

STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF THE PETITION OF
THE ATTORNEY GENERAL FOR
SUBPOENAS,

Supreme Court No.

Court of Appeals No. 342680

Plaintiff-Appellant,

Ingham Circuit Court
No. 17-000021-PZ

v

VERNON EUGENE PROCTOR, M.D.,

Defendant-Appellee.

_____ /

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

Michele M. Wagner-Gutkowski (P44654)
Assistant Attorney General
Attorneys for Plaintiff-Appellant
Licensing and Regulation Division
P.O. Box 30758
Lansing, MI 48909
517-335-7569

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STATEMENT OF JURISDICTION

On February 14, 2018, the Ingham County Circuit Court issued an order denying Respondent-Appellee Vernon Proctor, M.D.'s motion to vacate its order authorizing Petitioner-Appellant the Department of Licensing & Regulatory Affairs, Bureau of Professional Licensing (Department) to subpoena requested patient substance abuse treatment records. On February 26, 2019, the Court of Appeals issued a published opinion reversing the Ingham County Circuit Court's order. The Court of Appeals denied the Department's motion for reconsideration on April 19, 2019. This Court has jurisdiction to consider the Department's application for leave to appeal pursuant to MCL 600.232 and MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

Whether the Department properly complied with federal law in obtaining a subpoena to search the patient files of a doctor who is suspected of abusing his prescription authority. This question is predicated on three subordinate questions:

1. Whether the plain language of federal regulatory law, 42 CFR 2.66, requires a hearing before a court may authorize a subpoena that requires disclosure of protected substance abuse treatment records as part of an investigation of a federally-assisted drug treatment program?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

2. Whether the Department demonstrated "good cause" to support the authorization of the requested substance abuse treatment records?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Yes.

Court of Appeals' answer: No.

3. Whether the circuit court order properly provided for the disclosure of confidential communications, where that order guaranteed the protection from disclosure identifying information for the patients and provided an opportunity for the patient or record holder to seek revocation or modification of the court order?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Yes.

Court of Appeals' answer: No.

STATUTES AND REGULATIONS INVOLVED

42 USC § 290dd-2

(a) Requirement

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) Permitted disclosure

(1) Consent

(2) Method for disclosure

Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives written consent, the content of such record may be disclosed as follows:

(c) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

42 CFR § 2.12 Applicability

(a) General—

(1) Restrictions on disclosure. The restrictions on disclosure in the regulations in this part apply to any information, whether or not recorded, which:

(i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and

(ii) Is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

42 CFR § 2.13 Confidentiality and safeguards

(a) General. The patient records subject to the regulations in this part may be disclosed or used only as permitted by the regulations in this part and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any federal, state, or local authority. Any disclosure made under the regulations in this part must be limited to that information which is necessary to carry out the purpose of the disclosure.

42 CFR § 2.63 Confidential communications

(a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious

bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

42 CFR § 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

42 CFR § 2.66 Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a part 2 program or other person holding the records

(a) Application.

(1) An order authorizing the disclosure or use of patient records to investigate or prosecute a part 2 program or the person holding the

records (or employees or agents of that part 2 program or person holding the records) in connection with a criminal or administrative matter may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

(2) The application may be filed separately or as part of a pending civil or criminal action against a part 2 program or the person holding the records (or agents or employees of the part 2 program or person holding the records) in which the applicant asserts that the patient records are needed to provide material evidence. The application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny or the patient has provided written consent (meeting the requirements of § 2.31) to that disclosure.

(b) Notice not required. An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c).

(c) Requirements for order. An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64.

(d) Limitations on disclosure and use of patient identifying information.

(1) An order entered under this section must require the deletion of patient identifying information from any documents made available to the public.

(2) No information obtained under this section may be used to conduct any investigation or prosecution of a patient in connection with a criminal matter or be used as the basis for an application for an order under § 2.65.

INTRODUCTION

The decision below frustrates the ability of the Department to effectively combat the opioid epidemic in this state. The doctor's patient charts are the best evidence of whether a provider is prescribing controlled substances within the standard of care. For that reason, it is imperative that health regulatory and law enforcement agencies be able to subpoena patient medical records in an unencumbered manner when conducting an investigation into whether a doctor's drug prescribing practices are proper. Federal law provides heightened privacy protections for individuals receiving substance abuse treatment. But it also recognizes these agencies need to quickly and thoroughly access medical records when investigating possible misconduct by a health provider. That is the case here. Specifically, 42 CFR 2.66 provides a procedural mechanism for these agencies to petition a court for an order authorizing disclosure of the substance abuse treatment records relevant to its investigation of a health care provider.

In particular, the Department petitioned the court to subpoena substance abuse patient charts from Dr. Vernon Proctor as part of its investigation of his potentially abusive drug prescribing practices. The Court of Appeals vacated the court order on the grounds that it failed to make a determination of "good cause" for disclosure, failed to conduct a pre-authorization hearing as required by the federal regulations, and erred in finding that the national opioid epidemic justified the disclosure of confidential communications made between the patients and Dr. Proctor noted within the patient charts. The decision was wrong on all three points. And it misinterpreted federal regulatory law and the cases examining it.

First, the plain language of 42 CFR 2.66 allows law enforcement or a health regulatory agency to obtain an ex parte order authorizing disclosure of substance abuse treatment records when the health provider providing the treatment is the subject of the agency's investigation or prosecution. To compound this error, the Court of Appeals misinterpreted *United States v Shinderman*, 515 F3d 5 (CA 1, 2008) and *Hicks v Talbott Recovery Sys, Inc.*, 196 F3d 1226 (CA 11, 1999) to apply the closed hearing requirement of 42 CFR 2.64 and 42 CFR 2.65 to applications for disclosure requests filed under 42 CFR 2.66.

Second, the Court of Appeal's decision that "good cause" had not been shown to authorize disclosure of the substance abuse treatment records is inconsistent with the analysis in *In re The August, 1993 Regular Grand Jury*, 854 F Supp 1380 (1994).

Third, the Court of Appeals erred in finding that the existence of the national opioid epidemic or the risk of serious injury or death to the patients themselves did not justify disclosure of provider/patient communications contained within the records.

Accordingly, the lower court opinion – which was published – is clearly erroneous, is of significant public interest, and will cause material injustice by impeding the Department and law enforcement agencies ability to promptly investigate health care providers for improper controlled substance prescribing practices. The Department respectfully requests this Court grant its application for leave to appeal.

STATEMENT OF FACTS AND PROCEEDINGS

The Department is a health oversight regulatory agency charged with licensing and regulating health professionals in order to protect the public. The Department petitioned the Ingham County Circuit Court for an order authorizing it to subpoena eleven confidential substance abuse treatment patient records from Dr. Vernon Proctor as part of its investigation of his controlled substance prescribing practices and treatment of his patients. (Appellant's Attachment 1.)

In its petition, the Department identified the patients at issue by fictitious names and ensured that the petition was devoid of any patient identifying information. The Department's petition further advised the circuit court that it was seeking only records (eleven patient charts) that were necessary to the investigation, that all unique identifiers of Dr. Proctor's patients would be deleted from the patient records, and that the records would only be disclosed to those who had a need for the information as necessary for the investigation. Although the Department did not specifically use the term "good cause" in its petition seeking disclosure, it did factually plead the requisite "good cause" criteria specified in 42 CFR § 2.64(d).

Namely, the Department pled in its petition that the eleven patient charts being requested from Dr. Proctor were the most effective means to investigate whether he was providing those patients with treatment that met the standard of care for the profession and complied with the Public Health Code. The Department also advised the court in its petition that the public interest in disclosing the eleven

patient charts to enable the Department to investigate improper drug prescribing practices outweighed any potential injury to the patients, the physician-patient relationship, and the treatment services. (Appellant's Attachment 1.)

Thereafter, the Ingham County Circuit Court issued an order authorizing the disclosure of the requested patient records. (Appellant's Attachment 2.) The Department mailed Dr. Proctor a subpoena dated December 19, 2017, an exhibit referencing the patients in question, and a copy of the Court's order authorizing the subpoena. (Appellant's Attachment 3.)

Dr. Proctor filed a motion to vacate the order authorizing the subpoena, and a hearing on the motion was held before the court on February 14, 2018. After oral argument, the circuit court opined from the bench, ruling as follows:

- 42 CFR 2.66 governed the Department's petition;
- the February 14, 2018 hearing provided Dr. Proctor with his opportunity to seek revocation or amendment of the disclosure order;
- the Department's petition and the court's December 13, 2017 order complied with the applicable federal regulations; and
- the opioid epidemic was evidence of a threat to life or serious bodily injury that justified disclosure of confidential communications made between Dr. Proctor and his patients as he was being investigated for abusive controlled substance prescribing practices. (Appellant's Attachment 4.)

Although the Ingham County Circuit Court did not specifically employ the words "good cause" in rendering its decision from the bench, it did state "that the requirements of 2.64(d)(1) and (2) [the provisions delineating the good cause

criteria] have been met.” (Appellee’s Attachment 4.) Moreover, the circuit court’s written order denying Dr. Proctor’s motion to vacate reiterated that it was based, in part, upon the reasons articulated on the record. (Appellant’s Attachment 5.)

Dr. Proctor filed a claim of appeal with the Court of Appeals on March 5, 2018. He sought a stay of the circuit court’s order on March 16, 2018, which the Court of Appeals denied on April 9, 2018.

The Court of Appeals consolidated this case with Docket No. 342086,¹ and it scheduled both matters for oral argument on February 12, 2019. On February 26, 2019, the Court of Appeals issued a published opinion affirming the circuit court’s order in Docket No. 342086, but reversing and remanding for further proceedings of the circuit court order at issue in this application for leave to appeal. (Appellant’s Attachment 6.) In so doing, the Court of Appeals found that in issuing its order authorizing disclosure, the circuit court did not comply with the applicable federal regulations. In particular, it found that the circuit court failed to properly assess the factors for determining “good cause,” failed to conduct a pre-authorization hearing, failed to impose appropriate safeguards to protect against unauthorized disclosure, and improperly authorized disclosure of confidential communications when such disclosure is limited to circumstances similar to suspected child abuse or

¹ Mark Mortiere, M.S., D.D.S., filed a claim of appeal of the Ingham County Circuit Court’s order denying his motion to quash subpoena, arguing the Public Health Code did not vest the Department with authority to initiate an investigation and subpoena a patient chart based upon a malpractice settlement award less than \$200,000. The Court of Appeals affirmed the circuit court order, finding that the plain language of the Code authorized the Department to initiate an investigation.

verbal threats. The Department timely filed a motion for reconsideration, which the Court of Appeals denied on April 19, 2019.

STANDARD OF REVIEW

Appellate courts review a trial court's decision to quash a subpoena for an abuse of discretion. *Castillon v Roy*, 412 Mich 873 (1981). A trial court abuses its discretion if it renders a decision that is not within the range of reasoned and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006) (citing *People v Babcock*, 469 Mich 247, 269 (2003)).

