

**Consideration of Adoption of New 22 Tex. Admin. Code §217.24, relating to
Telemedicine Medical Service Prescriptions, including Written Comments
Received and Results of Public Hearing, if any**

Background: Proposed new §217.24 was approved by the Board at its July 2018 meeting for submission to the *Texas Register* for public comment. The proposal was published in the *Texas Register* on September 14, 2018, and the comment period ended on October 14, 2018. The Board received one written comment on the proposal. The Board did not receive any requests for a public hearing. A copy of the written comment received is attached hereto as Attachment "A".

The Board received a comment from a representative of the Texas Medical Association. Staff does not recommend making the commenter's suggested changes.

A summary of the comment received and Staff's proposed response is attached as Attachment "B". The rule text, as proposed, is included in Attachment "C", for reference.

Board Action: Move to adopt new 22 Texas Administrative Code §217.24, relating to *Telemedicine Medical Service Prescriptions*, without changes from the proposed text published in the *Texas Register*. Further, authorize Staff to publish the summary of comments and response to comments attached hereto as Attachment "B".

Attachment "B"

Summary of Comments Received

Summary of Comment: A commenter representing the Texas Medical Association states that the rule should re-iterate that, in order to issue prescriptions in conjunction with telemedicine medical services, an advanced practice registered nurse (APRN) must have prescriptive authority. The commenter states that, unlike the Texas Medical Board's rules on telemedicine, the Board's proposed rules contain no restriction relating to who may issue a prescription. The commenter states that the Texas Medical Board's rules clarify that prescriptions issued contemporaneously with a telemedicine medical service are those that are issued by a physician or by another health professional who is acting pursuant to a prescriptive authority agreement. The commenter states that, while the Board clarifies in the preamble of the proposed rule that this applies to APRNs with prescriptive authority, this clarification is not published in the administrative code, and therefore, would not be easily accessed by nurses or other members of the public. The commenter encourages the Board to amend the proposed rules to put in the text of the rule a clarification that an APRN must have a prescriptive authority agreement under Chapter 157 before the nurse may issue prescriptions contemporaneously with a telemedicine medical service.

The commenter also points out that the rule does not include a definition of "telemedicine medical service". The commenter states that both Senate Bill (SB) 1107 and the Texas Medical Board's rules contain a definition of "telemedicine medical service". The commenter states that this definition is important because it distinguishes a

telemedicine medical service from a telehealth service. Further, the commenter states that physicians and physician delegates provide telemedicine medical services, while a telehealth service is everything else. Thus, without physician delegation and supervision, nurses, including APRNs, may not provide telemedicine medical services. The commenter recommends that the Board include a definition of “telemedicine medical service” in the rules that will clarify that telemedicine medical services may be provided only under physician delegation and supervision.

Finally, the commenter states that the Board has no other rules that provide direction or standards for its licensees when providing telehealth or telemedicine medical services. The commenter acknowledges that SB 1107 does not direct the Board to adopt rules on anything but the validity of a prescription issued contemporaneously with a telemedicine medical service. However, the commenter recommends that the Board utilize its general rulemaking authority under the Occupations Code §301.151 to adopt general rules that apply to nurses when providing telehealth or telemedicine medical services. The commenter states that the Texas Medical Board has provided regulatory privacy, fraud and abuse, notice, and record keeping standards, for physicians providing telemedicine medical services. The commenter notes that these standards are not perfect and may lack clarity in some areas, but still urges the Board to adopt the same standards for APRNs providing telemedicine medical services. The commenter states that this would help physicians when they delegate tasks to APRNs and other nurses, because the physicians would know that the nurses have a clear set of standards to follow in performing telemedicine medical or telehealth services. The commenter further states that this would ensure that telemedicine medical services have the privacy, fraud and

abuse, and other protections, regardless of whether they are provided by a physician or APRN.

