HOOT WHAT WHERE

WELCOME TO ANOTHER EDITION OF "HOOT WHAT WHERE," a newsletter developed by Professional Risk Management Services® for the behavioral healthcare network of psychiatrists and mental health professionals. From risk management and claims advice to risk alerts, PRMS announcements, and events, this quarterly newsletter will share relevant news, useful tips, and important updates in the field of psychiatry to help keep you, your patients, and your practice safe.

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TEST YOUR KNOWLEDGE!

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PHARMACIES REFUSING TO FILL PRESCRIPTIONS
WHAT PSYCHIATRISTS NEED TO KNOW

SUMMARY: To prevent liability for dispensing prescriptions that are not legitimate, pharmacies are self-imposing policies against filling certain controlled substance prescriptions, such as those from out-of-state prescribers or from prescribers that have not seen their patients in-person.

BACKGROUND

"CORRESPONDING RESPONSIBILITY" OF THE PHARMACIST

In order to fill a prescription for controlled substances, pharmacies need, in addition to a DEA registration, to meet various obligations in dispensing. If pharmacies fail to meet these obligations, they could lose their DEA registration, have civil and criminal charges brought, have to pay significant fines, and lose their business.

One of the main obligations is the "corresponding responsibility" to ensure each prescription filled is for a specific, legitimate medical purpose, and not for abuse.

RED FLAGS

Pharmacists are required to note red flags that could indicate the prescription may not have been written for a legitimate medical purpose, and resolve those red flags prior to dispensing controlled substances. There are, however, no statutes or regulations listing exactly what the federal government's red flags are. The government basically says red flags are any signs of diversion, misuse, or illegitimate prescribing. There have been lawsuits where the government lists red flags, some obvious such as very high strength, very high doses, requests for early refills, but also one relevant to telemedicine - the pharmacy is a long way from the prescriber's office. These red flags have been relevant many, many years prior to the surge in telemedicine.

While there is no federal statutory or regulatory list of red flags, state boards of pharmacy have put out specific red flags that pharmacies need to be aware of and address before dispensing, again, including the distance flag. Examples include:

- The California State Board of Pharmacy lists as a red flag "long distances traveled from the patient's home to the prescriber's office"
- The Texas State Board of Pharmacy lists as a red flag "The person's address is a significant distance from your pharmacy and/or from the prescriber's office" and "The prescriber of the drugs is located a significant distance from your pharmacy"

Interestingly, the DEA has been made aware of the adverse impact of this pre-pandemic red flag on legitimate prescribing of controlled substances via telemedicine. In the DEA's proposed rule on prescribing via telemedicine, the DEA proposed prescriptions done via telemedicine will have a DEA State Registration number on it, and noted:

> Pharmacists occasionally encounter what they may perceive as "red flags" for certain telemedicine prescriptions which can stem from the nature of telemedicine itself where patients may receive prescriptions from prescribers located at distances far away (both inside and outside the state where the patient is located). The geographical distance can raise doubts about the legitimacy of the prescription and could lead pharmacists to question its validity and refuse to fill the prescription. By verifying the State Telemedicine
>
> Registration numbers, pharmacists would be provided a level of assurance that a special registration prescription is legitimate when it originates from a prescriber located at a significant distance from the patient.

LITIGATION AGAINST PHARMACIES FOR DISPENSING PRESCRIPTIONS THAT ARE NOT LEGITIMATE

Many pharmacies faced charges from the US Department of Justice and from State Attorney Generals alleging they contributed to the opioid crisis. Billions of dollars were paid by pharmacies in these cases.

In late 2024 / early 2025, the Justice Department filed another round of nationwide lawsuits against CVS and Walgreens alleging they knowingly filled millions of controlled substance prescriptions that lacked a legitimate medical purpose, in violation of the Controlled Substances Act. In response, Walgreens filed a countersuit alleging the government has failed to specify what actions are to be taken in response to red flags.

