



Document #3212

California's Prescription Drug Monitoring Program: The Controlled Substance Utilization Review and Evaluation System (CURES)

CMA Legal Counsel, January 2017

The Controlled Substance Utilization Review and Evaluation System (CURES) is California's statewide database of Schedule II through IV controlled substances dispensed to patients in the state. (CURES/PDMP website at <https://oag.ca.gov/cures>.) It serves to assist health care practitioners in making appropriate prescribing decisions and law enforcement and regulatory agencies in their efforts to control the abuse and diversion of controlled substances. This document provides an overview of California's prescription drug monitoring program (PDMP) and discusses legal requirements related to CURES, including recently enacted legislation imposing a duty to consult the database prior to prescribing a Schedule II through IV controlled substance to a patient.

For more information on prescribing and dispensing controlled substances, see **CMA ON-CALL document #3200 "Controlled Substances: Dispensing"** and **CMA ON-CALL document #3201 "Controlled Substances: Prescribing."**

OVERVIEW

1. What is CURES?

Maintained and administered by the Office of the Attorney General in the California Department of Justice (DOJ), California's PDMP system allows pre-registered users, including licensed health care practitioners eligible to prescribe, order, administer, furnish, or dispense controlled substances, pharmacists authorized to dispense controlled substances, law enforcement, and regulatory boards, to access timely patient controlled substances prescription history information. California's database, known as CURES, contains entries of all Schedule II, III, and IV controlled substance prescriptions that are dis-

pensed in California. (Health & Safety Code §11165.)

The PDMP allows registered health care professionals, including physicians and dentists, that prescribe, order, administer, furnish, or dispense controlled substances, to access controlled substance history information in the CURES database at the point of care so they can properly evaluate their patients and prevent the abuse of controlled substances. It can be used by physicians to monitor if a patient is "doctor shopping," evaluate their patients' care, prevent inappropriate use of drugs, and assist those patients who may be abusing controlled substances. CURES is also used by law enforcement and regulatory oversight boards to identify individuals who may be diverting controlled substances.

CURES History

Originally the Triplicate Prescription Program enacted in 1939, CURES was established as the electronic database to support efforts to prevent, inves-

© California Medical Association 1995-2016

This CMA ON-CALL document is brought to you through the support of our members, and the generous support of physician-sponsored professional liability companies, Medical Insurance Exchange of California, NORCAL Mutual Insurance Company, The Doctors Management Company, and the Cooperative of American Physicians.

tigate, and prosecute the abuse of Schedule II prescription drugs in 1997. (A.B. 3042, Stats. 1996, ch. 738.) Since then, the California Legislature has expanded the breadth of information contained in the CURES database by adding prescription records for Schedule III and Schedule IV controlled substances. (S.B. 151, Stats. 2003, ch. 406; A.B. 2986, Stats. 2006, ch. 286.) Beginning in 2002, A.B. 2655, Stats. 2002, ch. 345, allowed health care professionals and pharmacists to submit a written request to the DOJ for a record of controlled substances dispensed to a patient. The DOJ subsequently developed a searchable, online PDMP that made the CURES database available to registered health care provider users and pharmacies through a client-facing web interface in 2009. (*Controlled Substance Utilization Review & Evaluation System: Feasibility Study Report*, State of California, Department of Justice, Office of the Attorney General (April 2014) at 1-2.)

In 2013, the California Legislature, with input from CMA, passed S.B. 809, Stats. 2013, ch. 400, making changes to CURES and upgrading it so that it could better achieve its purpose. For many years, CURES was underfunded by the State leading to a system that has many technological limitations. S.B. 809 and an associated budget trailer bill provided funding for CURES through both a budget appropriation and an additional \$6 licensing fee to be paid by all health care practitioners able to prescribe, order, administer, furnish or dispense Schedule II, III or IV controlled substances. The fee on health care practitioners has been assessed beginning April 1, 2014. (Business & Professions Code §208.)

