California Board of
PSYCHOLOGY

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MEMORANDUM

DATE	October 21, 2016
TO	Board Members
FROM	Antonette Sorrick Executive Officer
SUBJECT	**Telepsychology Committee Report and Consideration of Committee Recommendations: Agenda Item 16**

Background:

Attached are the following documents:

a) Proposed Additions to CCR Title 16 to Address Standards of Practice for Telehealth
b) Business and Professions Code Section 2290.5 – Telehealth
c) BBS Telehealth Regulations
d) Article – *Licensing Board Issues Warning to Patients Who Travel Out of State*

Action Requested:

Review draft regulatory language and move to accept the language as written and proceed with a rulemaking file.

Section XXXX Standards of Practice for Telehealth

a) A licensee is permitted to provide psychological services via telehealth to an originating site in this State, as defined in section 2290.5 of the Code, and to provide psychological services to a patient or client who is a resident of California who is temporarily located outside of this State, subject to the laws and regulations of the other state where either the licensee or the patient is located. Resident means any individual who is present in California for other than a temporary or transitory purpose, or who is domiciled in California, but outside California for a temporary or transitory purpose. Domicile means the place where an individual voluntarily establishes themselves and their family, not merely for a special or limited purpose, but with a present intention of making it their true, fixed, permanent home and principal establishment.

b) The provision of services under subdivision (a) are subject to the following conditions:
   1) The licensee holds a valid and current license issued by the Board.
   2) The licensee obtains and documents informed consent for the provision of psychological services via telehealth from the patient or client. Such consent shall cover concerns unique to the receipt of psychological services via telehealth, including risks to confidentiality and security, data storage policies and procedures specific to telehealth, the possibility of disruption and/or interruption of service due to technological failure, insurance coverage considerations, and ~~any~~ other issues that the licensee can reasonably anticipate regarding the non-comparability between psychological services delivered in person and those delivered via telehealth.
   3) The licensee determines that delivery of psychological services via telehealth is appropriate after considering at least the following factors:
      a. The patient or client's diagnosis, symptoms, and medical/psychological history;
      b. The patient or client's preference for receiving services via telehealth;
      c. The nature of the services to be provided, including anticipated benefits, risks, and constraints resulting from their delivery via telehealth;
      d. ~~Any~~ The benefits, risks, or constraints posed by the patient or client's physical location. These include the availability of appropriate physical space for the receipt of psychological services via telehealth, accessibility of local emergency psychological services, and other considerations related to the patient or client's diagnosis, symptoms, or condition.
      e. The provision of telehealth services are within the scope of competency of a psychology trainee who provides services under the supervision of the licensee.
   4) The licensee is competent to deliver such services based upon whether he or she possesses the appropriate knowledge, skills, and abilities relating to delivery of psychological services via telehealth, the information technology chosen for the delivery of telehealth services, and how such services might differ from those delivered in person.
   5) The licensee takes reasonable steps to ensure that electronic data is transmitted securely, and informs the patient or client immediately of any known data breach or unauthorized dissemination of data.

6) The licensee complies with all other provisions of the Psychology Licensing Law and its attendant regulations, and all other applicable provisions of law and standards of care in this and the other relevant jurisdiction.

c) Failure to comply with these regulations or the laws and regulations of a jurisdiction outside of this State relating to telehealth, may constitute unprofessional conduct.

Reference: Business and Profession Code sections 2290.5, 2904.5

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Reference: Business and Profession Code sections 2290.5, 2904.5

BUSINESS AND PROFESSIONS CODE - BPC

DIVISION 2. HEALING ARTS [500 - 4999.129] *(Division 2 enacted by Stats. 1937, Ch. 399.)*

CHAPTER 5. Medicine [2000 - 2525.5] *(Chapter 5 repealed and added by Stats. 1980, Ch. 1313, Sec. 2.)*

ARTICLE 12. Enforcement [2220 - 2319] *(Article 12 added by Stats. 1980, Ch. 1313, Sec. 2.)*

2290.5. (a) For purposes of this division, the following definitions shall 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 without the presence of the patient.

