



Physicians Caring for Texans

Mar. 18, 2021

Jena Abel
Deputy General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, Texas 78701

Via email to jena.abel@bon.texas.gov

Re: Comments on Emergency Rule 22 T.A.C. § 217.24, *Texas Register*, Mar. 12, 2021, Vol. 46, No. 11, Pages 1561-1704

Dear Ms. Abel:

On behalf of the Texas Medical Association (TMA), we submit these comments on the Texas Board of Nursing's (BON's) emergency rule regarding prescribing controlled substances to treat chronic pain as proposed in the March 12 Texas Register. TMA, on behalf of our over 55,000 members, has several concerns with the rule as published, including the rule (1) does not expressly address delegation and supervision, and instead may be interpreted to impermissibly supersede statutory law as drafted; and (2) is inconsistent with the Texas Medical Board's (TMB's) emergency rule on issuing prescriptions for controlled substances to treat chronic pain via telemedicine, which could create practical problems with delegation requirements. We thank you in advance for your consideration and prompt attention to these concerns.

Comments

1. The emergency rule as drafted improperly supersedes statutory physician delegation and supervision requirements.

We recognize and appreciate BON's inclusion of the physician-delegation requirement under state law in the preamble of its emergency rule ("The emergency amendments will only apply to those APRNs whose delegating physicians agree to permit them to issue re-fills for these patients."). However, the preamble is not binding law. Consequently, we are concerned subparagraph (A) contains no delegation and supervision language, particularly in light of the "notwithstanding" language in that provision. "Notwithstanding" language is commonly interpreted to supersede the provision it is referencing, which in this case is subsection (e)(1). We reference the problematic language in bold below:

(e) (No change.)

(1) Treatment of chronic pain with scheduled drugs through use of telemedicine medical services is prohibited, **unless otherwise allowed under federal and state law**. For purposes of this section, "chronic pain" means a state in which pain persists beyond the usual course of an acute disease or healing of an injury. Chronic pain may be associated

with a chronic pathological process that causes continuous or intermittent pain over months or years.

(A) Notwithstanding paragraph (e)(1), treatment of chronic pain with scheduled drugs through use of telemedicine medical services is not prohibited by this rule if the patient is an established chronic pain patient of the APRN and is seeking telephone refill of an existing prescription, and the APRN determines that such telemedicine treatment is needed due to the COVID-19 pandemic.

This could be interpreted by a health care provider looking at just BON's rule in isolation as permitting independent prescribing through the use of telemedicine, which is not permitted under Texas law. *See, e.g.*, Tex. Occ. Code 301.152 (referencing delegation and supervision sections 157.0512 (prescriptive authority agreement) and 157.054 (prescribing at a facility-based site)). To avoid unintended application of the law, we strongly urge BON to expressly reference the physician delegation and supervision requirement in its rule. While ordinarily we would provide example language, there is another issue with BON's emergency rule, as explained below, that needs to be addressed.

2. The emergency rule is inconsistent with TMB's emergency rule 174.5 on issuing prescriptions via telemedicine, which may complicate delegation authority.

BON's emergency rule is inconsistent with the Texas Medical Board's (TMB's) rule on issuing prescriptions for controlled substances via telemedicine—in some places it is more restrictive and in others more permissive. For example, under BON's rule, the APRN's treatment is limited to whether the treatment is needed due to the COVID-19 pandemic (including certain factors the APRN must consider), but the delegating physician's treatment decision *is not* limited in this manner under TMB's emergency rule—indeed, TMB's new emergency rule does not condition treatment on the pandemic at all. As another example, an APRN may only issue a prescription to treat chronic pain for a telephone refill; however, under TMB's new rule, a physician can issue certain prescriptions to treat chronic pain through a two-way audio and visual communication *or* by phone, so long as certain factors are met. These inconsistent and sometimes conflicting rules may pose problems for the physician exercising appropriate delegation and for the APRN trying to comply with the delegation and BON rule. Therefore, we strongly urge BON to align its rule with TMB's rule to prevent confusion. For reference, both emergency rules are laid out below. First, the BON emergency rule states as follows:

(e) (No change.)

(1) Treatment of chronic pain with scheduled drugs through use of telemedicine medical services is prohibited, unless otherwise allowed under federal and state law. For purposes of this section, "chronic pain" means a state in which pain persists beyond the usual course of an acute disease or healing of an injury. Chronic pain may be associated with a chronic pathological process that causes continuous or intermittent pain over months or years.

(A) Notwithstanding paragraph (e)(1), treatment of chronic pain with scheduled drugs through use of telemedicine medical services is not prohibited by this rule if the patient is an established chronic pain patient of the APRN and is seeking telephone refill of an existing prescription, and the APRN determines that such telemedicine treatment is needed due to the COVID-19 pandemic.

(B) If a patient is treated for chronic pain with scheduled drugs through the use of telemedicine medical services as permitted by (e)(1)(A), the medical records must document the exception and the reason that a telemedicine visit was conducted instead of an in-person visit.

(C) An APRN, when determining whether to utilize telemedicine medical services for the treatment of chronic pain with controlled substances as permitted by (e)(1)(A), shall give due consideration to factors that include, at a minimum, date of the patient's last in-person visit, patient co-morbidities, and occupational related COVID risks. These are not the sole, exclusive, or exhaustive factors an APRN should consider under this rule.

(D) The emergency amendment of this rule effective March 4, 2021, shall be in effect for only 60 days or the duration of the time period that the Governor's disaster declaration of March 13, 2020 in response to the COVID-19 pandemic is in effect, whichever is shorter.

Now, compare this to the Texas Medical Board emergency rule (in relevant part) also published in the March 12 Texas Register:

(1) Treatment for Chronic Pain. For purposes of this rule, chronic pain has the same definition as used in §170.2(4) of this title (relating to Definitions).

(A) Telemedicine treatment of chronic pain with scheduled drugs by any means other than via audio and video two-way communication is prohibited, unless: a patient is an established chronic pain patient of the physician, is receiving a prescription that is identical to a prescription issued at the previous visit, and has been seen by the prescribing physician or health professional defined under Chap 111.001(1) of Texas Occupations Code, in the last 90 days either:

(i) in-person; or

(ii) via telemedicine using audio and video two-way communication

(B) All other treatment of chronic pain with scheduled drugs through use of telemedicine medical services is allowed, unless otherwise prohibited under federal and state law.

(C) The emergency amendment of this rule effective March 3, 2021 at 12:01 A.M. shall be in effect for only 60 days or the duration of the time period that the Governor's disaster declaration of March 13, 2020 in response to the COVID-19 pandemic is in effect, whichever is shorter.

Conclusion

Thank you for your consideration of the above comments, concerns, and recommendations. Should you have any questions, please feel free to contact us by email as follows: Rocky Wilcox, vice president and general counsel, at rocky.wilcox@texmed.org; Kelly Walla, associate vice president and deputy general counsel, at kelly.walla@texmed.org; Laura Thetford, associate general counsel, at laura.thetford@texmed.org; or Dan Finch, vice president of advocacy, at dan.finch@texmed.org; or by phone at 512-370-1300; or at our mailing address: 401 West 15th Street, Austin, Texas 78701.

Sincerely,

A handwritten signature in black ink, appearing to read "Diana L. Fite, MD". The signature is stylized with a large, looping initial "D" and a trailing "MD".

Diana L. Fite, MD
President
Texas Medical Association