

**BOARD OF BEHAVIORAL SCIENCES
INITIAL 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.

Background and Identification of the Problem:

The Board of Behavioral Sciences (Board) licenses marriage and family therapists (LMFTs), educational psychologists (LEPs), clinical social workers (LCSWs), and professional clinical counselors (LPCCs).

Over the past several years, telehealth practice has increased in popularity for many types of healing arts professionals, including Board licensees.

Current California statute, Business and Professions Code (BPC) Section 2290.5, defines telehealth for all healing arts practitioners. It sets up patient consent and confidentiality requirements, and makes failure to comply with these requirements unprofessional conduct.

However, the law does not address specific issues regarding the use of telehealth in a setting providing psychotherapy. As telehealth increases in use, the Board is getting a higher volume of questions from its licensees regarding the practice of psychotherapy via electronic means.

The Board developed this regulatory proposal in order to clarify these questions, including when a California license is needed, and actions a licensee must take in order to protect the client in a telehealth setting.

Specific Changes: Purpose, Factual Basis/Rationale and Anticipated Benefits:

The changes proposed by this regulatory package are as follows.

A. ADD SECTION 1815.5. STANDARDS OF PRACTICE FOR TELEHEALTH

Proposed Change #1: Subsection (a): Clarification of Need for a California License to Engage in Practice with a Client Located in California.

Purpose/Rationale. Existing law states that a valid California license is needed to practice any of the professions that the Board regulates within the state of California. However, the law does not specifically discuss various scenarios that may arise during the practice of telehealth (i.e. client located in this state, practitioner located in another state, etc.)

This proposed amendment clarifies that any practitioner wishing to engage in a practice that the Board regulates must have a valid California license if the client is physically located in California.

Anticipated Benefit: This amendment will benefit licensees and consumers by clearing up the confusion regarding need for a California license to perform services via telehealth if the client is located in California. At this time, the answer is only implied in statute – there is not specific statement in statute that the Board can point to when someone asks this question.

Proposed Change #2: Subsection (b): Clarification that Services Offered via Telehealth are Still Subject to the Board’s Statutes and Regulations.

Purpose/Rationale: The Board’s statutes and regulations outline professional qualifications and standards of conduct that all licensees and registrants must abide by.

The purpose of this amendment is to specifically point out that these statutes and regulations apply to services rendered via telehealth, just as they apply to traditional face-to-face services.

Anticipated Benefit: Delivery of services via telehealth is becoming increasingly common, and therapy via telehealth can present some unique challenges that are not necessarily present in a face-to-face therapy setting (for example, potential for technology failure, potential diminished awareness of non-verbal cues). This amendment will benefit practitioners by serving as a reminder to them that the statutes and regulations apply equally to telehealth services as they do to face-to-face services. This will also benefit consumers, as it reinforces the law, assuring that therapy via telehealth has the same legal protections as face-to-face services.

Proposed Change #3: Subsection (c): Define Actions a Licensee or Registrant Must Take Upon Initiating Telehealth Services.

Purpose/Rationale: This amendment defines certain one-time actions that a licensee or registrant must take when initiating telehealth services for the first time.

The amendment is proposed because therapy via telehealth presents some unique questions and challenges not seen in face-to-face therapy interactions. Specifying actions that must be taken protects the consumer from issues that may arise from these unique circumstances. For example, the online environment may make it easier for a therapist to be anonymous, and therefore this section requires the therapist to provide his or her license or registration number. In addition, telehealth comes with potential risks (technology failure, lesser availability to the therapist in the event of a mental health crisis) and therefore this section requires the therapist to take actions to inform the client of these potential risks.

Anticipated Benefit: These proposed amendments will benefit both the patient and practitioner by ensuring that both are informed about the differences in telehealth interactions. It will also increase transparency for the client.

Proposed Change #4: Subsection (d): Define Actions a Licensee or Registrant Must Take Each Time he or she Performs Telehealth Services.

Purpose/Rationale: This amendment defines the actions a licensee or registrant must take each and every time he or she performs telehealth with a client.

This amendment is proposed because telehealth creates a unique environment in therapy and circumstances may change from session to session. For example, this session requires the licensee to verbally obtain and document the client's full name and address of location for each session. This is to lessen the possibility of impersonation of a client, and also so the therapist is aware of the client's location, which may change from session to session if telehealth is use, should an emergency situation arise.