(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 either of the following:

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

(B) A marriage and family therapist intern or trainee functioning pursuant to Section 4980.43.

(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 while the patient is at the originating site and the health care provider is at a distant site. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers.

(b) Prior to 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) Nothing in this section shall 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 shall not be construed to alter the scope of practice of any 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 his or her medical information shall apply to telehealth interactions.

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

(h) (1) Notwithstanding any other provision of 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.

(Amended by Stats. 2015, Ch. 50, Sec. 1. Effective January 1, 2016.)

Board of Behavioral Sciences

Order of Adoption

The Board of Behavioral Sciences of the Department of Consumer Affairs hereby adopts regulations in Division 18 of Title 16 of the California Code of Regulations, as follows:

ARTICLE 1. GENERAL PROVISIONS

ADD §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) 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.

AVOIDING LIABILITY BULLETIN **SEPTEMBER 2016**

By: Richard S. Leslie, J.D.
Attorney at Law – "At the Intersection of Law and Psychotherapy"

LICENSING BOARD ISSUES WARNING TO PATIENTS WHO TRAVEL OUT OF STATE!
Re: Telephone Counseling/Psychotherapy

Suppose that you have been treating or counseling an adult individual, or a couple, or a child for a period of time for a particular problem. You have informed the client of your office policies and any other information that is required or encouraged by state law or regulation (or by HIPAA) or by applicable ethical standards. At some point during the course of the professional relationship, you learn that the client will be leaving the state for a limited period of time to go on a vacation or business trip, to attend a graduation, wedding or funeral, or for other reasons. The client, while away, may need or choose to contact you by telephone and may require one or more sessions – whether for the typical "hour" or for a shorter period of time.

Should a client expect the therapist's availability during the period of time when the client is temporarily out of state? May the client call the practitioner during this period of time, without jeopardy to the practitioner, if there is a need to discuss something or to receive counseling, psychotherapy, or other professional services, whether in a crisis situation or otherwise? May the client receive therapy services via a telephone session, without jeopardy to the practitioner, if the practitioner determines that such treatment is necessary or appropriate? "Yes," or "of course," has been and should be the answer to these questions.

Such scenarios have occurred for mental health practitioners of all licensures and in all states for multiple decades (half a century for some), and to my knowledge, without problem or controversy and without jeopardy for patients or practitioners. But one state licensing board has recently taken action which shockingly calls into question the legality of such contact between client and practitioner. What has occurred is an affront to clients and potential clients (consumers) in California, and to the mental health professionals regulated by this board.

From the very inception of the existence of the licensing law in the state in which you practice, clients have likely expected and should expect that practitioners will continue to be available during the course of the professional relationship, especially in times of need and even when the client is temporarily out of state – provided that the practitioner has not previously informed the client of any limits on or conditions of such availability. Mental health practitioners of all licensures and from all states recognize the importance of the patient's

expectation of continuity of care from the practitioner of his or her choice, and they strive to advance the welfare of their clients. I am not aware of any state that has tried to prohibit a licensee of State "A" from speaking with an existing client from State "A" who is temporarily out of State "A" and who has a need for telephone counseling from the treating practitioner located in State "A" - where the professional relationship began and continues.

Recently, however, the Board that regulates California LPCCs, LCSWs, LMFTs, and LEPs has published a notice to California consumers that is alarming. This notice is essentially a travel warning to all current patients and to all California consumers seeking or receiving counseling or psychotherapy from any of these practitioners. The Board notifies California consumers that if they are traveling to another state and wish to engage in psychotherapy or counseling via the telephone (or the internet) with their California-licensed therapist while they are away, their therapist needs to check with the state that the patient is temporarily located in to see if this is permitted. The State of California, through one of its many regulatory boards, is thus suggesting to patients who are already in treatment with their California-licensed practitioners that they may not be able to get continuing and necessary treatment from their therapists via telephone if they temporarily cross the borders of California!

