



Board of Behavioral Sciences

Memo

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To: Committee Members

Date: November 29, 2023

From: Rosanne Helms
Legislative Manager

Subject: Review of the Board's Current Telehealth Regulations

Summary

When the Telehealth Committee (Committee) was formed in early 2021, one of its first tasks was to review the Board's existing telehealth regulations, §1815.5 of Title 16 of the California Code of Regulations (CCR). The regulations would then be reviewed again toward the conclusion of the Committee.

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.

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 some provisions of the current telehealth regulations may need to be reconsidered or adjusted.

Discussion of Potential Adjustments

1. Subdivisions 1815.5(f) and (e)

This adjustment was originally discussed at the initial Telehealth Committee meeting. 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 has 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 suggest 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. This proposed amendment is shown in **Attachment A**.

If the Committee wishes to examine other options to address this, the Board of Psychology recently adopted telehealth regulations, in August 2021. These regulations can be found in 16 CCR §1396.8. Subdivision (c)(6) of those regulations address this issue slightly differently, as shown in [Reference 1](#).

Arizona's Board of Behavioral Health Examiners has also adopted regulations related to telehealth, which are shown in [Reference 2](#).

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. For example, could this include an inactive license, that is in current standing? It may be more precise to make an amendment to require a "current and active" license or registration.

3. Disclosure of License and Registration Number

The Board's Policy and Advocacy Committee has been discussing the requirements to physically display a license or registration, and whether those

requirements in statute need to be updated to account for the use of telehealth. One possibility that was discussed was that perhaps a licensee or registrant should be required to provide a client with their license or registration number, type, and expiration date as part of the required notice to consumers that is provided upon initiation of services.

The Board discussed this at its November 2023 meeting, and a definitive solution has not been reached yet. However, this Committee may wish to review subsection (c)(3) of §1815.5, which required a client be provided with the therapist's license or registration number and type of license and registration upon initiation of telehealth services, and discuss if the Committee believes this is still appropriate.

4. Documentation of Emergency Services

This Committee recently discussed the results of its online-only therapy platform survey. One of the findings that the Committee expressed concern with was that 40% of the survey respondents indicated that the online-only therapy platform that they worked for did not have a clear emergency plan in place.

Currently, subdivision (c)(4) of the Board's telehealth regulations require the therapist to "Document reasonable efforts made to ascertain the contact information of relevant resources, including emergency services, in the patient's geographic area", upon initiation of telehealth services.

The Committee may wish to discuss whether this requirement is sufficient, or if modification is needed.

5. 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 bill signed this year pertaining to telehealth in the practice of veterinary medicine. Newly adopted section 4826.6(h)(1) of [AB 1399](#) (Chapter 475, Statutes of 2023) 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.*"

Alternatively, the Committee may wish to look to the telehealth regulations cited above for the Board of Psychology as an example:

16 CCR §1396.8(c)(5) The licensee takes reasonable steps to ensure that electronic data is transmitted securely, and informs the client immediately of any known data breach or unauthorized dissemination of data.

Recommendation

Conduct an open discussion regarding the four potential adjustments outlined above, as well as any other provisions of §1815.5 that the Committee believes may require amendments. Direct staff to make any discussed amendments, and any non-substantive amendments, and to bring to the proposal to the Policy and Advocacy Committee for consideration.

Attachments

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

Attachment B: Statute Relating to Telehealth: BPC §2290.5

Attachment C is a previous letter from the California Association of Marriage and Family Therapists (CAMFT) describing their concern with 16 CCR §1815.5(f) and (e).

Reference 1: Board of Psychology Telehealth Regulations: 16 CCR §1396.8

Reference 2: State of Arizona Board of Behavioral Health Examiners: Arizona Administrative Code Title 4, §R4-6-1106: Telepractice

Reference 3: Section 4826.6(h)(1) of AB 1399, Pertaining to Telehealth in Veterinary Medicine

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

(f) 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.

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.



**CONNECT
ENRICH
ACHIEVE**

ATTACHMENT C

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January 11, 2018

Kim Madsen
Executive Officer
Board of Behavioral Sciences
1625 N. Market Blvd., Suite S-200
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RE: 16 CCR § 1815.5: Telehealth

Dear Ms. Madsen:

On behalf of the California Association of Marriage and Family Therapists (CAMFT), we request that the Board of Behavioral Sciences (BBS) put 16 CCR § 1815.5 on their February 22, 2018 agenda for public discussion of possible amendment.

We want to start by thanking the BBS for attempting to tackle the incredibly complicated and difficult topic of California licensed or registered therapists practicing telehealth outside of California. This issue is one that comes up again and again and the BBS's attempt to provide direction is to be commended.

The purpose of this letter, however, is to request that the BBS, along with stakeholders, re-review the subject of telehealth performed with individuals outside of California (sub-section § 1815.5 (e)) and its construction with unprofessional conduct (sub-section § 1815.5(f)). We are concerned that the connection between the two sub-sections, as currently written and placed, could lead to unintended consequences, as well as, additional confusion on this already complicated topic.

During the public comment period in 2014, CAMFT advocated that these sections together did not take into account California patients in other locations temporarily due to vacations or work, nor patients moving out of state but in need of transition. Although CAMFT understands the BBS has no authority over other states' laws, CAMFT would like to see that the regulations allow for some flexibility in determining which out-of-state practices of telehealth would be deemed "unprofessional conduct." The implication of these sub-sections together is that if a therapist does not meet the lawful requirements of the state where the client is located, providing telehealth to the client would inherently be considered unprofessional conduct.

In 2015, in response to the concerns discussed above, the BBS indicated that it would take into account mitigating circumstances if any disciplinary action were to arise, but no standards were released. In 2016, CAMFT requested that official guidelines be developed and published to help practitioners navigate the common patient scenarios, unfortunately none were made available.

As noted above, CAMFT is thankful to the BBS for being a leader in trying to clarify such a complex area of law, as well as empathetic to the difficulties associated in doing so. CAMFT would like to see additional discussion occur on the combination of sub-sections § 1815.5(e) and § 1815.5(f), and the unintended consequences (including sub-par patient care) that could be created with the language as currently written. For example, could sub-section § 1815.5(e) be moved elsewhere and reworded to not only act as a guide, but possibly allow the BBS more flexibility in reviewing any out-of-state complaints against California therapists. This is but one example.

CAMFT would like to hear more from the BBS, and other stakeholders, on how we can improve the law so that we are not only protecting patients, but also providing therapists clear and reasonable legal precedent.

We are hopeful that this topic can appear on the February 2018 Board meeting agenda, even if to simply begin discussions in advance of the April 2018 Board meeting.

Thank you for your time.

Sincerely,



Ann Tran-Lien, JD
Managing Director, Legal Affairs



Cathy Atkins, JD
Deputy Executive Director

cc: Rosanne Helms, Legislative Analyst, Board of Behavioral Sciences
Political Solutions, LLC