

## CHAPTER 5. MEDICINE

## Article 12. Enforcement

## Section

## 2290.5 Telemedicine Informed Consent

**Telemedicine Informed Consent**

§ 2290.5. (a) (1) For the purposes of this section, "telemedicine" means the practice of health care delivery, diagnosis, consultation, treatment, transfer of medical data, and education using interactive audio, video, or data communications. Neither a telephone conversation nor an electronic mail message between a health care practitioner and patient constitutes "telemedicine" for purposes of this section.

(2) For purposes of this section, "interactive" means an audio, video, or data communication involving a real time (synchronous) or near real time (asynchronous) two-way transfer of medical data and information.

(b) For the purposes of this section, "health care practitioner" has the same meaning as "licentiate" as defined in paragraph (2) of subdivision (a) of Section 805 and also includes a person licensed as an optometrist pursuant to Chapter 7 (commencing with Section 3000).

(c) Prior to the delivery of health care via telemedicine, the health care practitioner who has ultimate authority over the care or primary diagnosis of the patient shall obtain verbal and written informed consent from the patient or the patient's legal representative. The informed consent procedure shall ensure that at least all of the following information is given to the patient or the patient's legal representative verbally and in writing:

(1) The patient or the patient's legal representative retains the option to withhold or withdraw consent at any time without affecting the right to future care or treatment nor risking the loss or withdrawal of any program benefits to which the patient or the patient's legal representative would otherwise be entitled.

(2) A description of the potential risks, consequences, and benefits of telemedicine.

(3) All existing confidentiality protections apply.

(4) All existing laws regarding patient access to medical information and copies of medical records apply.

(5) Dissemination of any patient identifiable images or information from the telemedicine interaction to researchers or other entities shall not occur without the consent of the patient.

(d) A patient or the patient's legal representative shall sign a written statement prior to the delivery of health care via telemedicine, indicating that the patient or the patient's legal representative understands the written information provided pursuant to subdivision (a), and that this information has been discussed with the health care practitioner, or his or her designee.

(e) The written consent statement signed by the patient or the patient's legal representative shall become part of the patient's medical record.

(f) The failure of a health care practitioner to comply with this section shall constitute unprofessional conduct. Section 2314 shall not apply to this section.

(g) All existing laws regarding surrogate decisionmaking shall apply. For purposes of this section, "surrogate decisionmaking" means any decision made in the practice of medicine by a parent or legal representative for a minor or an incapacitated or incompetent individual.

(h) Except as provided in paragraph (3) of subdivision (c), this section shall not apply when the patient is not directly involved in the telemedicine interaction, for example when one health care practitioner consults with another health care practitioner.

(i) This section shall not apply in an emergency situation in which a patient is unable to give informed consent and the representative of that patient is not available in a timely manner.

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

(k) 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.

Amended by Stats. 2007, ch. 507 (AB 1224), § 1, effective January 1, 2008.

## Telehealth: Legal Basics for Psychologists

*A 50-state review of telehealth laws and rules yields guidance for psychologists considering telehealth services delivery.*



With rapid advances in technology, gone are the days when interactions between health care professionals and patients are limited to in-person communication.

While statistics may be scant, a U.S. Department of Commerce analysis<sup>1</sup> sheds some light on the potential growth of telehealth services. The federal government analysis cited two market research studies from 2008 that found “the [U.S.] market for telemedicine devices and services is forecast to exceed \$1.8 billion by the year 2013<sup>2</sup>

and that the market is expected to grow at a five-year compound annual growth rate of 56 percent.”<sup>3</sup>

And though this trend may not yet have had a broad impact on psychology practice, an increasing number of psychologists are raising questions about the possibility of providing telehealth services in their state and across state lines. Psychologists want to know whether existing law allows them to provide telehealth services and, if so, whether additional legal requirements or restrictions apply.