Agency response: The Board does not find the commenter's recommended changes necessary and, therefore, declines to make them. The proposed rule applies to APRNs with prescriptive authority, as those are clearly the only licensees within the Board's jurisdiction who are authorized to issue prescriptions. An APRN must be properly licensed and authorized under a valid prescriptive authority agreement in order to issue a prescription, whether in the context of telemedicine or otherwise. This is true whether this rule specifically re-states these requirements or not. However, this rule is intended to implement the specific provisions of the Occupations Code Chapter 111, as they relate to telemedicine medical service prescriptions. It is not intended to summarize all requirements or limitations that may apply to a nurse's practice. Nurses, including APRNs, are required to know and abide by the limitations of their licensure and to ensure their nursing practice meets all required standards at all times. The text of the rule does not alter this expectation in any way.

The Board also declines to add a definition of "telemedicine medical service" to the rule. The scope of the rule is very narrow and refers only to telemedicine medical service prescriptions and telemedicine medical services. The Board does not find the rule confusing or misleading in this regard. Further, APRNs who provide telemedicine medical services must adhere to the requirements associated with that setting, including appropriate physician delegation and supervision. The Board does not find it necessary to add additional language to the rule to re-iterate what is already required of APRNs in these settings.

Finally, the Board declines to adopt a comprehensive set of standards for APRNs providing telehealth or telemedicine medical services in this rule. The Board has already adopted minimum standards of nursing practice that apply to APRNs in any practice setting (22 Tex. Admin. Code §217.11), standards that apply to all APRNs (22 Tex. Admin. Code Chapter 221), and standards that apply to APRNs with prescriptive authority (22 Tex. Admin. Code Chapter 222). Additionally, APRNs must know and conform their practice to other state and federal laws and regulations that may affect their practice, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Occupations Code Chapter 111 and 157, the Health and Safety Code Chapter 181, and any applicable rules adopted by the Texas Medical Board, the Texas Board of Pharmacy, and the Texas Department of Insurance, to name a few. Privacy standards, fraud and abuse, notice, and record keeping standards are already covered by these federal and state statutes and regulations. As such, the Board declines to include duplicative standards in this rule.

Attachment "C" (as proposed)

§217.24. Telemedicine Medical Service Prescriptions.

(a) The validity of a prescription issued as a result of a telemedicine medical service is determined by the same standards that would apply to the issuance of the prescription in an in-person setting.

(b) This rule does not limit the professional judgment, discretion or decision-making authority of a licensed practitioner. A licensed practitioner is expected to meet the standard of care and demonstrate professional practice standards and judgment, consistent with all applicable statutes and rules when issuing, dispensing, delivering, or administering a prescription medication as a result of a telemedicine medical service.

(c) A valid prescription must be:

(1) issued for a legitimate medical purpose by a practitioner as part of patient-practitioner relationship as set out in §111.005, Texas Occupations Code; and

(2) meet all other applicable laws before prescribing, dispensing, delivering or administering a dangerous drug or controlled substance.

(d) Any prescription drug orders issued as the result of a telemedicine medical service, are subject to all regulations, limitations, and prohibitions set out in the federal and Texas Controlled Substances Act, Texas Dangerous Drug Act and any other applicable federal and state law.

(e) Limitation on Treatment of Chronic Pain. Chronic pain is a legitimate medical condition that needs to be treated, but must be balanced with concerns over patient safety

and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(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.

(2) Treatment of acute pain with scheduled drugs through use of telemedicine medical services is allowed, unless otherwise prohibited under federal and state law. For purposes of this section, "acute pain" means the normal, predicted, physiological response to a stimulus, such as trauma, disease, and operative procedures. Acute pain is time limited.



Physicians Caring for Texans

October 10, 2018

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Via email to dusty.johnston@bon.texas.gov

Re: Comments on Proposed Rule 22 Tex. Admin. Code § 217.24 (43 Tex. Reg. 3567)

Dear Mr. Johnston:

The Texas Medical Association (TMA) appreciates the opportunity to provide brief comment on the Board of Nursing's (BON) proposed rules in 22 Tex. Admin. Code §217.24, as published in the Texas Register on September 14, 2018 (43 TexReg 5907). TMA is a private, voluntary, nonprofit association of more than 51,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its mission is to "Improve the health of all Texans." TMA's diverse physician members practice in all fields of medical specialization.

