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ARTICLE

No More Wild West: The Need for Wellness Professional Standards

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Abstract

The burgeoning wellness industry attracts a lot of practitioners who are largely unregulated. This "wild west" of wellness creates uncertainty for insurers, employers, consumers, and practitioners as to: (1) what services and items wellness practitioners can offer; (2) whether those practitioners are qualified; and (3) whether they behave in an ethical manner. Some guideposts for these wellness stakeholders would be welcome and may reduce consumer harm. Guideposts for wellness is especially crucial in a time when the *Braidwood Management, Inc. v. Becerra* case threatens the delivery of preventive care services in the health care sector. As we have learned from the health care sector, the state licensure scheme is confining and not conducive to national practice, particularly in the wake of virtual platform technologies. Thus, instead of state licensure, this article proposes a private Standard Development Organization (SDO) scheme that can create and enforce standards within the wellness industry.

Keywords: wellness; standards; self-regulation; market regulation; state licensure; ethical standards

Introduction

The wellness industry is booming and fills needs unmet by medical care. Wellness practitioners offer holistic health, coaching, and preventive services in a variety of settings. Many wellness practitioners are not licensed. Most wellness certifications are not recognized by the government or accredited by arbiters of quality. As a result, from a regulatory perspective, wellness is the wild west. The litigation in *Braidwood Management, Inc. v. Becerra* may eliminate no-cost coverage of preventive services recommended by the U.S. Preventive Services Task Force (USPSTF), which would likely accelerate consumer reliance on the wellness industry for preventive care. Asking consumers to rely on an industry that has no uniform professional standards is risky both from a consumer harm perspective and a regulatory perspective. The wellness industry would be best served by using a "soft law" approach to create standards of care and conduct before the government creates "hard laws" in wellness that would erect barriers to access for both practitioners and consumers. Standards could offer necessary boundaries for wellness practitioners and protect consumers from unethical practitioners. In Part I, this Article explores the current state of the wellness industry, including: (1) who practices it, who uses it, and why; and (2) who trains, hires, insures, and polices wellness practitioners. Part II explains why wellness practitioners should embrace professional standards and how the *Braidwood* decision may reinforce the appeal of the wellness industry and the need for wellness industry standards. Part III maps out what wellness professional standards may look like, given the types of harm currently experienced by wellness industry consumers. Part III also shows how the wellness industry could develop standards using a soft law approach, such as creating a wellness Standards Development Organization (SDO).

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I. The State of the Wellness Industry

A. What Is Wellness?

Wellness is a ubiquitous term and often used in conjunction with "health." But in the U.S. marketplace and the law, those two terms are distinguishable. In the law, those who work in wellness are uninhibited by robust regulation and free to do things that those who work in health care cannot. For example, federal law provides a free pass on health status discrimination as long as such discrimination occurs inside an employee "wellness" program.[1] Employers, who are generally prohibited by the Americans with Disabilities Act (ADA) from asking employees about sensitive health information, are able to do so through voluntary wellness programs.[2] In contrast, federal law prohibits health status discrimination by "health care" insurers through the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA).[3] Furthermore, tax law allows deductions for "health care expenses,"[4] but not for "wellness benefits."[5] The Food and Drug Administration (FDA) demands a rigorous approval process for drugs and medical devices, which by their very definition aim to treat or prevent health conditions.[6] In contrast, the FDA does not require premarket approval for nutritional supplements, cosmetics, or wellness devices, which constitute many of the products pushed by wellness practitioners.[7] Another law-related difference between the wellness and health industries, and a key point of this article, is the regulation (or lack thereof) of the industries. Health care is highly regulated through licensure, credentialing, billing, and data privacy requirements. In contrast, there is little to no parallel regulations for wellness.[8] Indeed, as noted in one health and wellness textbook:

> Unlike all other medical and healthcare practitioners, with the notable exception of exercise physiologists, there is no regulation of wellness practitioners. There are no minimal educational requirements, and no state license or registration is needed by anyone providing wellness services. While several organizations offer a certification in the fitness aspect of wellness (e.g., APTA [American Physical Therapy Association] and the American College of Sport Medicine [ACSM]), proof of education or certification in wellness is not required for someone to offer wellness programs.[9]

[1] 29 C.F.R. § 2590.702(c)(3) (2014).

[2] 42 U.S.C. § 12112(d)(4) (2008).