<sup>1</sup> U.S. Department of Commerce, International Trade Administration, Manufacturing and Services, Office of Health and Consumer Goods. (2009, June 25). *Telemedicine: an important force in the transformation of healthcare*. Retrieved June 7, 2010, from [http://www.ita.doc.gov/td/health/telemedicine\\_2009.pdf](http://www.ita.doc.gov/td/health/telemedicine_2009.pdf)

<sup>2</sup> Marketwire. (2008, July 23). *Telemedicine revenues to exceed \$1.8 billion by 2013, report projects*. Retrieved June 7, 2010, from <http://www.marketwire.com/press-release/Telemedicine-Revenues-to-Exceed-18-Billion-by-2013-Report-Projects-882137.htm>

<sup>3</sup> Chang, Christine. (2008, November 13). *Intel's health guide puts telehealth in the spotlight (analyst's opinion)*. *Datamonitor*. Retrieved June 7, 2010, from <http://www.american-telemed.org/files/public/Intel%20HealthGuidePutsTelehealthinSpotlight.pdf>



This article reflects the results of a recent 50-state review of telehealth laws by the American Psychological Association (APA) Practice Directorate's Legal and Regulatory Affairs Department, including telehealth laws that apply specifically to psychologists as well as rules that apply in states without psychology-specific telehealth laws. Further, we discuss the results of a 50-state telephone survey of state psychology boards on enforcement activity related to providing telehealth services. The article concludes with a framework for practitioners to identify relevant legal provisions when they consider providing telehealth services.

### WHAT IS TELEHEALTH?

The term "telehealth services" can be defined broadly to include all interactions that are not in-person between health care professionals and their patients. Organizations that have developed telehealth guidelines for health care practitioners often use this definition. Regulators and insurers, however, often use much narrower definitions of telehealth services, depending on what particular services they are trying to regulate or reimburse. So there is no universal definition of telehealth services.

Differing definitions of telehealth appear in various federal and state laws, reimbursement policies, organization or facility policies or treatment guidelines, with the definition changing depending on the purpose and/or coverage terms of the law or policy at issue. For example, many definitions include only telehealth services furnished via audio-video devices, excluding phone and e-mail. Reimbursement policies using that definition would pay only for services that were furnished using audio-video devices.

Other definitions are specific to the type of provider. For example, general telehealth laws may define "provider" in a way that includes physicians but excludes psychologists. In that case, the psychologist would not be subject to the law's restrictions, nor would the psychologist benefit from any of the law's permissions.

### State Laws on Telehealth

While our review did not find any state that prohibits the provision of telehealth services, some states have specific telehealth laws imposing special requirements when

services are furnished via telehealth, as discussed below. In the absence of a specific telehealth law, psychologists should assume that existing licensure and ethical requirements apply when providing telehealth services.

When analyzing state telehealth laws, it is helpful to focus on three factors: who is covered by the law; what services are covered by the law; and what the law requires.

### Providers Covered by Telehealth Laws

We found 22 states that have telehealth laws, but only three of those (California, Kentucky and Vermont) apply to psychologists. We also discovered that telehealth laws generally fall into two categories: those that cover multiple providers (general telehealth laws); and those that cover a single type of provider, usually via the provider's licensure law (psychologist-specific laws).

Of the three telehealth laws that apply to psychologists, two are general laws covering multiple providers (California and Kentucky), while the third is psychologist-specific (Vermont). Laws in the 19 additional states with telehealth laws do not appear to apply to psychologists at this time. However, psychologists should be aware of these laws. As telehealth becomes more prevalent among psychologists and other mental health professionals, states may apply their general state laws to these providers.

### ARE SPECIAL CREDENTIALS NEEDED?

Many states take the view that practitioners should be separately licensed or credentialed to furnish services via telehealth. For example, some psychologists know of physicians who are required to have a special credential. But no state thus far has imposed that obligation on psychologists, meaning they are not yet required to obtain a special "telehealth" license or credential in order to provide telehealth services.

### Services Subject to Telehealth Laws

Information about what services are covered by telehealth laws usually is found in the law's definition of telehealth services. California and Kentucky have a somewhat narrow



## Telehealth: Legal Basics for Psychologists *continued from page 3*

definition of telehealth covering interactive audio, video or other “electronic media” used in the delivery of health care for “diagnosis, consultation, treatment, transfer of health information” and education. (See Cal. Bus. & Prof. Code § 2290.5(a)(1); KRS § 319.140.) California specifically defines “electronic media” to exclude phone conversations and email messages between patients and providers, and specifies that its law does not apply to interactions where the patient is not directly involved – for example, consultations between two providers where the patient is not present.

