

Comments to the Board of Psychology on Telehealth Regulations				
Commenters	Company/Organization/Lic. #	Comments	Date Submitted	Response/Recommended Action
Michael Donner	PSY13166	1) Confirmation of Residency outside of practice of psychology. 2) Confusing language re: trainees and licensee is contradictory. Separate section for trainees would be appropriate.	9/27/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Gary Buck	PSY27298	1) Remove restriction on state residency of client due to negative effects. 2) Negative effects of restricting interns from practicing telepsychology and three negative consequences: a) few cases for interns to serve due to online b/c of CVD-19; b) face to face b/c of CVD is unsafe for client and clinician; and c) interns will miss out of opportunities to treat as TP grows in future.	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Dr. Brian S. Sedgeley	Bay Psychology Group PSY27612	Term "resident" is problematic since a lot of students, etc., are not CA residents "will result in a restriction of access to interjurisdictional telehealth services."	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
David Aronson, Ph.D		The current "resident" access restrictions would prohibit young adults, who are insured under their parents insurance policies, but are attending college out of state and thus in an inter jurisdictional telehealth service.	9/27/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Amir Ramezani, PhD		Requests the proposed changes to BOP Telehealth Guidelines as outlined by the California Psychology Association. Letter Attached urging deletion of residency requirement; allowance for trainees or other supervised individuals performing telehealth services.	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Ed Howard	Ed Howard, CAI Senior Counsel	Attached letter from Children's Advocacy Institute - USD School of Law. Discusses legal issues of jurisdictional issues with respect to civil and administrative cases in two sections entitled: A. The Proposed Regulations Unlawfully Subordinate California Law To The Laws Of Other States When Applied To California Psychologists And California Residents; and B. The Board Does Not Have The Discretion To Prohibit Its California Licensees From Temporarily Offering Services To Out-of-state California Residents; and provides a proposed amendment to the text to resolve the concern.	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to address your concerns. In so doing, the Board is cognizant of other jurisdiction's temporary practice laws and believes that it is the duty of each licensee under this section to determine the laws of the other jurisdictions, where either the licensee or their clients may be located during a telehealth visit, and for the licensee to ensure that they are not violating the other jurisdiction's laws or practice acts. If another jurisdiction takes legal action against a licensee that is practicing under this section, the Board reserves its right to take action against the licensee for unprofessional conduct for a violation of this section. In addition, the licensee shall remain liable for any other unprofessional conduct, etc., that they may commit during a telehealth visit, regardless of
Bert Epstein	Santa Rosa Junior College	As coordinator of mental health services at college, notes that "virtually all therapy for students is provided by trainees under supervision of licensed psychologist." Would need to eliminate almost all services under proposed language. In light of CVD pandemic, those aged 17-24 are feeling suicidal and this is not time to limit their therapy in CA.	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Marie C. Dumas, Psy.D.	PSY24081 (Inactive)	1) Suggest that there be maximum flexibility in the wording of the originating site of the provider; 2) Suggest a wording change to "state or locality" or simply to "locality" to allow for more flexibility to provide services when a provider is outside of the U.S. or in a "district", while still retaining all of the same responsibilities to make sure that we are being compliant with both the laws of the California consumer (resident or temporary non-resident), and the locality where we are originating services. 3) Any provider, regardless of location, would be subject to the laws of practice in the originating site, and the locality of the client, and could have their license sanctioned or revoked if there are problems.	8/14/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Angus Strachan, Ph.D.	PSY8929	Urges Expansion of Regulations. Two glaring problems with psychologists who work across state lines: 1) I do mediation, co-parenting therapy and conduct custody evaluations which often involve parents who live in different states. In order to help them, I am required to get temporary licensing in the other state as well as California. This is sometimes possible; sometimes not, depending on the state. Children would be better served if I could speak to both parents in this situation. 2) Organizational consulting. When I have done such projects with large companies, it usually involves my talking to people in multiple states. I need temporary permission to speak to all members of a team I am working with.	8/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.

Carolyn Anderson, Ph.D.	PSY#14244	<p>1) I am concerned about the term "resident" of California, as some of my patients are college students from a local university, who are legally still residents of other states. It sounds like this requirement would preclude me from seeing them via while they are out of state, for example for summers at home. Removing the requirement of "resident" from the regulations would solve this. Residency status doesn't matter for in-person services. Why should it matter for telehealth? 2) I am also concerned about the term "resident" in terms of how it might affect undocumented persons and DACA recipients. 3) I believe that trainees and supervisees should also be allowed to provide services via telehealth, with appropriate supervision. I want to be sure that the language of the regulations continues to support this.</p>	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Christie Schueler, Ph.D.	PSY28170	<p>1) The language seems a bit unclear regarding whether or not trainees are permitted to provide telehealth services. <b>I would recommend making that language clearer. As a psychologist working in the training department at a large community mental health center, it is important to me that we continue to be able to offer training opportunities for students and pre-doctoral interns in the field.</b> In order to protect the health of our staff and the public, <b>we are only offering remote services via telehealth, and any restrictions on provision of telehealth by trainees would greatly impede their training experience and reduce access to services for the public.</b> 2) I am concerned about the language regarding resident status. <b>Some of the clients served by my agency are undocumented, and may be put off by questions regarding legal residence.</b></p>	9/22/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Tiffany Sickler	PSY30322	<p>1) <b>Concern regarding the well-being of CA college students and their ability to receive needed mental health services while living here to attend school (while their legal residence remains in another state).</b> Young adults are under a tremendous amount of pressure already, and now with the added burden of restrictions related to Covid, many are isolated and depressed. I feel it is our responsibility to <b>ensure the greatest access to services as possible, for their safety and the safety of other students. The "legal residency" requirement is prohibitive and unnecessary.</b> 2) <b>Trainees should be allowed to provide services via telehealth as long as they are under the appropriate supervision.</b> This is another scenario that seems prohibitive we should be seeking ways to serve as many people as need our support as possible.</p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Marc Schoen	UCLA Geffen School of Medicine	<p>1) <b>Consider changing the use of the term "resident" in your regulations since it significantly impacts a number of the students and athletes I treat or manage at UCLA.</b> For example, I work with students and athletes that are not legal residents of California. In particular, there are athletes I manage who travel out of state for games. 2) <b>A situation arises with business men/women who come to California for an extended assignment, and then are on travel and need some continuation of treatment while they are gone, and return a couple weeks later to California for an extended assignment their primary residence may be in another state other than California. A similar situation occurs with students who are not athletes who go home for Spring or Winter Break.</b></p>	9/27/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
J.D. Daniels, Ph.D.	jddanielsphd.com	<p>1) <b>[T]he proposed guidelines for use of TeleHealth services by California Psychologists is limited to in State only.</b> This does make sense on several levels. <b>First, during the Pandemic, patients are often traveling out of State to work in more remote locations as a way to help preserve their mental health, but they are still in need of Psychotherapy.</b> It does not make sense for them to stop working with their preferred Therapist, who already knows their story, and has established goals and a great working relationship, to try to find someone else to work with in a brand new State with no references or direction. This would harm patients! 2) <b>TeleHealth allows for well trained California Psychologists like myself to have the potential to work with patients through the Country.</b> This will allow patients who would normally have a hard time finding great services, to have access to fantastic care. And, given that it is TeleHealth, the patient could be next door, or 1,000 miles away -- it's still the same high quality session. <b>Now, one might argue that a remote Therapist would not know as much about the local emergency services or other potentially beneficial services (such as support groups, PHP programs, etc.). However, finding out that information is incredibly easy in the era of the internet.</b></p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.

