

California Supreme Court Upholds Medical Board's Right to Physician Prescribing Data



The California Supreme Court has finally ruled in the [Lewis v. Superior Court](#)

case, ruling that the Medical Board of California did not violate patient privacy rights when it accessed controlled substance data from the state prescription drug monitoring program known as CURES.

Doctors and pharmacies are required to report controlled substance prescribing and dispensation into the [CURES](#) database. The California Department of Justice (DOJ) established CURES in 2009 to help identify overprescribing by doctors and drug-seeking behavior by patients. By checking CURES, for example, a doctor can ensure that a patient seeking pain medications is not also getting other drugs from other sources. Similarly, law enforcement can identify doctors with unusually high prescribing patterns.

The question is what it takes for DOJ to release records. In the *Lewis* case, the Board investigated Dr. Lewis after a patient complaint about the doctor's "[Five Bite](#)" diet plan. (Dr. Lewis advocates for a strict diet under which you skip breakfast, have just five bites of food at lunch and five more bites at dinner.)

In the course of the investigation, the Board investigator decided to explore Dr. Lewis' prescribing to other patients unrelated to the case by accessing the [CURES](#) data without patient consent, a search warrant, or a subpoena supported by a finding of good cause. The Board subsequently relied on the CURES data to conclude that Dr. Lewis had overprescribed controlled substances. Former Fenton Nelson attorney Henry Fenton represented Dr. Lewis, challenged the legality of the Board's action as a violation of the right of privacy in the California Constitution. (Fenton also alleged that the Board was acting in a retaliatory manner for comments by Dr. Lewis suggesting that the Board representatives were arguably overweight.)

In upholding the lower court decision that the Board's access to CURES data did not violate patient privacy rights, the Supreme Court relied on the state's interest in protecting the public from the illegal use and diversion of dangerous controlled substances, as well as the interest in protecting patients from negligent or incompetent doctors. In a nutshell, the public policy concerns outweighed the privacy concern. In light of the national attention devoted to the nationwide opioid epidemic, the Court's conclusion to subordinate privacy to preventing overprescribing is not a surprise.

The *Lewis* decision should eliminate any doubt for physicians and pharmacists about the significant potential risks for overprescribing. The Medical Board and other law enforcement agencies have the freedom to obtain prescriber and dispenser data, and the *Lewis* decision is likely to increase the use of CURES data. Doctors and pharmacists who prescribe and dispense controlled substances should ensure that they are in compliance with all legal requirements, documenting appropriately, and instituting safeguards to prevent overprescribing and diversion.



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