In addition, S.B. 809 sets goals for the functioning of the upgraded CURES system. These include:

- Upgrading CURES so that it is capable of accepting real-time updates and is accessible in real-time, twenty-four (24) hours a day, seven (7) days a week.
- Upgrading CURES so that it is capable of operating in conjunction with all national prescription drug monitoring programs.
- Providing access to data for controlled substances dispensed through the VA, Indian Health Service, the Department of Defense, and

other entities that dispense controlled substances in California.

- Upgrading CURES so that it is capable of accepting the reporting of electronic prescription data.

(S.B. 809, Stats. 2013, ch. 400.)

MANDATORY ENROLLMENT

2. **Are physicians required to apply to register for CURES access?**

Yes. The law mandates that all California licensed physicians authorized to prescribe scheduled drugs, upon receipt of a Drug Enforcement Administration (DEA) Controlled Substance Registration Certificate, submit an application to access the CURES database. Physicians with an active license and a DEA Controlled Substance Registration Certificate should have submitted an application by July 1, 2016. (Health & Safety Code §11165.1.) Business & Professions Code §209 also requires that the DOJ and Department of Consumer Affairs (DCA) develop a procedure to enable health care practitioners who do not have a DEA number to opt out of applying for access to the CURES PDMP, but that process has not been developed.

In addition to physicians, individuals who have a valid California license as a dentist, naturopathic doctor, optometrist, osteopathic physician, physician assistant, podiatrist, advanced practice registered nurse, or veterinarian and possess a DEA Controlled Substance Registration Certificate must apply to register with CURES. Pharmacists must also apply to register for CURES access upon licensure. (Health & Safety Code §11165.1.)

3. **Do retired physicians have to register for CURES?**

A physician holding a retired license does not have to register for CURES as such a license prohibits the physician from engaging in the practice of medicine and therefore the physician is not authorized to prescribe. However, if a physician is retired from practice, but maintains an active license and DEA registration, the physician will be required to register with CURES.

Registering for CURES

4. How do I register with CURES?

Applicants must submit and complete an online registration form at <https://cures.doj.ca.gov/registration/confirmEmailPnDRegistration.xhtml>. Physicians will need to provide a valid email address, license number, and DEA registration certificate number. DOJ will then validate the identity and license of the applicant electronically with the Department of Consumer Affairs and the DEA. (CURES/PDMP website.)

The DOJ has developed publications and training videos to assist physicians with CURES registration. These resources, including the *CURES 2.0 Registration Tips and Tricks* can be found on the CURES/PDMP Publications and Training Videos website at <https://oag.ca.gov/cures/publications>.

5. Do CURES 1.0 users need to re-register for CURES 2.0 access?

No. CURES 1.0 users will be able to access CURES 2.0 with their current user ID and password. Upon first logging into CURES 2.0, they will be required to update their security questions and answers, establish a new password, review their account profile to verify accuracy, make necessary updates, and acknowledge CURES 2.0 Terms and Conditions. (CURES/PDMP website.)

6. Do CURES 2.0 users have to renew their account every year?

Yes. All users must renew their account on an annual basis. Users should receive renewal notices on the renewal date, and again thirty (30) days after the renewal date. (*CURES 2.0 Prescriber and Dispenser User Guide*, State of California, Department of Justice, Office of the Attorney General at 8, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/pdmp/cures-2.0-user-guide.pdf>.) (CURES 2.0 User Guide.)

7. Why may an application to access CURES be denied?

An application may be denied, or a physician may be suspended from using the database, for reasons which include, but are not limited to, the following:

- Materially falsifying an application for a physician;
- Failure to maintain effective controls for access to the patient activity report;
- Suspended or revoked federal Drug Enforcement Administration (DEA) registration;
- An arrest for a violation of law governing controlled substances or any other law for which the possession or use of a controlled substance is an element of the crime; or
- Accessing information for any other reason than caring for his or her patients.