Annice Ormiston, PsyD		<p>1) I have concern about the focus on the term "resident" in the proposed regulations. ... I believe focusing on "resident" in the regulations would unnecessarily and unjustly limit their access to interjurisdictional care.</p> <p>2) The language of the proposed regulations could be construed so as to limit telehealth services provided by trainees. I believe this is problematic in how it would potentially disrupt the continuity of care with trainees and patients currently pursuing treatment together as well as future treatments. Trainees provide some of the most needed services to some of the most at risk and under resourced patients in our communities. Limiting this access would be very problematic and unfortunate for in need and trainees needing to complete their requirements to pursue licensure.</p>	9/28/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
VeLora J. Lilly PhD		<p>1) I concur with concern that a requirement that clients/patients must be "residents" of California could limit access to persons who might not meet that criteria tho entitled to being served by a clinician.</p> <p>2) I would suggest that the term "licensee" to describe a provider of care would prevent clinicians in training under supervision to provide needed care to clients and would interrupt their opportunity to receive clinical training as interns in approved clinical settings.</p> <p>I trust the BOP will incorporate the recommendations of the CPA regarding language changes to the proposed regulations.</p>	9/26/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Alex Graves	Vice President for Government Relations, AICCU	<p>The Association of Independent California Colleges and Universities (AICCU) supports of the comments and suggestions provided by the University of California Office of the President (UCOP) regarding clarification for discipline and deletion of residency requirement. AICCU is concerned that students who are residents of other states or countries be able to access services. [UCOP Letter comments discussed separately.]</p>	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to address your concerns. In so doing, the Board is cognizant of other jurisdiction's temporary practice laws and believes that it is the duty of each licensee under this section to determine the laws of the other jurisdictions, where either the licensee or their clients may be located during a telehealth visit, and for the licensee to ensure that they are not violating the other jurisdiction's laws or practice acts. If another jurisdiction takes legal action against a licensee that is practicing under this section, the Board reserves its right to take action against the licensee for unprofessional conduct for a violation of this section. In addition, the licensee shall remain liable for any other unprofessional conduct, etc., that they may commit during a telehealth visit, regardless of
Melissa J Johnson, PhD	PSY13102 - Institute for Girls' Development, A Psychological Corporation	<p>1) Interjurisdictional telehealth services: As also noted by CPA (see their letter for a broader discussion of this), the term "residents" of California appears to preclude access to interjurisdictional telehealth services to anyone who is not a "resident" of California.</p> <p>2) Licensee requirement: The text of the proposed regulation states in the first sentence that a "licensee" is permitted to provide health care services via telehealth. This could be interpreted as prohibiting trainees from continuing to provide services via telehealth.</p>	9/26/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Emily Semow, Psy.D.		<p>1) I am concerned by the statement that California licensed psychologists can only use telehealth with legal residents of California. I have had patients in the past who live in California but do not have legal residency as they are immigrants or out-of-state students studying in California. I fear this law would prohibit them from receiving services. I am also concerned that given the recent transition to remote communications during the Covid-19 pandemic, there will be a large wave of migration across state lines.</p> <p>2) I also have concern about the first sentence in the proposed regulation that states that a "licensee" is permitted to provide health care services via telehealth. This may prohibit trainees from continuing to provide telehealth services when supervised. As we know, the only way for trainees and their clients to continue safely working together during the pandemic has been through telehealth services. It would be hugely damaging to the trainees' career plans as well as to their clients' care if trainees were prohibited from telehealth.</p>	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.

Anne Dinkelspiel, Ph.D.	PSY14393	I am in agreement with the CPA's concerns regarding the proposed telehealth regulations. I'm particularly concerned about the "resident" requirement as so many people have moved because of the pandemic, the fires, etc. and to interrupt the continuity of care at this time seems unwise. I would propose that telehealth continue to be available to patients who initially began treatment while residents of California.	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Oriana McGee	SBCPA Student Representative PsyD Doctoral Candidate	1) As a member of the California Psychological Association and a current student working toward a doctorate degree in psychology, I would like to echo the CPA's concerns regarding the proposed regulations on standards of practice for telehealth.... Restricting telehealth services to registered California residents, and requiring a license to practice telehealth, directly impacts thousands of trainees like myself and our clients. Please do not narrow the availability of much needed mental health services in our state.	9/27/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Elizabeth Winkelman, JD, PhD	Director of Professional Affairs - California Psychological Association	See Association letter attached separately, below.	9/22/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Jo Linder-Crow, PhD	Chief Executive Officer California Psychological Association	See Attached Letter.	9/22/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Zoe Barnow, Psy.D.	PSY29665	1) I believe it is important that as CA psychologists we have as much freedom as possible to work remotely with anyone in California (resident or not) so that we can be serving undocumented folks, people with disabilities, in rural communities and with limited means to arrive at a therapist's office. 2) I also believe it is essential that these rights be extended to trainees and interns, in addition to supervisors so that we can continue to safely and ethically provide training.	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Mandeep K. Tumber-Bhela, Ph.D.	North Valley Practicum Program Director, Kaiser Permanente Northern California Mental Health Training Programs	1) I received the BOP email below and am VERY concerned about the implications of the law on my license. This is a slippery slope when working with suicidal or homicidal patients (any risky patients) as we may not be familiar with the laws outside the state we reside in. I do not feel comfortable with this proposal and wish to share my concern.	8/14/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns. The revisions include requirements to ensure that the practitioner both know and comply with the laws and practice acts of the other jurisdictions in which they will be practicing and have a working knowledge of the resources available where the client is located in order to provide emergency services to the client in case they are required.
Barbara Kirsch, Ph.D.	Licensed Psychologist	1) I have provided in person services to some clients who did not meet the criteria of legal residents. As this is not a requirement for in person provision of services, I don't think it should be included in Telehealth Requirements. If the clients I am thinking of should return and request services, I would not be able to provide it based on the proposed regulations, plus, I have no way of generally knowing someone's legal status, unless they volunteer that. I have also treated graduate students, who may now have moved out of the area because of distance learning, and thus are not current legal residents. 2) I am concerned that it be clear in the regulations that appropriately supervised trainees are able to provide telehealth services. I recently attended a meeting where several graduate students discussed that they are not be able to provide services on-site, and are doing this by telehealth. I support the suggested modifications from CPA"	9/26/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.

