

TITLE 16: BOARD OF BEHAVIORAL SCIENCES

NOTICE IS HEREBY GIVEN that the Board of Behavioral Sciences (Board) is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at:

Board of Behavioral Sciences
1625 N. Market Blvd.
El Dorado Room, Suite 220
Sacramento, CA 95834
August 25, 2015
10:00am – 11:00 am

Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, must be received by the Board at its office not later than 5:00 p.m. on August 24, 2015 or must be received by the Board at the hearing.

The Board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 4980.60 and 4990.20 of the Business and Professions Code (BPC), and to implement, interpret or make specific Sections 2290.5, 4980, 4989.50, 4996, 4999.30, and 4999.82 of the BPC, the Board is considering changes to Division 18 of Title 16 of the California Code of Regulations as described in this Notice.

INFORMATIVE DIGEST

Over the past several years, therapy via electronic means (telehealth) has dramatically increased in popularity. As this happens, state licensing entities and professional associations are beginning to adopt laws, regulations, and guidelines regarding its use. Reflecting this trend, the Board of Behavioral Sciences (Board) is receiving an increasing number of inquiries regarding the lawful practice of telehealth.

Current law (Business and Professions Code Section 2290.5) specifically defines telehealth for all healing arts professions regulated by the Department of Consumer Affairs (DCA), including the Board's licensees. It sets patient consent and confidentiality standards, and it makes failure to comply with these standards unprofessional conduct.

However, the Board's licensing law offers little guidance regarding telehealth practice when performing psychotherapy. The law simply requires a valid state license in marriage and family therapy, clinical social work, educational psychology, or clinical counseling, respectively, before a person can engage in the practice of any of these professions in this state (BPC §§4980, 4989.50, 4996, 4999.30, and 4999.82), but no further details are provided.

This implies that a licensee in another state may not counsel an individual who is located in the State of California, unless they hold a California license. If the client is not located in California, the state where the client is located would have jurisdiction. However, this is not stated specifically, leading to confusion and questions by licensees and consumers.

The regulatory proposal is as follows:

Add Section 1815.5. Standards of Practice for Telehealth

1815.5 (a) Clarification of Need for a California License to Engage in Practice with a Client Located in California.

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 specifically states 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.

Policy Statement Overview: The objective of this amendment is to make it clear that if the client is located in California, the treating practitioner must have a California license. This is in response to the Board frequently being asked if a practitioner who is licensed and located in another state (who is not licensed in California) may treat a patient located in California via telehealth.

The mental-health consuming public will benefit from this amendment, because it will clarify that all psychotherapists treating a patient located in California hold a valid California license. This guarantees that those treating clients located in California have received a high level of education and experience treating diverse populations unique to California.

1815.5 (b) Clarification that Services Offered via Telehealth are Still Subject to the Board's Statutes and Regulations.

The Board's statutes and regulations outline professional qualifications and standards of conduct that all licensees and registrants must abide by. This amendment makes it clear that these laws and regulations apply to telehealth services just as they apply to traditional face-to-face services.

Policy Statement Overview: This amendment seeks to remind practitioners utilizing telehealth that even though they are using a different medium, the same standards of professional conduct apply. For example, licensees of the Board are mandated reporters, and this still applies, even in a telehealth interaction.

This amendment stating statutes and regulations apply to both face-to-face and telehealth practice will benefit practitioners, as it will serve as a reminder that the law also applies to telehealth as various professional questions arise. In addition, consumers will benefit from this assurance that their therapy via telehealth has the same legal protections as face-to-face service.

1815.5 (c) Define Actions a Licensee or Registrant Must Take Upon Initiating Telehealth Services.

Offering services via telehealth creates some unique questions and challenges not encountered in traditional face-to-face therapy situations. To address these, the amendments define certain actions that a licensee or registrant must take when initiating telehealth services with a client for the first time. They are as follows:

- Documenting informed consent in accordance with BPC §2290.5;
- Informing the client of potential risks and benefits of telehealth;
- Ensuring the client is given a license or registration number; and
- Ensuring the client has written emergency procedures near his or her location if a crisis arises when the therapist is not available.

Policy Statement Overview: The goal of this section is to make the practitioner aware that therapy via telehealth has some differences from face-to-face therapy. The electronic communication medium may have certain nuances (technology failure, need for specialized electronic security systems, less visibility of verbal cues) that do not exist with face-to-face therapy. In addition, online interaction can be more anonymous, so it is important to ensure the client obtains the therapist's license number so that they have the ability to verify the therapists' identity. Finally, if there is an emergency, the therapist may be less familiar with the resources in the client's area, and therefore it is important for the therapist to become aware of, and document, this information.

Requiring these actions upon initiation of telehealth services ensures that both the patient and the practitioner are informed about differences in telehealth interactions, and increases transparency for the client, thus enhancing consumer protection.

1815.5 (d) Define Actions a Licensee or Registrant Must Take Each Time he or she Performs Telehealth Services.

This amendment defines the actions a licensee or registrant must take each and every time he or she performs telehealth with a client. They are as follows:

- Verbally obtain and document the client's full name and address of present location;
- Assess whether or not the client is appropriate for telehealth; and
- Utilize industry best practices to ensure client confidentiality and to ensure that the communication medium is secure.

