Privacy Wins in Bearman Case

David Bearman, MD, a Santa Barbara doctor who refused to turn over a patient's file subpoenaed by the state Medical Board, has been vindicated. On April 1 a state appellate court ruled that the subpoena should never have been issued because the Board "failed to demonstrate sufficient facts to support a finding of good cause to invade the patient's right of privacy."

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Said Bearman, "This is a message to the Medical Board staff that they cannot go on fishing expeditions. It's more than a victory for Prop 215, it's a victory for civil liberties."

The Board (counseled by the state Attorney General's office) decided to petition the state supreme court for review of the appellate-court decision. On June 30 the supreme court denied review.

On August 4, the superior court vacated its order issuing the subpoena and directed Dr. Bearman's attorneys to prepare an order denying the petition for the subpoena. Dr. Bearman was awarded costs on appeal and may make a claim for attorney fees.

Just and Noble Were Neither

The saga began in April 2001 when Bearman's patient, N., a 21-year old migraine sufferer (who also had been diagnosed with depression and ADD), went camping with three friends in the Lake Piru Recreation Area. A search of their vehicle by Forest Ranger James Just turned up a small quantity of cannabis.

N. claimed ownership and showed Ranger Just a letter from Dr. Bearman authorizing him to medicate with cannabis. Just photocopied the letter, in which Bearman had written:

"You reported to me that using marijuana relieves your medical symptoms of migraines and ADD. I have evaluated the medical risks and benefits of cannabis use with you as a treatment pursuant to Health and Safety Code section 11362.5. I recommend/approve of your use of cannabis for relief of pain and nausea of migraines and decreasing the frequency and intensity."

Ranger Just then wrote to the Medical Board opining that Dr. Bearman's letter of approval for N. "may exceed his scope of practice, violate medical ethics, and be objectionable to California law." Just asked the Board to take "appropriate actions." The Board —which investigates about 2,000 of the 12,000 complaints it receives annually— decided to pursue Ranger Just's suspicions of Dr. Bearman. They assigned Senior Investigator Linda Foster and Randolph Noble, MD, to determine whether Bearman had been guilty of "gross negligence... incompetence, or... dishonesty or corruption" in his treatment of N.

Noble, the Board's expert, wrote a declaration revealing profound misunderstanding of Prop 215: "Review of the Medical Marijuana statute (section 11362.5) reveals that marijuana can be used for seriously ill Californians and is to be recommended by a physician who is a primary caregiver and the indications include migraine headaches, however, there is no mention of attention deficit disorder." In fact, the law allows cannabis users to get approvals from doctors who are not their primary-care providers, and to treat any condition for which cannabis provides relief.

Bearman, who is 63 and has always been in good standing professionally, says he learned he was under investigation when he got a phone call from N. in September 2001. "He said he'd been contacted by the Board and said he wasn't going to authorize the release of the records. He just wanted to check that turning them down was the right thing to do. I said that they were his records, and that they were private, and that it was up to him. About a week later I got a certified letter from the Board requesting N.'s records."

Bearman discussed his plight with State Sen. John Vasconcellos. Months passed with no word from the Medical Board, and Bearman began to think that Vasco had induced them to call off the investigation. Then he got another certified letter requesting N.'s medical records. Bearman notified the Board that he had a professional obligation to fight the subpoena. More months passed and then, says Bearman, he got a letter "just like the one before, as if we'd had no previous correspondence." Eventually (March 2003), after briefings and more briefings, the matter wound up in Superior Court in Los Angeles where Judge Dzintra Janavs upheld the subpoena and gave Bearman a month to appeal.

While Bearman was preparing his appeal, the Medical Board tried to get an Administrative Law Judge to fine him $1,000 per day for not complying with Judge Janavs's order. "My attorneys kept assuring me that we had a defense against the fine," says Bearman. "It seemed so inequitable. I trusted them and I trusted the justice system enough... My wife, I think, was more concerned." If Bearman had not prevailed in the appellate court, the fine could have totaled $115,000; but his victory makes the fine proceedings moot.

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The Appeal

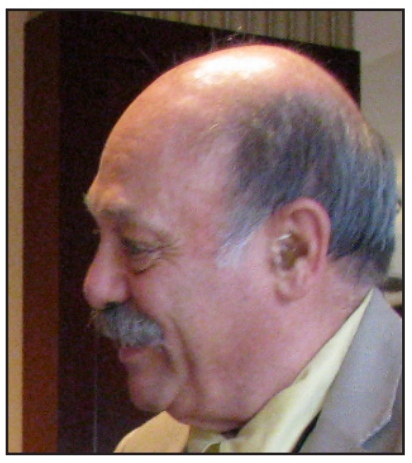
Bearman's appeal was heard by a three-judge panel from the Second Appellate District. Briefs were submitted in September '03, including a 50-page amicus brief on Bearman's behalf from the California Medical Association (drafted by Catherine Hansen and Alice Mead). Bearman was represented by Seymour Weisberg, Alison Adams, and Joseph Allen (the former district attorney of Mendocino County). Attorney General Bill Lockyer assigned four prosecutors to represent the Medical Board; Deputy AG Paul Ament did the oral argument.

