



Board of Behavioral Sciences

Memo

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To: Committee Members

Date: January 10, 2024

From: Rosanne Helms
Legislative Manager

Subject: **Discussion and Possible Recommendations to Initiate a Rulemaking to Amend the Board's Standards of Practice for Telehealth Regulations (16 CCR §1815.5)**

Summary

The Board's Telehealth Committee (Committee) held its final meeting in December 2023. The Committee ended with a final review of the Board's telehealth regulations (California Code of Regulations (CCR) Title 16, §1815.5) to determine desired amendments based on previous discussions.

Background

The Board's telehealth regulations were adopted in 2016. Prior to 2016, the Board's law offered very little guidance about telehealth, other than providing a definition and some basic requirements for patient consent and confidentiality in Business and Professions Code (BPC) §2290.5 (**Attachment B**).

The lack of guidance caused confusion among licensees and registrants as telehealth became more prevalent. To address this, the Board proposed its first telehealth regulations. These regulations were developed after extensive review and research on the topic, as well as discussion with stakeholders, over several Board and committee meetings.

The practice of psychotherapy via telehealth continues to evolve, and the Board has received feedback that some provisions of the current telehealth regulations may need to be reconsidered or adjusted.

Discussion of Potential Adjustments

Potential amendments to §1815.5 of the telehealth regulations are shown in **Attachment A** and are as follows:

1. Subdivisions 1815.5(e) and (f)

Regulation §1815.5(e) states that a California licensee or registrant may only provide telehealth to a client in another jurisdiction if they meet the requirements to lawfully provide services in that jurisdiction, and if telehealth is allowed by that jurisdiction.

This subsection was added because often, Board licensees and registrants are unaware that it is common for jurisdictions to require their license to practice with a patient located there. To avoid opening themselves up to liability, therapists need to check to make sure they are following that jurisdiction's laws before practicing there. Otherwise, that jurisdiction could decide to take disciplinary action if there were a violation. If the jurisdiction decided to take such an action for a violation of their law, it would be within their authority to do so because the violation occurred in their jurisdiction.

Regulation §1815.5(f) states that failure to comply with any provisions of the Board's telehealth regulations is unprofessional conduct.

CAMFT had raised a concern that making it unprofessional conduct if a therapist fails to check to make sure he or she is following the laws of the jurisdiction where the client is located is too rigid and could lead to unintended consequences. For example, it does not necessarily account for a patient who is traveling, a patient who is transitioning to a new therapist, or a patient in crisis. They suggested that the location of 1815.5(e) be moved to after 1815.5(f) so that it functions as guidance, rather than a requirement that one must follow to avoid discipline by this Board.

However, the Board's Regulations Counsel pointed out that any violation of the Board's statutes and regulations is unprofessional conduct. BPC sections 4982(e), 4989.54(f), 4992.3(f), and 4999.90(e) state that the following is unprofessional conduct:

Violating, attempting to violate, or conspiring to violate any of the provisions of this chapter or any regulation adopted by the board.

Based on this, the Telehealth Committee believes that §1815.5(f) is unnecessary and should simply be struck.

2. Replace the Term "Valid and Current" License or Registration; Subdivision 1815.5(a)

To practice via telehealth with a client located in California, the regulation states that a "valid and current" California license or registration is required.

It is unclear exactly what a “valid” license includes. According to the Board’s Regulations Counsel, “valid” is typically interpreted to mean a license that is current, active and unrestricted.

However, it is unlikely the intent of the Board to restrict someone on probation from doing therapy via telehealth, unless the terms of their probation specifically prohibit it. Therefore, the Telehealth Committee recommended replacing the requirement in §1815.5(a) that requires a license be “valid and current” to engage in telehealth, to instead require the license to be “current and active”.

3. Disclosure of License and Registration Number

The Board is currently pursuing a legislative proposal to make changes to how license information is shared with clients. Instead of continuing to require a licensee or registrant to display the license or registration in a conspicuous place in their primary place of practice, the Board’s proposed amendments will require this information instead be included in the notice to clients that is required to be provided prior to initiating psychotherapy services.

This proposed amendment is still pending. However, if it is successful, the Board may wish to review subsection (c)(3) of §1815.5, which requires a client be provided with the therapist’s license or registration number and type of license and registration upon initiation of telehealth services, as it may no longer be necessary. Staff recommends that if the telehealth regulations are approved by the Board, that this issue be revisited prior to the submission of the regulations to the Office of Administrative Law (OAL) for initial notice to the public. This will allow the Board time to determine if its legislative proposal was successful, and to make adjustments to this section of the regulations if needed.

4. Utilization of “Industry Best Practices”

The current telehealth regulations (§1815.5(d)(3)) require that each time a therapist provides services via telehealth, they must “utilize industry best practices for telehealth to ensure both client confidentiality and the security of the communication medium.”

