

**TITLE 16. ACUPUNCTURE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS**

**INITIAL STATEMENT OF REASONS**

**Hearing Date:** No hearing scheduled.

**Subject Matter of Proposed Regulations:** Standards of Practice for Telehealth Services

**Sections Added:** Adopt Section 1399.452.1 of Title 16 of the California Code of Regulations (CCR)<sup>1</sup>

**Background and Statement of the Problem:**

The California Acupuncture Board (Board) regulates the practice of acupuncture in California and is the sole issuer of acupuncture licenses in the state. The Board regulates over thirteen thousand licensed acupuncturists. The Board establishes and maintains standards of conduct within the acupuncture profession, primarily through its authority to license and enforce minimum standards for the protection of the public. (Acupuncture Licensure Act (Chapter 12 (commencing with section 11.5) of Division 2 of the Business and Professions Code (BPC)) (Act).) BPC section 4928.2 states that protection of the public shall be the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions. The Board is authorized to establish necessary rules and regulations for the enforcement of the Act and the laws subject to its jurisdiction. (Bus. & Prof. Code, § 4933.)

The provision of medical services over the past four years has increasingly embraced telehealth. During the COVID19 pandemic many Californians turned to various and appropriate electronic communication formats to receive medical treatment and advice-known to many as “telehealth.” Soon after the onset of the pandemic, the Board received requests from stakeholders for clarification on the provisions of acupuncture allowed and the format and structure around acupuncture provided via electronic means. The Board, cognizant of the rising demand and challenges for acupuncture services to be delivered via telehealth, approved proposed language to initiate the rulemaking to promulgate a telehealth regulation initially on March 26, 2021. Later on October 26, 2023, the Board approved revised language included in this proposal.

BPC sections 686 and 2290.5 authorize health care providers who are individuals licensed under Division 2 of the Code to provide telehealth. Although these sections authorize licensees of the Board to provide acupuncture services via telehealth, they do not provide any specific guidelines for the provision of services in this manner. In an effort to provide further guidelines and requirements specific to the delivery of

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<sup>1</sup> Unless otherwise noted, all references to the CCR hereafter are to Title 16.

acupuncture services provided via telehealth, a proposed telehealth regulation has been developed deemed necessary for clarity. The Board, cognizant of the rising demand and challenges for acupuncture services to be delivered via telehealth, discussed potential applications for telehealth in acupuncture, and approved proposed language to initiate the rulemaking to promulgate a telehealth regulation initially on March 26, 2021. On October 26, 2023, the Board approved revised language included in this proposal. With a clearer standard of practice, the Board is able to establish violations if it receives a complaint related to the provision of services via telehealth.

The regulatory proposal will establish standards for licensees to follow when acupuncture services are provided via telehealth. The proposal defines what acupuncture services include when delivered via telehealth, the appropriate standard for services provided at the discretion of licensees pursuant to BPC section 4937. Referencing BPC section 4937 clearly points to modalities included within an acupuncturist's scope of practice.

The proposal also identifies who is permitted to deliver acupuncture through telehealth. The proposal sets factors and criteria to take under consideration in determining what modalities and services are appropriate to offer via telehealth. The proposal identifies what shall be identified for patient consent and the requirements to follow when obtaining patient consent. The proposal also emphasizes the law by specifying that a violation of the regulatory standards constitutes unprofessional conduct.

#### **Anticipated benefits from this regulatory action:**

The Board anticipates that this regulatory proposal will ensure acupuncturists, as health care providers, have standards in place when implementing telehealth into their practice. These changes are intended to better protect California consumers by providing transparency of a telehealth setting to the consumer.

#### **Specific purpose of, and rationale for, each adoption, amendment, or repeal:**

##### **1. Adopt section 1399.452.1**

**Purpose:** Establish a definition of acupuncture services within the practice of telehealth limited to patients only located in California.

