Client Alert: Is Your Professional Information Being Sought From Your Licensing Agency? Do You Know Your Rights?

California Court of Appeal Decision in *Board of Registered Nursing v. Superior Court of Orange* Draws A Line In the Sand: Health Care Professionals Must Be Notified When Their Professional Information Is Sought From An Administrative Body

Stemming from California's ongoing legal battle against pharmaceutical companies for deceptive marketing schemes in relation to the opioid epidemic (think Purdue), the issue of health care professionals' privacy rights came to the forefront when the State of California subpoenaed administrative records (including disciplinary records) and investigatory files (including complaints) about these professionals from their licensing boards, including the Medical Board, Nursing Board, Pharmacy Board, and Department of Justice.

In Board of Registered Nursing v. Superior Court, January 15, 2021, ___ Cal.App.5th ___ [2021 WL 140983], the administrative and governmental agencies referenced above took the position that the subpoenas issued by the State, demanding a broad swath of documents, were invalid because the State failed to provide notices to consumer (i.e., health care professionals) that their professional information was being sought. The agencies further maintained that the scope of categories demanded was protected by the official information privilege, deliberative process privilege, and constitutional right to privacy.

When the trial court ordered the agencies to produce documents in response to the State's subpoenas, despite the arguments above, the agencies sought and were granted writ relief by the Court of Appeal.

The Court of Appeal made the following findings, among others:

- Health care professionals (doctors, nurses, pharmacists, etc.) whose identities would be disclosed in an agencies' administrative records, investigatory files, and coroners report must be given notice of the subpoena.

The Court of Appeal denied the State's argument that the Information Practices Act of 1977 (IPA) allowed administrative and governmental agencies to comply with subpoenas without providing notice to consumer. Instead, it held that, because the subpoenas sought "the personal information of investigated or disciplined health care professions, without redaction, [the State] was required to provide notice to these persons."

- Requests for complete administrative records, investigatory files, and CURES data absent notice to consumer (i.e., health care professionals) was a violation of the constitutional right to privacy and the statutory official information and deliberative process privileges.

The Court of Appeal held that the private and public interest in confidentiality of the requested materials (which included investigatory files, administrative records, and CURES data) is substantial. "The health care professionals named in the investigatory files and disciplinary proceedings have a legally protected privacy interest in their personal information reflected in the records…This right to privacy is especially salient for those professionals who were investigated but never accused of wrongdoing…"

Take Away:

The arguments and assertions made by the administrative and governmental agencies in Board of Registered Nursing v. Superior Court in response to the State's subpoenas are the very same arguments and assertions that can and are raised when the same agencies issue similar requests/subpoenas to health care professionals. Health care professionals must keep a close eye on whether these administrative and governmental agencies are providing notice to consumer, whether the consumer is a health care professional or a patient, before turning over any records.

When you receive a subpoena or similar request, even if it is for your own administrative records or investigatory file, notice to consumer needs to be provided. If you did not receive notice or if you received notice, but do not know how to respond, contact an attorney immediately to discuss how to best protect your privacy rights. Statutory deadlines require a quick response to subpoenas or similar requests, so time is of the essence.

If you have any questions or would like to discuss how to protect your privacy interests, the attorneys at Nelson Hardiman are here to answer your questions. Feel free to contact Sara Hersh or Miriam Mackin at 310-203-2800.

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