[3] 29 C.F.R. § 2590.702(a)(1) (2014); 45 C.F.R. § 156.125 (2022); *see also* Mary Crossley, *Discrimination Against the Unhealthy in Health Insurance*, 54 Kan. L. Rev. 73, 75 (2005).

[4] 26 U.S.C. § 213(d); *see also* Barbra J. Zabawa & JoAnn Eickhoff-Shemek, The Rules of Workplace Wellness Programs 147-49 (Am. Bar Assoc. Book Publ'g 2d. ed. 2021) (noting that § 213 is an exception carved out of the general rule of § 262, which prohibits deductions for personal, living, or family expenses).

[5] *Id.* (citing *Publication 502 (2023), Medical and Dental Expenses*, Internal Revenue Serv., https://www.irs.gov/publications/p502 [https://perma.cc/8NK2-ZNNM]) (noting that expenses for cosmetics, toiletries, weight-loss programs that are not to treat a specific disease diagnosed by a physician, vitamins, health club dues, and other general wellbeing activities or items are not deductible).

[6] Stephen McInerney, *Can You Diagnose Me Now? A Proposal to Modify the FDA's Regulation of Smartphone Mobile Health Applications with a Pre-Market Notification and Application Database Program*, 48 U. Mich. J.L. Reform. 1073, 1086-87 (2015); U.S. Food & Drug Admin., Complementary and Alternative Medicine Products and Their Regulation by the Food and Drug Administration (2007) (citing 21 U.S.C. § 321(g)(1) to define "drug").

[7] U.S. Food & Drug Admin., General Wellness: Policy for Low Risk Devices (2019); *see also* Yvonne Abraham, *Dietary Supplements, Largely Unregulated, Deserve the State's Skepticism*, Bos. Globe (Jan. 29, 2020, 5:53 AM), https://www.bostonglobe.com/2020/01/29/metro/dietary-supplements-largely-unregulated-deserve-states-skepticism/ [https://perma.cc/94J5-KLHP].

[8] *See* Robert I. Field, *Why Is Health Care Regulation So Complex?*, 33 Pharm. & Therapeutics 607, 607 (2008) ("Health care regulations are developed and enforced by all levels of government — federal, state, and local — and also by a large assortment of private organizations. At times, they operate without coordination."); Katie Suleta, *Health Care Coaches Are the Next Big Thing. They're Also Completely Unregulated*, STAT (May 9, 2023), https://www.statnews.com/2023/05/09/health-care-coaches-regulation/ [https://perma.cc/W8XD-HG7N]; *see also* Lisa Held, *Psychic Mediums Are the New Wellness Coaches*, N.Y. Times (Mar. 3, 2019), https://www.nytimes.com/2019/03/19/style/wellness-mediums.html [https://perma.cc/T2HQ-5VZ2] (noting that psychic mediums are self-regulated).

[9] Sharon Elayne Fair, Wellness and Physical Therapy 23 (Jones & Bartlett 2009).

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In the marketplace, wellness is free-ranged and encompasses a wide swath of products, services and practitioners. According to author Colleen Derkatch, wellness culture spans categories that include: (1) monitoring one's health to prevent a possible disease; (2) self-care by making healthy choices; (3) detoxification through use of natural health products; (4) participation in stress management and relaxation activities; and (5) adopting techniques and engaging in services to become the best version of ourselves in body, mind, spirit and productivity.[10]

These broad views of wellness invite a wide range of products, services, and practitioners to incorporate the concept of "wellness" into their business, resulting in a hard to manage, often confusing — or worse, misleading — wellness marketplace. As one writer noted recently:

> "Wellness" is an umbrella term. It can be used to cover forms of traditional Chinese medicine, such as acupressure and acupuncture; aspects of the Indian tradition Ayurveda; and more recent inventions like Reiki, which involves pressure-free caressing and non-touch hand movements. It can also encompass nutritional counseling, herbal supplements, exercise, homeopathy, massage, reflexology, yoga, touch therapy, art therapy, music therapy, aromatherapy, light therapy, and more.[11]

Most of today's consumers identify wellness as focused on addressing individual lifestyle illnesses and behaviors.[12] Much of the modern wellness industry operates on the assumption that with appropriate education and lifestyle modifications, people can look and feel more "well."[13]

