patient takes medication, he may calm
23 down, respond to the medication and he did not need to
24 be anymore in the locked seclusion.

25 Q. Now, on the fourth one, or second one up from the

1 bottom, you know, I can never say --

2 A. Chlorpromazine.

3 Q. "50 milligram IM now for AAI," and then it looks
4 like "XT dose due to psychotic agitation."

5 Is that correct?

6 A. Uh-huh.

7 Q. And "XT" means?

8 A. It means one time, times one time dose, only one
9 time. This is authorized only one time. This is the
10 one I did order because it shows that.

11 Q. Now, were you actually -- did you actually
12 observe him or was this called in or do you remember?

13 A. I can't remember. I have to look at the chart.

14 Q. On page seven, under "prognosis," it says, "The
15 patient refuses psychiatric treatment and this refusal
16 is facilitated by his attorney."

17 A. Uh-huh.

18 Q. I assume that's me?

19 MS. DERRY: Objection; calls for
20 speculation.

21 Q. Is that me?

22 A. I'm not really sure. I have to look at the chart
23 and see what it meant.

24 MS. POHLAND: Mr. Gottstein, just to remind
25 you, Dr. Khari has to get back to work, so we're going

1 to want to try to wrap things up so Ms. Derry has time
2 to ask some questions as well.

3 Q. I mean, it's obviously -- okay. And going back
4 to that, so I would read into that that patient's
5 refusal -- by "psychiatric treatment" you mean the drug,
6 right, drugs?

7 MS. POHLAND: Objection. Dr. Khari didn't
8 author this record.

9 MR. GOTTSTEIN: I believe she did.

10 MS. DERRY: Where does it say that?

11 A. Actually, Dr. Michaud wrote that and then I
12 cosigned it.

13 Q. So is your understanding that "refuses
14 psychiatric treatment" means refuses the medication?

15 A. I have to see what Dr. Michaud meant by that, but
16 in my aspect, no, it's not only the medication. It's
17 the whole aspect of getting appropriate --

18 For example, the treatment intervention that
19 inside the hospital is offered, and probably, in this
20 case, also when he gets discharged, he is not willing to
21 work with his outpatient provider, he is not willing to
22 have case management, he is not willing to work with the
23 structure and social support that the clinician may feel
24 like the patient would benefit from, so it's not only
25 medication.