Allen Kanner, Ph.D.		<p>I am particularly concerned about the proposed limits on interjurisdictional telehealth. Specifically, this would mean that students who left the state to go home as a result of COVID-19 would have to cease working with their therapist at a time when they are already struggling with the loss of campus life, a key part of the college experience which includes social activities that are essential to mental health. Why add this additional and unnecessary loss during these already traumatic times?</p> <p>Non-students who have "gone home" due to the virus, perhaps because they have lost their jobs, would be subject to the same unnecessary loss.</p> <p>I urge you eliminate this provision.</p>	9/29/2020	<p>your comments and the proposed text has been revised to address your concerns. In so doing, the Board is cognizant of other jurisdiction's temporary practice laws and believes that it is the duty of each licensee under this section to determine the laws of the other jurisdictions, where either the licensee or their clients may be located during a telehealth visit, and for the licensee to ensure that they are not violating the other jurisdiction's laws or practice acts. If another jurisdiction takes legal action against a licensee that is practicing under this section, the Board reserves its right to take action against the licensee for unprofessional conduct for a violation of this section. In addition, the licensee shall remain liable for any other unprofessional conduct, etc., that they may commit during a telehealth visit, regardless of whether or not the other</p>
Marilyn Foley, PH		<p>I support the California Psychological Associations [CPA] suggested changes for TeleHealth.</p> <p>In his [sic] age of COVID with the high incidents of Depression Suicide and Anxiety it is CREUL to impose limits on THEAPY. Can you cite a case where a non resident was harmed by continued treatment by a California psychologist. We need generosity from officials, not more cruelty, we have enough.</p>	9/25/2020	<p>The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.</p>
Daniel Reed, Psy.D.	Counselor-Faculty Personal Growth & Counseling Center California State University - Monterey Bay	<p>It has come to my attention through the California Psychological Association that proposed regulations on the standards of practice for telehealth are currently under review and as a professional psychologist working towards licensure here in the State of California, I can make comments and express concerns prior to the BOP meeting on Nov. 20, 2020. I am concerned that the proposed regulations could restrict access to telehealth services. Specifically, the current language appears to prohibit clients who are not legal "residents" of California from receiving inter-jurisdictional telehealth services. I am also concerned that, as currently written, the proposed regulations could restrict the provision of telehealth services by students and trainees. This would have a significant impact on our education and training community. I work at California State University Monterey Bay as a pre-licensed psychologist in the counseling center. Our center consists of myself and 3 other full-time counselors, 1 part-time counselor, 2 doctoral interns, and 2 MSW interns. Our center serves the entire approximately 7,000 students enrolled at CSUMB. Our center serves undocumented and international students enrolled at the university and these proposed changes can severely impact our ability to provide the necessary and appropriate mental health services to our student population. The proposed changes would also devastate our campus community which is working remotely due to COVID-19, student and faculty safety concerns, as well as a directive ordered by the Chancellor of CSU, who has determined that the 2020-2021 academic year will remain remote. With the proposed changes, I will be without a job until I have completed my requirements for licensure in this</p>	9/28/2020	<p>The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.</p>
Lucille Q. Ferranti, Psy.D.	PSY18293	<p>I am writing to support changes in the proposed regulations on the standards of practice for telehealth as outlined in the California Psychological Association's letter to members of the Board of Psychology. The terms "resident of California" and "domiciled in California" have the potential to restrict access to mental health services by many individuals as stated in the CPA's letter. In particular, many college students who live in California temporarily during the academic year are neither legal residents nor domiciled in the state. There is a tremendous need for these students to have access to mental health services, not only while they are living in California, but also when they travel to their home states during holidays, school breaks, and internships. I encourage the Board to consider how these regulations, as currently written, will impact college students and to amend the regulations as outlined by the California Psychological Association.</p>	9/29/2020	<p>The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.</p>
Lucia Milburn, PhD	PSY14411	<p>I support the California Psychological Association's concerns and comments about the proposed Telehealth guidelines. I urge you to make the changes that they suggest.</p>	9/25/2020	<p>The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.</p>

Mary Jane Weatherbee, PsyD		<p>1) I'd like to ask that the Board consider making changes to the term "resident" as this language appears to preclude access to interjurisdictional telehealth services to anyone who is not a "resident" of California. Individuals who may not meet the definition of resident include out-of-state students, individuals temporarily employed in California, DACA participants and undocumented immigrants, among others. Such a limitation could be potentially harmful and discriminatory.</p> <p>2) I would also request that you consider changing the regulations so that trainees are specifically included and allowed to practice telehealth.</p>	9/28/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Scott Taney Young	Registered Psychological Assistant Registration #: PSB 94025552	As a member of the American Psychological Association (APA) and a current student working toward licensure as a psychologist in the state of California, I would like to echo the CPA's concerns regarding the proposed regulations on standards of practice for telehealth. Restricting telehealth services to California residents and requiring individuals to possess a license in order to practice telehealth directly impacts thousands of trainees like myself and all of our clients. Please do what you can to ensure that access to mental health services in our state are not unduly restricted. In the midst of COVID, these services are needed now more than ever before.	9/28/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Paige Leopold, Ph.D.	Secretary, Contra Costa Psychological Association	<p>1) I appreciate the Board of Psychology's work in developing standards of practice for the provision of psychological services via telehealth. Access to appropriate telehealth services is an extremely important issue for California consumers, especially since the outbreak of COVID. We also note that individuals who are elderly or disabled, who cannot leave work for mental health appointments, or who live in rural or remote areas may particularly benefit from robust access to telehealth services.</p> <p>2) I have serious concerns about the potential implications of some of the language in the current proposal. Specifically, the current language appears to restrict access to interjurisdictional telehealth services and does not clearly allow for the provision of telehealth services by students and trainees. I am concerned about the focus on the term "resident" in the proposed regulations, believe that use of that term will result in a restriction of access to interjurisdictional telehealth services. These problems could be avoided by modifying subdivision (a) to remove the references to residency status.</p> <p>3) Suggested edits: "A licensee is permitted to provide psychological health care services via telehealth to a client at an originating site in this State, as defined in section 2290.5 of the Code, as well as to a client who is a resident of California who is temporarily located 3 outside of this State, subject to the laws and regulations of the other state jurisdiction where either the licensee or the client is located. (1) Resident means any individual who is or has been present in California for other than a temporary or transitory purpose, or who is domiciled in California. (2) Domicile means the place where an individual</p>	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Jane Weisbin, PsyD		I very much applaud the Board's action in proposing the expansion of our ability to provide care, especially in a lock-down situation. We would all like to be able to continue to care for our patients who have sheltered in place with family in other states, who have returned to school in other states, and who are sheltering here though may be legal residents of another state. Thank you so much.	8/19/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Leonard N Matheson, PhD	PSY 9294 - EPIC Neurorehabilitation & Psychology Services, Inc.	<p>therapeutically counterproductive, for three reasons.</p> <p>1) The proposed wording does not reflect the importance of established psychotherapeutic relationships, nor collaborative relationships on an interdisciplinary team basis when California licensees move about the country, as academic faculty members, research project officers, and for other reasons must establish residency in another state.</p> <p>2) Second, the proposed wording also does not address the issue of permanent dislocation of victims from California disasters such as the Camp Fire. Many people in Butte County relocated to other states without clarity as to whether or not this would be a case of a person who "is temporarily located outside of the state".</p> <p>3) The proposed wording does not address the provision of family therapy services on a telehealth basis when members of the family are located in different states. This occurs even without the catastrophic dislocations that have taken place in the last few years, which have accelerated family separations involving residencies in other states. One of the real advantages of telehealth services is in reuniting family members and reestablishing communication. The proposed wording does not allow this.</p> <p>In order to address these shortcomings of the proposed wording, I would like to propose that the following be added: A licensee also is permitted to provide psychological health care services via telehealth to a client who is a resident of another state, subject to the laws and regulations of the other state where either the licensee or the client is located. This would have</p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.



