

BOARDS AND COMMISSIONS
Board of Licensed Professional Counselors
(Amendment)

201 KAR 36:045. Distance counseling.

RELATES TO: KRS 335.505, 335.515(1), (3), (11), 211.332, 211.334, 211.336, 211.338

STATUTORY AUTHORITY: KRS 335.515(3), (11)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 335.515(3) requires the board to promulgate administrative regulations necessary to carry out and enforce the provisions of KRS 335.500 to 335.599. KRS 211.336 establishes requirements for state agencies that promulgate administrative regulations related to telehealth. This administrative regulation establishes procedures for preventing abuse and fraud through the use of distance counseling, prevents fee-splitting through the use of distance counseling, and utilizes distance counseling in the provision of professional counseling services and in the provision of continuing education.

Section 1. Client Requirements. A counselor-client relationship may commence via distance counseling. An in-person meeting shall not be required unless the provider determines it is medically necessary to perform those services in person as set forth in KRS 211.336(2)(a). A licensee using distance counseling to deliver counseling services or who practices distance counseling shall, upon initial contact with the client:

- (1) Make reasonable attempts to verify the identity of the client;
- (2) Obtain alternative means of contacting the client other than electronically such as by the use of a telephone number or mailing address;
- (3) Provide to the client alternative means of contacting the licensee other than electronically such as by the use of a telephone number or mailing address;
- (4) Provide contact methods of alternative communication the licensee shall use for emergency purposes such as an emergency on call telephone number; ~~and~~
- (5) Document if the client has the necessary knowledge and skills to benefit from the type of distance counseling provided by the licensee;
- (6) Document which services were provided by distance counseling;
- (7) Use secure communications with clients, including encrypted text messages via e-mail or secure Web sites, and not use personal identifying information in non-secure communications; ~~and~~
- (8) In accordance with KRS 211.334 and 900 KAR 12:005 Section 2(1)(c), obtain the informed consent of the client; and
- (9) Inform the client in writing about:
 - (a) The limitations of using technology in the provision of distance counseling;
 - (b) Potential risks to confidentiality of information due to technology in the provision of distance counseling as required by 900 KAR 12:005(2)(a);
 - (c) Potential risks of disruption in the use of distance counseling;
 - (d) When and how the licensee will respond to routine electronic messages;
 - (e) In what circumstances the licensee will use alternative communications for emergency purposes;
 - (f) Who else may have access to client communications with the licensee;
 - (g) How communications can be directed to a specific licensee;
 - (h) How the licensee stores electronic communications from the client;
 - (i) Whether the licensee or client may elect to discontinue the provision of services through distance counseling; and
 - (j) The reporting of clients required by 201 KAR 36:040, Sections 2 and 3.

Section 2. Competence, Limits on Practice, Maintenance, and Retention of Records. A licensee using distance counseling to deliver counseling services or who practices distance counseling shall:

- (1) Limit the practice of distance counseling to the area of competence in which proficiency has been gained through education, training, and experience;
- (2) Maintain current competency in the practice of distance counseling through continuing education, consultation, or other procedures, in conformance with current standards of scientific and professional knowledge;
- (3) Document the client's presenting problem, purpose, or diagnosis;
- (4) Maintain records in accordance with the requirements of 201 KAR 36:040;~~and~~
- (5) Use methods for protecting health information, which shall include authentication and encryption technology as required by KRS 211.332(5)(c); and
- (6) Ensure that confidential communications obtained and stored electronically cannot be recovered and accessed by unauthorized persons when the licensee disposes of electronic equipment and data.

Section 3. Compliance with Federal, State, and Local Law. A licensee using distance counseling to deliver counseling services or who practices distance counseling shall:

- (1) Comply with the state law where the licensee initiates the distance counseling;
- (2) Be licensed to practice counseling where the client is domiciled;~~and~~
- (3) Comply with Section 508 of the Rehabilitation Act, 29 U.S.C. 794(d), to make technology accessible to a client with disabilities;~~and~~
- (4) Maintain patient privacy and security in accordance with 900 KAR 12:005 Section 2(1)(b).

Section 4. Representation of Services and Code of Conduct. A licensee using distance counseling to deliver counseling services or who practices distance counseling shall:

- (1) Conform to the statutes and regulations governing the provision of counseling services in Kentucky;
- (2) Not engage in false, misleading, or deceptive advertising of distance counseling in violation of KRS 335.540(1)(c);
- (3) ~~(2)~~ Comply with the code of ethics, 201 KAR 36:040; and
- (4) ~~(3)~~ Not split fees.

Section 5. Utilization of Distance Counseling in the Provision of Continuing Education. Providers approved pursuant to 201 KAR 36:030 may utilize distance counseling in the provision of continuing education courses.

DR. HANNAH COYT, Chair

APPROVED BY AGENCY: September 13, 2023

FILED WITH LRC: September 14, 2023 at 2 p.m.