WHAT PHARMACIES ARE DOING TO PROTECT THEMSELVES FROM FURTHER LIABILITY

Pharmacies have self-imposed a variety of restrictive policies related to prescriptions for controlled substances, including, but not limited to:

- In 2022, Walgreens and CVS both stopped filling prescriptions through telemedicine platforms Cerebral and Done.
- Pharmacists choosing not to fill prescriptions from out-of-state prescribers.
- Pharmacists choosing not to fill prescriptions from out of the area prescribers, even if they are in the same state.
- Pharmacists choosing not to fill prescriptions if the patient has not been seen in-person within 12 or 24 months, even in states where in-person visits are not required under state law (and in-person visits are temporarily waived under federal law).

RISK MANAGEMENT THOUGHTS:

- Consider alerting patients to the potential issues at the beginning of treatment.
- If clinically appropriate, prescribers may want to consider utilizing patient's mail order pharmacy benefits, if available.
- Prescribers may want to send their prescription to a local branch of a chain pharmacy that can then forward the prescription to a pharmacy near the patient.
- Prescribers may need to contact the non-local pharmacy to request that the prescription be filled.
- Other actions that may be finalized in the DEA's future final regulation on prescribing controlled substances via telemedicine.



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CASE OF THE QUARTER:
BOARD OF MEDICINE V. JANE DOE, MD

Written by
Professional Risk Management Services (PRMS)

The "Case of the Quarter" column is a sample case study that highlights best practices in actual scenarios encountered through PRMS' extensive experience in litigation and claims management. Specific names and references have been altered to protect clients' interests. This discussion is for informational and education purposes only and should not be relied upon as legal advice.

FACTS:

Dr. Doe receives notice that the Medical Licensing Board ("Board") in her primary practice state, Paradise, is investigating a complaint concerning her prescribing. Specifically, the complaint alleges that Dr. Doe was informed by a family member that her patient, Mary, was misusing the Xanax she was prescribing and obtaining additional prescriptions from other providers. The complaint further alleges that Dr. Doe continues to prescribe Xanax to Mary despite receiving this information from the family member, ultimately leading to Mary's overdose and hospitalization.

In response, Dr. Doe submits a written response to the Board defending her care. Dr. Doe does not report the matter to her medical malpractice carrier because she is unsure whether coverage is available. Dr. Doe is licensed in three states.

DEFENSES:

In her written response, Dr. Doe offers support for the prescribed dosages by pointing to her documentation of the patient's reported increase in anxiety. She also notes that the medical record reflects that she addressed the family member's concerns with the patient and that the patient denied misusing the medication or obtaining prescriptions from multiple providers.

Dr. Doe asserts that she trusts Mary and has never been given a reason not to do so. As a result, she does not believe it is necessary to check the prescription monitoring program.

ALLEGATIONS:

Following its investigation, the Board finds that Dr. Doe violated multiple state regulations governing the prescribing of controlled substances. The Board determines that Dr. Doe failed to check the prescription monitoring program to determine whether Mary was obtaining Xanax from other providers. The Board also considers the opinion of its expert psychiatrist, who is critical of the increasing dosages Dr. Doe prescribed.

OUTCOME:

The Board sanctions Dr. Doe. It orders her to refrain from prescribing controlled substances until she completes a course on safe prescribing and submits proof of completion to the Board. The Board further orders that she report to a mentor for one year after resuming the prescribing of controlled substances and pay a $3,000 fine.

Following the Board's sanctions, Dr. Doe receives notice from the medical board of another state in which she is licensed that it is imposing a $500 fine for her failure to report the sanctions imposed by the first Board.

TAKEAWAY:

Be familiar with and follow all state and federal laws and regulations governing the prescribing of controlled substances. Notify your medical professional liability insurance carrier as soon as you receive notice of a Board complaint to determine whether defense coverage may be available. If you are licensed in multiple states, inform your attorney so that any required reporting obligations can be addressed promptly.

TEST YOUR KNOWLEDGE!
THE STANDARD OF CARE:

THE STANDARD OF CARE AGAINST WHICH A PSYCHIATRIST'S CONDUCT WILL BE MEASURED IN A MALPRACTICE ACTION IS _____

A) Based on the patient outcome

B) What a jury thinks the doctor should have done

C) That of a similar psychiatrist in similar circumstance

D) Both a & c

Answer: C is correct!

Juries do not determine the standard of care; rather, they determine whether the standard of care was met. The standard of care refers to the degree of care and skill that a reasonably competent, similarly trained medical professional would provide under the same or similar circumstances.

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