Moreover, questions of statutory construction are reviewed de novo. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519 (2004). Courts have long held that “[t]he primary goal of statutory interpretation is to give effect to the intent of the Legislature.” *Id.* In doing so, the court must examine the language of the statute itself. If the statute is unambiguous, it must be enforced as written. *Id.*

ARGUMENT

- I. The plain language of federal regulatory law, 42 CFR 2.66, authorizes a court as here to issue ex parte orders authorizing disclosure of drug treatment records for an investigation into alleged misconduct of a health provider without a prior hearing.**

The opioid prescription problem is rooted in the action of health care providers who abusively prescribed medication that is either unwarranted or unnecessary. The Department here suspects Dr. Vernon Proctor of engaging in that very activity and properly sought an order from the circuit court to examine the records of eleven patients, while protecting their identifying information. Nothing in the federal regulations requires a public hearing before a court authorizes such disclosure. And the federal case law supports this conclusion as well. This Court should reverse.

- A. The plain language of 42 CFR 2.66 does not require a hearing prior to a court order authorizing disclosure.**

Federal law protects the identity, diagnosis, prognosis, or treatment of any patient receiving alcohol or substance abuse treatment from a federally assisted substance abuse treatment program. 42 USC § 290dd-2. These patient records can only be disclosed with the informed written consent of the patient or through a procedural process specified by federal law. The applicable statutory provision that allows for disclosure without patient consent is 42 USC § 290dd-2(b)(2)(C), which provides that such a disclosure may be made after a showing of good cause:

If authorized by an appropriate order of a court of competent jurisdiction granted *after application showing good cause* therefor, including the need to avert a substantial risk of death or serious bodily

harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure. [Emphasis added.]

The federal regulations, 42 CFR 2.61 *et seq.*, set forth the procedures and criteria for obtaining the disclosure of confidential substance abuse patient records when the person seeking disclosure does not have patient consent and requires an order authorizing disclosure from a court of competent jurisdiction. Moreover, under 42 CFR 2.66(a), they allow regulatory agencies, such as the Department, to apply for a court order of disclosure as part of an investigation of a licensee/program it has jurisdiction over. Whereas, 42 CFR 2.67 provides the procedure for law enforcement seeking disclosure of records as part of a criminal investigation of employees or agents of a substance abuse treatment program. And 42 CFR 2.64 provides the procedure for all other persons seeking disclosure that have a legally recognized interest in the information being sought.

The Department is a health regulatory agency that investigated Dr. Proctor for possible violations of the Public Health Code relating to improper controlled substance prescribing practices. The Department has jurisdiction over his medical license and his medical practice constitutes a federally assisted drug treatment program. In accordance with 42 CFR 2.66, the Department sought and obtained an order from the Ingham County Circuit Court to obtain the charts of the patients believed to be at issue in its investigation. Dr. Proctor filed a motion to vacate, arguing the circuit court was required to conduct a hearing prior to issuing an order

authorizing disclosure against him. The Ingham County Circuit Court denied his motion, finding that 42 CFR 2.66(b) applied and the only hearing Dr. Proctor was entitled to was one that provided him with an opportunity to seek revocation or amendment of the order after authorization but prior to implementation. The Court of Appeals reversed the circuit court, holding that a “closed judicial hearing” was required:

In this case, the court determined that no hearing was required before issuing the subpoena. However, at this time, the only available authority is that a closed judicial hearing is required before a court may order the release of a substance abuse patient’s confidential medical records. Thus, the court erred when it determined that no hearing was required and when it failed to hold a hearing. [*In re Petition of Attorney General for Subpoenas*, ___ Mich App ___, ___ (2019) (Docket No. 342680); slip op at 10.]

This is wrong. The Court of Appeals misread 42 CFR 2.66(b), which provides as follows:

Notice not required. An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, *upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c).* [Emphasis added.]

In other words, nothing here requires a pre-authorization hearing.

The inaccuracy in the Court of Appeals' holding is the result of its reliance on an inapplicable federal regulation. Unlike 42 CFR 2.64² and 42 CFR 2.65, in which disclosure is sought for civil/noncriminal purpose and the reasoning for the request is unclear or is based on the prosecution of the patient, the regulation at issue here – 42 CFR 2.66 – contains no pre-authorization closed hearing requirement. To the contrary, 42 CFR 2.66 is fact specific and only applicable to law enforcement and regulatory agencies, such as the Department, seeking patient records from a provider who is the subject of the agency's authorized investigation. By its plain language, 42 CFR 2.66 vests the courts with authority to issue ex parte orders of disclosure. The only hearing required is post issuance of the court's disclosure order, and that hearing is limited to a determination of compliance with the regulatory criteria. 42 CFR 2.66(b).

When interpreting federal regulations, rules of statutory construction can provide us with guidance. In *Barnhart v Sigmon Coal Co*, 534 US 438, 450 (2002), the United States Supreme Court stated:

As in all statutory construction cases, we begin with the language of the statute. The first step “is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). The inquiry ceases “if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’” [519 US at 340, 117 S Ct at 843.]

² The provision the Court of Appeals erroneously relied upon in making its decision that a closed hearing was required.

In as much as 42 CFR 2.66's regulatory language is unambiguous and clear, it should be interpreted as written, and the Court of Appeals should have affirmed the circuit court's order authorizing disclosure. *Id.*

B. Federal courts recognize that 42 CFR 2.66 does not require a closed hearing prior to a court issuing an ex parte order for disclosure.

Federal courts that have looked at 42 CFR 2.66 have recognized its limited scope. In fact, even the federal cases cited by the Court of Appeals support the Department and Ingham County Circuit Court's interpretation. In holding that the court must conduct a closed hearing before issuing an order authorizing disclosure of substance abuse treatment records to law enforcement or health regulatory agencies investigating or prosecuting the provider or holder of the records, the Court of Appeals relied upon the decisions rendered in *United States v Shinderman*, 515 F3d 5 (2008), and *Hicks v Talbott Recovery Sys, Inc.*, 196 F3d 1226 (CA 11, 1999). That reliance, however, was misplaced. These cases do not support the decision of the Court of Appeals.

In *Shinderman*, with facts similar to this appeal, federal law enforcement initiated an investigation of Dr. Shinderman for, among other things, improper controlled substance prescribing practices at a methadone treatment clinic. 515 F3d at 9. In accordance with 42 CFR 2.66, the federal law enforcement agency sought and obtained not one but three ex parte orders from the federal magistrate authorizing the disclosure of the requested methadone treatment patient records. *Id.* at 10. In each request, the federal magistrate found law enforcement had

demonstrated good cause. *Id.* On appeal of his criminal conviction, the issue was whether Dr. Sinderman had been given proper notice of the magistrate's ex parte order *after* its issuance. *Id.* at 9. Although the issue of the appropriateness of the magistrate's issuance of the ex parte orders without a closed hearing was not raised by the parties, the federal appellate court reaffirmed that all that is required for disclosure under this provision is that a hearing be provided to a provider or patient after the court's issuance of an ex parte order. *Id.* at 12 (“[Section 2.66(b)]'s text demands that a court issuing a disclosure order afford protected parties with an opportunity to contest the underlying validity and scope of the disclosure—nothing more”).

In *Hicks*, the Texas Board of Medicine sought Dr. Hick's personal substance abuse treatment records as part of a disciplinary investigation initiated against *his* medical license. *Id.* at 1231-1232. Because the Texas Board was seeking Dr. Hick's own personal treatment records to be used against him in a disciplinary proceeding and not those of his patients, the board was required to seek a court order authorizing disclosure in accordance with 42 CFR 2.64, *id.* at 1242 n 32, not 42 CFR 2.66(b). Section 2.64 requires a court to hold a closed hearing to establish compliance with the regulatory criteria prior to issuance of the disclosure order. In contrast, here the Department sought the disclosure order in accordance with 42 CFR 2.66, which contains no closed hearing requirement. Therefore, the *Hicks* decision is not on point and does not support the Court of Appeals' decision to reverse the Ingham County Circuit Court's ex parte order authorizing disclosure.

In sum, based upon the foregoing, neither a clear reading of 42 CFR 2.66 nor the *Hicks* and *Shinderman* decisions provide support for the Court of Appeals' holding that a closed judicial hearing is required before a court may order the release of a substance abuse patient's confidential medical records. In fact, reading such a requirement into the regulations could frustrate or impede a regulatory agency investigation into an overprescribing physician, Dr. Proctor is a case in point as it is possible that some patients would not want the volume of controlled substances being prescribed to them disrupted. The federal regulations do not require a hearing prior to the issuance of the disclosure order.

II. The Department's petition established good cause to support the authorization of the disclosure of the requested substance abuse treatment records, and the failure of the circuit court's ex parte order to specifically use the phrase "good cause" was harmless error.

The decision of the Court of Appeals below elevates form over substance. The petition filed by the Department established good cause under federal regulatory law to allow a disclosure of the information sought as a part of the Department's licensing investigation. The circuit court noted that the petition met the proper legal standard, and the fact that it did not expressly state the phrase "good cause" does not affect the legal validity of the order. The federal case law supports this conclusion as well. The order was proper.

A. The Department’s petition and circuit court order satisfy the “good cause” requirement.

The Court of Appeals erred when it found that the Ingham County Circuit Court’s order failed to make a finding of good cause, because it did not weigh the “good cause” mandatory factors before authorizing disclosure, and did not provide appropriate protections to safeguard the patient records. *In re Petition of Attorney General for Subpoenas*, ___ Mich App at ___; slip op at 9.

The requirements for an order authorizing disclosure are set forth in 42 CFR § 2.66(c):

(c) Requirements for order. An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs d and e of § 2.64.

42 CFR § 2.64(d) and (e) provide as follows:

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

- (1) Other ways of obtaining the information are not available or would not be effective; and
- (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:

- (1) Limit disclosure to those parts of the patient’s record which are essential to fulfill the objective of the order;
- (2) Limit disclosure to those persons whose need for information is the basis for the order; and
- (3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient’s record has been ordered.

As evidenced by a review of the Department's petition and the Ingham County Circuit Court's disclosure order, these criteria were met. Specifically, the court's order refers to the Department's petition as the basis for issuance of the order. The petition, in turn, contained the following key information, which included the fact of the licensing investigation against Dr. Proctor and the fact that the Department was only seeking the documents necessary to determine whether he was engaged in abusive prescription practices:

- The Department of Licensing & Regulatory Affairs is a health oversight agency and pursuant to Michigan Board of Medicine authorization initiated an investigation of Dr. Proctor's practice of medicine.
- The focus of the Department's investigation centered on the treatment rendered to, and the controlled substance prescribing practices for, eleven identified patients of Dr. Proctor.
- The purpose for requesting disclosure of the eleven patient charts was to determine Dr. Proctor's compliance with appropriate prescribing practices, and the requested patient charts were the most effective means to determine compliance.
- The Department was only seeking records that were necessary for the investigation (i.e., 11 identified patient records, not all of Dr. Proctor's patient records) and all unique patient identifiers would be deleted from disclosure.
- The public interest in investigating errant health practices that involved an abuse of prescribing controlled substances outweighed any potential injury to the patients, especially considering unique patient identifiers were removed from disclosure. (Appellant's Attachment 1.)

