Regulatory and Legal Considerations for Telehealth

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* [Ann Tran Lien, JD, Managing Director Legal Affairs](https://www.camft.org/Resources/Legal-Articles/Chronological-Article-List/cid/38?Category=ann-tran-lien%2c-jd%2c-managing-director-legal-affairs) |

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By Ann Tran-Lien, JD,

Managing Director of Legal Affairs

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Reviewed November, 2017 by Ann Tran-Lien, JD

With ever-increasing innovations in technology changing the way we interact with one another, it comes as no surprise that the practice of telehealth has increased in popularity in both the medical and behavioral health arenas. California law has long recognized telehealth as a form of delivery of health care and behavioral health services, but many psychotherapists practicing in the state, including CAMFT members, have inquired as to the standards surrounding the rendering of telehealth services. As a result, the Board of Behavioral Sciences (BBS) developed regulations on the standards of practice for telehealth that became effective July 1, 2016. All therapists licensed or registered with the BBS, who are interested in or are engaged in the practice of telehealth, should be familiar with these new regulations as failure to comply may result in an accusation of unprofessional conduct.

**Telehealth Defined**

In California, “telehealth” is defined as a method to deliver health care services using information and communication technologies to facilitate the diagnosis, consultation, treatment, and care management while the patient and provider are at two different sites.1 The two most common modes of telehealth for psychotherapy are via 1) live videoconferencing either through a personal computer with a webcam or a mobile communications device with two-way camera capability, and 2) telephone. The BBS recognizes the practice of psychotherapy via telehealth as falling within its jurisdiction and subject to the same statutes and regulations that apply to in-person psychotherapy.2 Therefore, all California and/or federal laws regarding the confidentiality and privacy of health care information and a client’s right of access to his or her medical information apply to telehealth services. To read more about the general issues and recommendations related to telehealth, see CAMFT Paralegal, Alain Montgomery’s article in the January/February 2015 issue *The Therapist*, “The Basics of Telehealth .”

**A Look at the Regulations**

In order to practice marriage and family therapy, clinical social work, or professional clinical counseling via telehealth with a client who is **physically located** in California, the therapist must have a valid and current license or registration issued by the BBS.3 Therefore, LMFTs, LCSWs, and LPCCS who are licensed in other states must also hold valid California licenses or registrations in order to provide psychotherapy services, including via telehealth, to clients who are physically located in California.

It is important to note that these regulations do not mention MFT Trainees. Per Business and Professions Code Section 2290.5, MFT Trainees, while under appropriate supervision and working in lawful, exempt settings, may provide psychotherapy services via telehealth. The BBS does not have jurisdiction over any complaints filed against the MFT Trainee as MFT Trainees do not hold a registration or license issued by the BBS. Nevertheless, the BBS and CAMFT strongly encourage MFT Trainees to comply with these regulations as they establish the standard of care for marriage and family therapy services via telehealth in California.

**Upon Initiation of Telehealth Services**

The regulations require the therapist to engage in four specific one-time actions upon initiation of telehealth services to a client. The four actions are as follows:

1. **Obtain Consent:** The therapist providing telehealth services must obtain consent from the client as required by the “telehealth statute” (Business and Professions Code Section 2290.5).4 The statute requires the therapist to 1) inform the client about the use of telehealth; 2) obtain from the client verbal or written consent for the use of telehealth as an acceptable mode of delivering psychotherapy services; and 3) document the consent obtained by the client in the client’s treatment record.
2. **Disclose Risks/Limitations:** The therapist must inform the client of the potential risks and limitations of receiving treatment via telehealth.5 This disclosure may be done verbally or in writing. Either way, documentation of the disclosure in the client’s record is recommended. Potential risks and limitations of telehealth may include: technical failures; interruption by unauthorized persons; unauthorized access to transmitted and/or stored confidential information; and decreased availability of the therapist in the event of a crisis. C*AMFT Code of Ethics* Section 1.4.2 also requires the therapist who is rendering telehealth services to “inform patients of the potential risks, consequences, and benefits, including but not limited to, issues of confidentiality, clinical limitations, transmission difficulties, and ability to respond to emergencies.”
3. **Disclose License/Registration:** The therapist must also provide the client with his or her license or registration number and the type of license or registration.6 This disclosure can be done verbally or in writing. Most therapists have this information on their Disclosure Statements or Informed Consent Forms.
4. **Provide Contact Information of Relevant Resources**: The therapist must document reasonable efforts to ascertain the contact information of relevant resources, including emergency services in the client’s geographic area.7 Section 1.5.3 of the *CAMFT Code of Ethics* also specifies that when a therapist is not located in the same geographic area as the patient, he or she must provide the client with appropriate resources in the patient’s locale for contact in case of emergency. The therapist may achieve this by sending or emailing the relevant resources to the client or by providing the information verbally and documenting in the client’s record (e.g., the therapist informed the client of the University Hospital, located on Washington Street, which provides emergency services and inpatient psychiatric services, including specialized services for children). The emergency services near the client’s location may include telephone numbers and addresses for nearby emergency rooms, the psychiatric emergency team telephone number; and telephone numbers to local crisis hotlines/centers.

