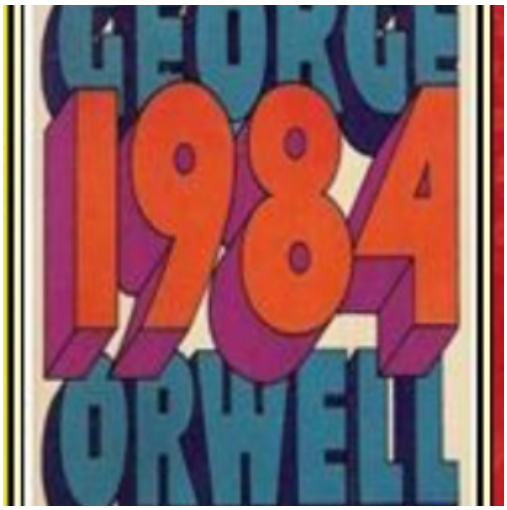
Published on *American Council on Science and Health* (https://www.acsh.org)

Big Brother's Latest Blow To Patient Privacy

By Jamie Wells, M.D. — August 23, 2017



Credit: Gordon State College [1]

The 9th U.S. Circuit Court of Appeals recently reversed [2] a 2014 U.S. District Court ruling that affirmed patients had a reasonable expectation of privacy with respect to their prescription records and mandated a court order be required before allowing federal agents the ability to obtain such data. With this decision, the Drug Enforcement Administration (DEA) does not need to meet the standard of seeking a warrant based on probable cause and, instead, can routinely access such information.

This result is highly unfavorable to patient privacy rights and could significantly alter or impede their care— to be further addressed momentarily.

Basically, a program was created in 2009 as a means to centralize into a web-based data system prescription medications that met the criteria for Schedule II-IV controlled substances [3]— or the Oregon Prescription Drug Monitoring Program (PDMP) [4]. This list includes but is not limited to anti-anxiety medications, anti-convulsants (or anti-seizure), sedative hypnotics, anesthetics, stimulants, pain killers (e.g. opioids) and other drugs. The intent was to enhance physician and pharmacy communication in an effort to improve healthcare. In general, these prescriptions carry risks of misuse, overdose, dependence, adverse events when mixed with alcohol or other drugs etc. The PDMP [4] provides a tool to identify and intervene when an individual might be developing signs of abuse, prevent doctor-shopping, ensure proper dosages and medication choices are made, side effects are well-managed and so on. Additionally, the data is made anonymous or de-identified so epidemiological information can be collected to benefit public health and safety.

Oregon consistently imposed and upheld regulations that access was limited to pharmacists and health care practitioners. They maintained “PMDP patient information is protected by law—ORS 431.966… Law Enforcement requests must be pursuant to a valid court order.” Throughout the

current legal battle between Oregon's Health Authority/PDMP and the DEA, this certainty has been challenged and with the recent win for federal authority it will be interesting to see whether the state now takes the issue to the Supreme Court or pursues its other judicial options.

They have not fought alone. Though this particular case is specifically about Oregon's PDMP, many states have the same programs so the ramifications of what transpires here have a resounding impact. The American Civil Liberties Union (ACLU), ACLU Foundation of Oregon [5], confidential patients and a physician, the Litigation Center of the American Medical Association (AMA) [6] along with the medical associations of the nine states in the circuit (Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii) filed an amicus brief [7]and have all rallied around Oregon's PDMP to fight to uphold what they deem are the protected U.S. Constitution Fourth Amendment rights of patients.

The Yale Law School Information Society Project's (ISP) amicus brief is here [8]. ISP is "an intellectual center addressing the implications of new information technologies for law and society, with a special interest in data privacy and medical privacy issues."

The Arguments…

Though the 9th U.S. Circuit Court of Appeals found the arguments of the ACLU [5] and Oregon compelling and reasonable in terms of patient expectations of privacy, they ruled specifically that they believed the ACLU had no standing in this particular case and federal law trumped state law. The court writes "We acknowledge the particularly private nature of the medical information at issue here and thus do not question the seriousness of Intervenors' fear of disclosure. Nor do we imply that this concern is unreasonable." To review their decision, see here [2].

According to the AMA's Litigation Center [9], "The DEA countered that patients and physicians have no reasonable expectation of privacy in their prescription records. The DEA relied in part on the "third party doctrine," taking the position that because people disclose medical information to a pharmacist they therefore forfeit their privacy interest in that information vis-a`-vis law enforcement."

The court decision's [2] unfavorable medical consequence…

This reversal is a bad day for the sanctity of the doctor-patient relationship, its therapeutic nature and the overall health —mental and physical— and well-being of patients. If a patient believes his health information is not protected, then he may not seek treatment and potentially further endanger himself and others depending on the etiology of the disorder or disease. Coercive forces should never enter the exam room or hospital bed. Patient fears regarding honest disclosures might lead to trajectories of suboptimal care choices, by them and possibly doctors or providers. The litany of untoward problems is long.

The DEA's argument is inherently flawed. A physician does not merely diagnose and leave a patient to die or be disabled and remain suffering. Therapies are intrinsic to the healing process and implementing them is implicit in providing medical care. Physicians cannot exclude pharmacies in the process. The idea that a third party in such a position is outside of patient privacy protections is completely unreasonable. Indiscriminate access to such prescription data

can afford any individual the ability to discern a diagnosis thereby violating a patient's right to privacy. Health Insurance Portability and Accountability Act (HIPAA) laws [10] were instituted, in part, to secure the protection and confidential handling of health information with the most minimum-- in circumstances of third parties-- to be used to conduct business. Though health insurance agencies can to a certain extent be optional (and that's a stretch), taking and acquiring medications is a misguided labelling of "third party."

Requiring probable cause with a court order is a reasonable consideration. Anything short of that fundamentally impairs and damages the patient, the doctor-patient relationship and can adversely influence treatment course and decisions. The ensuing cascade harms not only the patient, but care givers, health professionals, family, and potentially the public at large.

As Oregon weighs its legal options, a visit to the U.S. Supreme Court might be in its future.

Note(s):

For further understanding of the dangers of shackling the doctor-patient relationship, review Physician 'Gun-Gag' Law: The Politics And The Medicine [11].