**Rationale:** The proposed language references BPC section 4937 to define “acupuncture services” that may be provided via telehealth. This Section is seen as the licensee’s scope of practice. Nothing in a licensee’s scope is specifically prohibited under this section. It is necessary to provide discretion to the licensee based upon their ability to obtain, confirm, or determine a diagnosis and/or prescribe treatment to a patient in a telehealth setting so the treatment can be tailored to the patient.

Telehealth is not a type of service provided by licensees, rather it is a mode of delivery of acupuncture services. This proposal will improve access to acupuncture to individuals who live in remote areas who, due to illness or mobility issues, cannot leave their homes,

or who require additional support and care between regularly scheduled office visits. The proposal requires acupuncture services via telehealth are provided only to a patient physically located in California because there are different laws to adhere to from state to state around the practice of acupuncture. There would be too many enforcement and scope issues if acupuncture services could be provided if the patient or licensee is located in another state. In addition, the Board already does not allow portability of its license or reciprocity from other states given the lack of consistent qualifications and standards between states. The jurisdiction of the Board is strictly over acupuncture provided within California which makes it necessary to limit telehealth to patients within California.

## 2. Adopt subsection (a)

Purpose: Requires that licensees hold a current, active, and unrestricted license issued by the Board.

Rationale: It is necessary to identify the individual holds a valid and current, active, and unrestricted license issued by the Board (BPC section 4935 (a)(1)) to ensure the services are compliant with statute. This subsection is also necessary so it is clear that guest acupuncturists permitted under BPC section 4949, other licensees permitted to provide acupuncture under their license, and acupuncture trainees are not permitted to practice acupuncture via telehealth for the safety of the public.

## 3. Adopt subsection (b)

Purpose: Establishes the conditions under which the provision of acupuncture services via telehealth may be provided.

This proposal requires that licensees are competent to deliver acupuncture services. The licensee is required to consider their own ability to obtain a diagnosis and prescribe the proper treatment in a telehealth setting. The licensee is also required to consider the symptoms reported by the patient and their medical history when determining whether telehealth is appropriate. When determining effective treatment, the types of treatment for the diagnosis are required to be considered along with weighing the risks/benefits with providing the treatment via telehealth versus in-person.

Rationale: It is necessary to provide a set of criteria for a licensee to assess when determining telehealth is appropriate as the Board cannot be prescriptive in listing out specific diagnoses and treatments that are limited to the telehealth setting as this is not practical or within the Board's jurisdiction to determine. Rather, there is a guideline of factors to consider so the licensee can make an educated decision on the type of care to render the patient. This provides the appropriate amount of discretion and flexibility for the licensee and provides protection to the consumer because there are separate standards of care involved with telehealth.

## 4. Adopt subsection (b)(1)

Purpose: The licensee must assess the diagnosis of the patient and consider the appropriate treatment to determine if the patient's needs can be met in a telehealth setting. For example, if the licensee has to physically palpate an area of the patient's body to make a diagnosis, or effective treatment can't be achieved without needling, then a telehealth setting would not be a suitable mode of treatment.

Rationale: These factors have to be weighed to tailor the appropriate mode of delivery of acupuncture services to the patient. This is necessary to advance consumer protection because the licensee must consider whether or not the individual patient's needs and safety will be met through a telehealth setting.

#### 5. Adopt subsection (b)(2)

Purpose: Establishes a requirement for a licensee to consider a patient's diagnosis, symptoms, and medical history prior to initiating telehealth services in determining whether delivery of acupuncture services remotely is appropriate. If a patient has symptoms that requires physical evaluation, then telehealth may not adequately address the specific needs of the patient.

Rationale: All of the patient's medical history relevant to the forthcoming acupuncture services is necessary information for the licensee to evaluate in determining appropriate treatment and whether the services can be offered via telehealth. This is necessary to advance consumer protection because the licensee must consider whether or not the individual patient's needs and safety will be met by telehealth.

#### 6. Adopt subsection (b)(3)

Purpose: Establishes a requirement for a licensee to obtain information about a patient's preference for the mode of treatment so the patient's desired treatment and expectations are met.

Rationale: Some patients may not wish or feel comfortable receiving acupuncture services via telehealth. Requesting the patient's preference is a necessary component to take under consideration in determining the mode of acupuncture services provided.