In addition, the physician must notify the DOJ within thirty (30) days of any changes to the physician's account. (Health & Safety Code §11165.1.)

8. Will registering to access CURES subject a physician to law enforcement actions?

As is mentioned above, enrolling in CURES is mandated. (Health & Safety Code §11165.1.) Further, physicians who prescribe controlled substances are already a part of the CURES database as prescriber information is entered into the database as part of the mandated dispensing data provided to the DOJ by dispensing pharmacies and clinics. Therefore, registering to access CURES will not subject a physician to any heightened law enforcement scrutiny. Having access to CURES allows a prescriber to quickly review controlled substance information, identify patients that may be at risk of addiction or drug diversion, and assist those patients who may be abusing controlled substances.

9. Are there penalties for not registering with CURES?

While there is no penalty specified in the law for failure to register with CURES, according to the Medical Board of California (MBC), if it is brought to the MBC's attention that a physician is not registered, the Board will investigate the matter. Although the Board states that it will focus on bringing the physician into compliance, it is seeking regulatory authority to issue a citation and fine for failing to register as required by law. In the meantime, the failure to register to access CURES may be added to an accusation as a cause of discipline if the MBC investi-

gates a physician and finds other violations. (*Frequently Asked Questions About CURES*, MBC Newsletter Summer 2016, available at www.mbc.ca.gov/Publications/Newsletters/newsletter_2016_07.pdf.)

SUBMITTING DISPENSING INFORMATION

Pharmacists and all licensees, including dispensing physicians, who dispense Schedule II-IV controlled substances must submit dispensing data to the DOJ as soon as reasonably possible, but no later than seven (7) days after the controlled substance was dispensed in a format approved and accepted by the DOJ. (Health & Safety Code §11165; CURES/PDMP website.) Currently, the ASAP 2009 Version 4.1 format is accepted. Information as to how to submit such information can be found in the *Prescription Drug Monitoring Program Manual*, which can be found at http://pharmacy.ca.gov/publications/cures_reporting_handbook.pdf.

Physicians who directly dispense to their patients from their offices, and entities, including those reporting zero fills and pharmacies filling less than twenty-five (25) prescriptions a month, can report dispensing data electronically to DOJ on the Direct Dispense website at www.aaicures.com. To access the secure Direct Dispense website, physician dispensers must complete an application at <https://www.aaicures.com/register.for.access.php>. DOJ no longer accepts paper direct dispense reports nor granting reporting exemptions. Reporting exemptions previously granted are no longer in effect. (CURES/PDMP website.)

10. What information must be submitted?

The dispenser must report the following information to DOJ:

- Full name, address, and, if available, telephone number, gender, and date of birth of the patient;
- Prescriber's category of licensure, license number, national provider identifier (NPI) number, if applicable, the federal controlled substance registration number, and the state medical license number of any prescriber using

the federal controlled substance registration number of a government-exempt facility;

- Pharmacy prescription number, license number, NPI number, and federal controlled substance registration number;
- National Drug Code (NDC) number of the controlled substance dispensed;
- Quantity of the controlled substance dispensed;
- International Statistical Classification of Diseases, 10th revision (ICD-10) Code, if available;
- Number of refills ordered;
- Whether the drug was dispensed as a refill of a prescription or as a first-time request;
- Date of origin of the prescription; and
- Date of dispensing of the prescription.

(Health & Safety Code §11165(d).)

11. Does information regarding controlled substances that are directly administered to the patient in a physician's office have to be reported?

Health & Safety Code §11165 states only that controlled substances that are dispensed need to be reported to the DOJ. Health & Safety Code §11190 provides a similar reporting requirement for controlled substances but makes an express exception for drugs directly administered to the patient. Although this exception is not expressly stated in the CURES reporting law, leaving some ambiguity, general practice indicates that directly administered drugs do not currently face the same reporting requirements.