The Ingham County Circuit Court's order authorizing disclosure reiterated the above referenced information contained in the Department's petition and further ordered:

- The Department to limit the subpoenas to its investigation of the treatment and controlled substance prescribing practices of Dr. Proctor in regard to the eleven patients identified.
- The preclusion of the use of the patient charts being produced for prosecution of the patients themselves.
- The blocking, or deleting, of all unique patient identifiers from the patient charts prior to disclosure.
- The limitation of disclosure of the patient charts to that what was necessary to comply with the court order and to those persons having a need for the information in relation to the investigation.³
- An opportunity for a provider, patient, or record holder to seek revocation or modification of the order. (Appellant's Attachment 2.)

In finding that the Ingham County Circuit Court's orders were "devoid of any determination of good cause ...[and] did not weigh the mandatory factors of whether injury would result to the patient, physician-patient relationship, and treatment services before authorizing disclosure," slip op, p 9, the Court of Appeals failed to appreciate that such a determination and weighing was included in the circuit court's order as it incorporated the contents of the Department's petition and did not require further discussion on the record. In particular, the Department advised the circuit court that it was investigating Dr. Proctor for potentially abusive controlled substance prescribing practices, which if true posed a risk of injury to the patients as well as to the public's health, safety, and welfare. The likelihood of injury to the patient, the physician-patient relationship and treatment services was negligible given the Department was only seeking copies of the patient charts, all

³ MCL 333.16238 provides that all information obtained in an investigation is confidential and not subject to public disclosure. All Department staff, including the Michigan Office of Administrative Hearings & Rules, and board members are bound by this provision.

patient identifying information was being deleted from disclosure, and the Public Health Code protects all information obtained during an investigation from disclosure to the public by the Freedom of Information Act, search warrant or subpoena. MCL 333.16238; *Meier v Awaad*, 299 Mich App 655, 664 (2013); *In re Investigation of Ruth Lieberman*, 250 Mich App 381, 388 (2002); *Messenger v Consumer Industry Services*, 238 Mich App 524, 531 (1999). Thus, it is clear that the Department did not have other ways of obtaining the information and that the public need outweighed the potential injury to the patient, the relationship with Dr. Proctor, and the treatment services. The prescriptions themselves exposed the patients to possible risk.

Given that only copies of patient records were being requested, as opposed to original files, there should have been no disruption to the patient-physician relationship or treatment services unless an investigation determined Dr. Proctor was practicing illegally or below the standard of care. And if that turned out to be the case, then Dr. Proctor's patients were more likely to suffer injury than if the Department was not able to thoroughly investigate the conduct. The Court of Appeals erred in finding that the circuit court failed to weigh the mandatory factors for disclosure. The petition was supported by good cause under federal law under 42 CFR § 2.66(c) to order the disclosure.

B. Omission of the words “good cause” from the Department’s petition and the circuit court’s order was harmless if error and did not warrant reversal.

In denying Dr. Proctor’s motion to vacate, the circuit court specifically stated on the record “that the requirements of 2.64(d)(1) and (2) (the provisions delineating the good cause criteria) have been met.” (Appellant’s Attachments 4, 5.) This ruling was sufficient to explain that the order met the standard of federal regulatory law. The Court of Appeals failed to account for this fact.

Moreover, any possible error is harmless in any event. When the error does not require reversal and is not inconsistent with substantial justice, it is harmless and should not be modified by a reviewing court. MCR 2.613(A). Although the Department’s petition and the circuit court’s order did not use the words “good cause,” if such omission was error, it was harmless and did not warrant reversal because, as discussed, information pled in the petition was enough for the circuit court to make a finding of good cause. The Ingham County Circuit Court’s ability to appropriately weigh the factors pled by the Department in its petition was not diminished simply because the court did not have Department staff personally testify to those very same facts in a closed hearing.

C. Federal case law relied upon by the Court of Appeals confirms the circuit court satisfied the “good cause” requirement.

Rather than support the decision below, the federal cases on which the Court of Appeals relied only support the circuit court’s decision here that there was good cause to issue the ex parte order.

In *Shinderman*, the U.S. Court of Appeals for the First Circuit held that the lower court properly found good cause to issue ex parte orders allowing the disclosure of Medicaid records, methadone treatment records, and other records seized by execution of a search warrant to the federal law enforcement agency criminally investigating Shinderman for illegal controlled substance prescribing practices. 515 F3d at 10. The same federal regulatory provision was at issue there, 42 CFR § 2.66(c), and the court found good cause for the same kinds of reasons that were present here.

Similarly, in *In re The August*, the U.S. District Court for the Southern District of Indiana found good cause existed to allow a grand jury to subpoena the substance abuse treatment records of patients of a psychotherapist being investigated for billing fraud. *In re The August, 1993 Regular Grand Jury (Hospital Subpoena)*, 854 F Supp 1380, 1385–1387 (1994). The *August* court specifically found that the psychotherapist’s patient records were the most effective source of information for investigating the psychotherapist’s billing practices, and it did not matter if less effective alternative sources were available. *Id.* at 1386. The same is true here.

In as much as the federal courts have already determined that these referenced factors satisfy the “good cause” requirement, there was no need for the Ingham County Circuit Court to hold a hearing on them. The Court of Appeals should have affirmed the circuit court’s order.

III. The court's order providing for the disclosure of confidential communications was proper.

The Department argued, and the circuit court agreed, that to the extent any patient confidential communications were disclosed when obtaining copies of Dr. Proctor's patient charts, such disclosure was necessary to protect against the existing threat to life or of serious bodily injury caused by the national opioid epidemic. Namely, abusive controlled substance prescribing practices allow large numbers of controlled substances to be disseminated to the general public illegally. These actions were supported by the federal regulations.

Under federal law, patient records may contain confidential communications between the patient and provider, which is distinguishable from objective data consisting of physician diagnostic impressions, treatment recommendations, referrals, and diagnostic tests. See *In re The August*, 854 F Supp at 1384. For example, confidential communications could include statements made by a patient detailing trauma that may have contributed to the alcohol or substance abuse. Confidential communications contained within substance treatment records are given a heightened level of protection and are disclosable only if good cause has been shown and one of the criteria specified in 42 CFR § 2.63(a) have been met. *Id.* 42 CFR 2.63(a) provides that a court may order disclosure of confidential communications made by a patient to a federally assisted substance abuse treatment program in the course of treatment only if:

- (1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

The Department's purpose in seeking to obtain disclosure of the patient confidential communications was based in its effort to investigate potentially abusive prescribing practices to protect against an existing threat to life or of serious bodily injury caused by misuse, diversion or illegally sold controlled substances; it complies with 42 CFR 2.63(a)(1). These are significant threats to the community's safety generally, and to these patients in particular. Thus, the circuit court's order providing for disclosure of patient confidential communications within the Dr. Proctor's eleven requested patient charts was proper.

However, the Court of Appeals disagreed, stating that the opioid crisis is too diffuse to warrant the circuit court decision:

Here, the court determined that redaction was not required because the national opioid epidemic was such a threat. A national epidemic does not fall within the same types or kinds of threats to life as child abuse and neglect or threats against third parties, which are personal threats of harm *by the patient*. A national epidemic is neither personal nor will it be found in a patient communication. [*In re Petition of Attorney General for Subpoenas*, ___ Mich App ___, ___ (2019); slip at 11. (emphasis in original).]

In so holding, the Court of Appeals relied upon the statutory analysis from this Court in *Neal v Wilkes*, 470 Mich 661,669 (2004).

This Court's analysis in *Neal*, however, actually lends support for the Department's position that the confidential communication exemption found within 42 CFR 2.63(a)(1) is not just limited to threats of loss of life or serious bodily *caused* by the patient. In *Neal*, this Court overruled prior caselaw interpreting the Recreational Use Land Act and held that application of the act should not be limited when nothing in the statute indicates that it should be. 470 Mich at 667. Likewise, there is nothing in 42 CFR 2.63(a)(1) that limits disclosure of confidential communications to only those situations where the threats to life or of serious bodily injury are made against third parties by the patient. It applies equally where the *patients themselves* are threatened with loss of life or serious bodily injury.

Moreover, no other court has interpreted this provision in such a restrictive way. The intent of the federal confidentiality provisions is to encourage patients to seek substance abuse treatment without fear that their privacy will be compromised or they will be subjected to criminal prosecution. *United States v Hughes*, 95 F Supp 2d 49, 57 (2000). The intent of the legislation is not to shield errant health professionals. The circuit court clearly understood the intent and purpose of the federal confidentiality regulations and found that the Department's petition and order authorizing disclosure complied with these provisions. Thus, the Court of Appeals erred in holding that disclosure of confidential communications contained within the requested patient charts was not justified and the circuit court's order should have been affirmed. These are significant issues of law that merits this Court's review.

CONCLUSION AND RELIEF REQUESTED

The Department respectfully requests this Court grant its application for leave to appeal and find the Court of Appeals erred in holding that: (1) a court must hold a closed hearing before issuing an order authorizing disclosure of substance abuse treatment records to law enforcement and/or health regulatory agencies investigating or prosecuting the substance abuse treatment provider; (2) the Ingham County Circuit Court's order authorizing disclosure warranted reversal for a failure to make a specific finding of good cause; and (3) the national opioid epidemic did not justify the disclosure of confidential communications contained within the protected patient records. Leaving the Court of Appeals published opinion as written conflicts with the plain language of 42 CFR 2.66, is inconsistent with the case law relied upon by the Court of Appeals, and will result in material injustice.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

/s/Michele M. Wagner-Gutkowski
Michele M. Wagner-Gutkowski
(P44654)
Assistant Attorney General
Attorneys for Plaintiff-Appellant
Licensing and Regulation Division
P.O. Box 30758
Lansing, MI 48909
517-335-7569

Dated: May 31, 2019

LF: 2018-0206048-C/In Re: Proctor, Vernon E. M.D., (MI S Ct)/Application for Leave to Appeal – 2019-05-31

Appellant's Attachment 1

EXHIBIT 1

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

In the Matter of the Petition of the
Attorney General for Subpoenas

File No. 17-21-PZ
Hon. Joyce Draganchuk

PETITION FOR SUBPOENAS

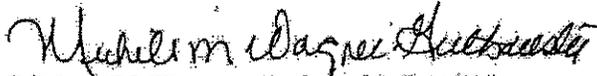
Petitioner, Michigan Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing, by its counsel, Bill Schuette, Attorney General for the State of Michigan, through Assistant Attorneys General Michele M. Wagner-Gutkowski and M. Catherine Waskiewicz, pursuant to section 16235 of the Public Health Code, MCL 333.16235, and 42 CFR 2.66, makes application to this Court for subpoenas, stating as follows:

1. The Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing (Department), as authorized by the Public Health Code, MCL 333.1101 *et seq.*, has initiated an investigation of a licensee of the Department.
2. Section 16235 of the Public Health Code authorizes the circuit court to issue investigative subpoenas upon application by the Attorney General.
3. The Department is a regulatory health oversight agency and pursuant to 45 CFR 164.512(d) and 42 CFR 2.66(a)(1) seeks potential protected health information for the purpose of determining compliance with the regulatory requirements within the Public Health Code.
4. The Department is a regulatory agency with jurisdiction over the licensee, in accordance with 42 CFR 2.66, and the limited disclosure of the information sought in this petition is the most effective means to investigate the matter at hand. Furthermore, the Department is only seeking the records that are necessary to the investigation, and all unique identifiers may be deleted from the records of the licensee's patients. Therefore, the public interest and the need for disclosure outweigh any potential injury.
5. The Department seeks an Order for Subpoenas without notice, in accordance with 42 CFR 2.66(b), since no patient identifiers are sought.
6. The Department is conducting an investigation into the licensee's treatment of patients and/or controlled substance prescribing and requests certain records described in the attached Exhibit A.