This focus on lifestyle and behavior choices feeds the booming wellness market in the United States. A survey by McKinsey & Company (McKinsey) shows that wellness is a major priority for American consumers, who spend more than $450 billion annually on wellness products and services, and that figure will increase more than five percent per year.[14] Consumers in the United States view wellness in six dimensions:

> *Health:* over-the-counter medicine, vitamins, and personal hygiene
> *Fitness:* fitness clubs, studios, at-home fitness equipment, and fitness wearables
> *Nutrition:* diet programs, subscription food services, nutrition apps, and juice cleanses
> *Appearance:* skin care, dermo-cosmetics, hair care, and salon services
> *Mindfulness:* counseling or therapy, meditation studios, and mindfulness apps
> *Sleep:* sleep supplements, app-enabled sleep trackers, and other sleep-enhancing products[15]

B. Who Are Wellness Practitioners?

An army of "wellness practitioners" step in to help consumers achieve wellness. This article uses this general term to collectively refer to these practitioners, who go by many names, including health or wellness coaches, life coaches, personal trainers, nutrition counselors or coaches, Reiki practitioners, Ayurveda practitioners, mindfulness/meditation practitioners, holistic health counselors, fitness and exercise specialists, natural healers, aromatherapists, herbalists, sleep specialists, mental wellness

[10]Colleen Derkatch, Why Wellness Sells 6-7 (2022).

[11]Jessica Wapner, *Medicine's Wellness Conundrum*, New Yorker (Nov. 6, 2021), https://www.newyorker.com/science/annals-of-medicine/medicines-wellness-conundrum [https://perma.cc/PU9B-6EQX]

[12]*Id.* (noting that wellness has expanded to include the elimination of disease and disability, particularly those illnesses viewed as lifestyle driven).

[13]*Id.* at 24. Later in this article and in a separate article I highlight the faultiness in this assumption. See Barbara Zabawa, *Countering Workplace Wellness Bias through Wellness-Legal Partnerships*, J. L. & Health (forthcoming 2024).

[14]Shaun Callaghan et al., *Still Feeling Good: The US Wellness Market Continues to Boom*, McKinsey & Co. (2022), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/still-feeling-good-the-us-wellness-market-continues-to-boom [https://perma.cc/96ZE-8NRS].

[15]*Id.*

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coaches, relationship coaches, spiritual coaches and healers, yoga teachers or practitioners, and even hypnotists and psychic mediums.[16] What these wellness practitioners have in common is that none of them require any credential to start working in their role.[17] A symptom of this lack of regulation is an ever-evolving nomenclature of who practices "wellness."

As yoga practice demonstrates, wellness practitioners are typically white, middle-aged women of a high socioeconomic status.[18] This closely corresponds to data gathered from the career company Zippia, which found that 66 percent of all wellness specialists are women, the same percentage are white, and their average age is forty-seven years old.[19] Also of note, the vast majority of wellness specialists (71 percent) have a Bachelor's degree; 16 percent have a master's degree, about 8 percent have an associate's degree, 2.3 percent have a high school education, and only 1.4 percent have a certificate.[20] Notably, many wellness practitioners have left roles in the traditional health care system to work in wellness. A recent article in the *Washington Post* declares that "nurses are leaving hospitals in droves" and establishing new careers, particularly in the wellness space.[21] According to a 2022 issue brief from the U.S. Department of Health and Human Services, "22 percent [of frontline nurses] were considering leaving their positions in the next year, and 60 percent of those said they were more likely to do so because of the pandemic."[22] Over half of those nurses said "they planned to seek another career, a non-direct care position, or retir[e]."[23] The unregulated wellness industry can offer flexibility and growth that many burnt-out licensed health care practitioners crave. Finally, it is worth noting that many businesses incorporate the words "wellness" or "self-care" to destigmatize their product or service offering.[24] Psychedelic drug clinics, such as ketamine clinics, promote themselves as "wellness

[16] *32 Health and Wellness Business Ideas for 2022*, Wellpreneur, https://wellpreneur.com/health-and-wellness-business-ideas/ [https://perma.cc/3HA2-2NCH] (listing the following wellness practitioner titles: health and wellness coach, holistic health counselor, corporate wellness coach or consultant, yoga teacher, personal trainer, nutritionists and nutritional therapists, herbalists, acupuncturist, weight loss coach, personal chef, massage therapist, services related to aging and senior health, wellness retreats); Held, *supra* note 8; *see also* Jenny Cowley et al., *Almost Anyone Can Become a Life Coach. A Hidden Camera Investigation Reveals Why That's a Problem*, CBC News (Feb. 26, 2022, 4:00 AM) https://www.cbc.ca/news/canada/marketplace-life-coach-1.6364745 [https://perma.cc/5YKE-T6YH] (finding some life coaches in Canada trying to treat clients' anxiety and depression without proper credentials and training).