PUBLIC HEARING AND COMMENT PERIOD: A public hearing on this administrative regulation shall, if requested, be held on November 28, 2023 at 1:00 p.m. EST in Room 127CW, The Mayo-Underwood Building, 500 Mero Street, Frankfort, Kentucky 40601. Members of the public may also utilize the following link to attend the meeting by video conference: Topic: LPC Regulation Public Hearing

CONTACT PERSON: Sara Boswell Janes, Staff Attorney III, Department of Professional Licensing, Office of Legal Services, 500 Mero Street, 2 NC WK#2, phone (502) 782-2709, fax (502) 564-4818, email Sara.Janes@ky.gov, Link to public comment portal: https://ppc.ky.gov/reg_comment.aspx.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person:Sara Boswell Janes

(1) Provide a brief summary of:

(a) What this administrative regulation does:

This administrative regulation establishes the requirements for distance counseling and telehealth pursuant to KRS 211.332 - .338.

(b) The necessity of this administrative regulation:

This regulation is necessary to establish standards for use of distance counseling and telehealth.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

The necessity of this regulation is to ensure compliance by licensed professional counselors for distance counseling in compliance with new telehealth standards set under KRS Chapter 211.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

The regulation is in conformity as the authorizing statute which gives the board the ability to promulgate regulations regarding the use of distance counseling and telehealth

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

The amendment changes the existing regulation to bring it up to date with the telehealth requirements set forth in KRS Chapter 211.

(b) The necessity of the amendment to this administrative regulation:

The amendment is necessary to comply with the requirements of professional licensing boards to promulgate administrative regulations relating to new standards for telehealth which impacts distance counseling.

(c) How the amendment conforms to the content of the authorizing statutes:

The regulation is in conformity as the authorizing statute gives the board the ability to promulgate regulations regarding use of telehealth by a credential holder as set forth in KRS 211.332 through .338.

(d) How the amendment will assist in the effective administration of the statutes:

The amendment updates and clarifies the telehealth requirements that impact the delivery of distance counseling that was already authorized.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

There are presently 2692 active and 39 inactive licensed professional clinical counselors (LPCCs) and 1325 active and 17 inactive licensed professional clinical counselor associates (LPCAs) who may be impacted by the changes to the telehealth law if they choose to provide services via telehealth.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

? Licensees will have to take appropriate measures to ensure or enhance any technology used to comply with security, encryption, and confidentiality requirements in compliance with state and federal law.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

There is no way to tell how much it may cost any entity as it is dependent on whether they choose to engage in telehealth services and/or the update needs of their data systems.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

The amendment allows more accessible services to clients, as well as more opportunities for licensees to provide telehealth services under regulations that comply with recent telehealth standards adopted by the legislature; and improve the safety and confidentiality of any client using the services.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

No new costs will be incurred by the changes

(b) On a continuing basis:

No new costs will be incurred by the changes.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

The board's operations are funded by fees paid by credential holders and applicants.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

No increase in fees or funding will be required to implement the changes made by this regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:

This administrative regulation does not establish any new fees.

(9) TIERING: Is tiering applied?

This regulation does not distinguish between similarly situated individuals on the basis of any factor.

FISCAL NOTE

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

Kentucky Board of Licensed Professional Counselors.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 335.515(3), KRS 211.332, KRS 211.334, KRS 211.335, and KRS 211.336.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

None.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

None.

(c) How much will it cost to administer this program for the first year?

There are no additional costs to administer this program.

(d) How much will it cost to administer this program for subsequent years?

See 3(c).

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

(4) Estimate the effect of this administrative regulation on the expenditures and cost savings of regulated entities for the first full year the administrative regulation is to be in effect.

(a) How much cost savings will this administrative regulation generate for the regulated entities for the first year?

Indeterminable. Cost savings could result from providing telehealth services but any specific dollar amount cannot be calculated because it would be largely based on each licensee's business model and incorporation of telehealth services, if any.

(b) How much cost savings will this administrative regulation generate for the regulated entities for subsequent years?

Indeterminable.

(c) How much will it cost the regulated entities for the first year?

Indeterminable. The costs will be based on each licensee's existing data systems and whatever updates are needed to comply with state and federal regulatory security and other HIPAA requirements.

(d) How much will it cost the regulated entities for subsequent years?

Indeterminable. The costs will be based on each licensee's existing data systems and whatever updates are needed to comply with state and federal regulatory security and other HIPAA requirements.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Cost Savings (+/-):Indeterminable.

Expenditures (+/-):Indeterminable.

Other Explanation:

The cost savings is indeterminable and would be based on each licensee's individual circumstances and how the licensee incorporated telehealth into the practice; and, any expenditures cannot be estimated because it will be based on each licensee's existing data systems and whatever updates are needed to comply with state and federal regulatory security and other HIPAA requirements.

(5) Explain whether this administrative regulation will have a major economic impact, as defined below.

"Major economic impact" means an overall negative or adverse economic impact from an administrative regulation of five hundred thousand dollars (\$500,000) or more on state or local government or regulated entities, in aggregate, as determined by the promulgating administrative bodies. [KRS 13A.010(13)]. This administrative regulation will not have a major economic impact.