

Telemedicine Prescribers Should Read This Case: U.S. vs. Zadeh

Article By:

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Health care providers who use telemedicine for remote prescribing of controlled substances should pay close attention to an important case currently pending at the Fifth Circuit Court of Appeals. The case will decide whether or not the **Drug Enforcement Administration** can use administrative subpoenas to obtain and review medical records *without a warrant* to determine if the provider has violated controlled substances prescribing laws. As remote prescribing of controlled substances is subject to the federal [Ryan Haight Act](#) – including whether or not an in-person examination is required before remote prescribing – the outcome of this case will have a significant impact on telemedicine-based prescribers of controlled substances.

The case on appeal is [United States v. Zadeh](#), arising from the Northern District of Texas. In it, the DEA seeks to compel production of medical records of Dr. Zadeh's patients as part of a DEA inquiry into whether or not Dr. Zadeh violated the [Controlled Substances Act](#). The DEA has not stated why or how it believes Dr. Zadeh's prescribing practices violated federal law, nor what specific aspects of his prescribing practice it is investigating. The pleadings suggest the subpoena would be used to obtain records to *subsequently* determine whether or not Dr. Zadeh violated the Controlled Substances Act (a practice the Association of American Physicians & Surgeons characterized as "a fishing expedition through scores of highly personal and private medical records").

The DEA claims it is properly exercising its statutory authority, whereas Dr. Zadeh's refusal to produce the records raises Fourth Amendment protections under the U.S. Constitution.

The DEA prevailed at the District Court level, with the Court ruling the DEA could obtain the medical records without probable cause or a warrant. The District Court approved the magistrates judge's findings, stating the DEA can use its administrative subpoenas

merely on suspicion that the law is being violated, *or even just because it wants assurance that it is not.*

Dr. Zadeh appealed the ruling.

Dr. Zadeh argues the forced disclosure of private medical information will have a chilling effect on patients' willingness to openly share such information with their provider, hindering the information exchange and trust essential to the doctor-patient relationship and potentially jeopardizing patients' health. The DEA argues that without access to such information, it is unable to investigate potential criminal activity in the healthcare industry, putting patients at risk of unlawful practices.

If the Fifth Circuit rules in favor of the DEA, the DEA might issue similar administrative subpoenas with greater frequency. Records requested under an administrative subpoena must be at least related to the investigation, and identifying information should be specifically requested. The DEA might instruct the provider to keep the investigation and subpoena confidential, but the magistrate judge stated Dr. Zadeh was not required to keep the DEA's investigation a secret, despite the DEA's representation to the contrary.

If the Fifth Circuit rules in favor of Dr. Zadeh, the DEA's administrative subpoenas will not suffice to compel production of these private medical records. Such a ruling may include narrowly defining the scope of relevance for DEA investigations, requiring certain redactions before sensitive information is produced, requiring the DEA to obtain a search warrant, or other procedures designed to protect individual rights while still permitting the DEA to obtain relevant records in connection with its investigations.

Notably, the Oregon District Court [considered and rejected](#) the DEA's ability to use administrative subpoenas in a case involving Oregon's Prescription Drug Monitoring Program. The DEA issued administrative subpoenas to seek copies of prescription information. The Court ruled the DEA could not use administrative subpoenas to obtain such private health information "entitled to and treated with a heightened expectation of privacy." The Court stated, "By reviewing doctors' prescribing information, the DEA inserts itself into a decision that should ordinarily be left to the doctor and his or her patient," and the DEA's attempt to draw a distinction between medical records and prescription information "is very nearly meaningless."

Telemedicine prescribers should continue to follow this Fifth Circuit case as it develops.

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