[17] Barbara J. Zabawa, *Health Coach Legal Guidelines*, Wellness Council of Am., https://www.welcoa.org/blog/health-coach-legal-guidelines/ [https://perma.cc/SKN9-PBHH].

[18] Crystal L. Park et al., *Who Practices Yoga? A Systematic Review of Demographic, Health-Related, and Psychosocial Factors Associated with Yoga Practice*, 38 J. Behav. Med. 460, 463 (2015).

[19] *Wellness Specialist Demographics and Statistics in the US*, Zippia, https://www.zippia.com/wellness-specialist-jobs/demographics/ [https://perma.cc/KP7K-EUTA]; *What Does a Wellness Specialist Do?*, Zippia, https://www.zippia.com/wellness-specialist-jobs/what-does-a-wellness-specialist-do/ [https://perma.cc/R6MF-67L9] (last updated Feb. 16, 2024) (defined "wellness specialist" as a person "responsible for guiding clients in achieving their wellness and healthy lifestyle goals by creating fitness training and programs according to clients' needs and concerns," conduct regular counseling for their clients regarding daily activities, exercise, routines, stress levels, and eating habits, suggests various supplementary medication and meal recommendations to help stabilize clients' immune systems and energize them on daily tasks).

[20] *Best Colleges and Majors for Wellness Specialists*, Zippia, https://www.zippia.com/wellness-specialist-jobs/education [https://perma.cc/XD2A-ZLBX]. It is unclear from the data whether the certificate statistic overlaps with the degree statistic.

[21] Jennifer Miller, *Why are Nurses Quitting? Ask the Nurse No Hospital Will Hire.*, Wash. Post (Feb. 21, 2023, 8:00 AM), https://www.washingtonpost.com/lifestyle/2023/02/21/katie-duke-instagram-nursing-pandemic/ [https://perma.cc/DU3J-VWYB]. Anecdotally, in my almost ten-year practice as a wellness lawyer, I have seen a growing interest in wellness from registered nurses, physician assistants, nurse practitioners, psychologists, respiratory therapists, and even physicians. Most of these individuals have expressed exhaustion with traditional health care, particularly in the aftermath of COVID-19.

[22] Off. of the Assistant Sec'y for Planning & Eval., Dep't of Health & Hum. Servs., No. HP-2022-13, Impact of the COVID-19 Pandemic on the Hospital and Outpatient Clinician Workforce 13 (May 2022), https://aspe.hhs.gov/sites/default/files/documents/9cc72124abd9ea25d58a22c7692dccb6/aspe-covid-workforce-report.pdf [https://perma.cc/DTG2-G9Y5].

[23] *Id.*

[24] *See, e.g.*, Rina Raphael, The Gospel of Wellness 266 (2022) (discussing how egg freezing start-ups' use of trendy terms like "self-care" transforms a medical procedure into something more empowering and destigmatizes fertility treatment).

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clinics";[25] cannabis has been re-branded as a wellness product;[26] and even psychic mediums "now work in the general field of wellness, calling themselves 'intuitives' or 'intuitive healers,' who channel 'energy' that helps people discover what they want out of life."[27]