PATIENT ACTIVITY REPORT

The patient history of dispensed medications is known as a "Patient Activity Report" or "PAR." The PAR provides the physician with a list of all Schedule II, III, and IV controlled substances that have been prescribed to a patient within a chosen period of time, up to one year. CURES subscribers can log into CURES through its secure website and enter the patient's first name, last name, and date of birth to access and view an individual's PAR. (CURES 2.0 User Guide at 10-11.)

CURES subscribers may also receive a PAR initiated by the DOJ when a patient's CURES profile indicates the possibility of inappropriate, improper, or illegal use of Schedule II, III, and IV controlled substances. (Health & Safety Code §11165.1(c).)

12. What information is included in the PAR?

The PAR includes the patient's name, date of birth, patient address, prescriber name, prescriber DEA number, pharmacy name, pharmacy license number, date the prescription was dispensed, prescription number, drug name, drug quantity and strength, and number of refills remaining. (CURES/PDMP website.) A PAR may provide useful data as to the patient's drug utilization practices and alert the physician if a patient has altered the quantity of drugs prescribed from the original order or if illegal orders have been made in the practitioner's name.

Patient Safety Alerts

In addition to PAR queries by prescribers or dispensers, CURES 2.0 generates unsolicited messages called "Patient Safety Alerts." These alerts occur when prescription information is analyzed according to preset thresholds and reported to certain entities, such as prescribers, dispensers, licensing boards, and/or law enforcement. Clinicians are alerted via flags on their user profile dashboard when a patient's aggregate prescription level exceeds certain thresholds. These patient safety alerts can serve to inform prescribers and pharmacists that an individual may be abusing or diverting controlled substances, help prescribers make better prescribing decisions to improve patient care, and provide an opportunity to intervene and refer patients for substance use disorder treatment when appropriate.

The CURES 2.0 alerts have been set by DOJ at the following thresholds:

- Patient is currently prescribed more than one hundred (100) morphine milligram equivalents per day;
- Patient has obtained prescriptions from six (6) or more prescribers or six (6) or more pharmacies during last six (6) months;

- Patient is currently prescribed more than forty (40) morphine milligram equivalents of methadone daily;
- Patient is currently prescribed opioids more than ninety (90) consecutive days; and
- Patient is currently prescribed both benzodiazepines and opioids.

CURES 2.0 also provides messaging capability between an individual's different prescribers within the secure database. (CURES/PDMP website.)

Medical Records

13. Can a physician add a printed PAR to the patient's medical record?

Yes. Until recently, the DOJ discouraged physicians from providing a copy of the PAR to the patient. This changed in 2016 when the California Legislature clarified the law to allow health care providers to provide a patient with a copy of the patient's PAR from CURES so long as no additional CURES data is provided and include a copy of the PAR in the patient's medical records. (Health & Safety Code §11165(c)(3); S.B. 482, Stats. 2016, ch. 708.)

This recent change ensures that physicians maintain complete and up-to-date medical records relating to the provisions of services to their patients as required by the law. (Business & Professions Code §2266.) Any information that serves as a basis for patient care should be adequately reflected in the patient's medical record. Thus, physicians who use information provided in the PAR as a basis for patient care should include a copy of the PAR in the patient's medical records. Physicians who include the PAR in the patient's medical record should be aware that patients have a right to access their medical records and ensure that the PAR reflects the appropriate context of the patient's care and is properly dated to reflect when the report was accessed. In the alternative, physicians can document the pertinent information in the PAR in the medical record without including the PAR itself. For more information on for medical record documentation, see [CMA ON-CALL document #4003, "Contents of Medical Records."](#)

Prescriber Activity Reports

14. Can a physician access all prescriptions attributed to them in CURES under their DEA number?

No. Physicians can only query specific patients and access a patient activity report. Physicians do not have access to view reports of their own prescribing activities or prescriptions attributed to their DEA number in CURES.