In October the appeals court issued an interim ruling that would have quashed the subpoena unless the Medical Board chose to submit another brief. The Board chose to submit another brief —your taxpayer dollars at work— and another round of oral argument ensued on Jan. 27 '04.

The April 1 ruling was unanimous. Judge Laurence Rubin wrote the opinion, stating: "When the Medical Board seeks judicial enforcement of a subpoena for physician's medical records, it cannot delve into an area of reasonably expected privacy simply because it wants assurance the law is not violated or a doctor is not negligent in treatment of his or her patient. Instead, the Medical Board must demonstrate through competent evidence that the particular records it seeks are relevant and material to its inquiry... This requirement is founded in the patient's right of privacy guaranteed by Article I of the California constitution, which the physician may, and in some cases must, assert on behalf of the patient."

The appellate court judges relied on several directly relevant precedent cases. Their ruling amounts to a serious rebuke of the Medical Board. "The declarations included *no facts* [italicized by the judge] even suggesting Dr. Bearman was negligent in Nathan's treatment, that he indiscriminately recommended marijuana, the circumstances under which marijuana may arguably be prescribed for migraines or attention deficit disorder, or that Dr. Bearman in any way violated section 11362.5. The statements regarding Dr. Bearman's possible unethical conduct made by Ranger Just, Investigator Foster, and Dr. Noble are nothing more than speculations, unsupported suspicions, and conclusory statement drawn solely from Dr. Bearman's letter to N. and the simple fact he recommended the use of marijuana."

Judge Rubin noticed that Bearman's letter only approved cannabis use for the treatment of migraine. "The Medical Board further contends," wrote the judge, "Dr. Bearman recommended marijuana for attention deficit disorder, which is not a listed illness in section 11362.5. While Dr. Noble and Investigator Foster stated in their declarations the subpoena was necessary because of this recommendation, it is clear they misread both Dr. Bearman's letter and the statute, which does not limit the use of marijuana to the listed illnesses."



David Bearman, MD

The Medical Board had also argued that N. waived his right of privacy when he showed his letter of approval to the Park Ranger. As precedent they cited a case in which a patient had filed a lawsuit. Not applicable, the appeals court ruled. "This is not a case where N. voluntarily initiated an action placing his medical records at issue. Instead, N. produced Dr. Bearman's letter as evidence that he qualified for... protection against criminal prosecution...

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—Judge Laurence Rubin

By passing this law, the voters intended to facilitate the medical use of marijuana for the seriously ill. This purpose would no doubt be defeated if, as a condition of exercising the right granted by section 11362.5, a person waived his or her right of privacy simply by producing a physician's written recommendation. Interpreting section 11362.5 as necessitating the waiver of a fundamental right in order to enjoy its protection would, we believe, hinder rather than facilitate the voters' intent."

The appeals court granted Bearman "recovery of costs" —meaning the cost of photocopying his legal briefs. The system provides no recourse for recovery of legal costs when a doctor responds to a Medical Board investigation. Two of Bearman's attorneys worked pro bono, and one gave him a steep discount; nevertheless, the tab will approach $20,000. Bearman hopes to raise it at a benefit victory party in El Capitan Canyon October 17. (The event was originally set for June but postponed due to a fire.)

The Wrong Doctor to Confront

The Medical Board picked the wrong doctor to confront over questions involving quality of care and privacy. For much of his career Bearman was medical director of the Santa Barbara Regional Health Authority, for which he set up quality-assurance and peer-review programs. The agency got a large grant to study "medical data connectivity," which Bearman defines as "sharing medical information over the internet with appropriate protections for confidentiality." That project, he says, made him "even more familiar with the issues relating to privacy and who wanted access to what and who could deny access to what."

Bearman says, matter-of-factly, "The Medical Board overlooked the fact that I was more knowledgeable and experienced in terms of medical quality [than their investigator or consultant]... They're supposed to have your records reviewed by someone who's an expert in your field. Clearly, the people who looked at this didn't know about cannabis, they didn't know about drug-abuse prevention, and they didn't know about quality."