Policy Statement Overview: This amendment seeks to protect the consumer of telehealth therapy services by requiring the therapist to address, at each telehealth session, key situations which could change from session to session due to environmental factors.

Verbal identification and documentation of the client's identity and location protects the clients' personal information, and ensures that if an emergency arises, the therapist knows where the client can be located.

Assessing appropriateness for telehealth is crucial to the situation, because the client's mental health may change from session to session. For example, if the client is

experiencing severe mental distress, a therapist may decide that in his or her professional opinion, it is in the client's best interest to seek face-to-face therapy services, or emergency resources.

Requiring the therapist to utilize industry standards to ensure confidentiality ensures that for each session, the therapist's actions are always consistent with maintaining the confidentiality of the client's information, and ensures that the therapist is always using the appropriate technology to prevent electronic communications from being compromised.

1815.5 (e) Clarify that a Board Licensee Performing Telehealth Services in Another State Must Comply with the Licensing Laws of that State.

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. This amendment seeks to clarify that a Board licensee practicing telehealth with a client in another jurisdiction must ensure that he or she meets the requirements to lawfully provide services in that jurisdiction.

Policy Statement Overview: Adoption of this amendment will benefit licensees because it clarifies that they are not permitted to practice telehealth in another jurisdiction unless they meet the requirements of that jurisdiction. This may also benefit the public in other states, as it helps to ensure that they are seeking telehealth from a practitioner who meets the particular licensing requirements relevant to his or her state.

1815.5 (f) State that Failure to Comply with Provisions in this Regulation is Unprofessional Conduct.

This amendment clarifies that the regulations discussed in this proposal are required of all licensees and registrants providing services via telehealth, and must be followed.

Policy Statement Overview: This amendment will benefit consumers of mental health services by requiring certain actions be taken to promote transparency, security, and client safety when services via telehealth are rendered.

CONSISTENCY OR COMPATIBILITY WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, the Board of Behavioral Sciences has determined that these are the only regulations that apply to the subject area of telehealth for licensees and registrants of this Board. Therefore, the Board finds that these proposed regulations are consistent and compatible with existing state regulations.

FORMS INCORPORATED BY REFERENCE

No forms have been incorporated by reference.

FISCAL IMPACT ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

It is possible that the Board may see an increase in enforcement cases stemming from complaints of licensee unprofessional conduct due to violation of these proposed telehealth regulations.

The Board estimates the following:

- An estimated 4 additional cases per year investigating allegations of misconduct performing telehealth that end up with action being taken by the Attorney General's office.
- Additional subject matter expert review costs of \$680 per case (8 hours x \$85 per hour).
- Total additional subject matter expert review cost of \$2,720 (4 cases x 680 per case).
- Estimated cost of \$7,000 per case for Attorney General investigation and prosecution.
- Total estimated Attorney General costs of \$28,000 (4 cases x \$7,000) per year to prosecute these cases.
- **Total annual potential additional cost to the Board: \$2,720 subject matter expert review cost + \$28,000 Attorney General cost = \$30,720.**
- The Board is able to absorb this additional cost.

These regulations provide increased clarity regarding the practice of telehealth. It is therefore possible that the regulations may provide some cost savings. If the regulations provide any clarity to the Attorney General's office during case preparation, it could lessen the amount of time they need to spend preparing the case. If the increased clarity encourages stipulated settlements and leads to fewer disputed cases, this could reduce hearing costs. The amount of any potential cost reduction is indeterminable.

Finally, BPC §2290.5 already permits Board licensees to practice via telehealth, and makes violations of its provisions unprofessional conduct. Therefore, there is already the potential for a fiscal impact due to needed enforcement actions from the Board to enforce the provisions of §2290.5, regardless of whether or not these regulations are adopted. These regulations are needed to provide more clarity to §2290.5 regarding the practice of telehealth.

There will be no effect on federal funding to the state.

The fiscal impact of these regulations is also discussed in **Attachment A** of the STD 399.

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Section 17500-17630 Require Reimbursement: None

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 license 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.

Cost Impact on Representative Private Person or Business: The cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action are insignificant. The law (Business and Professions Code (BPC) Section 2990.5) already permits Board licensees to perform services via telehealth and states that all confidentiality laws regarding health care information and patient's rights apply to telehealth interactions. This regulation specifies that the licensee must comply with industry best practices to ensure the security of the communication medium. Such costs would only apply to a licensee who chooses to practice via telehealth, and would depend on the communication medium chosen.

Impact on Jobs/New Businesses: The Board has determined that this regulatory proposal will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California. With clearer regulations regarding the use of telehealth, licensees may be more willing to provide telehealth service, which could increase their client base and lead to increased access to therapists in rural areas.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS

These proposed regulations will impact a business that is owned by a Board licensee or that employs Board licensees. This could include small businesses (although the Board does not license small businesses). It will make it easier for a licensee to know what is expected of them under the law in regards to telehealth. With this increased clarity, a Board licensee who owns his or her own business, or a business that employs licensees, may be more willing to perform services via telehealth, which could result in an increased client base.

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 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 practicing via telehealth 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.

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 that a California license is needed to practice via 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.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Board has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the person designated in the Notice under Contact Person or by accessing the Board's website, www.bbs.ca.gov.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below. You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Rosanne Helms
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The backup contact person is:

Name: Christy Berger
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Website Access: Materials regarding this proposal can be found at www.bbs.ca.gov.