ACCESSING CURES/PDMP DATA

15. Who can access CURES information?

Health care practitioners authorized to prescribe, order, administer, furnish, or dispense Schedule II, III, or IV controlled substances, as well as pharmacists, must obtain approval to access information in CURES related to the electronic history of controlled substances dispensed to an individual under his or her care. (Health & Safety Code §11165.1(a).) The subscriber may only access the information to care of his or her patients. (*Id.*)

In addition, the DOJ may provide data obtained from CURES to "state, local, and federal public agencies for disciplinary, civil, or criminal purposes." The law specifies, however, that regulatory boards whose licensees do not prescribe, order, administer, furnish, or dispense controlled substances do not have access to CURES data. The DOJ may also provide de-identified data to public and private entities approved by the DOJ for educational, peer review, statistical, or research purposes. (Health & Safety Code §11165 (c).) Any individual or entity that obtains data from CURES is prohibited from further disclosing the data to a third party unless it is authorized by, or pursuant to, state and federal privacy and security laws and regulations. (*Id.*)

16. Why can't I access the upgraded CURES 2.0 system?

Users must make certain that they are accessing CURES through the correct URL for CURES 2.0 at <https://cures.doj.ca.gov>.

Additionally, CURES 2.0 requires the use of an updated web browser. The DOJ has, until now, accommodated users with outdated browsers by redirecting them to the legacy "CURES 1.0" system while users upgraded their browser software and transitioned to the new CURES 2.0 system. As of Sunday, March 5, 2017, however, the CURES 1.0 system will no longer be available to users attempting to access CURES with an unsupported browser. To ensure continued access to the CURES database, physicians should make sure that their web browsers are updated to one of the following secure browsers:

- Microsoft Internet Explorer, version 11.0 or higher;
- Mozilla Firefox;
- Google Chrome; or
- Apple Safari

(CURES/PDMP website.) For any other assistance, physicians should contact the CURES Help Desk at (916) 227-3843 or cures@doj.ca.gov.

17. Can out-of-state physicians access CURES data?

Yes. Out-of-state physicians can register for CURES using the same online method described above. Such applicants must attach notarized PDF copies of the following supporting documents:

- Government-issued photo ID;
- State-issued medical or pharmacist license; and
- DEA Registration Certificate (prescribers only).

Out-of-state physicians, especially in border states, are encouraged to join CURES in order to receive the most accurate and up-to-date information on their patients. Furthermore, California physicians are encouraged to access the PDMP programs of neighboring states as well. (CURES/PDMP website.)

Delegation

18. Can a physician delegate the task of checking CURES to someone else?

Physicians can delegate their authority to query CURES and order reports on individual patients. (Business & Professions Code §209.) However, a del-

delegate can only initiate the PAR requests for the “parent” prescriber or dispenser user. No other functionality is accessible to the authorized delegate and thus, a delegate cannot access the patient’s actual PAR.

The parent user can view, add, and remove delegates from their User Profile in CURES 2.0 under “Delegations.” Delegates are assigned their own login information to enable them to identify and query patient prescription information in CURES on behalf of the parent user. However, the registered prescriber or dispenser user must then login to the system to access a dashboard of identified patients to view the patient’s PAR. (CURES 2.0 User Guide at 8.)

19. Can a physician authorize more than one delegate to initiate a patient’s PAR? Conversely, can a delegate be authorized by multiple physicians?

Yes. Delegate registration is managed from the User Profile by the parent prescriber or dispenser user. A delegate can be associated with more than one prescriber or dispenser, and the system will allow up to fifty (50) delegates per parent user and up to fifty (50) parent users per delegate. It is important to note that the parent user will be responsible for keeping the status of their authorized delegates up-to-date on their User Profile. The DOJ will delete delegate user accounts when a delegate has no parent user for more than thirty (30) days or has not logged into CURES for twelve (12) months. (CURES 2.0 User Guide at 8-10.)