Devon Berkheiser, Psy.D.	Counseling & Psychological Services San Diego State University	<p>I am writing to express concern about some of the language in the proposed telehealth regulation. I am specifically referring to the proposed addition of Section 1396.8 of Article 8 of Division 13.1 of Title 16 of the CA Code of Regulations, which proposes to restrict licensees to provide services to "residents" of California.</p> <p>I work in a college counseling center (San Diego State University), which at times means that I serve students who are NOT residents of California, except temporarily when they are enrolled in the university. Their permanent homes may be in other states, and even other countries. Some of those students are choosing to remain in their permanent homes in other states with their families during the pandemic, for a variety of reasons including their own physical safety, the need to care for family members, and financial considerations.</p> <p><b>This new proposed language could prevent me from providing mental health services to them, even though they are paying for those services as part of their tuition and fees. It seems like this language should include an exception for students who are enrolled in a university in California but are temporarily living elsewhere due to the global pandemic. Let me be very clear.... limiting access to mental health services during a global pandemic is unwise, dangerous, and just plain cruel. We should be doing everything in our power to expand access to affordable mental health care, now more than ever.</b> I will assume that the proposed language suggesting an overly narrow definition of a "resident" was just an oversight. <b>I hope that the Board will consider the unintended effects of this proposed language, and will do everything in its power to ensure that licensees are allowed to</b></p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Diane Harnish		<p>I am writing to express my concern about the focus on the term "resident" in the proposed regulations. I believe that use of that term will result in a restriction of access to interjurisdictional telehealth services. These limitations would prohibit the provision of clinically appropriate services and would have a disproportionately negative impact on individuals who are not legal residents of California. Subdivision (a) currently states: "A licensee is permitted to provide psychological health care services via telehealth to a client at an originating site in this State... as well as to a 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 client is located. (1) Resident means any individual who is or has been present in California for other than a temporary or transitory purpose, or who is domiciled in California. (2) 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>This language appears to preclude access to interjurisdictional telehealth services to anyone who is not a "resident" of California. Individuals who may not meet the definition of resident include out-of-state students, individuals temporarily employed in California (including H-1B visa holders), DACA participants, and undocumented immigrants, among others. We see no compelling reason for limiting interjurisdictional services to residents of California and believe that such a limitation would be potentially harmful and discriminatory. It should be noted that legal residency has no bearing on the provision of in-person services. Similarly, we firmly believe that residency should have no bearing on access to telehealth services, and we certainly do not think psychologists should be required to determine the residency status of their clients.</b></p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Carl H. Shubs, Ph.D.	Psychologist; License: PSY8912 (2/4/85) Marriage, Family and Child Counselor; License: MFC16629 (10/9/81).	I agree with the concerns expressed in CPA's September 22, 2020, letter of comments concerning the Proposed Regulations on the Standards of Practice for Telehealth. I urge you to follow their recommendations.	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Kirk Schneider, Ph.D.	President of the Existential-Humanistic Institute: ehinstitute.org; Candidate for President of the APA; Adjunct Faculty, Saybrook University and Teachers College, Columbia University.	I am concerned that the proposed telehealth regulations do not account for the many gaps that would be created when clients move temporarily or are not permanent residents in the State of CA. I support the CPA's comments in this regard.	9/27/2020	
Christine A. Baser, R.N., Ph.D.	PSY9695	<p>As I understand it, the language of the regulations could be interpreted to exclude students and trainees from providing telehealth. It may not have been intended as such, but a possible exclusion of unlicensed providers, which would include students and trainees, would greatly impact clinical training. As a member of the California Psychological Association I received information about the proposed regulations in an email. <b>It is my concern that language in the regulations be changed to specifically include students/interns/trainees as being able to provide telehealth services. Just trying to make sure this point is not misconstrued and students are not overlooked. If these supervised, but unlicensed, individuals are not included in the mix of providers who can use telehealth, then their training and education essentially stops. As long as the trainee is supervised, the platform of telehealth should not be restricted to licensed providers only.</b></p>	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.

