

HEALTH CARE ALERT

DWYER & COLLORA ATTORNEYS PREVAIL IN SJC DECISION THAT THE PSYCHOTHERAPIST-PATIENT PRIVILEGE BARS SUBPOENA OF PATIENT RECORDS BY BOARD OF REGISTRATION IN MEDICINE

Board of Registration in Medicine v. John Doe

Summary

In *Board of Registration in Medicine v. John Doe*, the Supreme Judicial Court (“SJC”) held that the psychotherapist-patient privilege bars the Board of Registration in Medicine (“Board”) from obtaining patient treatment records from a psychiatrist absent patient consent. In the opinion, the SJC makes clear that the psychotherapist-patient privilege cannot be pierced other than through a legislatively enacted exception or a constitutional concern, such as a criminal defendant’s constitutional right to obtain and present evidence. In the opinion, the SJC also stated that when a physician challenges an administrative subpoena issued by the Board, the Superior Court should hold an evidentiary hearing in which the physician may challenge the validity of the subpoena.

Statute Involved

General laws chapter 233 § 20 (psychotherapist-patient privilege)

The Case

The *Board v. Doe* decision arises out of a subpoena for the records of twenty-four patients that was issued to Dr. John Doe as part of a Board investigation into Dr. Doe’s prescription writing practices. Dr. Doe is a board certified psychiatrist who specializes in the treatment of patients suffering from chronic pain. Dr. Doe requires all of his patients to enter into a pain management agreement that waives any applicable privileges if Dr. Doe receives information that the patient is receiving narcotic pain medications from a source other than Dr. Doe. After receiving the Board’s initial request for the records of twenty-four patients, Dr. Doe agreed to be interviewed by the Board, and because he had information that one of the patients for whom the Board was seeking records had obtained pain medication from another source, he disclosed the records for that single patient. Dr. Doe refused to provide the records of the other twenty-three patients, asserting that the psychotherapist-patient privilege barred their disclosure. The Massachusetts psychotherapist-patient privilege is a statutory privilege which provides that, with only limited exceptions, “in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient’s mental or emotional condition.” G.L. ch. 233, § 20B. The statute defines a “psychotherapist” to include “a person licensed to practice medicine, who devotes a substantial portion of his time to the practice of psychiatry.”

When Dr. Doe refused to provide the requested records, the Board filed an action in Superior Court pursuant to G. L. c. 233, § 10 to compel Dr. Doe to comply with the subpoena. The Board asserted two reasons why the privilege did not bar production of the records. First, it claimed that Dr. Doe did not meet the definition of “psychotherapist” in the statute because he had reported to the Board that he spent the majority of his time in “pain management,” which the Board asserted was not part of the practice of psychiatry. Second, it argued that even if Dr. Doe was a psychotherapist, the Board’s interest in investigating allegations of inadequate or improper medical practices by a physician outweighed the interests protected by the privilege, and therefore the privilege should not apply to its subpoena. Dr. Doe

countered by arguing that pain management is a legitimate subspecialty of psychiatry and that lacking an express legislatively enacted exception, the privilege barred the Board's demand for privileged communications between a psychotherapist and his patients. He also sought an evidentiary hearing to challenge the factual assertions made in the Board's complaint and accompanying affidavit. The Superior Court denied the request for an evidentiary hearing and granted the Board's motion to compel, finding that Dr. Doe did not spend "a substantial portion of his time" in the practice of psychiatry.

The SJC reversed and remanded with instructions to quash the Board's subpoena. First, it pointed out that the Board itself conceded in front of the SJC that pain management was a legitimate subspecialty of psychiatry. As to the Board's argument that pain management was also a subspecialty in other medical fields, the SJC found this to be "irrelevant." Regarding Dr. Doe's contention that the Superior Court erred in not permitting an evidentiary hearing into the factual assertions made by the Board in support of its subpoena, the SJC held that such a hearing should have been allowed. Because the Board now conceded that pain management was a subspecialty of psychiatry, however, such a hearing was no longer necessary.

Finally, having determined that Dr. Doe met the statutory definition of "psychotherapist", the SJC then held that the privilege barred the Board's request for patient records. It stressed that, "Creation of an exception to a statutory privilege is for the Legislature." Therefore, because the Legislature had created no such exception for Board investigations, the SJC had no authority to do so. It held that, "in criminal cases we have sometimes permitted the production of privileged material, we have done so because the confidentiality interests underlying a statutory privilege must yield to a criminal defendant's constitutional right to present relevant evidence. There is obviously a conflict between the confidentiality interest underlying the psychotherapist-patient privilege and the [B]oard's need to obtain medical records in the course of its investigations. The Legislature has resolved that conflict in favor of confidentiality by declining to enact a statutory exception to the privilege for board investigations into physician misconduct. With no constitutional considerations implicated, we accept the legislative judgment." It therefore remanded the matter to the Superior Court to quash the subpoena.

The Lessons

- When a psychiatrist is under investigation by the Board, he or she cannot be compelled to provide patient records or other material containing privileged communications with patients to the Board.
- When faced with a potentially improper subpoena, a practitioner should consider forcing the Board to initiate an action in Superior Court, and once such an action is initiated, the practitioner should seek an evidentiary hearing during which the Board's investigatory personnel can be cross-examined.
- When describing the nature of their practice to the Board, psychiatrists practicing specific subspecialties should make clear that this work is still psychiatric in nature to ensure that the privileged nature of the patient communications is not in jeopardy.

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