A parent user may remove a delegate at any time. By doing so, the delegate will no longer be able to generate a PAR search on behalf of that user. If the delegate is linked with more than one parent user, when one parent user removes a delegate from his profile, that delegate will still have access to CURES 2.0 through the remaining parent users. (*Id.*) It is important for physicians to be vigilant about ensuring that delegates associated with their account are kept up-to-date. Delegates that are no longer authorized to access CURES due to changes in job function or employment status must be removed immediately to protect patient information and comply with state and federal privacy laws. It may be helpful to include the removal of an individual’s del-

egate access as part of the office’s human resources checklist for departing employees. For more information on CURES 2.0 user preferences, *see* CURES 2.0 User Guide.

20. Can a physician share his or her CURES/PDMP login and password?

No. The history of controlled substances dispensed to a patient and other patient information contained in the PAR is confidential protected health information and subject to state and federal privacy laws. Dissemination or distribution of information provided by CURES in a PAR to anyone other than the registered user is prohibited, unless otherwise authorized by state and federal privacy laws, and will subject a physician to disciplinary, civil, or criminal actions by the DOJ and/or the MBC as well as civil and criminal penalties under state and federal privacy laws. (Health & Safety Code §§11165 and 11165.1(d).)

Patient Access

21. Can patients access their information in CURES?

The only mechanism available for an individual to obtain his or her prescription history report from DOJ is through the Information Practices Act (IPA). For more information or to obtain a CURES IPA Request Form, contact the CURES Help Desk at cures@doj.ca.gov. (CURES/PDMP website.)

Patients, however, may access a PAR that has been included as part of their medical records pursuant to their access rights under state and federal laws. For more information on patient access to medical records, *see* **CMA ON-CALL document #4205 “Patient Access to Medical Records.”**

DATA CORRECTIONS

22. What should a prescriber do if he or she notices the CURES information is incorrect?

The DOJ will not correct any inaccuracies in CURES data. Rather, it maintains that since data contained in CURES is reported to the DOJ by

pharmacies and direct dispensers, patients and prescribers should notify the reporting pharmacy or dispenser of any incorrect information in CURES. The DOJ will only accept submissions for corrections from the original reporting pharmacy or dispenser. For information on how to submit reports of data corrections, pharmacies and direct dispenser should contact Atlantic Associates, Inc. by email at CACures@aainh.com or by phone at (800) 539-3370. (CURES/PDMP website.)

23. Are physicians subject to any liability arising from relying on incorrect or incomplete data in CURES?

Health care practitioners, when acting with reasonable care and in good faith, are not subject to civil or administrative liability arising from any false, incomplete, inaccurate, or misattributed information submitted to, reported by, or relied upon in the CURES database, or for any resulting failure of the CURES database to accurately or timely report that information. (Health & Safety Code §11165.1(f); S.B. 482, Stats. 2016, ch. 708.)

DUTY TO CONSULT

In 2016, the California Legislature enacted S.B. 482 which will require a health care provider to consult CURES prior to prescribing a Schedule II, III, or IV controlled substance to a patient for the first time and at least once every four (4) months thereafter if that substance remains part of the patient's treatment. The "first time" is defined as the "initial occurrence in which a health care practitioner . . . intends to prescribe, order, administer, or furnish a . . . controlled substance to a patient and has not previously prescribed a controlled substance to the patient." The physician must consult CURES no earlier than twenty-four (24) hours or the previous business day, prior to the prescribing, ordering, administering, or furnishing of a controlled substance to the patient. (Health & Safety Code §11165.4(a); S.B. 482, Stats. 2016, ch. 708.)

The "duty to consult" CURES is not yet in effect. It does not take effect until DOJ certifies that the CURES database is ready for statewide use and that the department has adequate staff to handle the related technical and administrative workload. The

mandate will go into effect six months after DOJ certifies that the database and the agency are ready. CMA will provide updates on its website once an effective date is determined. (Health & Safety Code §11165.4(e); S.B. 482, Stats. 2016, ch. 708.)