FILED

WHEREFORE, the Department prays that this Honorable Court, in accordance with section 16235 of the Public Health Code, issue an order authorizing subpoenas to compel the production of records as described in Exhibit A, subject only to further order of this Court.

BILL SCHUETTE
Attorney General



Michele M. Wagner-Gutkowski (P44654)

M. Catherine Waskiewicz (P73340)

Assistant Attorney General

Licensing & Regulation Division

P.O. Box 30758

Lansing, Michigan 48909

Telephone: (517) 373-1146

Dated: December 12, 2017

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EXHIBIT A

In compliance with 42 CFR 2.66(a)(2), Petitioner is providing fictitious names of patients (i.e., "John Doe" and "Jane Doe") to protect their confidentiality. Upon receipt of an executed Order from this Court, Petitioner will provide patient identifying information to the licensee for the purpose of complying with the subpoenas.

Case Information: Bureau of Professional Licensing v. Vernon Proctor M.D.

Complaint No. 142281

Records Requested: All medical records, x-ray films and reports, billing records, incident reports, emergency room records, documentation, treatment records, pathology and laboratory reports pertaining to the following patient[s]:

John Doe 1 while under the care and treatment of the licensee.

Jane Doe 2 while under the care and treatment of the licensee.

John Doe 3 while under the care and treatment of the licensee.

Jane Doe 4 while under the care and treatment of the licensee.

Jane Doe 5 while under the care and treatment of the licensee.

John Doe 6 while under the care and treatment of the licensee.

John Doe 7 while under the care and treatment of the licensee.

John Doe 8 while under the care and treatment of the licensee.

Jane Doe 9 while under the care and treatment of the licensee.

John Doe 10 while under the care and treatment of the licensee.

John Doe 11 while under the care and treatment of the licensee.

AND/OR

All employment records including any medical (non-substance abuse) records pertaining to Vernon Proctor M.D.

Appellant's Attachment 2

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

In the Matter of the Petition of the
Attorney General for Subpoenas

File No. 17-21-PZ
Hon. Joyce Draganchuk

ORDER AUTHORIZING SUBPOENAS

At a session of this Court held in the County of Ingham,
State of Michigan, this 13th day of December, 2017.

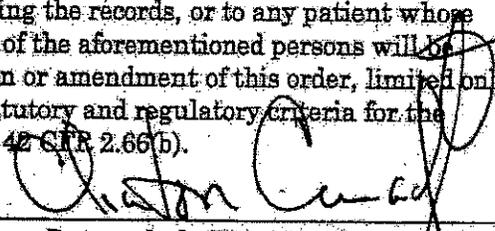
PRESENT: Hon. Joyce Draganchuk, Circuit Judge

WHEREAS Petitioner, Michigan Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing, by its counsel, Bill Schuette, Attorney General for the State of Michigan, through Assistant Attorneys General Michele M. Wagner-Gufkowiak and M. Catherine Waskiewicz, pursuant to section 16235 of the Public Health Code, MCL 333.16235, and 42 CFR 2.66, has made application to this Court for issuance of subpoenas, and this Court being duly advised in the premises:

IT IS ORDERED that subpoenas be issued to compel the production of certain records described in Exhibit A, at such times and places as designated by the Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing, a health oversight agency pursuant to 45 CFR 164.512(d) and 42 CFR 2.66(a)(1), subject only to further order of this Court.

IT IS ORDERED that such subpoenas be in accordance with Petitioner's application and serve only to investigate the licensee's treatment of patients and/or controlled substance prescribing practices, and the documents produced under the subpoenas shall not be used for the purposes of investigating or prosecuting the patients themselves. Furthermore all unique identifiers of patients shall be deleted or blocked out from all documents prior to being disclosed to the public. Disclosure shall be limited to only that which is necessary for fulfillment of this order and shall be limited to those persons whose need for the information is related to the investigation of the licensee or any following administrative licensing action.

IT IS ORDERED that no express notice is required to the program (or any of its employees or agents), the person holding the records, or to any patient whose records are to be disclosed; however, any of the aforementioned persons will be afforded an opportunity to seek revocation or amendment of this order, limited only to the presentation of evidence on the statutory and regulatory criteria for the issuance of this order only as set forth in 42 CFR 2.66(b).


f. Joyce Draganchuk (P39417), Circuit Judge

Appellant's Attachment 3

EXHIBIT 3



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
BUREAU OF PROFESSIONAL LICENSING

SHELLY EDGERTON
DIRECTOR

December 20, 2017

VERNON PROCTOR M.D.
ATTN: RECORDS
740 7TH ST
BALDWIN, MI 48304

RE: File No. 142281

To Whom it May Concern:

Enclosed is a subpoena authorized by the Ingham County Circuit Court pursuant to a petition filed by Michigan's Department of Attorney General. Please complete the acknowledgment of service on the original subpoena (labeled "RETURN") and return to our office within seven days.

It is not necessary to appear to produce the documents as ordered. Please submit the requested documents by mailing certified copies to the Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing, Investigations & Inspections Division, Attn: Dion-Anthony C., P.O. Box 30670, Lansing, MI 48909.

If it becomes necessary to send the subpoenaed material to us by express mail, please use our delivery address at the Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing, Investigations & Inspections Division, Attn: Dion-Anthony C., 611 W. Ottawa Street, 3rd Floor, Lansing, MI 48933. Please return the completed "Certification" (enclosed with subpoena) with the documents and allow time for mailing to ensure that the materials will arrive prior to the date specified on the subpoena.

Submission of certified copies of subpoenaed materials is legally acceptable in lieu of production of the original documents.

Please direct all questions to Dion-Anthony C. at (517) 241-9207.

Thank you for your cooperation.

Sincerely,

Dion-Anthony Culpepper Departmental Technician
Department of Licensing & Regulatory Affairs
Bureau of Professional Licensing
Investigation & Inspection Division

Original - Return
1st copy - Witness

Approved, SCAO

STATE OF MICHIGAN 30 th JUDICIAL CIRCUIT	SUBPOENA Order to Appear and/or Produce	CASE NO. 17-21-PZ
Court address: 313 W. Kalamazoo St., Lansing, MI 48933		Court telephone no. (517) 483-6500
Police Report No. (if applicable):		
Plaintiff(s)/Petitioner(s) <input type="checkbox"/> People of the State of Michigan <input checked="" type="checkbox"/> In the Matter of the Petition of the Attorney General for Subpoenas	Y	Defendant(s)/Respondent(s)
<input checked="" type="checkbox"/> Civil <input type="checkbox"/> Criminal		Charge
<input type="checkbox"/> Probate In the matter of _____		

In the Name of the People of the State of Michigan. TO: VERNON PROCTOR M.D.
ATTN: RECORDS
740 7TH ST
BALDWIN, MI 49304

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

YOU ARE ORDERED TO:

1. Appear personally at the time and place stated below. You may be required to appear from time to time and day to day until excused.

Dept. of Licensing and Regulatory Affairs, Attention: Dion-Anthony C., P.O. Box 30670,
Lansing, MI 48909

The court address above Other

Day: **FRIDAY** Date: _____ Time: _____

- 2. Testify at trial / examination / hearing.
- 3. Produce/permit inspection or copying of the following items: All medical records, x-ray films and reports, billing records, incident reports, emergency room records, documentation, treatment records, pathology and laboratory reports pertaining to patient(s) identified in Exhibit A encompassing treatment dates: June 1, 2015 to June 1, 2016 while under the care and treatment of VERNON PROCTOR M.D. AND/OR all employment records including any medical (non-substance abuse) records pertaining to VERNON PROCTOR M.D. The protected health information shall be disclosed to the Department of Licensing and Regulatory Affairs, which is a health oversight agency pursuant to 45 CFR 164.512(d)-(e).
- 4. Testify as to your assets, and bring with you the items listed in line 3 above.
- 5. Testify at deposition.
- 6. Abide by the attached prohibition against transferring or disposing of property. (MCL 600.6104(2), 600.6116, or 600.6119.)
In lieu of personally appearing with the records, please mail legible copies of the documents required in para. 3
- 7. Other: above to the Dept. of Licensing and Regulatory Affairs at the address in para. 1 above to arrive on or before the date specified in para. 1 above. Any questions regarding this subpoena should be directed to Dion-Anthony C. at 517-241-9207.

8.

Person requesting subpoena Department of Attorney General	Telephone no. (517) 373-1146
Address 525 West Ottawa Street	
City Lansing	State Zip MI 48933



NOTE: If requesting a debtor's examination under MCL 600.6110, or an injunction under item 5, 1 this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination on the other side of this form must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR TO APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.

Date: December 19, 2017 Judge/Clerk/Attorney: Michelle M. Wagner Bar no. 944687

Appellant's Attachment 4

STATE OF MICHIGAN
30TH JUDICIAL CIRCUIT COURT INGHAM COUNTY

IN THE MATTER OF THE PETITION OF
THE ATTORNEY GENERAL FOR SUBPOENAS,

Petitioner-Appellee,

vs

File No. 17-21-PZ

DR. VERNON PROCTOR,

Respondent-Appellant.

MOTION TO VACATE ORDER

BEFORE JOYCE DRAGANCHUK, CIRCUIT COURT JUDGE

Lansing, Michigan - Wednesday, FEBRUARY 14, 2018

APPEARANCES:

For the Petitioner:

Michele M. Wagner-Gutowski (P44654)
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LICENSING
525 West Ottawa, 3rd Floor Williams Bldg.
P.O. Box 30758
Lansing, Michigan 48909
(517) 373-1146

For the Respondent:

J. Nicholas Bostic-P
909 N. Washington Avenue
Lansing, Michigan 48906
(517) 706-0132

Recorded By:

Susan Melton, CER 7548
517-483-6500 Ext 6703

EXHIBIT 4

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<u>WITNESSES:</u>	<u>PAGE</u>
<u>EXHIBITS:</u>	<u>ADMITTED</u>

Lansing, Michigan

Wednesday, February 14, 2018

3:23:37 pm

THE COURT: This is In the Matter of the Petition of the Attorney General for Subpoenas, docket number 17-21-PZ. And this is the time set for hearing on a Motion to Vacate the Order Authorizing a Subpoena dated December 13, 2017. And could I get appearances for the record, please?

