The Top Five Ways Wellness Professionals Can Avoid Legal Liability

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Wellness professionals are an essential part of a vibrant health and wellness system. Wellness professionals include chiropractic, acupuncture, functional medicine, integrative medicine, spiritual healing, mindfulness meditation, reiki, ayurvedic medicine, massage, and coaching to name a few. Wellness professionals typically operate outside traditional health care provider systems, such as hospitals or physician clinics. Often, wellness professionals are entrepreneurs who go into business to serve patients or clients because conventional medicine has failed those patients or clients. In my experience as a health lawyer who focuses on serving as the attorney for alternative medicine providers, as well as a patient myself, many clients crave wellness professional services.

Because wellness professionals often straddle the worlds of traditional health care and alternative health care, they get caught in legal compliance confusion. There are many questions as to whether traditional health care laws apply to wellness professionals. The answer of course is that whether traditional health care laws, such as fraud and abuse laws, Medicare and Medicaid coding laws, Food & Drug Administration laws, HIPAA requirements, state licensure laws, to name a few, depends on the facts and circumstances of each case. That's why it is imperative that wellness professionals purchase professional liability insurance and work with a lawyer who is familiar with the wellness legal landscape. Based on my experience working as a wellness lawyer, here are the top legal areas that impact wellness professionals the most:

1. Stay within Your Scope of Practice.

Scope of practice is a concept relating to state licensure. Many wellness professionals do not have state licensure, like health and wellness coaches, ayurvedic and reiki practitioners and some naturopathic doctors, to name a few. Other wellness professionals, like chiropractors, acupuncturists or functional medicine providers, may have a license to practice their profession in one state, but not other states. With the growth in virtual practice or telehealth, wellness professionals may find themselves wanting to expand their services to states in which they do not have a license, or states that do not recognize their practice as a licensed profession.

A legal risk for wellness professionals concerns stepping outside of the scope of their license (if they have one), or offering services that creep into a licensed profession (if they do not have that license). In either case, the wellness professional could be accused of unlicensed practice. Specific to many health and wellness professionals, depending on state law and the circumstances, individuals providing

nutritional advice potentially could be subject to state prohibitions against unlicensed practice of various professions, including: medicine, psychology and counseling, and nutrition and dietetics.

State statues define the practice of “medicine” very broadly, typically in terms that involve diagnosis, prevention, treatment, or operation with respect to diseases or human ailments. The courts often interpret words such as “prevention” and “treatment,” broadly. This means that non-licensed practitioners of the healing arts can easily run afoul of prohibitions against unlicensed medical practice.

In contrast to the “unlimited” scope of medical licensing, wellness professionals like chiropractors have a limited scope of practice, which is defined by statute, regulations, and/or case law. For example, typical statutes provide that chiropractors can manipulate the spine to facilitate the free flow of nerve energy; acupuncturists can perform acupuncture needling, and while they have some diagnostic and therapeutic authority, this is limited to the categories and repertoire of traditional Eastern medicine.

Some states carve out exceptions to unlicensed practice if the wellness professional follows certain guidelines. For example, anyone in California can provide nutritional advice or give advice concerning proper nutrition, so long as they do not practice “medicine.”[1] Under this statute, the terms “providing nutritional advice or giving advice concerning proper nutrition” mean the giving of information as to the use and role of food and food ingredients, including dietary supplements. The individual must post a designated notice “in an easily visible and prominent place” as follows:[2]

NOTICE

State law allows any person to provide nutritional advice or give advice concerning proper nutrition–which is the giving of advice as to the role of food and food ingredients, including dietary supplements. This state law does NOT confer authority to practice medicine or to undertake the diagnosis, prevention, treatment, or cure of any disease, pain, deformity, injury, or physical or mental condition and specifically does not authorize any person other than one who is a licensed health practitioner to state that any product might cure any disease, disorder, or condition.”