Michael F. Jacques, Ph.D.	PSY31817	<p>I am a recent psychologist licensee in CA, having relocated here from MA in 2019. I practiced in MA beginning in 1991 and founded and managed the largest private behavioral health group practice in the state at that time. As I look forward to continuing my professional career in CA in a time of global pandemic when access to behavioral health care is needed at least as much if not more than before, CA's actions to allow for and support consumers' ability to access care via Telehealth has been a model of caring and responsibility.</p> <p><b>I am in agreement with the two suggested changes to the proposed regulations made by the California Psychological Association in its letter of September 22, 2020: that residential status not be a requirement for receipt of Telehealth services, and that trainees/supervisees be explicitly included consistently and without confusion, as providers of Telehealth services under proper supervision.</b></p>	9/28/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Kendra Nickerson	Associate Director/Training Director Counseling and Psychological Services   Division of Student Affairs Mount Saint Mary's University	<p>There are several concerns I have with how the proposal is currently written and how it would impact the ability of college and university counseling centers to serve our student clients during times of crisis or quarantine, and in the future as therapy over electronic means evolves. Specifically, <b>1) the current language appears to restrict access to interjurisdictional telehealth services and 2) does not clearly allow for the provision of telehealth services by students and trainees.</b></p> <p>The main problem with the proposed language is in subdivision (a). According to the Regulation Notice: "Subdivision (a) states that licensed California psychologists, registrants, and psychology trainees may provide psychological health care services via telehealth..." However, this is inconsistent with the actual language of the proposed regulation, which states in subdivision (a): "A licensee is permitted to provide psychological health care services via telehealth..."</p> <p>This problem could be fixed by adding language to subdivision (a) and subparagraph (b)(3)(E) to clarify that all properly supervised individuals otherwise entitled to provide psychological services under California law can provide such services via telehealth. This would include students, post-doctoral fellows, registered psychologists, psychological assistants, and exempt employees.</p> <ul style="list-style-type: none"> <li>Without this clarification, if supervised trainees were not allowed to provide therapy by Telehealth, then the practicums, internship and postdoctoral fellowships that are currently occurring would not be allowed to permit their trainees to gain hour or experience.</li> <li>Often the underserved populations in California are served by sites</li> </ul>	9/28/2020	
Sarah Burdge, PhD	Licensed Psychologist, Clinical Director Adolescent Counseling Service	<p>This comment is in response to the current regulations under review that speak to provision of services by licensed professionals. I just want to advocate that unlicensed clinicians can also provide services with proper training and supervision. ....</p> <p>I am the Clinical Director of Adolescent Counseling Service in Redwood City. We are a non-profit that provides mental health services to thousands of adolescents in San Mateo and Santa Clara County. All of our services are provided by clinicians in training; either as pre-degree MFT or PHD students or as post-degree fellows or interns. At the moment, due to COVID safety concerns, all our our services are provided via TeleTherapy. All of our interns are adequately training on the provision of services for minors via TeleTherapy.</p>	9/29/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Alice LoCicero, Ph.D.	Clinical Faculty, The Wright Institute; President-elect, Alameda County Psychological Association	<p>As California licensed psychologist and a Board Certified Clinical Psychologist I would like to comment on the proposed section. First I want to thank the board for taking on this topic and providing guidance, which is much needed. <b>I am especially grateful for the clarification that for patients' temporary trips out of state--such as happens from time to time--the therapist may continue to be available, subject to the rules of that state's rules.</b></p> <p><b>Some suggested additions:</b></p> <ol style="list-style-type: none"> <li>The section does not seem to make any reference to trainees working under supervision</li> <li>The section does not mention the importance of telehealth in situations of mass disasters, pandemics, and/or other large scale conditions that make traveling to offices difficult or impossible.</li> <li>The section does not mention the specific needs of therapists who may-- for example--have temporary mobility problems, or be at high risk of illness, and may themselves be unable to provide in person therapy for a period of time, but who determine that for continuity of care it is in the interest of some patients to have the option of seeing them via telehealth.</li> </ol>	9/28/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Cheryl Arutt, Psy.D.	Clinical and Forensic Psychologist	I think adding Section 1396.8 to Title 16 of the California Code of Regulations is an excellent idea. It is good for patients and for psychologists, and will help people access appropriate care when they need it.	8/18/2020	The Board greatly appreciates your comments and thanks you for you them.



Karen A. Schwarz, Ph.D.		<p>issue for California consumers, especially since the outbreak of COVID. Individuals who are elderly or disabled, who cannot leave work for mental health appointments, or who live in rural or remote areas will particularly benefit from robust access to telehealth services. <b>Providing guidance to psychologists about appropriate provision of telehealth services is a valuable and timely goal. I heartily support and encourage your efforts.</b></p> <p><b>I do have a concern about the potential implications of some of the language used in the current proposal. Specifically, the current language appears to restrict access to interjurisdictional telehealth services. I respectfully offer the following comments and suggested changes for your consideration, and I urge you to modify the regulations to address this concern. The proposed regulation uses the term "resident" and I am afraid that the use of this term will result in a restriction of access to interjurisdictional telehealth services. It would prohibit the provision of clinically appropriate services and would have a disproportionately negative impact on individuals who are not legal residents of California.</b> Subdivision (a) currently states: "A licensee is permitted to provide psychological health care services via telehealth to a client at an originating site in this State...as well as to a 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 client is located. (1) Resident means any individual who is or has been present in California for other than a temporary or transitory purpose, or who is domiciled in California. (2) 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."</p> <p><b>This language appears to preclude access to interjurisdictional telehealth services to anyone who is not a "resident" of</b></p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Marlene M. Maheu, Ph.D.	Executive Director TBH Consultation, Staffing & Credentialing & Professional Training Offering CME & CE Credit Hours	<p>2) "...we are alarmed to see your definition of telehealth being limited to people in remote areas, have mobility problems, or those seeking help in between in-person sessions. As has been made apparent by COVID, almost everyone can benefit from telehealth, regardless of their location or capacity. The literature in this area is replete with examples from every corner of the globe supporting telehealth for all people in all settings, provided they are safe."</p> <p>"As can be seen with COVID times, many people simply prefer telehealth. Study after study has clearly shown that when conducted by a professional who has learned the required competencies and a proposer screening has been conducted, telehealth can be just as effective as in-person care."</p> <p>3) Secondly, especially viewed from the lens of COVID, the statement of not having an impact on jobs is incorrect. There are many professionals who are currently unable to go to the office but are able to work through telehealth. COVID has allowed them to continue delivering services and thereby keep their jobs w-- and serve the needs of an increasingly distraught community. In non-COVID times, many professionals who may have retired could be allowed to work from the comfort and ease of their home. By working from home, where their brick-and-mortar office expense is eliminated, or from another home in another state, many professionals could extend their working years to stay connected to the people who have come to rely on them through the years if they desire. Likewise, the young mom, the spouse of a disabled adult, the caregiver of an aging parent, --all these professionals could extend their work hours and availability to citizens of CA if you allow those who choose to use telehealth do so freely, without defining who can and cannot. Furthermore, if telehealth</p>	9/26/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Gary M. Yontef, Ph.D., ABPP		<p>"I want to register my support for the well articulated comments by the California Psychological Association on the proposed regulation of Telehealth services.</p> <p>I think the resident requirement should be eliminated! It is an unnecessary and undesirable complication."</p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.
Amanda Han, Psy.D.	Clinical Psychologist (PSY 20782)	<p>"It came to my attention that the current language in the proposed regulations on the standards of practice for telehealth potentially limits access for some California consumers, during the outbreak of COVID. Subdivision (a) currently states: "A licensee is permitted to provide psychological health care services via telehealth to a client at an originating site in this State...as well as to a client who is a resident of California who is temporarily located outside of this State, subject to the laws and regulations of another state where either the licensee or the client is located. The term "resident" in the proposed regulations is likely to result in a restriction of access to interjurisdictional telehealth services. These limitations would prohibit the provision of clinically appropriate services and would have a disproportionately negative impact on individuals who are not legal residents of California. Here are some suggested edits for your consideration:</p> <p>"A licensee is permitted to provide psychological health care services via telehealth to a client at an originating site in this State, as defined in section 2290.5 of the Code, as well as to a client who is located outside of this State, subject to the laws and regulations of the other jurisdiction where either the licensee or the client is located."</p>	9/25/2020	The Board greatly appreciates your comments and the proposed text has been revised to meet your concerns.