#### 7. Adopt subsection (b)(4)

Purpose: The licensee is required to evaluate whether services can be appropriately provided to a patient, taking into account the client's needs, preferences, risks/benefits, and physical location and circumstances.

Rationale: For the protection of the patient, the licensee must consider whether or not the individual patient's needs and safety will be met in a telehealth setting.

#### 8. Adopt subsection (b)(5)

**Purpose:** Provides a minimum qualification for the licensee to be competent, possess the appropriate knowledge, skills, and abilities to deliver telehealth services for public protection. Provides the factor of information technology for the delivery of telehealth services as an additional factor for consideration in determining whether telehealth is appropriate. Requires a licensee to consider how the services provided via telehealth might differ from those delivered in person when determining if telehealth is appropriate. All of these factors are necessary to include as considerations in order to lay a foundation for a competent and well-equipped licensee. These factors of consideration ensure safety to the public.

**Rationale:** Providing acupuncture services via telehealth is different than providing care in-person. This criteria requires competency of the licensee to know what questions to ask, what their limitations are, and the best treatment option to meet the needs and safety of the patient. The licensee must be able to make the determination about the appropriate mode of technology to suit the needs of the patient, provide these modes, and adapt to these different technologies. Consumer protection requires that the licensee be competent to provide services through telehealth because of the different nature of this modality, which also requires familiarity with the available platforms and their appropriate use.

#### 9. Adopt subsection (c)

**Purpose:** Establishes disclosures for patient consent to meet the statutory mandate from BPC section 2290.5 (b).

**Rationale:** BPC section 2290.5 requires a licensee to obtain a patient's informed consent to use telehealth, including the risks to confidentiality and data security, potential for connection disruption, insurance issues, and other ways in which telehealth differs from in-person health care services. The consent is required to be documented prior to the delivery of acupuncture services and the licensee shall obtain the patient's consent verbally or in writing as specified by BPC section 2290.5. Specifying the methods in which consent is given provides clarity. Consent is necessary for consumer protection because the informed consent must address the uniqueness of receiving services via telehealth, making for a more educated consumer who is more able to determine whether receipt of services in this manner is right for them. The language provides more details around the informed consent requirement that provide more specificity and clarity.

#### 10. Adopt subsection (c)(1)

**Purpose:** Based on research of other similar healing arts boards with telehealth regulations, the concern regarding potential risks and limitations of receiving treatment via telehealth is being added as part of the informed consent requirements.

**Rationale:** There are considerations with receiving acupuncture services through telehealth versus in-person. There are limitations with what services can be reasonably provided remotely. To advance consumer protection, being transparent about the risks

and limitations allows the patient to make an informed decision for the use of telehealth.

#### 11. Adopt subsection (c)(2)

**Purpose:** Include risks to patient confidentiality and information security as a concern for the licensee to disclose as part of informed consent.

**Rationale:** It is necessary for licensees to point out the risks involved with conducting acupuncture treatment virtually, which makes privacy more vulnerable. Whether the services are being provided through the telephone or over the computer, the patient's information could be overheard or potentially accessed if hacked. These considerations are necessary to educate the patient in the interest of public safety and also increase transparency for the patient.

#### 12. Adopt subsection (c)(3)

**Purpose:** Require the licensee's disclosure of telehealth data storage policies and procedures as part of the informed consent requirements.

**Rationale:** Licensees may utilize special software or apps to conduct their telehealth appointments. These programs may store private patient information that can be vulnerable to data breach. It is important for consumer safety to raise these issues so the patient is aware prior to agreeing to a telehealth setting.

#### 13. Adopt subsection (c)(4)

**Purpose:** Require the licensee's disclosure of the possibility of service interruption or disruption in the case of technological failure as part of the informed consent requirements.

**Rationale:** Conducting acupuncture treatment via telehealth is a mode of delivery that relies on the use of technology. Technology can fail, which could disrupt the treatment session. These kinds of interruptions could delay treatment or cause lags based on connection quality and other variables. This can lead to unclear communication. To advance consumer protection, it is necessary for a licensee to go over these scenarios so the patient is more educated to determine whether receipt of services in this manner is right for them.