MR. BOSTIC: Good afternoon, your Honor. Nick Bostic on behalf of the respondent-movant, Dr. Proctor.

MS. WAGNER-GUTKOWSKI: Good afternoon, your Honor. Michelle Wagner-Gutkowski, Assistant Attorney General on behalf of the Bureau of Professional Licensing. Thank you.

THE COURT: Thank you. Mr. Bostic, you can go ahead.

MR. BOSTIC: Thank you. Obviously, your Honor, at this stage, we have a very limited amount of information for obvious reasons and it's briefed, they responded, I did a reply. I'm gonna rely primarily on what's been filed. I think this is--, the bulk of this is a legal issue. But, a couple of concerns that I want to focus on; the order, well, first of all the petition, I don't think the petition is sufficient to support the order, any order under this federal law because it doesn't allege in the petition that other sources are not available.

I mean, they say that as a conclusion. But, have they approached the patients for consent? Can the patients testify to whatever they need? In other words, it appears to me that they are asking the Court to issue, well, to authorize the issuance of the subpoenas because internally, the Department has authorized an investigation. And I would suggest that that's woefully inadequate under the heightened Privacy Protections under federal law and the federal regulations.

Just by way of example, they could allege that for a particular patient, John Doe A, the complaint that came into the department alleges that he used a dirty hypodermic needle. Now, I'm, I don't know what they want. They haven't said anything. But, and I don't know that they have to be absolutely that specific, I'm just using that by way of an example as to their duty, I think, under that federal law to give the Court some basis for making the determinations that are required in the statute and in the regulations.

And then when we get to the order, the order is limited to use of the records by "the Department". I think the federal law and the regulations give the impressions that it should be limited to particular persons. And I don't mean necessarily by name. But, for example, you know, the investigator assigned to the case, the assistant attorney general assigned to the case, obviously those people can come

and go. But, to say the department really is a, especially when you're talking about the Department of Licensing and Regulatory Affairs, that's a very broad-ranging group of people. The law also requires a distinction between the communications from the patient, and there are three specific things that are briefed, that must be established before those communications can be released. So, if you were to order that this remains then, I'm sort of left in a quandary as to whether I would instruct the Dr. to redact all communications as opposed to the files. But, then you redact communications from the patient, which would probably defeat their purpose. I, I don't know what they want. But, that's my point.

Now, I, in looking at whether 2.--, regulation 2.64 (b) notice requirement applies; I'm not willing to concede that prior notice to the patients isn't required. But, I, but I will concede that because 2.66 contains its own notice provision that probably that that's the one that we have to work with. But, and I see their point about 2.64 applying to civil litigants, other types of hearings where none of the players are really involved in the litigation and that would make sense. But the plain language of 2.64, civil proceedings. They're administrative proceedings. So, I'll just have to leave that argument there for the Court. But, I do see their point. But, it is Dr. Proctor's position that

EXHIBIT 4

in all of these Court ordered releases, 2.63 regulations about the communications applies.

So then, they read my motion as requiring a hearing and I can see how they read that into what I wrote. And I don't think we're talking about cross-examination or any type of a formal hearing. And it appears to me from some of the cases that a lot of this was in-camera. Now whether anybody was participating in-camera or not, I don't know. But, if they were to give you the specific reasons that they needed the records so that you could enter into that balancing test that's required; whether you had us participate or not, you could then write a decision with findings and then we would, you know, we would take it from there so to speak.

So, I just, the, it appears to me that--, well, and one last point, they put in their response the current status of Dr. Proctor's license and if they want the Court to make some inferences from the fact that he's been disciplined by them, we would want to enter into evidence for the Court to consider, either in-camera or in open court or however you thought appropriate, a lot of subjective things about that hearing process and our, Dr. Proctor's position that the ultimate outcome of that process is something the Department is very unhappy with. And so, this investigation comes right on the heels of the Board of Medicine and the Board of Pharmacy taking their actions. So, as a Court engages in that

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balancing test, is that appropriate information to factor into the departments need for the records versus the record holder's interest and the patient's interest. I'll admit, I don't see where that's come up in any of the case law. So, but I do think that the balancing test is mandatory. The findings are clearly mandatory and this particular order, I don't think satisfies the federal statute or the regulations. So, unless the Court has any questions, I'll, I'll rely on the submissions.

THE COURT: I do not. Thank you. Ms. Wagner-Gutkowski?

MS. WAGNER-GUTKOWSKI: Thank your Honor. I, too, will be brief. I will rely mostly on our responsive pleading to the Mr. Bostic's motion. I would just note first that the provisions that are at issue, the federal provisions at issue were meant to protect a patient from being criminally prosecuted for being able to use those treatment records against them in a criminal prosecution. It's not meant to shield errant health professional or programs from disciplinary action or (inaudible) law enforcement activities.

And that's why when you look at the provisions, the CFR provisions are applicable. It's divided into three categories; the 2.64 for the civil litigants; the 2.67 for law enforcement and then the 2.66, which is also well, law

enforcement engaging in criminal investigation and then 2.66, which is law enforcement and regulatory agencies that have jurisdiction with matter effectuating what they're responsible for doing.

We believe that our petition meets a criteria within the code. It seems that Mr.--, Dr. Proctor and Mr. Bostic seem to have several issues one of the notice requirement, when-, and the case law is clear, when the statute is clear on its face, there's no further, there is no further inspection into that. And it's clear that the advance notice is not required. What is required is that at, for an opportunity whoever the order is served upon, it says upon implementation. Whoever it's served upon is provided an opportunity to seek revocation or amendment of that courts order provided determining whether the statutory criteria has been met. It's limited. ~~It's not like a balancing test as Mr. Bostic articulated.~~

And so, you're provided an opportunity, which Mr. Bostic has been provided an opportunity. Sometimes, and many times in different cases not related to this, but the Department will serve a subpoena, personally serve at a location they'll personally serve the subpoena or a search warrant and make copies of the records there. This process affords an opportunity for somebody being served at that to oppose that.

So, we would, with regard to that--, the second part is with regard to Mr. Bostic talks about there's a distinction between confidential communications and the records itself and the statute itself talks about that. We didn't have an opportunity to respond to Mr. Bostic's reply. He cites two cases, the Hughes case and the Cook case. Both of them we assert are inapplicable to these proceedings. One involves criminal prosecution, the Hughes case involves criminal prosecution against a patient and is talking about 2.67.

And the Cook County case is involving a civil litigation, it's a qui tam and it's involving 2.64. So, we argue that they're inapplicable to proceedings here. Which is, the case that is on point and if I may approach, and I've provided a copy to Mr. Bostic, is that en re the August case and that talks about the distinction between confidential communications and then the other information and then the patient records. So, our position would be when you look at the provision of the code, it talks about confidential communications and that is what the patient says to the treatment provider. All the other information in the patient chart is what they call objective data, data.

That's what the department is concerned about. So, let me back up, in the petition, we assert there were, the Department, the health oversight agency, we indicate that

there's an invest-, we have jurisdiction over Dr. Proctor, an investigation has been authorized into his prescribing practices. Many talking about the prior disciplinary action just on that base alone. There is an opioid, we all know there's an opioid epidemic that's been promulgated down from the White House to our Governor. Ninety-one people die in America a day from a drug overdose. So, it's a serious health concern in this country. We're, as a department is investigating that. We meet the criteria for obtaining that information because we're only concerned with, we're looking at Dr. Proctor's prescribing practices, his habits. So, no other information would be relevant. His patient records are the most relevant and most effective means of determining that. So, we've, I believe, satisfied the criteria with regard to the petition.

As far as, I'm sorry-

THE COURT: Yeah, because I need you talk about 2.63.

MS. WAGNER-GUTKOWSKI: The confidential communication?

THE COURT: Yes.

MS. WAGNER-GUTKOWSKI: Okay. And that is fair enough is that we believe that when we look at that criteria, that we qualify because of the opioid epidemic, the criteria number one and that is but even if this tribunal--, or this

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Court finds that we don't need, which is a disclosure is necessary to protect against existing threat to life of serious bodily injury, we believe that we fall under that given the opioid epidemic and that's what we're investigating. But even so, if you believe that that, the Department and that case there talks about that distinction between the confidential communications and the other data in the patient records. In that case they found that the government didn't meet burden but they were investigating the felony firearm kind of, kind of charge. So, it wasn't relevant to they didn't meet the, felt that it met the criteria.

We believe that the opioid epidemic puts us within category number one. If you find that we don't, and we still think the only point that would be redacted is anything that the patient had said to the treatment provider. And we think that that confidential communication is meant to protect patients from, there's no need for us to be concerned that the reason that they have an addiction, what their history was, what their personal history for that. What we're looking at is overall what the treatment, the record. So what the objective data would be what was the evaluation; what's results Dr. Proctors evaluation, his assessment, his diagnosis and his treatment plan. What the patient presenting problem is is not really germane to the issue per

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se. It's looking to see how he responded with the objective data that he had, the diagnostic tools that he employed, whether or not to determine whether he's prescribing within the standard of care.

THE COURT: So, if you were to, if I were to protect the patient confidential communications being just what you described, things the patient says to Dr. Proctor, what would we have to do? Issue a new order that authorizes the subpoenas with redaction?

MS. WAGNER-GUTKOWSKI: We could prepare one for the Court, yes.

THE COURT: Okay.

MS. WAGNER-GUTKOWSKI: Yup, or I could, I prepared a generic order about denying the Motion to Vacate but we could treat that as well.

THE COURT: Okay.

MS. WAGNER-GUTKOWSKI: But, but we believe, like I said, we believe that we qualify under number one. But if not, we don't believe that the objective, the overall the rest of the information that would be in the patient chart would be, would be confidential, not considered to be confidential communication. And that provision specifically articulates it's the patient's communication to the provider, not the provider's thoughts, diagnostic testing employed, differential diagnosis, that type of thing.

THE COURT: Mm-hmm. That was my only question.

MS. WAGNER-GUTKOWSKI: Okay. And then we believe that, as I articulated below, when you look through the criteria into 64, what the petition's supposed to entail and what the order is supposed to entail, we believe we captured those requirements in our, in our standard petition and in our order that says those criteria as I laid out in our brief and I won't belabor that point.

THE COURT: Okay. Thank you.

MS. WAGNER-GUTKOWSKI: Thank you.

THE COURT: Mr. Bostic, do you want rebuttal time?

MR. BOSTIC: Please. I do take issue with the concept that the statute in these regulations the purpose was to protect patients from prosecution. I think we cited case law and the preamble to the statute obviously says the same thing. The purpose of the law is to encourage treatment and the argument that because of the opioid crisis we therefore should be allowed to investigate any doctors prescribing practices for any reason is, is the reverse of reality. The opioid crisis is the legislative purpose that's being fostered.