<p>Margia Corner as cover letter for Genie Kim, MPP DSW.</p>	<p>Principal Counsel, Health Affairs &amp; Technology Law University of California, Office of the General Counsel provided a letter from UC System Director of Student Mental Health &amp; Well-being Graduate, Undergraduate and Equity Affairs University of California, Office of the President</p>	<p>Please find attached letter and comments on behalf of the University of California regarding the Board of Psychology's Proposed Regulations for Standards of Practice for Telehealth - attached letter at pages 97 to 99. The letter addresses the psychological services rendered to UC students by University Counseling Center psychologists and trainees, especially during COVID-19 and the need for telehealth across the nation during this time. "The COVID-19 public health emergency has highlighted, and likely exacerbated, the significant nationwide shortage of providers of mental health services for students at all levels. Being able to offer psychological services via telehealth is an important step to helping improve access to psychological services, especially for those clients who are located in areas where services are scarce." The points raised concern 1) the meaning and scope of resident addressed in the text; and 2) whether the licensee is or would be subject to the laws of the other jurisdiction where either the licensee or client would be located.</p>	<p>The Board greatly appreciates your comments and the proposed text has been revised to address your concerns. In so doing, the Board is cognizant of other jurisdiction's temporary practice laws and believes that it is the duty of each licensee under this section to determine the laws of the other jurisdictions, where either the licensee or their clients may be located during a telehealth visit, and for the licensee to ensure that they are not violating the other jurisdiction's laws or practice acts. If another jurisdiction takes legal action against a licensee that is practicing under this section, the Board reserves its right to take action against the licensee for unprofessional conduct for a violation of this section. In addition, the licensee shall remain liable for any other unprofessional conduct, etc., that they may commit during a telehealth visit, regardless of</p> <p>9/29/2020</p>
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## MEMORANDUM

<b>DATE</b>	November 16, 2020
<b>TO</b>	Board Members
<b>FROM</b>	Sandra Monterrubio, Enforcement Program Manager
<b>SUBJECT</b>	Agenda Item #23(a)(1) Statutory Change Regarding Proposed Exception to Psychotherapist-Patient Privilege for Board Investigations

### **Background**

Following the Child Custody Stakeholder Meeting, the Enforcement Committee reviewed and made changes to Section 2918 of the Business and Professions Code in an effort to ensure the Board has statutory authority to collect all necessary documents to complete investigations. Attached is the language the committee has drafted to move forward on the implementation plan.

### **Child Custody Stakeholder Meeting Implementation Plan**

<b>Item</b>	<b>Action Items</b>	<b>How to Implement</b>	<b>Implementation Timeframe</b>
1	Mandate Child Abuse/ Domestic Violence Education for Subject Matter Experts	Child Custody Subject Matter Experts will be required to take 6 hours of continuing education in child abuse and 6 hours in domestic violence every three years (contract term for experts).	2020/2021
2	Screen Child Custody Subject Matter Experts that Subscribe to Parental Alienation Syndrome	The Expert Application will include the following question: "Do you believe parental alienation syndrome should be included in the DSM? Why or why not?" Depending on the answer given, further review will be undertaken on a case-by-case basis.	2020/2021
3	Educate Public on Clear and Convincing Evidence	A definition of clear and convincing evidence is provided on the Complaint Fact Sheet, which will be posted on the Board's website. In addition, the Board will post a link to Senior Assistant Attorney General Gloria Castro's presentation on clear and convincing evidence.	2019
4	Create a Complaint Fact Sheet	The Committee amended the Complaint Fact Sheet, which will be posted on the Board's website by early November.	2019
5	Review and Consider Statutory Language related to documentation considered for child custody complaints	This item is on the agenda for the Enforcement Committee and will be presented at a future Board Meeting.	2021

## **Proposed Exception to Psychotherapist-Patient Privilege in Board Disciplinary Matters**

The Enforcement Committee proposes a revision to current law that would allow the Board of Psychology to obtain evidence relevant to licensee misconduct, including psychotherapy patient records, even if such evidence is subject to the psychotherapist-patient privilege.

### **Current law**

The Board's investigations of licensee misconduct often require obtaining psychotherapy records, which an expert then reviews to opine on potential misconduct. A patient's communications with her psychotherapist, including her psychotherapy records, are, of course, confidential. The patient has a constitutional right to the privacy of her records. Further, the patient holds a privilege to refuse to disclose her records—the psychotherapy-patient privilege. These privacy and privilege issues may impede the gathering of sufficient evidence to prosecute licensee misconduct, thereby adversely affecting public safety

If the Board has an investigation in which a patient's psychotherapy records are relevant, it may request to review the records. As is their right, patients may agree or object to the Board's request for a release. If the patient objects, the Board's only recourse for obtaining the records is to formally request them with a subpoena duces tecum (also known as a subpoena for the production of evidence), and then obtain a civil court order enforcing the subpoena (there is no means to enforce such subpoenas through the Office of Administrative Hearings—a civil order from a superior court is required).

To obtain a civil court order enforcing a subpoena of patient records, a Deputy Attorney General on behalf of the Board must first establish that the scope of the subpoena is valid by demonstrating three factors to the court: (1) the subpoena inquires into a matter the Board is authorized to investigate; (2) the request for information is not too indefinite; and (3) the information requested is reasonably relevant to the investigation.

If these threshold criteria are met, the Deputy Attorney General must next provide the court with sufficient evidence to allow the court to make a finding of "good cause" to overcome the patient's constitutional privacy interests in her records. To support such a finding of good cause, the court must be provided with sufficient evidence to allow an independent determination that professional misconduct is likely to have occurred, and that the records sought by the subpoena will further the investigation of the misconduct. This analysis is similar to the determination by a criminal court as to whether probable cause exists to support a search warrant. In addition to this good cause requirement, civil courts, guided by subpoena enforcement case law, also often require the Board to show that it has a competing, or even compelling, interest in disclosure of the records that outweighs the privacy interest of the patient.

The Deputy Attorney General must then overcome one additional hurdle in order to obtain a court order enforcing its subpoena: the psychotherapy-patient privilege. When the patient has refused to sign a release of or otherwise waive her privilege not to disclose her psychotherapy records, civil courts will not issue an order enforcing the subpoena, notwithstanding the Board's assurances that privacy will be protected through redactions and protective orders. Therefore, even if the Deputy Attorney General can demonstrate that a subpoena has a valid, investigatory scope, and even if the Board can overcome the

patient's constitutional privacy interest in the confidentiality of her records by providing sufficient evidence of good cause supporting disclosure (*i.e.*, that the records are needed to confirm suspected licensee misconduct), the Board is nonetheless unable to obtain a court order to enforce its subpoena. Without a civil court order, the Board cannot obtain the patient records, and without such records, investigations are likely to remain inconclusive and must be closed.