Exceptions

24. Are there any exceptions to the duty to consult CURES?

Yes. Health care practitioners are exempted from this "first time" querying process (but still must query on any subsequent prescription and at least every 4 months thereafter) where the health care practitioner prescribes, order, administers, or furnishes a controlled substance to a patient:

- Admitted to a facility, such as a licensed clinic, outpatient setting, health facility, or county medical facility, or during an emergency transfer between such facilities for use while on facility premises;
- In the emergency department of a general acute care hospital, so long as the quantity of the controlled substance does not exceed a non-refillable seven (7) day supply;
- As part of treatment for a surgical procedure in a licensed clinic, outpatient setting, health facility, county medical facility, or dental office, so long as the quantity of the controlled substance does not exceed a non-refillable five (5) day supply;
- Currently receiving hospice care;
- When access to CURES is not reasonably possible in a timely manner and another health care practitioner or delegate authorized to access CURES is not reasonably available, so long as the quantity of the controlled substance does not exceed a non-refillable five (5) day supply (physicians must then document the reason in the patient's medical records the reason why the CURES database was not consulted);
- When CURES is not operational, as determined by DOJ, or it cannot be accessed because of a temporary technological or electrical failure. The health care practitioner must, without undue delay, seek to correct any cause

of the technological or electrical failure that is reasonably within his or her control;

- Where CURES cannot be accessed because of technological limitations that are not reasonably within the control of the health care practitioner; or
- Where consulting CURES would, as determined by the health care practitioner, result in a patient's inability obtain a prescription in a timely manner and adversely impact the patient's condition, so long as the quantity of the controlled substance does not exceed a non-refillable five (5) day supply.

(Health & Safety Code §11165.4(c); S.B. 482, Stats. 2016, ch. 708.) The duty to consult the CURES database does not apply to veterinarians or pharmacists. (Health & Safety Code §11165.4(b); S.B. 482, Stats. 2016, ch. 708.)

Liability

25. **What if a physician fails to consult CURES before prescribing as required by S.B. 482?**

Physicians who fail to consult the CURES database pursuant to Health & Safety Code §11165.4 may face disciplinary and administrative sanctions. The law, however, does not create a private right of action against a health practitioner for failure to consult CURES. (Health & Safety Code §11165.4(d); S.B. 482, Stats. 2016, ch. 708.)

PRIVACY OF PDMP DATA

26. **Does the routine use of CURES patient information for law enforcement or licensing oversight purposes violate patient privacy rights?**

This issue is currently pending before the California Supreme Court in *Lewis v. Superior Court (Medical Board of California)* (2014) 226 Cal.App.4th 933 (rev. granted). In response to a patient complaint that did not raise any issues with Dr. Lewis's prescribing practices, the Medical Board investigator accessed the prescribing records of all of Dr. Lewis's patients during a four-year period from CURES and added charges concerning five patients that had no relation to the original complaining patient. The Board

accessed the CURES data as a routine part of any investigation into a complaint and did not obtain any authorizations, warrants, or issue subpoenas prior to accessing this patient data. Dr. Lewis filed a petition for writ of administrative mandamus arguing that the accusations with respect to the five additional patients should be set aside and as the current statute governing disclosure of CURES information violates patients' right to privacy. The California Court of Appeal held that the CURES statute does not amount to an impermissible invasion of the state constitutional right to privacy, as there are sufficient safeguards to prevent unwarranted public disclosure and unauthorized access to CURES data. Dr. Lewis filed a petition for review and CMA, joined by American Medical Association (AMA), filed an amicus curiae letter brief in support of the petition for review before the California Supreme Court, which was granted.