In addition, a client's mental state could change from session to session, and the therapist must assess, for each session, whether telehealth remains appropriate.

Finally, utilizing an electronic medium can cause confidentiality and security concerns, and therefore the therapist is required to ensure both confidentiality, and that the communication medium is secure, for each and every session.

Anticipated Benefit: These amendments will benefit the client because they identify key environmental factors, which may change from session to session in telehealth and which could jeopardize the client's safety and security, and require the therapist to address them at each session.

Proposed Change #5: Subsection (e): Clarify that a Board Licensee Performing Telehealth Services in Another State Must Comply with the Licensing Laws of that State.

Purpose/Rationale: The Board's licensees frequently ask if they are permitted to perform services via telehealth with a client who is located in another state.

The Board does not have jurisdiction over telehealth services performed in another state. However, the question arises often because the law does not specifically state this. Therefore, this amendment clarifies that a Board licensee practicing via telehealth with a client in another jurisdiction must ensure that he or she meets the requirements to lawfully provide services in that jurisdiction.

Anticipated Benefit: Adoption of this change will benefit practitioners because it clarifies what they need to do when performing telehealth in another state in order to avoid unlicensed practice violations. Patients in other states may also benefit from this increased clarity, as they will have more assurance that their practitioner meets the licensing requirements relevant to his or her state.

Proposed Change #6: Subsection (f): State that Failure to Comply with Provisions in this Regulation is Unprofessional Conduct.

Purpose/Rationale: This subsection clarifies that the provisions of these amendments are

requirements, not suggestions, by which the practitioner must abide when practicing via telehealth.

Anticipated Benefit: Adoption of this proposed amendment will benefit consumers of mental health services by requiring that certain actions are taken during the rendering of telehealth services that promote transparency, security, and client safety. It clarifies for licensees that not following these regulations will result in consequences.

Underlying Data

None.

RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Board has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

- **Analysis of creation/elimination of jobs:** This regulatory proposal will not create or eliminate any jobs.
- **Analysis of creation/elimination of businesses.** No businesses will be created or eliminated as a result of this proposal.
- **Analysis of expansion of business:** This proposal is not may lead to some expansion of business if licensees choose to provide service via telehealth as a result of the increased clarity provided by these regulations. Therapists choosing to provide services via telehealth may gain access to an increased number of clients.
- **Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:** The Board has determined these regulations will benefit consumers by providing increased clarity regarding requirements for a Board licensee to practice telehealth. Consumers will benefit from requirements that protect their confidentiality and promote transparency (for example, because the therapist will be required to disclose his or her license number). In addition, licensees may be more willing to practice telehealth because they better understand what the law requires of them. If more licensees are then willing to practice telehealth, consumers of mental health services who live in rural areas, which often have a shortage of mental health professionals, may have increased access to care.

As part of its Economic Impact Analysis, the Board has determined that its proposal will not affect the ability of California businesses to compete with other states by making it more costly to produce goods or services, and it will not eliminate any jobs or occupations. This proposal does not impact multiple industries.

Occupations/Businesses Impacted: This proposed regulation will impact those licensed by the Board (and any business that they own or that employs) if they choose to provide services via telehealth. It clarifies what the law requires of them when they offer telehealth services. It is not possible for the Board to estimate the number of businesses impacted, as this regulation will only affect licensees who practice via telehealth. Choosing to do this is voluntary.

Reporting Requirements: The proposed regulations do not impose any reporting requirements on licensees or the public.

Business Reporting Requirement: The proposed regulations do not impose any reporting requirements on businesses.

Comparable Federal Regulations: None

Benefits: The benefits of this proposal cannot be quantified. However, Board licensees who wish to practice telehealth will benefit from increased clarity of what is required of them, and may be more willing to practice via telehealth, leading to an increased number of clients. If more Board licensees are willing to practice via telehealth due to these regulations, it is possible that consumers in rural areas, where there are typically very few therapists, may have greater access to mental health services.

Business Impact

The Board has made an initial 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.

Specific Technologies or Equipment

- This regulation does not mandate the use of specific technologies or equipment.
- This regulation mandates the use of specific technologies or equipment. Such mandates or prescriptive standards are required for the following reasons:

This regulation would require that, if a licensee chose to practice via telehealth, he or she must utilize industry best practices to ensure the security of the communication medium. In such a case, a technology would be required to ensure the client's communication remains confidential. However, licensees are not required to practice telehealth, and therefore there is no specific technology or equipment being mandated.

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.