Such a notion strikes this writer as absurd and contrary to decades of safe and ethical practice nationwide, where the best interests of patients have long been served by the continuity of care commonly expected and received by patients. This travel warning to the California consumer is related to and based upon a regulation recently enacted by the same Board (see the article entitled The Regulation of Telehealth/Online Therapy and Informed Consent in the July/August 2016 issue of the Bulletin). The regulation says that the California licensee may provide "telehealth services" to a client located in another jurisdiction only if the California licensee 1) meets the requirements to lawfully provide services in that other jurisdiction, and 2) only if the delivery of services via telehealth is allowed by that jurisdiction. The use of the word "located" in the regulation seemingly forms the basis for the Board's ill-advised, over-broad, and harmful travel warning to California consumers.

With respect to # 2, the Board that is supposed to be protecting California consumers takes the position that if the state where the client is presently located (on vacation, for example) does not allow for the delivery of services via telehealth, clients cannot call their California-based therapists and receive needed treatment when they are physically in that other state. Such a notion seems bizarre, but a violation of the regulation would apparently constitute unprofessional conduct for the California licensee! The possibility that some jurisdiction may not allow for the delivery of services via telehealth should not mean that a licensee from

California would be precluded from continuing to treat a patient via the telephone when the patient is temporarily traveling (located) in that other state or country.

The Board has publicly stated that it "... does not have jurisdiction over a therapist practicing telehealth with a client who is located in another state," yet the regulation it enacted indicates otherwise. The regulation, in part, allows the Board to pursue disciplinary action against a licensee if the licensee does not meet the requirements to provide professional services in the state where the patient happens to be temporarily located. Moreover, the Board notifies patients/consumers that if they travel out of California, their therapist is required to check with the state that the patient is located in to see if the therapist can lawfully provide treatment via the telephone according to that state's laws and regulations!

It is a strange fiction to believe that in order to accept and appropriately respond to a telephone call from an established client in need, a therapist would be expected or required to meet the requirements for practice in one or more states or countries as the California client travels about. What specific requirements must be met? Is the therapist committing the crime of practicing without a license in the other state by responding to the patient's phone call? Moreover, to think that the treating licensee would be expected to communicate with clerks of one or more licensing boards of other states or countries, or that the licensee is going to get timely and reliable answers to questions about the propriety of responding to the treatment needs (sometimes sudden and unexpected) of the California domiciled patient, is unrealistic, unnecessary, and unreasonable.

In reality, it would be up to the state where the patient is temporarily located to take the position, assuming they somehow learn of and care about the telephone counseling session(s), that the California licensee was practicing without a license in their state (typically a crime). *What licensing board in the country would be so irresponsible, so uninformed, and so out of control to think that it could or should interfere with or criminalize an established California based therapist-client relationship merely because the patient is temporarily traveling in its state and chooses to use a telephone to communicate with the therapist in California?*

Consumers who become aware of this travel warning will be concerned that traveling may interfere with their right to continuity of care with their therapist of choice. Practitioners fearful of disciplinary action by the State will hesitate to treat at times when the patient is in need, thus raising the abandonment issue. The development of telehealth nationwide is intended to improve patient access and to remove unnecessary or arbitrary barriers to treatment. The Board's travel warning issued to California consumers limits patient access, causes harm to the therapeutic relationship, and creates multiple problems and dilemmas for practitioners.

Therapists and counselors in all states are rightly concerned about protecting their licenses and livelihoods, and therefore they seek to avoid civil, criminal, or administrative jeopardy by practicing with care and by complying with ethical standards and applicable laws and regulations. Now, these affected California practitioners are subjected to possible disciplinary action simply because a telephone was used by client and practitioner while the client was traveling outside of California! If California consumers and practitioners were to become fully aware and educated about the precedent setting dangers this travel warning poses to the historic and special therapist - patient relationship, this warning would likely be retracted following the resulting anger and protest over this senseless government overreach.