Vermont, on the other hand, uses a much broader definition of telehealth that includes services furnished via the “internet or other electronic means.” The law does not specify any services as being excluded.

### What the Telehealth Laws Require

All three laws include provisions related to disclosure of information to the client, though the requirements are different under each law. These disclosure requirements appear to be intended to protect the client from risks inherent in furnishing services via telehealth. Examples include potential risks to privacy and confidentiality, or the fact that a client may not ever visit the psychologist’s office and would not necessarily know the applicable state psychology board should he or she want to file a complaint.

---

*“In addition to requiring certain disclosures, telehealth laws sometimes include language to make clear that existing laws apply to telehealth services.”*

---

California requires that providers inform their clients about: potential risks, consequences and benefits of telehealth; the right to withhold or withdraw consent to treatment; the fact that all confidentiality protections apply, as do existing laws regarding the patients’ right to access their health information; and the stipulation that information obtained from telehealth services cannot be shared for research purposes absent the client’s consent. All this information must be included in both a verbal and written informed consent from the patient before any telehealth services are furnished. Failure to comply with these requirements constitutes



unprofessional conduct and the psychologist could be subject to disciplinary action for noncompliance.

Like California, Kentucky requires that psychologists obtain the patient’s informed consent prior to providing telehealth services, but the law does not specify what must be included in the consent.

Similarly, Vermont requires that psychologists disclose certain specified information to their patients, such as their name, location, type of license, jurisdiction where licensed, what they are licensed and trained to do and to whom the client can make a complaint and how.

In addition to requiring certain disclosures, telehealth laws sometimes include language to make clear that existing laws apply to telehealth services. The Kentucky telehealth law, for example, states that all confidentiality requirements in state laws and regulations apply to telehealth interactions. Vermont law makes clear that psychologists must be licensed in Vermont as psychologists in order to provide telehealth services and that telehealth services are subject to the Vermont Psychology Board’s laws and rules.

### Psychology Board Opinions on Telehealth

In states that do not have specific telehealth laws, opinions or declaratory statements issued by state psychology boards provide a valuable source of information. These opinions are often provided in response to an inquiry about telehealth, and they indicate how the board believes its laws would apply to telehealth services and how the board might enforce the



laws if it received a complaint against a psychologist. Licensing boards in Colorado, Florida, Georgia, Massachusetts, North Carolina, Texas, Virginia and Wisconsin have issued statements or opinions on telehealth. In nearly all of these opinions, the board emphasizes that psychologists must consider carefully the potential challenges posed by telehealth services – for example, verifying client identity, dealing with limited or lack of visual and other cues, obtaining informed consent, recognizing potential confidentiality and privacy problems and taking the necessary steps to protect confidentiality, ensuring computer security and dealing with potential technology failure as well as addressing billing/payment issues.

In addition to written opinions, we were also informed of verbal opinions and reliance on opinions of other practitioner licensing boards. For example, the staff of one state board informed us that telephone therapy would be acceptable so long as the initial consultation between the patient and psychologist was in-person. Another board told us that it relied on the telehealth opinion written by the counseling board in that state. Where state psychology licensing boards do not have written policies in place, some boards may have considered the issue of telehealth and adopted an informal policy. Psychologists should keep themselves apprised of any telehealth-related policy their state board may follow. (See the section “A Framework for Identifying Legal Limits on Telehealth for Psychologists” on page 6 for additional information.)