C. Who Uses Wellness Products and Services, and Why?

Wellness consumer demographics in the United States mimic those of wellness practitioners, which makes sense because many wellness consumers become apostles of wellness after having a positive experience with a wellness product or service.[28] According to the Centers for Disease Control and Prevention (CDC), non-Hispanic white women are more likely to use yoga, meditation, and chiropractors than men or Hispanic and non-Hispanic Black adults.[29] Dietary supplement use is also higher among older, white women.[30] The Pew Research Center found that about twenty percent of Americans have tried alternative treatments — such as herbal dietary supplements, acupuncture, chiropractic, energy therapies, and other therapies that are not part of standard conventional Western-based medical care — in lieu of conventional medicine.[31] Another twenty-nine percent of Americans have used such alternative treatments in conjunction with conventional medical treatments.[32] Wellness practitioners provide many of these alternative services. People may use wellness products and services to address a wide range of psychological, emotional, and physical conditions. As Colleen Derkatch postulates, wellness sells because it creates a vision of a good life that is full of purpose and meaning.[33] That can appear very seductive and captivating for consumers. Indeed, "wellness is a powerful branding technique, one that has an almost horoscopic quality in that it invites consumers to project onto it their desires for self-determination, flourishing, and the good life."[34] This likely explains why so many "outlier" products and services, such as cannabis, psychedelic drugs, and psychic mediums, are branded as "wellness" products and services: to elevate their use and attract a new set of consumers.

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[25]Marisa Meltzer & Dani Blum, *A Ketamine Clinic Treads the Line Between Health Care and a "Spa Day for Your Brain,"* N.Y. Times (Mar. 14, 2022), https://www.nytimes.com/2022/03/11/well/mind/wellness-ketamine-mental-health.html [https://perma.cc/SL77-25EB].

[26]Dana Goodyear, *California Makes Marijuana a Wellness Industry*, New Yorker (Jan. 31, 2018), https://www.newyorker.com/culture/photo-booth/california-makes-marijuana-a-wellness-industry [https://perma.cc/47N6-NPYT] (noting that "thousands of people—disproportionately people of color—have been arrested or jailed on marijuana-related charges," but marijuana is now being marketed to affluent Californians as a way to optimize personal experience, regulate moods, appetites, pain and creative flow).

[27]Held, *supra* note 8.

[28]Tonia Callender, *Adding Color to Wellness, in* The Future of Wellness 2021 63, 64 (2021) (discussing how the wellness industry is largely catered to white individuals).

[29]Tainya C. Clark et al., *Use of Yoga, Meditation, and Chiropractors Among U.S. Adults Aged 18 and Over*, at 4 (Nat'l Ctr. for Health Stats., Data Brief No. 325, 2018), https://www.cdc.gov/nchs/products/databriefs/db325.htm [https://perma.cc/XW8D-F46Q] (noting that past research has identified yoga, meditation, and seeing a chiropractor as some of the most commonly used complementary health approaches).

[30]Suruchi Mishra et al., *Dietary Supplement Use Among Adults: United States, 2017-2018*, at 2 (Nat'l Ctr. for Health Stats., Data Brief No. 399, 2021), https://www.cdc.gov/nchs/products/databriefs/db399.htm [https://perma.cc/7UBH-J8SD].

[31]Cary Funk et al., Pew Rsch. Ctr., Vast Majority of Americans Say Benefits of Childhood Vaccines Outweigh Risks 32 (2017), https://www.pewresearch.org/science/2017/02/02/vast-majority-of-americans-say-benefits-of-childhood-vaccines-outweigh-risks/ [https://perma.cc/SE52-95ZT].

[32]*Id.*

[33]Colleen Derkatch, Why Wellness Sells: Natural Healing in a Pharmaceutical Culture 11-12, 25 (2022) (ebook) ("Underneath all the pills, products, gurus, clinics, and mantras that wellness culture comprises is a drive to access some approximation of what we perceive as the good life" and maintaining that wellness is ultimately an object of 'cruel optimism'—something we ardently desire that, in our seeking it, becomes an obstacle to our flourishing.").

[34]*Id.* at 25. The author also quotes Nicole Cliffe, who "mused" on Twitter, "The person who came up with 'wellness' as a product adjective is probably living in a castle carved out of gold right now." *Id.* (quoting Nicole Cliffe (@Nicole_Cliffe), Twitter (Mar. 26, 2015, 2:31 PM), https://twitter.com/Nicole_Cliffe/status/581206965885399040 (archived by author at https://www.colleenderkatch.com/2018/04/20/archivedcliffetweet/)).

