

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN THE MATTER OF INDIANA)
STATE MEDICAL ASSOCIATION)
APPLICATION FOR DISCLOSURE) Case No. 1:22-MC-0005
OF RECORDS PROTECTED UNDER)
42 U.S.C. 290dd-2.)

**INDIANA STATE MEDICAL ASSOCIATION'S APPLICATION FOR ORDER
AUTHORIZING DISCLOSURE OF RECORDS PROTECTED
UNDER 42 U.S.C. 290dd-2**

Petitioner, Indiana State Medical Association (the "ISMA"), pursuant to 42 U.S.C. 290dd-2 and its implementing regulations, 42 C.F.R. Part 2 ("Part 2"), respectfully requests that the court hold a confidential hearing pursuant to 42 C.F.R. 2.64(c) and issue an order authorizing the ISMA to disclose confidential records of licensed physician and surgeon Dr. John Doe to the Medical Licensing Board of Indiana (the "Licensing Board") and the Office of the Indiana Attorney General (the "AG"). In support hereof, the ISMA states as follows:

BACKGROUND FACTS

The ISMA is a nonprofit 501(c)(6) tax exempt organization that has formed in its bylaws a Commission on Physician Assistance ("COPA") to recognize, treat, and rehabilitate physicians in need of assistance due to psychiatric illness, neuropsychiatric illness, neurocognitive illness, physical disability, or alcohol or other substance use disorders. Through the COPA, the ISMA operates a Physician Assistance Program that refers physicians for alcohol and other substance abuse treatment and holds itself out to the public as a program that refers physicians for

such treatment. The Physician Assistance Program also monitors physicians for compliance with the terms identified by the treating facilities and/or COPA.

Through its Physician Assistance Program, the ISMA has received records and information that Dr. John Doe is not currently safe to practice medicine with reasonable skill and safety and that he refuses to comply with a course of treatment related to his alcohol and other substance use. Under Indiana law, the ISMA is obligated to report Dr. John Doe's failure to comply with treatment to the Licensing Board. However, Part 2, which preempts state law, prohibits the ISMA from making such report unless Dr. John Doe consents to the disclosure, which he has refused to do, or the court grants an order authorizing the ISMA to make the disclosure for good cause.

Indiana law requires that a practitioner¹ with knowledge that another practitioner has engaged in certain conduct report such conduct to the Licensing Board. 844 IAC 5-2-8(a). However, 844 IAC 5-2-8(b) states that "[a] practitioner who voluntarily submits himself/herself to, or is otherwise undergoing a course of, treatment for addiction, severe dependency upon alcohol or other drugs or controlled substances . . . where such treatment is sponsored or supervised by an impaired physicians' committee of a state, regional, or local organization of professional health care providers, [such as the ISMA] . . . shall be exempt from reporting to . . . the [L]icensing [B]oard for so long as: (1) the practitioner is complying with the course of treatment; and (2) the practitioner is making

¹ Practitioner is defined as "a person who holds an unlimited license to practice medicine or osteopathic medicine in Indiana or a limited license or permit as may be issued by the board." 844 IAC 5-1-1(14).

satisfactory progress.” Finally, 844 IAC 5-2-8(c) states that “[i]f the practitioner fails to comply with, or is not benefitted by, the course of treatment, the practitioner . . . or any member of the impaired physicians’ committee shall promptly report such facts and circumstances to the [] [L]icensing [B]oard.” Therefore, if a physician has been reported to the ISMA Physician Assistance Program for addiction or substance dependence, and the physician fails to comply with the course of treatment, the ISMA is mandated by Indiana law to report this information to the Licensing Board.

Licensed physician Dr. John Doe was reported to the ISMA Physician Assistance Program in lieu of the Licensing Board. Dr. John Doe is a surgeon, and it was reported to the Physician Assistance Program that there have been a number of formally documented “clinical concerns” regarding surgeries and John Doe’s patient care. The ISMA referred Dr. John Doe for an evaluation by a facility experienced in evaluating individuals who work in safety sensitive professions, such as physicians. The evaluation was conducted during the course of approximately three days and consisted of multiple components, including blood and hair tests and interviews with Dr. John Doe’s coworkers.

The ISMA Physician Assistance Program received the detailed written report of the evaluation which stated, among other things, that the hair test results showed cocaine use, the blood test showed alcohol use over a certain period of time, and that coworkers suspected alcohol abuse due to the smell of alcohol on his breath and the observation of tremors. The facility diagnosed Dr. John Doe as having

alcohol use disorder, moderate² and rule out stimulant use disorder.³ The evaluation team, which included a physician Medical Director, stated that Dr. John Doe “is currently not safe to practice medicine with reasonable skill and safety.”