#### 14. Adopt subsection (c)(5)

**Purpose:** Require the licensee's disclosure of the consideration of insurance coverage as part of the informed consent requirements.

**Rationale:** Some insurance policies have specific stipulations and contingencies around telehealth treatment or acupuncture services. Patients should be informed of this so they are aware of their insurance policy prior to agreeing to receiving acupuncture via

telehealth.

15. Adopt subsection (c)(6)

**Purpose:** Provides a broader disclosure requirement for the licensee to cover that takes into consideration all other issues related to advantages and disadvantages the licensee outlines when acupuncture is received via telehealth versus in-person.

**Rationale:** There are many different considerations and issues that are exclusive to receiving acupuncture services via telehealth versus in-person that cannot be covered through an exhaustive list. Licensees may also have issues specific to their practice that this broad category covers to prompt them to include in their informed consent.

16. Adopt subsection (d).

**Purpose:** Establishes a transparent method of documenting informed consent that all required disclosures were provided, whether it be verbally or in writing. The language in subsection (d) outlines how consent shall be documented based on whether the disclosures are provided verbally or in writing.

**Rationale:** BPC section 2290.5 (b) requires the healthcare provider to inform the patient about the use of telehealth and obtain verbal or written consent prior to initiating telehealth, which shall be documented. It is necessary to provide a clear process of how each method of delivering the disclosures is documented to effectively comply with the statutory requirement. It is best practices to keep a log of the date of the disclosures and when verbal consent was obtained to keep in the patient's record. Keeping record of this will provide proof of compliance and a history of the transaction for patient information.

If consent is written, then there is a clear process for obtaining the patient or patient's representative's signature and date of signature when the disclosures were acknowledged and received. Requiring a copy of this signed acknowledgment be retained in the patient's medical records is best practices to provide proof of compliance and a history of the transaction for patient information.

17. Adopt subsection (e).

**Purpose:** Requires a licensee to disclose their name and license number to a patient at the start of telehealth services.

**Rationale:** The online and telephone environment may make it easier for an acupuncturist to be anonymous, and therefore, this section requires the licensee to provide their license number. This helps ensure that a patient is consulting with the licensee and helps protect the patient's confidentiality.

18. Adopt subsection (f).

Purpose: Proposed language requires that licensees take reasonable steps to ensure that electronic data is transmitted securely and shall inform patients immediately of any known data breach or unauthorized dissemination of data.

Rationale: For consumer protection this is necessary because confidentiality of data, HIPAA compliance, and patient privacy are ethical and legal concerns in the medical industry.

#### 19. Adopt subsection (g).

Purpose: This proposed subsection builds off of BPC section 2290.5 (g) which states in part that all laws and regulations, unprofessional conduct, and standards of practice that apply to a health care provider shall also apply while providing telehealth services. The proposed language makes BPC section 2290.5 (g) specific to the practice of acupuncture and clearly identifies the statute that would be violated if a licensee fails to comply with this regulation.

Rationale: This subsection clarifies that the provisions of these amendments are requirements, not suggestions, by which the practitioner must abide when practicing via telehealth. Adoption of this proposed amendment will benefit consumers of acupuncture services by requiring that certain actions are taken during the rendering of telehealth services that promote transparency, security, and client safety. It clarifies for licensees that not following these regulations will result in consequences and potential enforcement action.

The proposed regulations partially duplicate or overlap a state statute (BPC section 2290.5 (g)) which is cited as “authority” and “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3).

