

## FINAL STATEMENT OF REASONS

**Hearing Date: August 25, 2015**

**Subject Matter of Proposed Regulations: Standards of Practice for Telehealth**

**Section(s) Affected:** Add Section 1815.5 to Division 18 of Title 16 of the California Code of Regulations.

### **Updated Information**

The Initial Statement of Reasons is included in the file (Tab III). The information contained therein is corrected as follows:

- Page 1, under “Background and Identification of the Problem”, 4<sup>th</sup> paragraph: The second word of the 1<sup>st</sup> sentence, “they”, should be “the”.

The following change was made to the proposed regulation text after the 45 day public comment period. The Board approved the change at a meeting on August 28, 2015, and a subsequent 15-day public comment period was then held:

1. **Amendment to Section 1815.5(c)(iv)**. This subsection defines certain actions that a Board licensee or registrant must take when initiating telehealth services for the first time. Subsection (iv) had previously stated that the licensee or registrant must provide the client with written procedures to follow in an emergency situation, including contact information for emergency services near the client’s location.

A concern was raised that the above language is unclear because it does not define what constitutes an emergency. Stakeholders argued that due to the fact that there can be a wide variety of emergency situations depending on the circumstances of the client (for example, an emergency could be due to child abuse, domestic violence, a suicidal patient, etc.) the language sets an unrealistic requirement upon providers.

After further discussion with stakeholders, the Board settled on striking the original Section 1815.5(c)(iv), and replacing it with language to instead require the licensee or registrant to do the following upon initiation of telehealth services:

**§1815.5(c)(iv): Document reasonable efforts made to ascertain the contact information of relevant resources, including emergency services, in the patient’s geographic area.**

This replacement subsection still upholds the goal of the original subsection, which is to require the therapist to familiarize his or her self with resources in the client’s geographic area. This still enhances consumer protection, while allowing

the therapist to use professional discretion in identifying relevant resources for his or her specific client, rather than attempting to account for every possible type of emergency situation.

**Objections or Recommendations/Responses to Comments:**

The following recommendations/objections were made during the 45-day public comment period or at the public hearing, regarding the proposed action:

**Comment #1 - California Association of Marriage and Family Therapists (CAMFT):**

CAMFT notes that subsection 1815.5(c)(iv) requires telehealth providers to provide the client with written procedures to follow in an emergency, including contact information for emergency services near the client's location. CAMFT believes this lacks clarity. There are many types of emergency situations. Therapists see clients who potentially could have a wide variety of emergency situations, setting up an unrealistic requirement to provide information for all scenarios.

CAMFT recommends amending the language in subsection 1815.5(c)(iv) to state that upon initiation of telehealth services, the licensee/registrant shall *"Make reasonable efforts to ascertain the contact information of relevant resources, including emergency services, in the patient's geographic area."*

**RESPONSE:** The Board accepts this comment with minor changes. At its August 28, 2015 meeting, at which CAMFT was present, the Board discussed this suggestion, but believed that the term "Make reasonable efforts to ascertain..." should be changed to "Document reasonable efforts made to ascertain..." so that the therapist has documented proof of what was done.

This amendment still upholds the goal of the original subsection, which is to require the therapist to familiarize his or her self with resources in the client's geographic area. This still enhances consumer protection, while allowing the therapist to use professional discretion in identifying relevant resources for his or her client, rather than attempting to account for every possible type of emergency situation.

**Comment #2 - Stephanie Kelly, IMF 74132:**

Ms. Kelly writes that there should be exceptions made when a client travels outside of the state temporarily or when moving there should be a temporary allowance until a new therapist is found. It seems unethical that if a client has a crisis while away, the therapist would have to tell the client they cannot provide assistance.

**RESPONSE:** The Board rejects this comment. The Board does not have jurisdiction over a therapist practicing telehealth with a client who is located in another state. In that case, the therapist must follow the laws and regulations for practice in the jurisdiction where the client is located.

A few states (Utah, Arizona) allow limited time periods for out-of-state licensees to practice in their state before obtaining a state license (grace periods), if certain conditions are met. The Board's Policy and Advocacy Committee discussed the possibility of allowing a grace period when crafting these telehealth regulations. However, allowing such an exemption raises

numerous issues of how any type of grace period would be enforced. Conversations with the licensing boards in Utah and Arizona, where such grace periods are allowed, found that these boards have not yet had a complaint or enforcement case regarding the exemptions, and therefore it is unknown how such a case would be prosecuted. Given the number of complications with the grace period, the Policy and Advocacy Committee recommended crafting telehealth regulations now that fill a basic need of setting general standards for how California licensees may practice telehealth, and possibly re-visiting the grace period issue in the future.