Now obviously, I can't stand here and tell the Court what these 11 patients are being treated for. The statute doesn't allow me to do that. The point--, and that's I think why it's written the way it is. It's the

petitioner's burden to convince the Court that these records are needed to overcome and they overcome, I'm sorry-, and that need overcomes the legislative purpose. And one other thing that I take issue with is that whoever it is, whoever it is served upon is the person that has to be given the opportunity to challenge it and I think that's incorrect. I think the statute and the regulations say that either the patient, the program or the record holder must be given an opportunity to challenge it.

And the last thing I would want to point out, your Honor, in rebuttal is that if we redact what the patient told Dr. Proctor, they're going to try to make a determination as to his prescribing practices without knowing the patients history as given. So, I think they have a lot of work to do. I'm not saying they can't get there. But, I think they have a lot of work to do to convince you that they need to get into these addiction treatment records. Thank you.

THE COURT: Okay. Thank you. Okay. First of all, I want to affirm, cause I'm not clear if it's still contested completely or not, that the applicable section of the regulations is 2.66. 2.66 applies to administrative investigations by an administrative or regulatory agency and the Department and the Board of Medicine have licensing and regulatory authority that includes investigating potential violations of the public health code.

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That is the more specific provision, more specific than 2.64 which applies to "any person having a legally recognized interest who's applying for an order authorizing disclosure of patient records for purposes other than criminal investigations or prosecution." 2.66 is clearly and unambiguously the appropriate section. There is an issue about notice under 2.66. Dr. Proctor does not get notice under that section of the Departments application. What he gets is an opportunity to seek revocation or amendment of the order before it is implemented.

And in that regard, the regulation says that not that notice is required but it specifically says "notice is not required although no expressed notice is required to the program, to the person holding the records or to any patient whose records are be, are to be disclosed upon implementation of an order so granted. Any of the above persons must be afforded an opportunity to seek revocation or amendment of that order."

Dr. Proctor is any of those persons. He has been served with it and he has been afforded an opportunity to do exactly what the regulation requires. There are also requirements not only for the procurement, well, there's requirements for the content of the petition as well as the content of the order. And for those 2.66 makes reference to 2.64 but subparagraphs d and e only. Subparagraph d refers

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to the criteria for entry of an order. It is clear in its requirements. ~~It does not mention a hearing. It does mention anything other than the content of the~~, what would be the content of the petition, which is it has to establish that other ways of obtaining the information are not available or would not be effective and that the public interest outweighs the potential injury to the patient, client or the patient, the patient-physician relationship, et cetera. ~~The petition does state that.~~ It does state in paragraph 4 that this is a limited disclosure, that it is the most effective means to investigate and that the department is only seeking the records that are necessary to the investigation, that unique identifiers may be deleted and are deleted and that the public interest outweighs the, any potential injury.

So, I believe that the requirements of 2.64 (d) (1,2) have been met. The content of the order and again, it does not say that the Court has to have any kind of a hearing or that the Court has to make any kind of findings of fact. But, it does state that the content of the order itself must "limit disclosure to only those parts of the records which are essential to fulfill the objective of the order." It does that.

In the order authorizing subpoenas, the third full paragraph, the second "it is ordered paragraph", it also

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requires that "disclosure be limited to those persons whose need for the information is the basis for the order" and it does do that.

There's no requirement in the regulations that the specific people be listed but that requirement is covered in the order. And then the third requirement under subsection (E) includes such "other measures as are necessary to limit disclosure for protection as, as appropriate." And that is also contained in the third paragraph of the order authorizing subpoenas.

There is also a requirement is 2.63 with regard to confidential communications that applies to a Court order under these regulations. So, I read that as meaning that it would apply to any of the sections. And that does prohibit disclosure of confidential communications made by a patient "unless", and one of the conditions is "the disclosure is necessary to protect against an existing threat to life or of serious bodily injury."

And it, it's not more specific than that. The allegations of abusive prescribing of opioids definitely represents a threat to life or of serious bodily injury given the opioid crisis and the number of people that die of overdose every single day. That is clearly the basis of the Departments investigation. And any action that they take in that they are investigating Dr. Proctor for the abuse of

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prescription or prescription--, prescribing abuse of opioids and that fits to me under 2.63 (a) (1).

So, in that the confidential communications made by a patient may be disclosed to protect against that threat to life or serious bodily injury. So, for all of those reasons, I am denying the Motion to Vacate the Order Authorizing the Subpoena. And do you have, do you have an order?

MS. WAGNER-GUTKOWSKI: I've prepared an order, your Honor.

THE COURT: You did?

MS. WAGNER-GUTKOWSKI: I'll show it to Mr. Bostic.

THE COURT: Okay.

MS. WAGNER-GUTKOWSKI: May I approach?

THE COURT: Yes.

MR. BOSTIC: Your Honor, at this time, I would move for a stay of your decision pending appeal.

THE COURT: And Ms. Wagner-Gutkowski, did you want-

MS. WAGNER-GUTKOWSKI: We would deny--, we would oppose that, your Honor. We don't believe that the criteria for a stay has been met.

THE COURT: Okay.

MS. WAGNER-GUTKOWSKI: And it won't prevail on the merits. There is no imminent harm. This is an investigation at this point in time. We don't believe, don't believe it meets the criteria.

THE COURT: All right. There is no authority for any kind of automatic stay. There are requirements that must be met and the Court does not believe that any of those have been shown. And I'm denying the Motion for a Stay.

MR. BOSTIC: Your Honor, your Honor, do you want me to submit an order or do you just want to write, write that on the order?

THE COURT: I could just write it on the order. Don't you think, everybody?

MR. BOSTIC: Yes.

MS. WAGNER-GUTKOWSKI: Yes.

THE COURT: Okay, I just wrote that in there. "It is further ordered that the request for stay is denied." And I signed it, dated it and you can take that down to the first floor Clerk's Office and they will stamp copies for you.

MS. WAGNER-GUTKOWSKI: All right. Thank you.

THE COURT: Thank you.

(At 3:53:04 p.m. proceeding ended)

STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

I certify that that this transcript, consisting of (20) pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Wednesday, February 14, 2018.

February 21, 2018

Susan C. Melton-CER #7548
Veteran's Memorial Courthouse
313 West Kalamazoo Avenue
Lansing, Michigan 48933
517-483-6500 ext. 6703

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Appellant's Attachment 5

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

In the Matter of the Petition of the
Attorney General for Subpoenas

File No. 17-21-PZ
Hon. Joyce Draganchuk

**ORDER DENYING MOTION TO VACATE ORDER AUTHORIZING
SUBPOENA DATED DECEMBER 13, 2017**

At a session of said Court, held in the City of Lansing,
Ingham County, Michigan on FEB 14, 2018

PRESENT: HONORABLE JOYCE DRAGANCHUK
Circuit Court Judge

This action having come before the Court on the Motion to Vacate
Order Authorizing Subpoena dated December 13, 2017 brought by
Respondent Vernon E. Proctor, M.D., briefs and answers having been filed,
oral argument having been heard, and the Court being fully advised in the
premises;

NOW, THEREFORE, for the reasons stated on the record,

IT IS HEREBY ORDERED that Respondent's Motion to Vacate
Order Authorizing Subpoena dated December 13, 2017 is denied and he is
hereby directed to fully comply with the Department of Attorney General's

December 13, 2017 subpoena no later than February 28, 2018. There are no other claims or case of actual controversy involving these parties pending before this Court.

IT IS FURTHER ORDERED that the request for a stay is denied.

Thus, with the Court being fully advised in the premises, **IT IS ORDERED**, that this Motion pending between the parties is resolved.



Joyce Draganchuk (P39417)
Circuit Court Judge

Prepared by:

Michele M. Wagner-Gutkowski (P44654)
Assistant Attorney General
Attorneys for Michigan Bureau of Professional Licensing
Licensing & Regulation Division
525 West Ottawa Street
Lansing, MI 48913
Telephone: (517) 373-1146

LF: 2018-020604E-A\In Re: Proctor, Vernon E. M.D., (Subpoena)\Pleading -- Order Denying Motion to Vacate --
2018-01-31

Appellant's Attachment 6

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

In re PETITION OF ATTORNEY GENERAL FOR
SUBPOENAS.

ATTORNEY GENERAL,

Petitioner-Appellee,

v

MARK R. MORTIERE, M.S., D.D.S.,

Respondent-Appellant.

FOR PUBLICATION

February 26, 2019

9:00 a.m.

No. 342086

Ingham Circuit Court

LC No. 17-000021-PZ

ATTORNEY GENERAL,

Petitioner-Appellee,

v

VERNON E. PROCTOR, M.D.,

Respondent-Appellant.

No. 342680

Ingham Circuit Court

LC No. 17-000021-PZ

Before: M. J. KELLY, P.J., and SERVITTO and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 342086, respondent, Mark R. Mortiere, M.S., D.D.S., appeals by right the trial court order granting the request of petitioner, Attorney General, for a subpoena to access Dr. Mortiere's medical records. In Docket No. 342680, respondent, Vernon E. Proctor, M.D., appeals by right the trial court order denying his motion to vacate the court's December 13, 2017 order, granting the Attorney General's request for subpoenas to access the medical records of 11 of his patients. In Docket No. 342086, we affirm. In Docket No. 342680, we reverse and remand for further proceedings.

I. BASIC FACTS

With regard to Docket No. 342086, in September 2017, the Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing (the Department) filed a petition for subpoenas, indicating that it had “initiated investigations of licensees . . . or scheduled hearings in contested cases . . . to determine whether disciplinary action should be taken against licensees.” Regarding Dr. Mortiere, the Department sought all unredacted records, reports, and other documentation related to Dr. Mortiere’s treatment of MG, a former patient. The record reflects that in November 2016, MG sent Dr. Mortiere an amended notice of intent to file a claim of professional negligence against him, but that she ultimately settled the case before commencing a lawsuit. The settlement was for less than \$200,000.

The circuit court authorized a subpoena requiring Dr. Mortiere to produce MG’s medical records by October 4, 2017. Dr. Mortiere filed a motion to quash the subpoena, which the circuit court denied on November 8, 2017. In the order denying the motion to quash, the court ordered Dr. Mortiere to comply with the subpoena “no later than November 30, 2017.” Thereafter, Dr. Mortiere filed an application with this Court for leave to appeal the circuit court’s denial of his motion to quash the subpoena. He did not, however, seek to stay the circuit court proceedings. Thus, on December 21, 2017, the Department filed a motion to show cause against Dr. Mortiere. In response, Dr. Mortiere sought a stay of the lower court proceedings, which was denied by the circuit court. Rather than hold Dr. Mortiere in contempt, the circuit court gave him 7 days to comply with its November 8, 2017 order. Dr. Mortiere also sought a stay in this Court; however, we denied his motion for a stay pending appeal. Further, this Court denied Dr. Mortiere’s application for leave to appeal “for failure to persuade the Court of the need for immediate appellate review.” *In re Petition of Attorney General for Subpoenas*, unpublished order of the Court of Appeals, entered January 17, 2018 (Docket No. 341250).