Another carveout in California, or safe harbor, commonly known as “SB 577,” allows unlicensed wellness professionals to practice their trade as long as they disclose to the client in a written statement, using plain language, the following:[3]

a. That he or she is not a licensed physician.
b. That the treatment is alternative or complementary to healing arts services licensed by the state.
c. That the services to be provided are not licensed by the state.
d. The nature of the services to be provided.
e. The theory of treatment upon which the services are based.
f. His or her educational, training, experience, and other qualifications regarding the services to be provided.
(2) Obtain a written acknowledgement from the client stating that he or she has been provided with the

information described in paragraph (1). The client shall be provided with a copy of the written acknowledgement, which shall be maintained by the person providing the service for three years.

However, the statutory carve-out does not eviscerate the prohibition against unlicensed practice of medicine. As specifically stated in BPC 2053.6(b)[4]:

Nothing in this section or in Section 2053.5 shall be construed to do the following:

1. Affect the scope of practice of licensed physicians and surgeons.
2. Limit the right of any person to seek relief for negligence or any other civil remedy against a person providing services subject to the requirements of this section."

Such licensing exemptions for alternative practitioners may also exist in other states[5], however, other states, such as Florida, may actively pursue unlicensed practitioners of alternative medicine where the state interprets the activity as violating licensing regulations.

Unlicensed practice is a crime, and penalties typically can include imprisonment as well as fines. For example, in California, it is a misdemeanor to use words such as, "dietetic technician, registered," "dietitian," "dietician," "registered dietitian," "registered dietician," "registered dietitian nutritionist," or the letters "RD," "RDN," "DTR," "or any other words, letters, abbreviations, or insignia indicating or implying that the person is a dietitian, dietetic technician, registered, registered dietitian, or registered dietitian nutritionist or to represent, in any way, orally, in writing, in print or by sign, directly or by implication, that he or she is a dietitian, a dietetic technician, registered, a registered dietitian, or a registered dietitian nutritionist." (Business & Professions ("B&P)") Code, Section 2585(c)).

Legal definitions of each profession vary by state, as do enforcement priorities.

Enforcement

To avoid the unlicensed practice of medicine or psychology, unlicensed wellness professionals like coaches should refrain from using diagnostic or therapeutic categories with their clients. For example, sometimes undercover investigators will pose as patients and use diagnostic categories in conversation or session, to see whether practitioners will respond in kind. The investigator might say that they are clinically obese and need help with nutritional advice. An unlicensed practitioner who responds saying they can cure the client's obesity could be accused of the unlicensed practice of medicine, for example.

At other times, investigators and prosecutors can search online content as evidence of unlicensed practice. For example, if the practitioner's website contains the term, "eating disorder," this could be evidence that the practitioner has treated a disease or psychological condition. Sometimes, the factual circumstances can give rise to a claim of unlicensed practice—for example, the condition itself suggests

that the client is seeking disease care.

The bottom line is that even if you have a disclaimer stating you do not practice a licensed profession, what you actually do and say in your practice matters. If you offer specific advice and guidance to clients based on their specific health needs, you may be wandering into the licensed practice of a profession for which you do not hold a license. Offering specific advice and guidance is often outside the scope of many wellness professionals, particularly those without a state-issued license. In contrast, offering education and information is something even unlicensed wellness practitioners can do, so long as the information is not misleading or inaccurate. There generally is a First Amendment, "free speech" allowance for providing information and education, as opposed to clinical guidance. We suggest contacting your liability insurer and/or your wellness lawyer to help you stay compliant and within your scope.

2. Do Not Order Lab

Similar to the scope of practice issue, wellness professionals ask whether they can order labs as a wellness provider. When a wellness provider looks at lab test results or other health history forms and then creates a recommendation or treatment plan based on those results, it could be argued that such conduct is equivalent to "treating" a person for a "disorder" or other physical or mental condition. The more the wellness provider gives personalized recommendations based on lab results or health history forms, the more likely one could interpret such actions as the practice of a licensed profession for which the wellness provider may not hold a license.

From a legal risk perspective, it is best for unlicensed wellness professionals to avoid personalized treatment plans as much as possible and instead offer more generalized education and resources while recommending at all times that the client consult their primary care physician for specific conditions.