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For many others, wellness offers respite from chronic illness. Individuals with chronic conditions are more likely to use alternative medical treatments than those without such conditions.[35] For example, research shows individuals turn to yoga for postmenopausal symptoms, low back pain, cancer, and heart disease.[36] As Derkatch observes, consumer interest in wellness may be:

> an expression of broader public concerns about health and healthcare that are not addressed by doctors, public health agencies, or legislators as we collectively work longer hours, get less sleep, live under increasing financial strain, and spend much of our lives sitting (mostly in front of screens), all in the name of productivity.[37]

Indeed, some studies have noted a growing distrust in conventional health care providers.[38]

The failure of conventional health care to support consumers suffering from the demands of modern life is a critical aspect of consumer attraction to wellness, particularly for marginalized groups who are frequently dismissed by the conventional health care system.[39] One reason so many people, particularly women, turn to wellness practitioners is potential "medical gaslighting" by conventional medicine, or dismissing a patient's symptoms.[40] This gaslighting may partially derive from the short time that physicians spend with a patient during a typical medical visit, which ranges between nine and twenty-four minutes.[41] One study found that "physicians listen to their patients for an average of eleven seconds before interrupting."[42] Other surveys show that the vast majority of consumers want the traditional health system to involve wellness activities, such as healthy eating and exercise, but there is a current disconnect between patient desires and experiences.[43] Nineteen percent of respondents to a survey conducted by The Harris Poll complained about the medical system's lack of focus on "preventive care

[35]Funk et al., *supra* note 31, at 33.

[36]Park et al., *supra* note 18, at 460.

[37]Derkatch, *supra* note 33, at 13-14 (noting that these impacts are compounded for queer, disabled, Black, Indigenous and other people of color who live under the additional weight of individual and institutionalized discrimination, marginalization, economic disadvantage, and personal and intergenerational trauma).

[38]Raphael, *supra* note 24, at 125; *see also* Richard S. Isaacs, *5 Steps to Restore Trust in U.S. Health Care*, Harv. Bus. Rev. (Sept. 8, 2022), https://hbr.org/2022/09/5-steps-to-restore-trust-in-u-s-health-care [https://perma.cc/7EEX-NCYL]; Paul Hudson & Michelle A. Williams, *People Are Much Less Likely to Trust the Medical System if They Are from an Ethnic Minority, Have Disabilities, or Identify as LGBTQ+, According to a First-of-Its-Kind Study by Sanofi*, Fortune (Jan. 31, 2023, 7:30 AM), https://fortune.com/2023/01/31/people-trust-health-medical-system-ethnic-minority-disabilities-identify-lgbtq-study-sanofi-hudson-williams/ [https://perma.cc/4UL9-W7Q9].

[39]*See supra* note 38; *see also* Francesca Butler, *Is the Wellness Industry Dangerous for Our Health?*, Health Pol'y P'ship: Blog (July 3, 2023), https://www.healthpolicypartnership.com/is-the-wellness-industry-dangerous-for-our-health/ [https://perma.cc/D8EV-TBXT] (citing Rina Raphael's *The Gospel of Wellness*, which argues, according to Butler, that, "many people (especially marginalized groups) are failed by health systems… [because] they are under-represented in clinical trials and many of the challenges they face… are frequently dismissed. Furthermore, the significant gaps in the provision of mental health services mean that people have to find other ways of helping themselves," such as the wellness industry).

[40]Allana Akhtar, *3 Shady Ways Wellness Brands Lure Women into Buying Expensive, Useless Products, According to New Book* "The Gospel of Wellness," Bus. Insider (Oct. 27, 2022, 5:32 PM), https://www.insider.com/rina-raphael-gospel-of-wellness-alternative-medicine-supplements-natural-organic-2022-10 [https://perma.cc/57YT-R2GK] (defining "medical gaslighting" as dismissing a patient's symptoms and quoting Rina Raphael as saying, "For many women, traditional Western medicine seems built to make a buck, not to significantly care for their needs.").

[41]*See* Wapner, *supra* note 11.

[42]*See id.* To be fair, as studied by the American Medical Association, physicians, like nurses, are also facing burnout and are under a lot of stress from administrative burdens, inadequate support in practices and health systems to mitigate obstacles, deliberate disinformation campaigns, political attacks on medical science, and third-party interference in the patient-physician relationship. *See* Jack Resneck Jr., *Burnout Is a Health Crisis for Doctors—and Patients*, AMA (Mar. 9, 2023), https://www.ama-assn.org/about/leadership/burnout-health-crisis-doctors-and-patients [https://perma.cc/5XLX-BLAK].