**For Each Telehealth Session**

The regulations provide three actions the therapist must take each and every time he or she performs telehealth with a client. The three actions are as follows:

1. At the beginning of each telehealth session, the therapist must verbally obtain from the client the client’s name and document such name and the address of the client’s present location.8 According to the BBS, obtaining the client’s full name and present location may lessen the possibility of impersonation of a client. Further, should an emergency situation arise, the therapist would be equipped with information regarding the client’s location, which may change from session to session.
2. The therapist, during each telehealth session, must assess whether the client is appropriate for telehealth, including but not limited to, consideration of the client’s psychosocial situation.9 The BBS is concerned the client’s mental health could change from session to session, hence the therapist should assess whether the rendering of psychotherapy via telehealth continues to be appropriate for the client. *CAMFT Code of Ethics* , Section 1.4.2 also provides that when therapists are providing telehealth services to clients, they should take care to evaluate the appropriateness and suitability of this therapeutic modality to the clients’ needs.
3. The necessary documentation of this issue may vary, depending on the client and his or her particular circumstances. For example, in circumstances where the client is in significant distress, or has a chronic history of serious behavioral health problems, a therapist may determine that it is appropriate to document in considerable detail, his or her effort to carefully assess the suitability and appropriateness of telehealth services for the particular patient at that time. In other circumstances, it may be adequate to document that the therapist believes, based upon his or her discussion with the client, that the use of telehealth is appropriate to the client’s needs.
4. For each session, the therapist must utilize industry best practices for telehealth to ensure both client confidentiality and the security of the communication medium.10 Therapists who are interested in utilizing a videoconferencing platform for telehealth services are encouraged to research the platform’s security and privacy protocols, including the security of the transmission of communication. A key inquiry is whether the voice, video, and file transfers through the platform are secured or encrypted. In addition, consider researching if any video or voice data is stored on the platform’s server(s) and if yes, whether the files on the server(s) are encrypted. Documentation of the therapist’s due diligence in researching and verifying the security of the communication medium is essential. Therapists who utilize a videoconferencing platform for telehealth should take care to protect their computers from viruses that can not only damage the computer, but also collect private stored data by installing antivirus software and firewalls. The computer or mobile device used for videoconferencing should be regularly receiving the most recent security updates. It is recommended to choose strong and unique passwords for both the computer and the platform’s account. Providers who are HIPAA “covered entities” should ensure the technology used for telehealth services is compatible with HIPAA requirements. For further reading on considerations related to HIPAA and telehealth, see Michael Griffin’s article in the November/December 2015 issue of *The Therapist, “Selecting theRight Videoconferencing Technology forTelehealth: Key Issues for Covered Entities.”*

**Providing Telehealth Outside of California**

According to the regulations, therapists licensed or registered in California are permitted to provide telehealth services to clients located in another jurisdiction only if the California licensee or registrant meets the requirements to lawfully provide services in that jurisdiction and delivery of telehealth services are allowed by that jurisdiction.11All fifty states, including Washington D.C., regulate the practice of marriage and family therapy, clinical social work, and professional clinical counseling.

According to the Center for Connected Health Policy, “States continue to pursue their own unique set of telehealth policies as more and more legislation is introduced each year. Some states have incorporated policies into law, while others have addressed issues such as definition, reimbursement policies, licensure requirements, and other important issues in their Medicaid Program Guidelines.”12

A few states have regulations or offered opinions, similar to California, on the provision of telehealth, to clients located in other states. According to the “Provision of Services via Electronic Means Adopted by North Carolina Marriage and Family Therapy Licensure Board (August 30, 2012),” “If a North Carolina licensee renders marriage and family therapy services electronically to an out-of-state client, it is recommended that the licensee contact the in the state in which the patient/client resides to determine whether or not such practice is permitted in that jurisdiction.” Likewise, the South Carolina Board of Examiners indicated in its statement, “Provision of Services via Electronic, Distance Professional Services (November 17, 2015)” the following: “The Board considers that the practice of counseling, marriage and family therapy occurs both where the therapist who is providing therapeutic services is located and where the individuals (patients/clients) who are receiving services are located. In order for an individual to provide counseling and therapy services in South Carolina, that individual must be licensed by the South Carolina Board for Counselors, Marriage and Family Therapists and Psycho-educational Specialist. On this basis, if an individual licensed in South Carolina renders services electronically to an out-of-state client, it is recommended that the licensee contact the licensure board for counselors, marriage and family therapist or psycho-educational specialist in the state in which the clients resides to determine whether or not such practices are permitted in that jurisdiction.”