3. HIPAA Compliance

The privacy and security rules of the Health Insurance Portability and Accountability Act (HIPAA) generally have not caught up to wellness practices. This is because many wellness professionals do not bill insurance, calling into question the applicability of HIPAA privacy and security rules to the typical wellness practice. HIPAA applies only to "covered entities." There are three types of covered entities:

1. Health care providers
2. Health plans
3. Health care clearinghouses

The most likely covered entity category for Wellness professionals is "health care provider." However,

for a health care provider to qualify as a HIPAA covered entity, that provider must also conduct HIPAA "standard transactions" electronically. These transactions are typically associated with electronic billing between the provider and health plans, such as electronic claims submission or prior authorization submissions. Many wellness professionals do not bill insurance for their services. Thus, it may be that for many wellness professionals, HIPAA privacy and security rules do not apply to their practices. However, states may have privacy and security rules with which the wellness provider must comply, so it is important to work with your wellness lawyer to understand your privacy and security obligations. Even if there are no laws specific to wellness provider practice, your clients will likely expect privacy and security standards similar to HIPAA. So, wellness professionals may wish to voluntarily adopt HIPAA privacy and security standards to give their clients more comfort about their use and disclosure of health information.

The federal Department of Health and Human Services has issued a guidance document to help you decide whether HIPAA applies to you.

Regardless of whether a wellness professional is subject to HIPAA, it is a good idea from a legal risk standpoint to have policies and procedures in place to protect the sensitive information wellness professionals collect from inappropriate use and disclosure. These policies and procedures should address information that is stored both on paper and electronically. If the wellness professional uses a virtual platform to deliver their services, the professional should be familiar with that platform's privacy and security standards. Moreover, if the wellness professional provides group sessions, they should have all participants sign a group acknowledgement form to ensure everyone participating in the group respects other participants' privacy.

4. Form a Legal Entity.

Many wellness professionals, no matter the type, often think that being a solo practitioner is the easiest and best way to provide their services. Being a solo practitioner without filing any paperwork with the state is certainly easiest, but it may not be the best option. Insulating personal assets from business assets can be a really smart option because one never knows if or when a client may decide that they didn't like a wellness professional's service and wants to them. By creating a legal entity that is separate from the wellness professional as a person, the wellness professional makes it much more difficult for any lawsuit to threaten their personal assets, like their home, personal savings or personal vehicles.

5. Acquire Liability Insurance

Buying liability insurance for the wellness professional practice can cover some of the costs related to such lawsuits (should they occur). Without liability insurance, the wellness professional may need to use their own funds (whether personal or business) to pay for lawyers or fees associated with defending themselves in a lawsuit. As a result, establishing a legal entity and purchasing adequate liability

coverage can help the wellness professional feel more confident about their practice just in case something goes wrong in the future.

[1] B&P Code, Section 2068.

[2] The statute provides: “The notice required by this section shall not be smaller than 8 1/2 inches by 11 inches and shall be legibly printed with lettering no smaller than 1/2 inch in length, except the lettering of the word “NOTICE” shall not be smaller than 1 inch in length.”

[3] *Id*., §2053.6.

[4] *Id*., §2053.6.

[5] We have limited our discussion to California and Florida in consideration of your financial limitations, however, per our previous discussions, that the laws for alternative healers vary from state to state. Here we use SB577 as the model for disclosures and provide general legal guidance for application in other jurisdictions, and have not researched across states, merely introducing CA and FL rules as an examples.

About the Author:

Barbara J. Zabawa, JD, MPH is the founder and President of the Center for Health and Wellness Law, LLC, a law firm dedicated to improving legal access and compliance for the health and wellness industries. Learn more at www.wellnesslaw.com. She is also the founder of Pursesuitz, LLC, a mission-based fashion company featuring the Pocketwear Tank that promotes gender equality. Learn more at www.pursesuitz.com. Finally, she is founder of Lemonspark, a movement and podcast celebrating the sparks that lead people to meaningful pursuits after experiencing life’s lemons. See www.lemonspark.com.

Barbara is lead author of the book Rule the Rules on Workplace Wellness Programs, published by the American Bar Association. She is also author of “The Tug: Finding Purpose and Joy through Entrepreneurship,” published by Henschel Haus Publishing in Spring 2021. She is a frequent writer and speaker on health and wellness law topics, having presented for national organizations such as WELCOA, National Wellness Conference, HPLive, Healthstat University and HERO.

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Barbara serves health and wellness professionals and organizations across the country as an advocate,

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