As a solution to this dead-end to enforcement of the Board's investigatory subpoenas, the Committee proposed creating an exception to the psychotherapy-patient privilege for Board investigations. In 1980, the Medical Board enacted such an exception to the physician-patient privilege, on which it relies to overcome patient objections to obtaining medical records relevant to its investigations. As a result of this exception, codified in the Medical Board's statute, Business and Professions Code section 2225 (as well as in a companion statute, Evidence Code section 1007), the Medical Board is more successful in obtaining court orders enforcing its investigatory subpoenas of patient records, even in cases in which the patient has refused to waive her patient-physician privilege in the records.

Because the Board of Psychology has no such exception to the psychotherapy-patient privilege for its investigations, it is unable to enforce subpoenas of records needed for its investigations if the patient objects to disclosure of such records. Therefore, under current law, the Board regularly finds itself unable to complete investigations. Further, under current law, the Board is likely to continue to find itself fighting an uphill battle in subpoena enforcement proceedings, which are costly and time consuming, place a hard stop on the progress of the investigation into the licensee, and do not serve to protect the public while they are ongoing.

### **Exception to Psychotherapy-Patient Privilege**

Last year, the Committee proposed creating an exception to the psychotherapist-patient privilege set forth in Evidence Code, sections 1010-1015, and Business and Professions Code, section 2918, authorizing the Board to obtain psychotherapy records, where such records are needed in an investigation. Attached to this memorandum is a proposed revised Business and Professions Code section 2918 creating such an exception.

### **Protection of Patient Privacy**

Under the proposed exception to the patient-psychotherapist privilege, the patient retains a constitutional privacy right to the confidentiality of her records. As noted above, to overcome a patient's objection to reviewing her treatment records, the Board must subpoena the records and satisfy a reviewing court that: (1) the subpoena has a valid, investigatory scope; (2) good cause supports disclosure (*i.e.*, a sufficient basis exists to suspect licensee misconduct, and the records are needed to confirm the misconduct); and (3) in some cases, depending on the court, the Board has a competing or compelling interest in disclosure of the records that outweighs the patient's privacy interest. If the court finds that the Board has satisfied each of these requirements, it issues an order enforcing the subpoena and requiring the provider to disclose the patient's records.

A bevy of existing legal requirements then apply to protect the confidentiality of the records. First, the limited staff authorized to review the records under the proposed statute, including Board investigators and prosecutors at the Attorney General's Office, must maintain the confidentiality of the records and protect the identity of the patient.

(See, e.g., Bus. & Prof. Code, § 800 (c)(1) (requiring the Board to maintain the confidentiality of its non-public records); Gov. Code, § 6254, subd. (f) (exempting the Board's investigation records from public disclosure requirements); Evid. Code, § 1040 (imposing duty on the Board, the Attorney General's Office, and their agents to protect official information obtained during investigations as privileged from disclosure); Gov. Code, § 11183 (directing the Board's investigators to maintain the confidentiality of subpoenaed information and evidence); and Civ. Code, § 1798.24 (requiring the Board not to disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains).) Subdivision (d) of the proposed revised section 2918 further explicitly provides that "[t]he names of any patients whose communications are reviewed shall be kept in confidence, except as is necessary during the course of an investigation."

Should the investigation confirm licensee misconduct and result in a disciplinary proceeding against a licensee, the law continues to ensure the confidentiality of records obtained during the Board's investigation. (See, e.g., Bus. & Prof. Code, § 800, subd. (c)(1); Gov. Code, § 6254, subd. (f); Evid. Code, § 1040; Civ. Code, § 1798.24.) The prosecution of the licensee may culminate in an administrative hearing. The law recognizes several tools that may be used to safeguard the privacy and identity of both the patient whose records are entered into evidence at a hearing, as well as other individuals relevant to the proceeding (such as the patient's relatives), including redaction of the individual's name and other identifying information from the records, thereby rendering the records anonymized; referring to the individual by an anonymous label, such as "Patient 1," "Child A," "Mother," or "Father"; and ordering records to be sealed from disclosure. (See Gov. Code, § 11425.20, subd. (a) (authorizing administrative law judge to close hearing to public and issue various protective orders to protect a patient's confidential information). Subdivision (d) of the proposed revised section 2918 further explicitly provides that "If [disciplinary] proceedings are instituted, reasonable efforts shall be made to keep patient names in confidence."

Accordingly, current law and the proposed statute together will ensure that the confidentiality of a patient's subpoenaed psychotherapy records and privacy of the patient are preserved, both during the Board's investigation and any subsequent prosecution and disciplinary hearing.

### **Anticipated benefits and impacts of an exception to the psychotherapy-patient privilege**

The proposed exception to the psychotherapy-patient privilege would allow the Board to enforce a subpoena and obtain psychotherapy records in the following situations in which it would otherwise be unable to do so:

- **Child custody investigation:** In a child custody investigation involving divorced parents, the non-custodial parent files a complaint about the quality of evaluation or treatment of his minor child by a licensee. The Board investigates the complaint and seeks to obtain records of the licensee's evaluation or treatment of the child. The custodial parent refuses to sign a waiver of the psychotherapy-patient privilege of her minor child's records, and the Board is unable to obtain the records under current law.
- **Patient refuses to disclose records in a sexual misconduct investigation:** A complaining patient reports she had a sexual relationship with her psychologist, which



the Board investigates. The patient later decides not to cooperate with the Board's investigation, because she wants to avoid the stress of the investigation and the potential disciplinary hearing that may result. Also, the patient feels intimidated by the psychologist, who has been urging her not to speak with the Board's investigator. While the psychologist's records of his treatment of the patient are unlikely to detail sexual misconduct, they may nonetheless prove useful to the investigation, by detailing the frequency and nature of treatment, and by establishing the existence of a psychotherapy-patient relationship, which the licensee has denied. Because the patient has not consented to the release of her records, the Board is unable to obtain them under current law.