[43]Dan Clarin, Kauffman Hall, 2022 State of the Healthcare Consumer Report: Who Will Help Consumers Put the Pieces Together? 9 (Sept. 27, 2022) https://www.kaufmanhall.com/insights/research-report/2022-state-healthcare-consumer-report [https://perma.cc/T4K2-3BSP] (stating that seventy percent of surveyed respondents report wanting health systems to be more actively involved in supporting their health management activities).

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and wellness."[44] The Harris Poll found that the U.S. health care system most commonly falls short of meeting consumers' needs with regard to appointment wait times and service costs, in addition to the system's focus on treating acute problems rather than preventive care and wellness.[45] Thus, when it comes to focusing on an individual's overall well-being and offering more holistic services and attention to consumers, the wellness industry stands ready to fill the ever-growing gap left by conventional medicine.[46] This alarming consumer desire to replace traditional health care with unregulated wellness products and services best emphasizes the urgent and desperate need for wellness practitioner standards.

D. Who Is Currently Training, Certifying, Hiring, Insuring and Policing Wellness Practitioners?

Just like wellness practitioners themselves, the entities that train, certify, hire and insure wellness practitioners are vast, varied, and fragmented. The rigor and type of wellness practitioner training and certification programs spans from easy to more challenging, but none are required for practice. Wellness practitioners can work in a variety of settings, but again, there is currently no universally accepted way for those who hire wellness practitioners to know whether that practitioner is qualified. The same is true for insurers who offer professional liability insurance to wellness practitioners. Because of the absence of any universally accepted standards, it is difficult to evaluate wellness practitioner credentials and skills.

1. Who Trains and Certifies?

There are countless training and certification programs for wellness practitioners, and the quality of those programs varies widely. Training programs may be marketed as "wellness certificate"[47] programs, especially for the purposes of worksite wellness programming, or more specific training programs that focus on a particular aspect of wellness like nutrition,[48] fitness,[49] coaching,[50] energy

[44]John Gerzema, Harris Poll, The Patient Experience: Perspectives on Today's Healthcare 7 (2023) https://www.aapa.org/download/113513/?tmstv=1684243672 [https://perma.cc/VGD4-558S] This poll was conducted in English and Spanish online in the United States and surveyed 2,519 adults age 18+ between February 23 and March 9, 2023.

[45]*Id.* at 7.

[46]Wapner, *supra* note 11 (even with the wellness industry standing ready to fill in gaps left by conventional medicine, it too is not meeting all consumers' needs); *see* Callaghan et al., McKinsey & Co., *supra* note 14 (according to McKinsey & Company, the wellness industry fails to sufficiently meet consumer needs around sleep and mindfulness, as well as the particular needs for Black consumers; specifically, 47 to 55 percent of Black consumers said they needed more wellness products and services to meet their needs, compared to 35 to 39 percent of Asian consumers and 30 to 35 percent of White consumers); *see also* Ash-Har Quaraishi et al., *Teens Turning to TikTok for Mental Health Advice are Self-Diagnosing*, CBS News (Feb. 27, 2023), https://www.cbsnews.com/news/social-media-mental-health-self-diagnosis/ [https://perma.cc/UQ5E-MJMD] (many young people are turning to TikTok for mental health needs, leading to untrained social medial influencers to deliver misinformation about mental illness; notes that what is online is a "free-for-all" and that there is no accountability and no responsibility taken).

[47]*See, e.g.*, *The Gold-Standard Wellness Certification*, Nat'l Wellness Inst., https://nationalwellness.org/certification/ [https://perma.cc/XT3S-2QRR]; Chap. Inst., Certified Wellness Program Coordinator (2018) https://chapmaninstitute.com/wp-content/uploads/Level_I_Course_Workbook_Live_2018.pdf [https://perma.cc/V6VP-FPNY].

[48]*See, e.g.*, *Nutrition Certifications & Courses*, Precision Nutrition, https://web.archive.org/web/20230324005825/https://www.precisionnutrition.com/nutrition-certification; *The Health Coach Training Program*, Inst. for Integrative Nutrition, https://course.integrativenutrition.com/the-health-coach-training-program [https://perma.cc/24KF-D82D].

[49]Steve Aldana, *22 Best Wellness Certifications, Personal Training and Health Coaching in 2023*, WellSteps, https://www.wellsteps.com/blog/2020/01/02/wellness-certifications-health-coach-certifications-personal-training-certifications/ [https://perma.cc/UE8M-AW3J] (listing six fitness training organizations).