With regard to Docket No. 342680, on December 12, 2017, the Department filed a petition for subpoenas. Relevant to Dr. Proctor’s appeal, the Department indicated that it was investigating Dr. Proctor’s “treatment of patients and/or controlled substance prescribing practices[.]” The Department sought all records, reports, and other documentation pertaining to 11 John and Jane Doe patients, as well as “[a]ll employment and records including any medical (non-substance abuse) records pertaining to Vernon Proctor M.D.” The record reflects that Dr. Proctor provided substance abuse treatment to 11 patients from June 1, 2015, to June 1, 2016. The Department stated that it sought the limited disclosure of information under 42 CFR 2.66, that limited disclosure “is the most effective means to investigate the matter at hand,” and that “this petition is the most effective means to investigate the matter at hand.” The Department also indicated that it was seeking information that was “necessary to the investigation” and that “all unique identifiers may be deleted from the records of the licensee’s patients.”

The circuit court ordered Dr. Proctor to produce the records, and it ordered that the subpoenas could only be used to investigate Dr. Proctor’s treatment of the patients or his controlled substance prescribing practices and “shall not be used for the purposes of investigating or prosecuting the patients themselves.” The court further directed that “all unique identifiers of patients shall be deleted or blocked out from all documents” before any disclosure to the public and that disclosure was to be limited “to those persons whose need for the information is related to the investigation of the licensee or any following administrative

licensing action.” The court stated that patients need not be expressly notified that their records were being disclosed, but any patient would be given the opportunity to seek revocation or amendment of the order under 42 CFR 2.66(b). Accordingly, the court issued a subpoena that sought the listed patients’ treatment information from June 1, 2015, to June 1, 2016, and Dr. Proctor’s employment records. The subpoena provided a list of fictitious names and the corresponding patient names and dates of birth.

Dr. Proctor filed a motion to vacate the circuit court’s order authorizing the subpoenas. In pertinent part, Dr. Proctor argued that the patients “may be addiction patients” subject to special confidentiality protections under 42 USC 290dd-2 and there was a criminal penalty for improperly disclosing patient records. Dr. Proctor argued that 42 CFR 2.64(b) required both the record holder and patients to be given the opportunity to file a written response to the application to compel disclosure of information, which had not occurred in this case. Finally, Dr. Proctor argued that the court’s order was insufficient under 42 CFR 2.64(d) because it did not provide that good cause existed to obtain the order, including, that other ways to obtain the information were unavailable or ineffective, or that the public interest and need for disclosure outweighed the potential injury to the patient.

The Department responded that on November 30, 2017 it had issued an order limiting Dr. Proctor’s medical license to preclude him from prescribing “schedules 2-3 controlled substances for a minimum one year,” and on January 2, 2018, it had suspended Dr. Proctor’s controlled substances license for six months and one day. It argued that without access to review the patients’ charts, the Department was “unsure if Dr. Proctor is providing substance abuse treatment to the patients in question.” Additionally, the Department denied that patients must be notified and given an opportunity to respond to disclosures of their records because this case concerned an administrative proceeding under 42 CFR 2.66 and not a civil proceeding under 42 CFR 2.64. The Department denied that the regulations required a hearing on the application for an order when the application was sought under 42 CFR 2.66. Finally, the Department argued that its application set forth good cause for seeking the disclosures and the court’s order properly limited the disclosures.

Following a hearing on the motion, the circuit court concluded that the applicable section of regulations was 42 CFR 2.66 because it applied to investigations initiated by administrative or regulatory agencies, such as the Department. The court determined that 42 CFR 2.66 provided its own notice provisions, and only incorporated portions of 42 CFR 2.64. The court reasoned that the incorporated portions—42 CFR 2.64(d) and (e)—only required the court to limit the disclosures, which it had done. The court further determined that any prohibition against disclosing confidential patient communications was subject to the “unless” provision in 42 CFR 2.63, which provided that disclosure could occur if “ ‘the disclosure is necessary to protect against an existing threat to life or of serious bodily injury.’ ” The court held that the national opioid epidemic was such a threat, so it denied Dr. Proctor’s motion to vacate the subpoena.

II. DOCKET NO. 342086

A. JURISDICTION

The Department argues that this Court lacks jurisdiction over Dr. Mortiere's appeal as an appeal of right. Specifically, the Department contends that the January 10, 2018 "show cause order" appealed from is a civil order of contempt, which is not a final judgment appealable as of right. In support, the Department directs this Court to *In re Moroun*, 295 Mich App 312; 814 NW2d 319 (2012) (opinion by K. F. KELLY, J.). In that case, this Court stated that "an order finding a party in civil contempt of court is not a final order for purposes of appellate review." *Id.* at 329. Yet, contrary to the Department's assertion on appeal, the January 10, 2018 order is not an order holding Dr. Mortiere in civil contempt. Rather, that order states the court granted the Department's motion to show cause, and it directed Dr. Mortiere to fully comply with the September 27, 2017 subpoena and the court's November 8, 2017 order no later than January 17, 2018. There is simply nothing in the order stating that the court was holding Dr. Mortiere in civil contempt. Moreover, the court expressly stated that it did not want to do so. Accordingly, the Department has not established that the order appealed from is not appealable of right on the ground that it is a civil contempt order.¹

B. COLLATERAL ATTACK

Next, the Department argues that Dr. Mortiere's appeal of the circuit court's January 10, 2018 order is an improper collateral attack of the court's November 8, 2017 decision on his motion to quash the subpoena. "It is well established in Michigan that, assuming competent jurisdiction, a party cannot use a second proceeding to attack a tribunal's decision in a previous proceeding[.]" *Workers' Compensation Agency Dir v MacDonald's Indus Prods, Inc (On Reconsideration)*, 305 Mich App 460, 474; 853 NW2d 467 (2014). As explained by our Supreme Court,

The final decree of a court of competent jurisdiction made and entered in a proceeding of which all parties in interest have due and legal notice and from which no appeal is taken cannot be set aside and held for naught by the decree of another court in a collateral proceeding commenced years subsequent to the date of such final decree. [*Dow v Scully*, 376 Mich 84, 88-89; 135 NW2d 360 (1965) (quotation marks and citation omitted).]

In this case, however, Dr. Mortiere is not challenging the court's decision in a previous proceeding, in a second, or subsequent proceeding. The record reflects instead that he is challenging an earlier order entered in the same proceeding, namely, the November 8, 2017 order denying his motion to quash the subpoena. Dr. Mortiere applied for leave to appeal the

¹ Even if this Court does not have jurisdiction to hear an appeal as of right, this Court may exercise its discretion by treating a party's appeal as an application for leave to appeal, granting leave, and addressing the issues presented on their merits. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

November 8, 2017 order, but this Court denied leave “for failure to persuade the Court of the need for immediate appellate review.” *In re Petition of Attorney General for Subpoenas*, unpublished order of the Court of Appeals, entered January 17, 2018 (Docket No. 341250). Thus, given the “nonsubstantive disposition,” no appellate court has yet weighed in on the merits of Dr. Mortiere’s claim. See *People v Willis*, 182 Mich App 706, 708; 452 NW2d 888 (1990) (stating that when this Court denies leave “for failure to persuade the Court of the need for immediate appellate review,” the order is “a nonsubstantive disposition”). Moreover, decisions of a court that were not appealable as of right can be challenged in a subsequent appeal by right. See *In re KMN*, 309 Mich App 274, 279 n 1; 870 NW2d 75 (2015). Thus, we discern no impropriety in reviewing the merits of the November 8, 2017 order denying the motion to quash the subpoena.

C. MOOTNESS

The Department next argues that this Court should dismiss this appeal as moot. “Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues.” *Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013). “A matter is moot if this Court’s ruling ‘cannot for any reason have a practical legal effect on the existing controversy.’” *Id.*, quoting *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). However, the disclosure of a previously unknown fact to a party does not necessarily render an issue moot if this Court’s ruling can still have a practical legal effect on an existing controversy. *Cooley Law Sch*, 300 Mich App at 254-255.

In this case, the Department sought to subpoena MG’s records on the basis that they were required in the case of “Complaint No. 147769,” which was “Bureau of Professional Licensing v Mark Mortiere D.D.S.” There is no indication in the record that the licensing controversy between the parties has ended. And, were this Court to conclude that the circuit court improperly issued the subpoena, Dr. Mortiere could argue that the information that the Department improperly obtained should not be used against him in the licensing controversy. Accordingly, even though previously unknown facts have been disclosed, this Court’s decision can have a practical effect on the controversy between the parties.

D. MERITS

Dr. Mortiere argues that the circuit court improperly issued a subpoena for MG’s medical records because the Department had no authority to seek a subpoena where MG’s settlement was his only settlement within the last five years and was for an amount less than \$200,000. When interpreting a statute, this Court’s goal is to give effect to the intent of the Legislature. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass’n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). The language of the statute itself is the primary indication of the Legislature’s intent. *Id.* This Court should read phrases “in the context of the entire legislative scheme.” *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012). This Court reads subsections of cohesive statutory provisions together. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Additional language should not be read into an unambiguous statute. *McCormick v Carrier*, 487 Mich 180, 209; 795 NW2d 517 (2010).

MCL 333.16221 provides that the Department has the ability to investigate health profession licensees under certain circumstances. MCL 333.16231 lists several circumstances under which the Department may initiate an investigation. At issue in this case, subject to an exception that does not apply here, MCL 333.16231(2)(a) provides that a panel of board members may review an allegation regarding a licensee's file under MCL 333.16211(4) and, if it determines that there is a reasonable basis to believe that the licensee violated the Public Health Code, it may authorize the Department to investigate. MCL 333.16231(2)(a). MCL 333.16231(4) provides that the Department *shall* initiate an investigation if it receives information reported under MCL 333.16423(2) that indicates a licensee has three or more malpractice settlements, awards, or judgments within a five-year period, or one or more malpractice settlements that total \$200,000 in a five-year period.

Additionally, MCL 333.16231(2)(b), which is not at issue in this case, provides that the Department shall initiate an investigation if it receives one substantiated allegation or two or more investigated allegations in a four-year period from persons or governmental entities who believe that the licensee violated the Public Health Code. MCL 333.16231(3), which is also not at issue, provides that if the Department receives a written allegation from a governmental entity more than four years after an incident, the Department *may* initiate an investigation "in the manner described in" MCL 333.16231(a) or (b), but it is not required to do so.

Reading these provisions in their contexts, MCL 333.16231 provides four means by which an investigation into a licensee's conduct may commence: the Board may authorize an investigation if it receives an allegation and determines there is a reasonable basis to investigate; the Department shall investigate if it receives a number of substantiated or investigated allegations from persons or governmental entities in a four-year period; the Department may investigate if it receives a written allegation from a governmental entity that is more than four years old; and the Department shall investigate if it receives information that the licensee has three or more malpractice settlements, or any number of settlements totaling more than \$200,000, in a five-year period. Because these provisions are alternatives, it is irrelevant whether the Department met the requirements to investigate under § 16231(4) so long as it met the requirements to investigate under § 16231(2). Nothing in the statutory language conditions every investigation on first having met the requirements of § 16231(4), and from the context of these highly precise statutes, with their many cross-references, this Court will not read such a requirement into § 16231(2).