In addition, the New Hampshire Board of Mental Health Practice, in response to queries posed to the Board concerning out-of-state practice via the internet, practice through the use of videoconference, and via other technologies, provided clarification in its “Statement of Interpretation of Statutory Authority: Out of State Practice.” The Board indicates “If you are located in another state and are providing mental health services to a consumer located in New Hampshire, you are considered to be practicing in New Hampshire and need to be licensed in this State. In either case, you might also be considered to be practicing in another jurisdiction.” Another example includes the Massachusetts State Board of Registration of Allied Mental Health and Human Services Professionals, which adopted “Policy Guidelines on Distance, Online, and other Electronic- Assisted Counseling,” indicating in particular, “ Board licensees who wish to provide services via electronic means to clients located outside of Massachusetts are urged to ensure that they meet the requirements for practice within the jurisdiction where the client is located.”

Currently, there are six states (Arizona, Colorado, Florida, New Jersey, Utah, and Wyoming), including D.C., that allow for out-of-state licensed MFTs to temporarily practice marriage and family therapy (and via telehealth) to clients located in those states. For example, Colorado’s State Board of Marriage and Family Therapist Examiners allow for an out-of-state LMFT to provide marriage and family therapy services to individuals in Colorado if the service is 1) performed within the scope of the person’s license or certification; 2) does not exceed twenty days per year in Colorado; 3) does not violate the licensing laws of Colorado; and 4) the provider discloses to the public that the provider is not licensed or certified in Colorado.13

Given states vary in their regulations and statutes, it is recommended for a therapist who is interested in providing telehealth services to a client located in another state, to contact the state’s MFT licensing board for an inquiry into the requirements for lawful practice of marriage and family therapy, or if the jurisdiction has relevant telehealth statutes, the practice of marriage and family therapy via telehealth in that state. In addition, see “ The Practice of Marriage and Family Therapy Across State Lines” on page 65 for a review of each state’s requirements (as of August, 2016) to provide marriage and family therapy services to individuals located in that state.

**Resources on Telehealth**

* The BBS has posted a *Notice to Licensees and Registrants Regarding Providing Psychotherapy or Counseling via Telehealth* on its website at www.bbs.ca.gov/licensees/psych\_online.
* The California Telehealth Resource Center (CTRC) is nationally recognized as one of fourteen federally designated Telehealth Resource Centers around the country. CTRC has a vision to achieve the fully optimized use of telehealth and other technology enabled health care in order to: 1) improve access to health care for all California citizens; 2) improve clinical efficiency and access to health information and education; and 3) reduce the cost of providing needed health care. Visit the CTRC website at [http://www.caltrc.org](http://www.caltrc.org/).
* The Center for Connected Health Policy (CCHP) is a program of the Public Health Institute which was established in 2008 to integrate telehealth virtual technologies into the health care system through advancing sound policy based on objective research and informed practices. Visit the CCHP website at [http://cchpca.org](http://cchpca.org/).
* The California Telehealth Network (CTN), an independent 501(c)(3) non-profit, focuses on increasing access to healthcare, including telehealth, telemedicine and health information exchange, through the innovative use of technology. CTN is funded through the Federal Communications Commission’s Rural Health Care Pilot Program. CTN is California’s authorized FCC broadband consortium for healthcare. Visit the CTN website at [http://www.caltelehealth.org](http://www.caltelehealth.org/).

*Ann Tran-Lien, JD, is a staff attorney and the Managing Director of Legal Affairs at CAMFT. Ann is available to answer member calls regarding legal, ethical, and licensure issues.*

Endnotes

1 Cal Bus and Prof Code §2290.5(4)

2 16 C.C.R. §1815.5(b)

3 16 C.C.R. §1815.5(a)

4 16 C.C.R. §1815.5(c)(i)

5 16 C.C.R. §1815.5(c)(ii)

6 16 C.C.R. §1815.5(c)(iii)

7 16 C.C.R. §1815.5(c)(iv)

8 16 C.C.R. §1815.5(d)(i)

9 16 C.C.R. §1815.5(d)(ii)

10 16 C.C.R. §1815.5(d)(iii)

11 16 C.C.R. §1815.5(e)

12 “State Telehealth Laws and Medicaid Program Policies A Comprehensive Scan of the 50 States and District of Columbia.” Center for Connected Health Policy. N.p., Mar. 2016. Web. July 2016.

13 §12-43-215(9) C.R.S.

*This article is not intended to serve as legal advice and is offered for educational purposes only. The information provided should not be used as a substitute for independent legal advice and it is not intended to address every situation that could potentially arise. Please be aware that laws, regulations and technical standards change over time. As a result, it is important to verify and update any reference or information that is provided in this article.*

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