Stakeholders have noted that the requirement to utilize “industry best practices” is a vague term that has led to confusion about exactly how this requirement is fulfilled. The Committee may wish to discuss clarifying it.

One possible option may be found in a bill signed this year pertaining to telehealth in the practice of veterinary medicine. Newly adopted BPC section 4826.6(h)(1) of [AB 1399](#) (Chapter 475, Statutes of 2023) in statute states that a vet who practices via telehealth must “*Ensure that the technology, method, and equipment used to provide veterinary medicine services via telehealth comply with all current privacy protection laws.*”

The Telehealth Committee discussed the possibility of using the Veterinary Medical Board's language. However, the Board's Regulation Counsel raised a concern that the language does not make it clear what privacy protection laws are being referenced. She points out that unlike statutes, regulations need to meet a higher clarity standard in order to be approved by OAL.

Given that information, the Committee decided to move forward with replacing the requirement in 1815.5(d)(3) to utilize "industry best practices" with the requirement language used in statute by the Veterinary Medical Board. However, to provide further clarity, the Committee decided to provide further clarity by specifying that the licensee must comply "with all current state and federal healthcare privacy protection laws."

Since the Telehealth Committee meeting, staff worked with the Board's Regulations Counsel to expand upon this further in order to specifically cite the main state and federal laws and regulations that would be included in this requirement. The full proposed text with these recommended revisions is shown in **Attachment A**.

Recommendation

Conduct an open discussion regarding the proposed amendments shown in **Attachment A**. After review, the staff request the Committee consider one of the following motions:

Motion A: (No changes are requested by the Committee to Attachment A.): Recommend to the Board approval of the proposed regulatory text in Attachment A and recommend the Board consider all of the following actions:

- (1) Direct staff to submit the text in Attachment A to the Director of the Department of Consumer Affairs and the Business, Consumer Services, and Housing Agency for review and if no adverse comments are received, authorize the Executive Officer to take all steps necessary to initiate the rulemaking process, make any non-substantive changes to the package, and set the matter for a hearing if requested.
- (2) If no adverse comments are received during the 45-day comment period and no hearing is requested, authorize the Executive Officer to take all steps necessary to complete the rulemaking and adopt the proposed regulations as noticed for title 16, California Code of Regulations section 1815.5.

Motion B: (The Committee has suggested changes to the text in Attachment A.) Recommend approval of the proposed regulatory text in Attachment A with the following changes (describe what the Committee would recommend changing here) and recommend the Board consider all of the following actions:

- (1) Direct staff to submit the text in Attachment A as revised to the Director of the Department of Consumer Affairs and the Business, Consumer Services, and Housing Agency for review and if no adverse comments are received, authorize the Executive Officer to take all steps necessary to initiate the rulemaking process, make any non-substantive changes to the package, and set the matter for a hearing if requested.
- (2) If no adverse comments are received during the 45-day comment period and no hearing is requested, authorize the Executive Officer to take all steps necessary to complete the rulemaking and adopt the proposed regulations as noticed for title 16, California Code of Regulations section 1815.5.

Attachments

Attachment A: 16 CCR §1815.5: Proposed Changes to Telehealth Regulations with Changes Previously Discussed by the Telehealth Committee

Attachment B: Statute Relating to Telehealth: BPC § 2290.5.

Reference 1: [BPC section 4826.6\(h\)\(1\) of AB 1399](#), Pertaining to Telehealth in Veterinary Medicine

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ATTACHMENT A
Current Telehealth Regulations With Changes Previously Discussed by the
Telehealth Committee
California Code of Regulations (CCR) Title 16, Division 18

§ 1815.5. STANDARDS OF PRACTICE FOR TELEHEALTH.

- (a) All persons engaging in the practice of marriage and family therapy, educational psychology, clinical social work, or professional clinical counseling via telehealth, as defined in Section 2290.5 of the Code, with a client who is physically located in this State must have a ~~valid and current~~ current and active license or registration issued by the Board.
- (b) All psychotherapy services offered by board licensees and registrants via telehealth fall within the jurisdiction of the board just as traditional face-to-face services do. Therefore, all psychotherapy services offered via telehealth are subject to the board's statutes and regulations.
- (c) Upon initiation of telehealth services, a licensee or registrant shall do the following:
- (1) Obtain informed consent from the client consistent with Section 2290.5 of the Code.
 - (2) Inform the client of the potential risks and limitations of receiving treatment via telehealth.
 - (3) Provide the client with his or her license or registration number and the type of license or registration.
 - (4) Document reasonable efforts made to ascertain the contact information of relevant resources, including emergency services, in the patient's geographic area.
- (d) Each time a licensee or registrant provides services via telehealth, he or she shall do the following:
- (1) Verbally obtain from the client and document the client's full name and address of present location, at the beginning of each telehealth session.
 - (2) Assess whether the client is appropriate for telehealth, including, but not limited to, consideration of the client's psychosocial situation.
 - (3) ~~Utilize industry best practices for telehealth to ensure both client confidentiality and the security of the communication medium.~~ Ensure that the technology, method, and equipment used to provide services via telehealth comply with all applicable federal and state privacy, confidentiality, and security laws and regulations, including the following:

- i. [The Confidentiality of Medical Information Act \(Part 2.6 \(commencing with section 56\) of Division 1 of the Civil Code\).](#)
- ii. [The Health Insurance Portability and Accountability Act of 1996 \("HIPPA" -- \(42 U.S.C. §§ 1320d - 1320d-8\)\) as amended by subsequent legislation.](#)
- iii. [The regulations promulgated under HIPAA by the United States Department of Health and Human Services, including, 45 Code of Federal Regulations parts 160 and 164, as are currently in effect or as later amended.](#)

(e) A licensee or registrant of this state may provide telehealth services to clients located in another jurisdiction only if the California licensee or registrant meets the requirements to lawfully provide services in that jurisdiction, and delivery of services via telehealth is allowed by that jurisdiction.

~~(f) Failure to comply with these provisions shall be considered unprofessional conduct.~~

Note: Authority cited: Sections 4980.60 and 4990.20, Business and Professions Code.
Reference: Sections 2290.5, 4980, 4989.50, 4996, 4999.30, and 4999.82, Business and Professions Code.

ATTACHMENT B
Statute Relating to Telehealth: BPC §2290.5

BPC §2290.5.

(a) For purposes of this division, the following definitions apply:

(1) “Asynchronous store and forward” means the transmission of a patient’s medical information from an originating site to the health care provider at a distant site.

(2) “Distant site” means a site where a health care provider who provides health care services is located while providing these services via a telecommunications system.

(3) “Health care provider” means any of the following:

(A) A person who is licensed under this division.

(B) An associate marriage and family therapist or marriage and family therapist trainee functioning pursuant to Section 4980.43.3.

(C) A qualified autism service provider or qualified autism service professional certified by a national entity pursuant to Section 1374.73 of the Health and Safety Code and Section 10144.51 of the Insurance Code.

(D) An associate clinical social worker functioning pursuant to Section 4996.23.2.

(E) An associate professional clinical counselor or clinical counselor trainee functioning pursuant to Section 4999.46.3.

(4) “Originating site” means a site where a patient is located at the time health care services are provided via a telecommunications system or where the asynchronous store and forward service originates.

(5) “Synchronous interaction” means a real-time interaction between a patient and a health care provider located at a distant site.

(6) “Telehealth” means the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient’s health care. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers.

(b) Before the delivery of health care via telehealth, the health care provider initiating the use of telehealth shall inform the patient about the use of telehealth and obtain verbal or written consent from the patient for the use of telehealth as an acceptable

mode of delivering health care services and public health. The consent shall be documented.

(c) This section does not preclude a patient from receiving in-person health care delivery services during a specified course of health care and treatment after agreeing to receive services via telehealth.

(d) The failure of a health care provider to comply with this section shall constitute unprofessional conduct. Section 2314 shall not apply to this section.

(e) This section does not alter the scope of practice of a health care provider or authorize the delivery of health care services in a setting, or in a manner, not otherwise authorized by law.

(f) All laws regarding the confidentiality of health care information and a patient's rights to the patient's medical information shall apply to telehealth interactions.

(g) All laws and regulations governing professional responsibility, unprofessional conduct, and standards of practice that apply to a health care provider under the health care provider's license shall apply to that health care provider while providing telehealth services.

(h) This section shall not apply to a patient under the jurisdiction of the Department of Corrections and Rehabilitation or any other correctional facility.

(i) (1) Notwithstanding any other law and for purposes of this section, the governing body of the hospital whose patients are receiving the telehealth services may grant privileges to, and verify and approve credentials for, providers of telehealth services based on its medical staff recommendations that rely on information provided by the distant-site hospital or telehealth entity, as described in Sections 482.12, 482.22, and 485.616 of Title 42 of the Code of Federal Regulations.

(2) By enacting this subdivision, it is the intent of the Legislature to authorize a hospital to grant privileges to, and verify and approve credentials for, providers of telehealth services as described in paragraph (1).

(3) For the purposes of this subdivision, "telehealth" shall include "telemedicine" as the term is referenced in Sections 482.12, 482.22, and 485.616 of Title 42 of the Code of Federal Regulations.