**Comment #3 - Joanne Smith, IMF 69337:**

Ms. Smith writes that the proposed regulations do not address texting, which is done a lot with adolescent clients. She asks if this can be incorporated into the regulations.

**RESPONSE:** The Board rejects this comment. In drafting the telehealth regulations, the Board chose not to specify particular telehealth mediums and apply criteria to each one. As electronic mediums are constantly changing, the Board instead set forth criteria that must be met to ensure safe practice for the client. The therapist must then ensure that he or she can comply with the regulations when using a particular electronic medium.

Section 1815.5(d)(ii) requires a licensee to assess whether in his or her professional opinion, the client is appropriate for telehealth, each time telehealth services are provided. Therefore, a licensee must be able to state that in his or her professional opinion, the medium being used is appropriate.

In addition, Section 1815.5(d)(iii) requires the licensee to utilize industry best practices at the time to ensure that both the client's confidentiality and the communication medium are secure, each time telehealth is used. Therefore, the therapist must consider his or her profession's code of ethics and standards of conduct at that time, and determine if the medium being used is able to meet those standards.

**Comment #4 - Howard Acosta, ASW, MSW:**

Mr. Acosta writes that the new telehealth regulations require a licensee performing telehealth in another state to comply with the licensing laws of that state. Does the Board provide resources to locate lists of states that recognize California licenses/registrations?

**RESPONSE:** This comment does not make a specific request, however, the Board rejects making any change to the regulations based on this comment. Most other states require their own state license or registration to practice. There are a few states that provide limited exemptions for licensees of another state to practice in their state, if certain conditions are met. When a Board licensee wishes to practice with a client in another state, Board staff advises them to contact that state's licensing board to find out their requirements to practice.

**Comment #5 - Mario Gutierrez, Executive Director, Center for Connected Health Policy (CCHP):**

Mr. Gutierrez writes that CCHP applauds the Board for drafting language that closely mirrors the requirements licensees must meet should services be provided in-person. He states that the Board appears to have struck the right balance of ensuring the safety of the patient, while allowing the provider flexibility to use technology for the cases they deem appropriate.

**RESPONSE:** The Board does not accept or reject this comment, as it is not requesting a change.

**Comment #6 - Robert L. Vazzo, LMFT, LPCC**

Mr. Vazzo discusses three specific concerns:

- a) Section 1815.5(d)(i) requires the therapist to verbally obtain the client's full name and address of current location each time telehealth is performed. Mr. Vazzo states that requiring a client to disclose such information could be a violation of the client's privacy if he or she does not wish to divulge this information. He notes that for regular in-office visits, there is no requirement that the therapist verify the identity or address of the client.

**RESPONSE:** The Board rejects this comment. The delivery of services via telehealth requires that the therapist ensure the identity of the client so that he or she does not divulge confidential client information. Impersonation of a client is easier when therapy is not in-person. Verification of the address of present location assists with identification of the client, and it also assists the therapist in identifying nearby resources to help the client should he or she have a crisis situation.

- b) Section 1815.5(d)(iii) requires the therapist to ensure the security of the communication medium. Mr. Vazzo notes that no communication medium is secure, and this would prohibit therapy via land line or cell phones as both have vulnerabilities.

**RESPONSE:** The Board rejects this comment. The Board is aware that all forms of communication have security vulnerabilities. This is why Section 1815.5(d)(iii) states that the therapist must utilize industry best practices to ensure security and confidentiality. Some forms of communication are recognized by the industry as reasonably secure, while others are not. For example, Skype is not considered by industry standards to be a secure medium, because it is not encrypted, but there are several encrypted therapy platforms that have general acceptance. As new technology emerges, new methods of telehealth may gain industry acceptance.

- c) Section 1815.5(f) allows the Board to discipline a licensee who violates Section 1815.5(e). Section 1815.5(e) allows a California licensee to provide telehealth services to clients in another jurisdiction only if he or she meets the requirements to lawfully provide services in that jurisdiction. Mr. Vazzo states that this is outside the jurisdiction of the Board, and that the Board would not have the jurisdiction to obtain records located in another state.