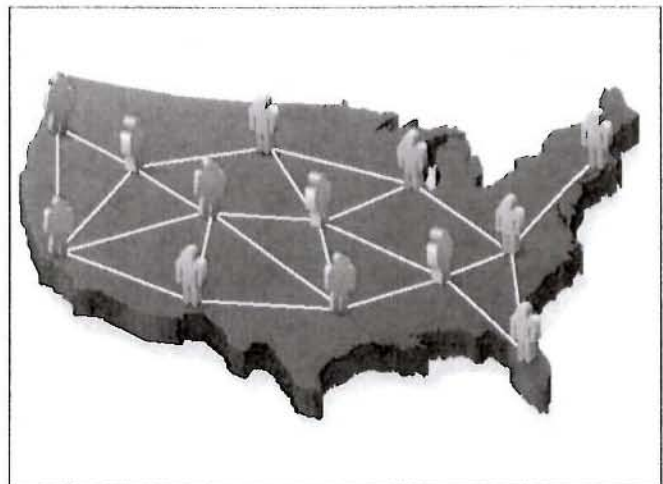
### State Laws on Practicing Across State Lines

Another key issue for many psychologists (and health providers in general) is the complex legal question of whether psychologists may provide telehealth services across state lines to a client located in a state where the psychologist is not licensed, or whether the psychologist may travel out of the state where he or she is licensed but continue to provide services to patients in the home state.

There is a strong legal argument that when providing psychology services, the “service” is furnished both where the psychologist is located and where the client is located, and psychologists must be licensed in both locations. Psychology boards generally take this position as well. (In the absence of a specific law to the contrary, this rule is generally accepted for all health care providers.)

Accordingly, state psychology boards told us that they would view the practices described earlier as providing psychological services in their state without a license. If a client complained to his or her state psychology board about a matter that involved telehealth services, that psychology board could find that the psychologist violated the state’s law and impose a sanction. Further, the psychology board in the client’s state might notify the psychologist’s home state board, which would generally have the authority to impose its own sanctions.

Several states have issued official written opinions to make clear their view that they can regulate out-of-state psychologists who provide telehealth services. Examples include Florida, Georgia, Massachusetts, North Carolina, Texas and Wisconsin. Some of these opinions address the issue of psychologists who are temporarily away from their home state and wish to continue providing therapy to their in-state clients, while others address the issue of psychologists who wish to furnish services to out-of-state clients.



In Florida, the psychology board responded to an inquiry submitted by an Ohio psychologist who was planning to live part-time in Florida. The psychologist asked whether treating his Ohio patients using telecommunications, including email and videoconferencing, while in Florida required psychology licensure in Florida. The board determined that such a situation did constitute the practice of psychology in Florida, thereby requiring licensure in that state.



## Telehealth: Legal Basics for Psychologists *continued from page 5*

In Texas, the psychology board issued an opinion stating that an “individual who is physically located in another state shall be considered to be practicing psychology in Texas and therefore, subject to the [Psychologists’ Licensing] Act, if a recipient of psychological services provided by the individual is physically located in the state of Texas.” North Carolina and Massachusetts have issued similar opinions.

Though psychology licensing laws generally require licensure in both the state where the psychologist is located and the state where the patient is located, psychologists can achieve what they need in many states on a temporary basis through temporary or guest licensure provisions. Under these provisions, states permit psychologists who are licensed in another state to practice for some fixed number of days per year in their state. Additional requirements sometimes apply, such as advance notification and/or approval of temporary practice by the psychology board. State provisions vary considerably and any psychologist relying on these provisions must understand them well.



### HELPFUL ONLINE TOOLS

A chart summarizing the results of our 50-state review of telehealth is available online ([apapracticecentral.org/advocacy/state/telehealth-slides.pdf](http://apapracticecentral.org/advocacy/state/telehealth-slides.pdf)) at Practice Central, the APA Practice Organization website. The chart identifies the availability of temporary/guest licensure on a state-by-state basis, along with additional details related to telehealth services delivery in each state. Please note that this chart does not substitute for the psychologist speaking to the applicable state board about the state’s temporary licensure provisions.

Another tool that some psychologists may find useful is the Interjurisdictional Practice Certificate (IPC), recently adopted by the Association for State and Provincial Psychology Boards (ASPPB). This certificate is intended to facilitate temporary practice in other states by licensed psychologists. Additional information is available on the ASPPB website ([asppb.net](http://asppb.net)).

### Enforcement Activity When Practicing Telehealth Across State Lines

Very few legal cases address the issue of practicing telehealth across state lines. Those we found address laws that apply specifically to physicians. Since not all enforcement actions result in lawsuits, we conducted a survey of state psychology boards to determine the level of enforcement activity regarding telehealth practice across state lines. None of the boards reported any significant enforcement activity.