In sum, the circuit court did not err by failing to quash the subpoena because MCL 333.16231, when read in context, provides several alternative options for the Department to initiate an investigation, and it was sufficient for the Department to show that it met the requirements of § 16231(2).

III. DOCKET NO. 342680

Dr. Proctor argues that an addiction patient's records cannot be disclosed without a hearing and that the circuit court's order did not comply with the regulatory requirements necessary to authorize the release of those records.

42 USC 290dd-2 provides that patient treatment records

which are maintained in connection with the performance of any program or activity related to substance abuse . . . treatment . . . shall, except as provided in [42 USC 290dd-2(e)²], be confidential and be disclosed only for the purposes and under the circumstances expressly authorized and permitted under [42 USC 290dd-2(b)].

In turn, 42 USC 290dd-2(b)(1) provides that patient records may be disclosed “with the prior written consent of the patient . . .” 42 USC 290dd-2(b)(2) indicates that patient records may be disclosed under three other circumstances, with specific requirements for disclosure under each. Only 42 USC 290dd-2(b)(2)(C) is relevant to this case, and it provides as follows:

If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Next, 42 CFR 2.61(a) provides that “[a] subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order . . .” 42 CFR 2.62 provides that a court “may authorize disclosure and use of records to investigate or prosecute qualified personnel holding the records” under 42 CFR 2.66. In turn, 42 CFR 2.66(a)(1) provides that a court may issue an order authorizing the disclosure of records “to investigate or prosecute . . . the person holding the records . . . in connection with a criminal or administrative matter[.]”³ In order to receive such a disclosure, the order “may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program’s or person’s activities.” 42 CFR 2.66(a)(1). The application “must use a fictitious name” to refer to a patient and may not disclose patient identifying information unless the patient has provided written consent or the court has properly sealed the record. 42 CFR 2.66(a)(2).

“An application under this section may, in the discretion of the court, be granted without notice.” 42 CFR 2.66(b). However,

² This subsection exempts the interchange of records within the Uniformed Services and Department of Veterans Affairs.

³ In contrast, 42 CFR 2.64(a) provides that “any person having a legally recognized interest in the disclosure which is sought” may apply for an order authorizing the disclosure of patient records, either separately or as part of a civil proceeding.

upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c). [42 CFR 2.66(b).]

In turn, 42 CFR 2.66(c) provides that “[a]n order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64.”

42 CFR 2.64(d) provides the following criteria for entering an order:

Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

- (1) Other ways of obtaining the information are not available or would not be effective; and
- (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

42 CFR 2.64(e) provides that an order authorizing disclosure must limit disclosure to “those parts of a patient’s records which are essential to fulfill the objection of the order” and “to those persons whose need for the information is the basis for the order,” and that the order must provide for any necessary measures to protect the patient, physician-patient relationship, and treatment services, such as by “sealing from public scrutiny the record of any proceeding for which disclosure of a patient’s record has been ordered.” 42 CFR 2.64(e)(1) to (3).

In this case, Dr. Proctor averred that he was providing substance abuse treatment to the patients in question. 42 USC 290dd-2 applies to patients receiving substance abuse treatment. Accordingly, the information concerning Dr. Proctor’s patients falls under this statutory and regulatory scheme. The Department argues that it was required to comply with § 2.66, not § 2.64. The Department’s argument, while technically correct, is not determinative. However, 42 CFR 2.66 incorporates § 2.64(d) and (e), and it is these provisions that Dr. Proctor argues the circuit court did not adequately comply with.

We agree that the circuit court’s order did not adequately comply with 42 CFR 2.66(d). 42 USC 290dd-2(b)(2)(C) provides that a court must assess good cause before authorizing an order that releases a patient’s substance abuse treatment records. 42 CFR 2.64(d)(1) requires the court to find that other ways of obtaining the information are not available or would not be effective, and 42 CFR 2.64(d)(2) requires the court to weigh the need for the information against the potential injury. 42 USC 290dd-2(b)(2)(C) specifies that when authorizing an order, “[i]n assessing good cause the court *shall* weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.” (Emphasis added.) The term “shall” is mandatory. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Here, the court’s order did not comply with 42 CFR 2.64(d)(1) because the court did not determine whether there were other ways of obtaining the necessary information.

Additionally, the court's orders did not comply with 42 USC 290dd-2(b)(2)(C) or 42 CFR 2.64(d)(2) because it did not make any finding of good cause before it released the patients' records. The court's initial order contained no findings regarding good cause, and ultimately, both of the court's orders are devoid of any determination of good cause.⁴ Finally, the court's order did not comply with 42 USC 290dd-2(b)(2)(C) or 42 CFR 2.66(d)(2) because it did not weigh mandatory factors before authorizing a disclosure.

We acknowledge that the circuit court's order partially complied with 42 CFR 2.66(e). It limited the disclosure of the patients' treatment records by providing that "all unique identifiers of patients shall be deleted or blocked out from all documents" before any disclosure to the public, and that disclosure was to be limited "to those persons whose need for the information is related to the investigation of the licensee or any following administrative licensing action." However, 42 CFR 2.64(e)(3) also requires the court to protect the patient, physician-patient relationship, and treatment services by "other measures as are necessary to limit disclosure," such as by ordering that any proceedings at which the records are to be used are sealed from public scrutiny. The court's order did not order that the administrative proceedings were to be closed and sealed to protect the patient's records. Accordingly, for these reasons, we conclude that the trial court failed to follow the mandatory procedural safeguards before ordering the disclosure of records in this case.

Next, Dr. Proctor argues that the court erred by authorizing the release of records without holding a hearing. "The interpretation of a federal statute is a question of federal law." *Auto-Owners Ins Co v Corduroy Rubber Co*, 177 Mich App 600, 604; 443 NW2d 416 (1989). When there is no conflict among federal authorities, this Court is bound by the holding of a federal court on a federal question. *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960). There are two federal decisions addressing these regulations—a criminal case from the United States Court of Appeals for the First Circuit, *US v Shinderman*, 515 F3d 5 (CA 1, 2008) (holding that disclosure of the defendant's records under 42 CFR 2.66 without compliance with 42 CFR 2.64(d) and (e) did not warrant suppression of the evidence where the defendant had not moved to revoke or amend the disclosure), and a civil case from the Eleventh Circuit, *Hicks v Talbott Recovery Sys, Inc*, 196 F3d 1226 (CA 11, 1999) (concerning a treatment facility's negligent release of confidential information).

In *Hicks*, the Texas Board of State Medical Examiners obtained a subpoena of the patient's treatment records. *Hicks*, 196 F3d at 1230. The plaintiff's substance abuse treatment facility released those records to the Texas Board. *Id.* The patient later sued the treatment facility after he was disciplined, lost his job, and became unable to find employment. *Id.* at

⁴ This error is not harmless. This Court will not modify a decision of the trial court on the basis of a harmless error. MCR 2.613(A). In this case, the court did not even find good cause *after* it issued its order. During the motion to quash the subpoena, the court addressed only one side of the equation—the public interest and need for disclosure—without addressing the other side—the injury to the patient, physician-patient relationship, and treatment services. Accordingly, the court never properly considered the issue of good cause.

1234-1236. The Eleventh Circuit Court of Appeals noted that the subpoena from the Texas Board did not comply with 42 CFR 2.64,⁵ and that

[t]hese stringent federal regulations include application for disclosure using a fictitious name, adequate notice to the patient, a closed judicial hearing, a judicial determination that good cause exists to order disclosure because no other feasible method is available for obtaining the information and the need for disclosure outweighs injury to the patient and the physician-patient relationship, and an order delineating the parts of the patient's records to be disclosed as well as limiting the persons to whom disclosure is made. [*Hicks*, 196 F3d at 1242 n 32.]

In this case, the court determined that no hearing was required before issuing the subpoena. However, at this time, the only available authority is that a closed judicial hearing is required before a court may order the release of a substance abuse patient's confidential medical records. Thus, the court erred when it determined that no hearing was required and when it failed to hold a hearing.⁶

Finally, we note that the court erred by determining that redaction of the patients' confidential communications to Dr. Proctor was not required because there was a threat to life or of serious bodily injury. The court's reasoning and conclusion are not sound when the regulation is read in context. The full text of 42 CFR 2.63, concerning confidential communications, is as follows:

(a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment *only if*:

⁵ 42 CFR 2.64(c) provides:

(c) Review of evidence: Conduct of hearing. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of the regulations in this part. The proceeding may include an examination by the judge of the patient records referred to in the application.

⁶ However, contrary to Dr. Proctor's arguments on appeal, there is no authority to support that *patients* must be notified before such a hearing. The only requirement is that of "adequate notice[.]" *Hicks*, 196 F3d at 1242 n 31. 42 CFR 2.66(b) provides that the court may, in its discretion, grant an application "without notice," but that it must afford patients an opportunity to revoke or amend its order. Thus, there is no legal support for Dr. Proctor's argument that patients must be given notice before the court authorizes the order.

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, *including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties*;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. [Emphasis added.]

The word "including" generally indicates a nonexhaustive list of examples. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651; 761 NW2d 414 (2008). However, when general terms and specific terms are placed together, the general term is generally interpreted to include things of the same types or kinds as the specific terms. *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004).

Here, the court determined that redaction was not required because the national opioid epidemic was such a threat. A national epidemic does not fall within the same types or kinds of threats to life as child abuse and neglect or threats against third parties, which are personal threats of harm *by the patient*. A national epidemic is neither personal nor will it be found in a patient communication. Accordingly, absent additional evidence, the court erred by concluding that it was not necessary to redact confidential communications from patients to Dr. Proctor. The general threat of an opioid epidemic is not specific enough to fall within the exception in § 2.63(a)(1).⁷ To the extent that the patients' records contained communications from the patients to Dr. Proctor, the court was required to order those records redacted unless the communications contained circumstances similar to suspected child abuse or verbal threats.

In sum, because the court failed to follow mandatory procedural safeguards before ordering the disclosure of records in this case, we reverse the circuit court's order and remand for further proceedings. On remand, the trial court shall order the medical records returned to Dr. Proctor and shall not grant a new subpoena ordering the disclosure of the records to the Department without first making all the findings required by the statute. Before making those findings, the court must hold a closed hearing on the matter.

⁷ Additionally, of these sections, 42 CFR 2.63(a)(3) is specific to administrative proceedings. In this case, there is no indication that the patients have testimony or other evidence pertaining to the extent of the communications, and thus there is no indication that 42 CFR 2.63 applies in this case to any confidential communications.

In Docket No. 342086, we affirm the circuit court's order. In Docket No. 342680, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Deborah A. Servitto
/s/ Mark T. Boonstra

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