**RESPONSE:** The Board rejects this comment. Licensees often contact the Board to ask if they may practice therapy with a client in another jurisdiction. Therapy with a client located in another jurisdiction must follow the laws and regulations of that jurisdiction. This section clarifies this for licensees. It is correct that if the therapist were to practice without a license in another jurisdiction, any resulting complaint and investigation would fall to that jurisdiction. However, this language allows that if a California licensee is cited for unlicensed practice by another jurisdiction, the violation would be considered unprofessional conduct under California law as well.

**Comment #7 - Hu, LMFT, LPCC**

Section 1815.5(e) requires a Board licensee performing telehealth in another jurisdiction to comply with the licensing laws of that jurisdiction. The commenter believes this section indirectly cedes BBS authority over CA licensees to other jurisdictions, and that this is neither in the best interest of California residents or California licensees. The clarification will add complexity, and will likely result in significant reluctance to provide services to clients. Jurisdictions that do not reciprocally require their licensees to comply with CA regulations may acquire a business advantage for their licensees.

**RESPONSE:** The Board rejects this comment. Most jurisdictions have their own licensing laws and regulations and require licensure to practice in their jurisdiction. Therefore, it is already illegal to practice without a license specific to that jurisdiction. Section 1815.5(e) serves to clarify this because there is confusion among licensees. If the licensing laws of another jurisdiction allow practice in their jurisdiction with only a California license (and not a jurisdiction-specific license) this regulation does not affect such practice. However, it is not legally feasible for the State of California to create a regulation allowing its licensees to practice legally in other jurisdictions; that is up to those jurisdictions. Additionally, there is no business advantage to be gained for other states' licensees in California, as they may not practice with a client who is located in California without obtaining a California license.

**Comment #8 - Robin Foemmel Bie, LCSW, California Victim Compensation and Government Claims Board (This comment was presented at the public hearing)**

Ms. Foemmel Bie notes that Victims' Compensation reimburses therapists for services, especially services to those who have been traumatized. It is not clear in the regulation if it is required that the technology medium for telehealth be both audio and video. Verbal cues can be missed if there's no video streaming. She would like to request that the Board consider requiring that telehealth require video.

**RESPONSE:** The Board rejects this comment. Telehealth via phone is already generally accepted by the industry. The Board recognizes that there are some risks and limitations of practicing via telehealth. Because of this, the Board drafted subsection 1815.5(c)(ii) to require the therapist inform the client of potential risks and limitations of telehealth. In addition, 1815.5(d)(2) requires the therapist to assess whether or not a particular client is appropriate for telehealth. If the therapist, in his or her professional opinion, believes a certain client needs in-person therapy, then according to the regulations, telehealth should not be performed.

**Comments Received During the 15-Day Period the Modified Text was Available to the Public**

The Board held one 15-day public comment period. One comment was received during that time:

**Tony Aguilar, LMFT**

Mr. Aguilar commented on Subsections (e) and (f) of the proposed regulations, which allow a California licensee to provide telehealth in another state only if he or she meets the requirements to lawfully provide service in that jurisdiction, and makes violation of this provision unprofessional conduct. He believes that this language would cause issues because he provides telephonic sessions with clients who are in other states or countries.

**RESPONSE:** The Board rejects this comment because it is not related to the modifications that were proposed in the 15-day public comment period. The Board responded to a similar comment (see Comment #7 above).

### **Small Business Impact:**

The Board has made a determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. A business may employ licensees, or a licensee may own his or her own business. The decision of a business or a Board licensee to perform services via telehealth is voluntary. A business or licensee which chooses to practice via telehealth may benefit from an increased client base. However, they may incur some compliance costs to ensure the security of the communication medium according to industry best practices. Any costs incurred would depend on the communication medium chosen.

### **Consideration of Alternatives**

The Board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The alternatives considered were as follows:

1. Not adopt the regulations. This alternative was rejected because it leaves a number of questions regarding the use of telehealth by Board licensees left unanswered by current law. Confusion due to a lack of clarity in the law would continue. As telehealth continues to increase in use, this confusion will increase. In addition, there is the potential for unlicensed practice to happen due to lack of understanding regarding the requirement that a California license is needed to practice telehealth when the patient is located in California.
2. Adopt the regulations. The Board determined that this alternative is the most feasible. It creates a system whereby consumer protection is increased by ensuring that it is clear that practicing telehealth with a client located in California requires a California license, and by requiring certain actions that promote transparency and protect the security and safety of the client.

### **Local Mandate**

The proposed regulation does not impose any mandate on local agencies or school districts.