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California Appellate Court Stands with Physician to Protect Patient Confidentiality As Government Scrutiny over Prescribing Controlled Substance Rises

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The opioid crises has raised a number of concerns for physicians, particularly those treating chronic illness. Heightened regulatory scrutiny of physician activity raises questions over how physicians should respond to government demands for confidential patient records. In *Grafilo v. Wolfsohn*, the California Court of Appeals denied the California Medical Board's (the Board's) attempt to subpoena one California physician's patient medical records in the Board's effort to investigate his prescribing of controlled substances.

Dr. Wolfsohn is a practicing physician, specializing in pain management. The Board sought medical records for five of his patients after it received information from a law enforcement officer and the CURES database suggesting that Dr. Wolfsohn might be improperly prescribing controlled substances. The Board subpoenaed Dr. Wolfsohn's medical records citing its belief that he prescribed controlled substances in a manner that appeared to be inconsistent with the accepted standard of care. Essentially, the Board sought to review confidential patient medical records in order to determine whether Dr. Wolfsohn's prescribing practices deviated from the standard of care, which would result in a violation of the California Medical Practice Act.

Dr. Wolfsohn did not comply with the Board's subpoena arguing that turning over medical records violated a patient's constitutional right to privacy. He also noted that a patient in need of medical care may be deterred from seeking such care if the government could access his or her medical records based on information gathered from a mandated prescription monitoring database like CURES.

Dr. Wolfsohn's failure to comply with the subpoena led the California Attorney General to petition the court to compel Dr. Wolfsohn to turn over the records to the Board. The petition cited the CURES report, suggesting Dr. Wolfsohn's prescribing patterns and activities may mean he was prescribing controlled substances with Morphine Equivalent Dosing (MED) values ranging from 80-300. MED values are used to compare different pain drugs and their potential adverse consequences. The Board did not argue that the data or the estimated MED levels based on the amount and frequency of prescribing was a violation of the Medical Practice Act. Instead, the Board claimed that a review of the medical records was needed to determine whether Dr. Wolfsohn evaluated, documented and monitored prescription practices in a manner which *may* have violated the Medical Practice Act.

Initially, the lower court ruled in favor of the Board's petition, stating the Board's compelling interest outweighed any physician or patient privacy interests. On Dr. Wolfsohn's appeal the Court evaluated whether the Board subpoena for confidential patient records was supported by good cause.

The Court balanced the Board's subpoena powers against a patient's constitutional right to privacy. Traditionally courts ask whether the Board has demonstrated, through competent evidence, that the

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particular records it seeks are relevant and material to its inquiry sufficient for a trial court to independently make a finding of good cause to order the materials requested.

For example, in *Cross v. Superior Court* the Board was granted access to confidential patient medical records when the Board's subpoena included evidence that at one of the physician's patients told an investigator that physician had not treated her at all, and the physician had been subject to discipline for improperly prescribing sleep medication in another state. The Board was able to access patient medical records because it supported its request with evidence to show the physician's activities, if true, would violate the law.

In the instant case, the Board's evidence was merely speculative because it did not have enough supporting evidence to indicate Dr. Wolfsohn did in fact violate the law. The Board offered no evidence as to how many patients Dr. Wolfsohn treats, the percentage of his patients the five records comprised, how often pain management physicians in similar practice prescribe the same drugs or the likelihood that Dr. Wolfsohn properly issued the prescriptions.

The Appellate Court reversed the lower court's order, reaffirming the limits on the Board's power to require physicians to produce patient medical records for investigative purposes. Physicians served with a subpoena for records by the Medical Board should not assume they must comply. It is important that physicians carefully review any orders to produce documents for sufficient good cause before turning over confidential patient medical records to regulators.



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