TMA was a strong supporter of Senate Bill 1107 (85th R.S.), which amended requirements for telemedicine medical services in Texas, and is the bill on which these proposed rules are based. That bill contained provisions to ensure that telemedicine medical services were provided in a way that would ensure patient safety, including by requiring that telemedicine medical services be provided by only Texas-licensed physicians or health professionals acting under the delegation and supervision of a Texas-licensed physician.

The BON's proposed rules do not comprehensively reflect those protections, so TMA comments to encourage the BON to amend the proposed rules to more closely follow S.B. 1107 and to ensure that the rules properly follow the statutorily prescribed scope of practice for nurses.

1. Comment 1: Include in the Text of the Rule that to Issue Prescriptions in Conjunction with Telemedicine Medical Services, an Advance Practice Registered Nurse Must Have Prescriptive Authority.

First, unlike the Texas Medical Board's (TMB) rules on telemedicine, the BON's proposed rules contain no restriction relating to *who* may issue a prescription. In 22 Tex. Admin. Code §174.2(1), the TMB telemedicine rule clarifies that prescriptions issued contemporaneously with a telemedicine medical service are those that are issued by a physician or by another health professional who is acting pursuant to a prescriptive authority agreement. While the BON clarifies in the preamble of the rule that this applies to advance practice registered nurses (APRN) "with prescriptive authority," this preamble clarification is not published in the administrative code and therefore would not be as easily accessed by nurses or other

members of the public. TMA thus encourages the BON to amend the proposed rules to put in the text of the rules a clarification that an advance practice registered nurse must have prescriptive authority pursuant to a prescriptive authority agreement under Chapter 157, Texas Occupations Code, before the nurse may issue prescriptions contemporaneously with a telemedicine medical service.

2. Comment 2: Include in the Text of the Rule a Definition of Telemedicine Medical Service to Clarify that Such a Service is Provided by Nurses Only Under Physician Delegation and Supervision.

Next, the BON's proposed rules also lack a clarification of what a "telemedicine medical service" is. Both S.B. 1107 and the TMB's rules on telemedicine contained a specific definition of telemedicine medical service. This definition is important because it distinguishes a telemedicine medical service from a telehealth service—physicians and physician delegates provide telemedicine medical services, while a telehealth service is everything else. Thus, without physician delegation and supervision, nurses, including advance practice registered nurses, may not provide telemedicine medical services. TMA thus recommends that the BON amend the proposed rules to add a definition of telemedicine medical services that is consistent with S.B. 1107 and the TMB telemedicine rules that will clarify that telemedicine medical services may be provided only under physician delegation and supervision.

3. Comment 3: Include in the Rule Other Appropriate Regulations Regarding the Provision of Telehealth and Telemedicine Medical Services.

Finally, the BON has no other rules that provide direction or standards for its licensees when providing telehealth or telemedicine medical services. While S.B. 1107 did not direct the BON to adopt rules on anything but the validity of a prescription issued contemporaneously with a telemedicine medical service, the BON would have general rulemaking authority under Section 301.151, Texas Occupations Code to adopt general rules that apply to nurses when providing telehealth or telemedicine medical services. The TMB has provided regulatory privacy, fraud and abuse, notice, and record keeping standards, for instance, for physicians providing telemedicine medical services.¹ While these standards are not perfect and may lack clarity in some areas, TMA still recommends that the BON adopt the same standards for APRNs providing telemedicine medical services. This would help physicians when they delegate tasks to APRNs and other nurses, because the physicians would know that the nurses have a clear set of standards to follow in performing telemedicine medical or telehealth services. This would ensure that telemedicine medical services have the privacy, fraud and abuse, and other protections, regardless of whether they are provided by a physician or APRN.

4. Conclusion

TMA again expresses appreciation for the opportunity to provide comment on these rules. Should you have any questions, please contact Kelly Walla, Associate Vice President and Deputy General Counsel, at kelly.walla@texmed.org or Jared Livingston, Assistant General Counsel, at jared.livingston@texmed.org. You may also call TMA's toll free number at 800-880-1300 and request to speak to these association staff members.

¹ See 22 Tex. Admin. Code Chapter 174, Subchapter A.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Curran MD". The signature is fluid and cursive, with a large initial "D" and a stylized "C".

Douglas Curran, MD
President
Texas Medical Association