After receiving the results of this report, Dr. John Doe requested to undergo another evaluation at a different facility for a second opinion. The ISMA Physician Assistance Program received the written report of the second evaluation, which reported the same two diagnoses, and stated: “the team cannot endorse his return to clinical practice at this time. It is [this facility’s] clinical opinion that Dr. [John Doe] should participate in a professionals program [that] specializes in treating physician[s] with substance use difficulties prior to returning to clinical duties.” Both facilities recommended that Dr. John Doe participate in an approved residential treatment program for professionals prior to returning to the clinical practice of medicine.

Dr. John Doe has the results of the two evaluations and has declined the recommendations to participate in an approved residential treatment program for professionals prior to returning to clinical practice. Prior to filing this Application,

² The American Psychiatric Association’s Diagnostic and Statistical Manual, Fifth Edition (“DSM-5”) provides standardized terms and criteria for diagnosis of mental health disorders. DSM-5 does not use the common term “alcoholism” and has replaced the prior terms “Alcohol Abuse” and “Alcohol Dependence,” with one term, Alcohol Use Disorder. The DSM-5 describes Alcohol Use Disorder as “[a] problematic pattern of alcohol use leading to clinically significant impairment or distress . . .” (page 490). Diagnosis of Alcohol Use Disorder is determined by finding at least 2-3 symptoms out of a list of about 11 (for mild severity), 4 to 5 symptoms (for moderate severity) and 6 or more symptoms (for severe). The list of symptoms include, for example: more than once wanted to cut down or stop drinking, or tried to, but could not; continued alcohol use despite having persistent or recurrent social or interpersonal problems; and spent a lot of time drinking, or being sick or getting over other after effects. (pages 490-491).

³ In layman’s terms this means the clinicians are considering a possible diagnosis of “stimulant use disorder” as that term is used in DSM-5 (a pattern of problematic use of cocaine or other stimulants) but need to do further evaluation.

the ISMA Physician Assistance Program staff explained to Dr. John Doe the provision in Indiana law that requires the ISMA to report the information to the Licensing Board. Also prior to filing this Application, counsel for the ISMA contacted counsel for Dr. John Doe and explained the Indiana mandate to report. Counsel for the ISMA also gave Dr. John Doe the opportunity to provide a written consent under Part 2 for the ISMA to fulfill its obligation under Indiana law to report to the Licensing Board. Through his counsel, Dr. John Doe declined the offer to sign the consent.

While 844 IAC 5-2-8(c) requires the ISMA Physician Assistance Program to report to the Licensing Board Dr. John Doe's noncompliance with the treatment recommendations received from the evaluating facilities, the ISMA also meets the definition of a "Part 2 program" under 42 C.F.R. 2.11 and is therefore subject to 42 U.S.C. 290dd-2 and Part 2. The ISMA accordingly files this Application and seeks a court order authorizing it to disclose to the Licensing Board Dr. John Doe's records, which would identify him as having been diagnosed with a substance use disorder and having been referred for treatment of a substance use disorder, so that the Licensing Board may assess Dr. John Doe's fitness to practice medicine. The ISMA also requests that the order authorize the ISMA to disclose Dr. John Doe's records to the AG, since the AG is responsible for investigating complaints regarding licensed physicians. Ind. Code 25-1-7-2; 25-1-7-3(a) and (b). Good cause exists for the ISMA to disclose Dr. John Doe's records to the Licensing Board and the AG as

the disclosure is necessary to protect against an existing threat to life or of serious bodily injury.

LEGAL STANDARD FOR DISCLOSURE UNDER PART 2

42 U.S.C. 290dd-2 provides that “[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient⁴ which are maintained in connection with the performance of any program or activity relating to substance use disorder 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 . . . be confidential and be disclosed only” as permitted by the statute and implementing regulations. 42 U.S.C. 290dd-2(a).

The statute allows disclosure if the patient consents, or, when the patient does not consent, “[i]f 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.” 42 U.S.C. 290dd-2(b)(2)(C).

The statute provides that “[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. 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.” *Id.*

⁴ Here, Dr. John Doe is the patient for purposes of Part 2.

The enacting regulations further provide that:

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, 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 C.F.R. 2.63.

Where, as here, the purpose of disclosure is for a noncriminal purpose, the court may issue an order authorizing disclosure 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 C.F.R. 2.64(d).

In determining whether good cause exists, the court may hold a hearing, provided it is "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.” 42 C.F.R. 2.64(c). “The proceeding may include an examination by the judge of the patient records referred to in the application.” *Id.* The regulation provides for Dr. John Doe to be given notice and an opportunity to be heard. 42 C.F.R. 2.64(b).