#### **Underlying Data / Materials Relied Upon**

- December 17, 2020 Licensing and Examination Committee Meeting Materials
- December 17, 2020 Board Meeting Minutes
- March 25 – 26, 2021 Board Meeting Materials
- March 25 – 26, 2021 Board Meeting Minutes, Agenda Item 22
- Next DLP, “10 Best HIPAA-compliant Video Conferencing Platforms in 2024” April 14, 2024, <https://www.nextdlp.com/resources/blog/hipaa-compliant-video-conferencing-platforms>
- Medical Advantage, “Types of Telehealth Services: 4 Examples and Their Benefits” July 12, 2022, <https://www.medicaladvantage.com/blog/types-of-telehealth-services/>
- Capterra Telemedicine Systems Software, [https://www.capterra.com/sem-compare/telemedicine-software/?utm\\_source=ps-google&utm\\_medium=ppc&utm\\_campaign=:1:CAP:2:COM:3:All:4:US:5:BAU:6:S](https://www.capterra.com/sem-compare/telemedicine-software/?utm_source=ps-google&utm_medium=ppc&utm_campaign=:1:CAP:2:COM:3:All:4:US:5:BAU:6:S)

### **Business Impact:**

The Board has made the initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses including the inability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

This proposal establishes guidelines for licensed Acupuncturists for providing Acupuncture services via telehealth in California. In the event a licensee opts to provide telehealth services, start-up and ongoing maintenance costs are anticipated to be minimal and considered part of normal business operations.

Licensees will be required to take reasonable steps to ensure electronic data is transmitted securely and HIPAA-compliant. To be HIPAA-compliant, a telehealth platform must include all, but not limited to, encryption, access control, audit controls, data integrity, Business Associate Agreements, privacy protections, breach notification agreements, and compliance with all other HIPAA requirements.

The Board has identified the following areas of compliance costs:

- Telephone, email, text services – None. Assumes licensee has current services.
- Video – less than \$100 per month or \$1,200 per year.
- Scheduling, video, record maintenance and billing services – \$300 per month or \$3,600 per year.

The Board does not have an estimate of the number of licensees that may opt to provide telehealth services or otherwise need to come into compliance with the proposed regulations. As a result, the Board does not have an estimate of the total economic impact at this time.

### **Economic Impact Assessment:**

The Board has made an initial determination that the proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

- **Analysis of creation/elimination of jobs:** This regulatory proposal will not create or eliminate any jobs because start-up and ongoing maintenance costs are anticipated to be minimal and considered part of normal business operations.

- **Analysis of creation/elimination of businesses.** No businesses will be created or eliminated as a result of this proposal because start-up and ongoing maintenance costs are anticipated to be minimal and considered part of normal business operations.
- **Analysis of expansion of business:** This proposal will not affect the expansion of businesses currently doing business within the State of California because the proposed regulatory action clarifies the existing ability of a licensee to deliver acupuncture via telehealth.
- **Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:** The Board has determined these regulations will benefit consumers by providing increased clarity regarding requirements for a licensee to practice telehealth. Consumers will benefit from requirements that protect their confidentiality and promote transparency.

This regulatory proposal does not affect worker safety because it does not involve worker safety. This regulatory proposal benefits the State's environment because it may reduce transportation related emissions.

Occupations/Businesses Impacted: The proposed regulation will impact those licensed by the Board (and any business that they own or that employs) if they choose to provide services via telehealth. It clarifies what the law requires of them when they offer telehealth services. It is not possible for the Board to estimate the number of businesses impacted, as this regulation will only affect licensees who choose to offer telehealth. Choosing to do this is voluntary and that data is not tracked by the Board.

Reporting Requirements: The proposed regulations do not impose any reporting requirements on licensees or the public.

Business Reporting Requirement: The proposed regulations do not impose any reporting requirements on businesses.

Comparable Federal Regulations: None

### **Specific Technologies or Equipment:**

This regulation does not mandate the use of specific technologies or equipment. This regulation will require that, if a licensee chose to practice via telehealth, they must take reasonable steps to ensure the security of the communication medium and compliance with HIPAA requirements, as specified.

**Consideration of Alternatives:**

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulations in a manner that ensures full compliance with the law being implemented or made specific.

No such alternatives have been proposed, however, the Board welcomes comments from the public.

**Description of reasonable alternatives to the regulation that would lessen any adverse impact on small business:**

No such alternatives have been proposed, however the Board welcomes comments from the public.