Generally, when asked about telehealth, psychology board representatives said that they had not received any complaints in this area and therefore had not taken any action. The boards generally believed that they have the authority to take action if a complaint were to arise about services being provided by an out-of-state psychologist.

Being aware of health care professionals who provide telehealth services across state lines on a routine basis may lead other practitioners to think that it must be legal to engage in such activity. That conclusion is not necessarily warranted. Some health care professionals seem to be willing to take the risk that enforcement action may be taken against them given scant enforcement actions thus far.

### A Framework for Identifying Legal Limits on Telehealth for Psychologists

If a licensed psychologist is interested in providing telehealth services and is practicing in a state that lacks telehealth laws or clear policies, the issue of risk management arises. Taking the following steps may help mitigate the risk of delivering telehealth services.

First, check with the psychology licensing board to confirm whether the board has considered the issue of telehealth and has issued any related policies – written as well as verbal. The field of telehealth is fluid and evolving. Checking periodically on psychology board policies, as well as general state laws and regulations related to telehealth, is prudent.

In general, information about psychology licensing laws, regulations and board policies can be found on the state psychology board’s website. Licensing board contact information is available online at the Association of State and Provincial Psychology Boards website at [asppb.net](http://asppb.net).



State laws, including telehealth laws if enacted in your state, generally can be found on your state legislatures' website. To access that website, try entering the name of your state followed by the word "legislature" into a search engine such as Google™. The Center for Telehealth and E-Health Law ([telehealthlawcenter.org](http://telehealthlawcenter.org)) is another useful online resource for information on general telehealth laws.

Second, it is important to contact your malpractice carrier to confirm whether telehealth services – in-state and/or across jurisdictional lines – would be covered under your malpractice policy.


Third, if you are interested in providing services across state lines, determine whether psychology licensing laws in the applicable states have temporary or guest licensure provisions that allow out-of-state psychologists to provide services for a short period of time. Temporary or guest licensure might be an attractive option for a psychologist whose patient might be in another state on a short-term basis. Not all states allow for temporary licensure. You need to understand clearly what states provide for guest licensure, how many days during a calendar year you may provide services under such licensure and whether you must obtain advance approval from the psychology board. If you do provide services across state lines, you should also be aware of the other state's requirements for providing psychological services, such as patient consent, confidentiality and duty to warn.

Another option is getting licensed in other states where your patients may be regularly located – for example, if you work in Florida and a significant percentage of your clients spend summers in other states. While licensure in multiple jurisdictions may result in increased costs (for example, licensure fees) and time commitment (such as to meet continuing education requirements), it would also lessen the risks posed by practicing across state lines.

### Additional Considerations When Providing Telehealth Services

In addition to looking into laws and regulations that govern a psychologist's provision of telehealth services, many general laws and ethical requirements have special implications when considered in light of telehealth. These would include, but not be limited to, federal and state privacy and security requirements, confidentiality and

informed consent requirements and ethical standards. For example, use of telehealth may require specific disclosures about the limits of telehealth services, the potential for disruption in services and potential risks to confidentiality. Ethical requirements continue to apply to psychologists whenever they are rendering services, including when doing so via telehealth.

Reimbursement considerations are also important. While most payers are not yet reimbursing generally for telehealth services, there seems to be growing acceptance among insurers related to using audio-video technologies in certain situations. For example, Medicare allows for coverage of telehealth services provided in certain designated settings to beneficiaries located in rural areas. It is important to check with any applicable payer(s) to find out their reimbursement policies before providing and billing for telehealth services. A more detailed discussion of reimbursement and other topics related to telehealth will be the subject of future articles from the APA Practice Organization. 

### TELEHEALTH GUIDELINES

The two organizations identified below have published guidelines on providing mental health services via telehealth that some practitioners may find useful.

Ohio Psychological Association. (2008, April 12, updated 2010). *Telepsychology guidelines*. Retrieved July 7, 2010, from <http://bit.ly/OHtelepsych>

American Telemedicine Association. (2009, October). *Practice guidelines for videoconferencing-based telemental health*. Retrieved June 7, 2010, from <http://bit.ly/telemed>