If the court determines good cause exists, its order authorizing 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 C.F.R. 2.64(e).

**GOOD CAUSE EXISTS TO AUTHORIZE THE ISMA TO DISCLOSE
DR. JOHN DOE’S PATIENT RECORDS TO
THE LICENSING BOARD AND THE AG**

On its Application and in further conduct of a confidential hearing whereby the court can examine the patient records pertaining to Dr. John Doe, the ISMA will show that good cause exists to allow disclosure to the Licensing Board and the AG.

Here, disclosure is necessary to protect against a substantial existing threat to life or of serious bodily injury to any patients Dr. John Doe may treat and perform surgery upon. 42 U.S.C. 290dd-2(b)(2)(C); 42 C.F.R. 2.63(a)(1). A surgeon under the influence, or even suffering from effects of significant alcohol use and cocaine use, presents a substantial threat to life or of serious bodily injury to patients. Two separate facilities have evaluated Dr. John Doe and have concluded that he is not safe to practice medicine until he completes an approved residential treatment program for professionals. Dr. John Doe currently has an active and unrestricted license to practice medicine in the State of Indiana. Absent disclosure of Dr. John Doe's patient records to the Licensing Board and the AG, the Licensing Board will lack the information necessary to follow its procedures to determine Dr. John Doe's fitness to practice medicine; the AG will lack the information necessary to investigate whether Dr. John Doe is fit to practice medicine; and nothing will prevent Dr. John Doe from continuing to treat and perform surgeries on patients even though two facilities specializing in the evaluation and treatment of physicians have determined that he is currently not safe to practice medicine.

An order of this court is the only means by which Dr. John Doe's patient records may be provided by the ISMA to the Licensing Board and to the AG. Dr. John Doe has refused to consent to disclosure, and the information may not be obtained through other means. 42 C.F.R. 2.64(d)(1).

Moreover, the public interest in disclosing the records to the Licensing Board outweighs the potential injury to Dr. John Doe, any physician-patient relationship,

or treatment services. 42 C.F.R. 2.64(d)(2). Dr. John Doe has declined to enter into treatment, and the public interest of protecting the health and life of patients weighs heavily in favor of disclosure to the Licensing Board and the AG to allow these entities to follow the statutory procedures for determining Dr. John Doe's fitness to practice medicine. The ISMA has already received reports of adverse consequences to Dr. John Doe's prior surgical patients, including performing surgery on the wrong site.

Pursuant to 42 C.F.R. 2.64(e), the ISMA seeks an order limited only to disclosure of Dr. John Doe's records to the Licensing Board and the AG under means that will otherwise preserve confidentiality.

CONCLUSION

For the foregoing reasons, the ISMA respectfully requests that the court hold a hearing in accordance with 42 C.F.R. 2.64(c); issue an order finding that good cause exists for the disclosure of Dr. John Doe's records; and issue an order authorizing the ISMA to disclose Dr. John Doe's records to the Licensing Board and the AG in accordance with the provisions of Part 2.

Respectfully submitted,

/s/ Jeanine Kerridge
Stacy L. Cook
Jeanine Kerridge
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, IN 46204
Telephone No. 317.236.1313
Facsimile No. 317.231.7433
scook@btlaw.com
jeanine.kerridge@btlaw.com

*Attorneys for Petitioner, Indiana State
Medical Association*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of January, 2022 a copy of the foregoing has been served via email and United States mail, first class, postage prepaid, on the following counsel for Dr. John Doe, who has agreed to accept service:

Gregory W. Bee
Taft Law
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
bee@taftlaw.com

/s/ Jeanine Kerridge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN THE MATTER OF INDIANA)
STATE MEDICAL ASSOCIATION)
APPLICATION FOR DISCLOSURE) Case No. 1:22-MC-0005
OF RECORDS PROTECTED UNDER)
42 U.S.C. 290dd-2.)

ORDER SETTING CONFIDENTIAL HEARING UNDER 42 C.F.R. 2.64(c)

This matter came before the Court on the Application of the Indiana State Medical Association under 42 U.S.C. 290dd-2 and its implementing regulations, 42 C.F.R. Part 2 (“Part 2”), to disclose confidential Part 2 records of Dr. John Doe to the Medical Licensing Board of Indiana and the Office of the Indiana Attorney General.

The Court hereby sets a confidential hearing pursuant to 42 C.F.R. 2.64(c), to be held in Room on the day of , 2022, at a.m./
p.m.

So Ordered this day of , 2022.

Distribution: to counsel of record via ECF