- **Investigation involving unidentified patient:** The Board receives an anonymous complaint from the parent of a minor child. The complainant reports that a psychologist conducted an educational evaluation of her son, learned that her son had been abused while in foster care, and failed to report the abuse to law enforcement. The complainant does not identify himself/herself or his/her child, and does not provide any contact information. The investigator contacts the psychologist, who confirms that he knows the identity of the child in question, but he refuses to disclose the child's identity (which is subject to the psychotherapist-patient privilege). The investigator serves a subpoena on the psychologist, seeking the name and contact information of the child and his/her parents or guardians. The psychologist declines to comply with the subpoena, and the Board has no recourse to seek subpoena enforcement in court, as there is no exception to the psychotherapy-patient privilege for disclosing the privileged information to the Board.
- **Investigation interviews of licensees:** The psychotherapy-patient privilege applies not only to written treatment records, but also to other communications between the psychotherapist and patient. Accordingly, when the Board interviews subject licensees as part of an investigation, the licensee may lawfully refuse to answer questions or provide information concerning protected communications, if the patient has not signed a waiver of her privilege. Indeed, Evidence Code section 1015 *requires* licensees to assert the psychotherapist-patient privilege on their patients' behalf unless the patient has waived her privilege.
- **Other types of investigations:** When a patient at issue in any investigation, for whatever reason, refuses to (or is unable to, due to inability to locate, incapacity, or death) waive the confidentiality of his treatment records, the Board is unable to obtain those records under current law. The Board may not be able to pursue an investigation.

### **Potential drawbacks of an exception to the psychotherapy-patient privilege**

- **Loss of patient confidence in confidentiality of psychotherapy:** Creating an exception to the robust privacy protection of the psychotherapy-patient privilege may cause patients or potential patients to lose confidence that their treatment or potential treatment will be kept confidential. As the Law Revision Commission commented in connection with the enactment of the current section of the Evidence Code, in 1965, "Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be

reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.” The loss of patient trust in the confidentiality of their psychotherapy may result in the patient withholding from full participation in therapy, or even declining to seek treatment altogether, thereby detrimentally impacting the psychotherapist-patient relationship.

- **Detrimental impact on psychotherapist notetaking:** Creating an exception could encourage a psychotherapist who is concerned about the Board’s potential scrutiny of her notes to censor their contents to omit mention of therapies and techniques that the Board may find objectionable. The lower level of detail in the censored notes may impact the patient’s quality of care. Alternatively, an unscrupulous practitioner concerned about the quality of her practice, or who anticipates engaging in misconduct involving her patient, could focus on recording particularly embarrassing and even exaggerated details of the patient’s psychotherapy. The psychotherapist could then seek to shame the patient into silence, threatening disclosure of her records should the patient submit any complaints to the Board and thereby prompt an investigation
- **Potential chilling effect on patient-complainants:** Creating an exception to the psychotherapist-patient privilege for Board investigations could have a chilling effect that discourages patient from submitting complaints of their psychotherapist misconduct, because the patient may not want to risk having to disclose their records without their consent as part of the investigation that may be triggered.

### **Action Requested**

The Enforcement Committee recommends the Board accept the proposed amendments to the psychotherapist-patient privilege language and seek an author to carry legislation.

### **Attachments**

Proposed Revised Business and Professions Code Section 2918

## Proposed Revised Business and Professions Code Section 2918

- (a) The confidential relations and communications between psychologist and client shall be privileged as provided by Article 7 (commencing with Section 1010) of Chapter 4 of Division 8 of the Evidence Code, except as set forth in subdivisions (b) through (f), herein.
- (b) Exception to Psychotherapist-Patient Privilege for Investigatory and Disciplinary Purposes. Neither the privilege established in California Evidence Code Section 1014 nor any other law making a communication between a psychotherapist and their patient privileged or confidential shall apply to investigations or proceedings conducted under this chapter. Such communication shall include, but is not limited to, recordings of the same, in physical or electronic format, in treatment records, progress notes, psychotherapy notes, correspondence, audio or video recordings, or any other record.
- (c) Applicability. This exception shall only be available to the Board and its agents and representatives, as related to an investigation into any alleged violation of this chapter or any other state or federal law, regulation, or rule relevant to the practice of psychology, a disciplinary hearing, or any other proceeding under this chapter, including but not limited to a proceeding for interim license suspension under Business and Professions Code section 494, and an appearance by or on behalf of the Board before a superior court judge in a criminal proceeding against a licensee to recommend practice restriction under Penal Code section 23.
- (d) Procedures for Accessing Records Subject to the Exception to the Psychotherapist-Patient Privilege. In accordance with this section, documents and records relevant to an alleged violation of the Psychology Licensing Law, or any other federal or state law, regulation, or rule relevant to the practice of psychotherapy, may be inspected for investigatory or disciplinary purposes in accordance with the following procedures:
1. Any psychotherapist-patient communication, or other relevant document or record, may be inspected, and copies may be obtained, where the patient gives consent. If the patient is deceased, consent may be obtained from the patient's beneficiary or authorized representative. If the beneficiary or authorized representative of a deceased patient cannot be located after reasonable efforts, the records may be inspected and copied without consent of the beneficiary or authorized representative, if the Board provides a written request to the recordholder that includes a declaration that the Board has been unsuccessful in locating or contacting the deceased patient's beneficiary or authorized representative after reasonable efforts.

2. Regardless of patient consent, the Board and its agents may issue an investigatory subpoena duces tecum for psychotherapist-patient communications, pursuant to Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.
  - i. Prior to the date called for in the subpoena duces tecum for the production of records, the Board must make a reasonable effort to give notice of the subpoena to the patient who is the subject of the records, or if the patient is a minor, to the patient's parent(s) or guardian(s), or if the patient is deceased, to the beneficiary or authorized representative of the deceased patient.
  - ii. Where a party fails to produce subpoenaed communications, the Board or its agents may seek a court order compelling compliance, pursuant to Sections 11187 and 11188 of the Government Code.
3. Any document or record relevant to the business operations of a licensee, and not involving psychotherapy records attributable to identifiable patients, may be inspected, and copies may be obtained, if relevant to an investigation or proceeding under this chapter.

(e) *Protection of Patient Privacy.* The names of any patients whose communications are reviewed shall be kept in confidence, except as is necessary during the course of an investigation. If proceedings are instituted, reasonable efforts shall be made to keep patient names in confidence.

(f) *Rights of Recordholders*

1. When requested documents or records are inspected or copies received under this section, their acquisition and review shall not unnecessarily disrupt the operations or recordkeeping of the licensee or facility where the records are kept.
2. Psychotherapists otherwise obligated to assert the psychotherapist-patient privilege for psychotherapist-patient communications under Evidence Code Section 1015 have no such obligation with respect to communications subject to the exception to that privilege created by this section. Recordholders shall be immune from claims of violating the psychotherapist-patient privilege arising from their compliance with investigatory requests, subpoenas, and court orders issued pursuant to this section.

3. The Legislature finds and declares that the authority created in the Board pursuant to this section, and a psychotherapist's compliance with this section, are consistent with Sections 56 to 59 of the Civil Code and the federal Health Insurance Portability and Accountability Act (HIPAA). Recordholders shall be immune from claims of violating the psychotherapist-patient privilege arising from their compliance with investigatory requests, subpoenas duces tecum, and court orders issued pursuant to this section.