On October 28, 2015, CMA, along with other amici including the AMA, filed an amicus brief before the California Supreme Court which underscored the importance of confidentiality of medical information as an indispensable component of quality medical care and explained that patients have a privacy interest in their medical information maintained in CURES. The brief also addressed how the current CURES law does not adequately protect patient privacy as it gives too much discretion to the Attorney General's office as to the use and disclosure of patient records. CMA stressed the heightened importance of protecting patient privacy rights in the digital age where technology has facilitated the government's ability to store and mine large amounts of data. As of press time, this case was still pending before the California Supreme Court.

While *Lewis* focuses on a regulatory agency's authority to access PDMP records, the issue of law enforcement access to PDMP records is before the U.S. Court of Appeals for the Ninth Circuit in *Oregon PDMP v. DEA* (Case No. 14-35402). In this case, the DEA sought patient-specific information from Oregon's PDMP through the use of a federal administrative subpoena, which does not involve judicial review or a showing of probable cause. The Oregon PDMP, however, refused to comply with the DEA's subpoena on the ground that doing so would violate Oregon state law, which requires a court order based on probable cause before patient data in the

PDMP can be disclosed to any federal, state or local law enforcement agency. A coalition of plaintiffs that include Oregon's PDMP, the American Civil Liberties Union (ACLU), patients and prescribing physicians filed a lawsuit in federal court against the DEA challenging the use of administrative subpoenas to access PDMP information. The plaintiffs argued that information in the PDMP is protected under the Fourth Amendment of the U.S. Constitution and that the DEA must show probable cause and obtain a warrant prior to accessing such information. The federal trial court sided with the State of Oregon and concluded that the Fourth Amendment prohibits the DEA from issuing administrative subpoenas for the database records. The court held that patients have an expectation of privacy in their prescription information contained in the PDMP stating that it "is difficult to conceive of information that is more private or more deserving of Fourth Amendment protections." The DEA appealed this ruling to the Ninth Circuit Court of Appeals, whose jurisdiction includes California.

CMA joined the AMA and the other western state medical associations within the Ninth Circuit to file an amicus brief in this case challenging the DEA's authority to obtain patients' private prescription records without a court order. The brief urges the court to recognize the profound interests that this case places at issue in the areas of patient privacy and the integrity of the patient-physician relationship. The protection of patient privacy "is essential for a patient-physician relationship built on trust ... so that patients will seek care and so that doctors may provide the most efficacious health care for the patient's benefit," the brief states. It advocates for the strongest possible protections for patient prescription data collected by state prescription drug monitoring programs so that data is used by doctors and pharmacists for responsible treatment and prescription practices and to protect public health and safety, not for the enhancement of federal law enforcement without stringent legal safeguards. Oral arguments were heard on November 8, 2016, and this case is awaiting a decision by the U.S. Ninth Circuit Court of Appeals.

CURES/PDMP RESOURCES

For more information, educational resources, and updates, visit:

- DOJ's CURES/PDMP website, available at <https://oag.ca.gov/cures>. The site contains frequently asked questions, links to registrations, and publications and training videos.
- The Medical Board of California's CURES Update website, available at www.mbc.ca.gov/Licensees/Prescribing/CURES_Update.aspx.
- CMA's CURES Resource Page, available at www.cmanet.org/cures.

We hope this information is helpful to you. CMA is unable to provide specific legal advice to each of its more than 43,000 members. For a legal opinion concerning a specific situation, consult your personal attorney.

For information on other legal issues, use CMA's online health law library, CMA ON-CALL, or refer to the *California Physician's Legal Handbook* (CPLH). CPLH is a comprehensive health law and medical practice resource containing legal information, including current laws, regulations and court decisions that affect the practice of medicine in California. Written and updated by CMA's Center for Legal Affairs, CPLH is available in an eight-volume, softbound print format or through an online subscription to www.cplh.org. To order your copy, call (800) 882-1262 or visit CMA's website at www.cmanet.org.