[50]*Id.* (listing nine health coaching certification organizations); *see also* Sarah Haye Coomer & Aleana Hall, *Best Health Coach Certification Programs 2023*, Forbes (Sept. 25, 2023), https://www.forbes.com/health/wellness/best-health-coach-certification/ [https://perma.cc/8JXA-8VXN] (listing six health coaching programs); *Approved Training Programs*, Nat'l Bd of Health & Wellness Coaching, https://nbhwc.org/find-an-approved-training-program/#!directory/ord=rnd [https://perma.cc/M36T-RNKQ] (listing 126 health coach training programs at both universities and private organizations that have been "approved" by the National Board of Health and Wellness Coaching).

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healing,[51] or mental wellness.[52] Given the wide range of wellness "specialties," thousands of programs and organizations exist to educate wellness practitioners. For example, the Yoga Alliance identified 6,000 registered yoga schools alone in 2021.[53] A simple Google search for a "list of wellness certifications" yields an array of different wellness education organizations, including programs affiliated with universities.[54] It is worth repeating that certifications are not even necessary to start working in wellness.[55]

Many of the wellness certifications do not require any specific amount of education or experience, even those from the most prestigious universities in the country. For example, a "health enthusiast" with no prerequisites other than an interest in wellness can obtain a certificate from Harvard Medical School in "Health and Wellness: Designing a Sustainable Nutrition Plan."[56] Or, in two weeks a "wellness professional" can earn a Wellness Counseling certificate from Cornell College of Human Ecology.[57] Not only are there low eligibility criteria established by reputable institutions to earn any credential in the wellness industry, but very few of these training programs are accredited by a standards-developing organization. One such accreditation organization is the Institute for Credentialing Excellence (ICE).[58] ICE does not specialize specifically in establishing and enforcing wellness standards, but rather accredits programs that offer certifications in various industries, including construction, management, food and beverage, finance, manufacturing, and health care.[59] Of the thousands of wellness certification programs that exist within universities and other private companies, only eighteen organizations offer wellness certification programs that are accredited by ICE, and most of those certifications pertain to fitness.[60]

To obtain accreditation through ICE, wellness certification programs are expected to adhere to "defined standards by a third party"[61] and a "code of ethics."[62] These standards and ethical codes, however, bind on the organizations delivering wellness certification programs, not the individuals

[51] *See, e.g.*, *You Are a Healer: Professional Training for Holistic Practitioners*, Sacred Wellness Sch. of Healing Art, https://www.sacredwellness.co/ [https://perma.cc/P9YE-Q2YV] (offering an "Energy Medicine Practitioner Diploma," Reiki certifications, and crystal energy healing certifications).

[52] *The Best Mental Health Coach Certifications in 2023*, Life Coach Mag., (Jul. 15, 2023) https://www.lifecoachmagazine.com/best-mental-health-coach-certification/ [https://perma.cc/6TSX-MRDH] (listing five programs in mental health and wellness coaching).

[53] Yoga All., Yoga Alliance Annual Report: 2020-2021 16-17 (2021) https://issuu.com/yogaalliance/docs/annual_report_2020-2021_final [https://perma.cc/P2AY-J4GS].

[54] For example, a Google search for "list of wellness certifications" reveals programs such as Cornell University Online's "Wellness Coaching Certificate" and Functional Medicine Coaching Academy, Inc.'s "Functional Medicine Training program." *See, e.g.*, *Wellness Counseling: Cornell Certificate Program*, eCornell, https://ecornell.cornell.edu/certificates/healthcare/wellness-counseling/ [https://perma.cc/KN5D-CETM]; *Transform Lives As a Functional Medicine Health Coach*, Functional Med. Coaching Acad., Inc. https://functionalmedicinecoaching.org/program/health-coach-certification [https://perma.cc/53P6-VL53].

[55] *See* Wellness and Physical Therapy, *supra* note 9.

[56] *Health and Wellness: Designing a Sustainable Nutrition Plan Certificate Program*, Harv. Med. Sch. Exec. Ed., https://execonline.hms.harvard.edu/health-and-wellness [https://perma.cc/MJT7-4F3C].

[57] *Wellness Counseling: Cornell Certificate Program*, eCornell, https://ecornell.cornell.edu/certificates/healthcare/wellness-counseling/ [https://perma.cc/KN5D-CETM].

[58] *About Us*, Inst. for Credentialing Excellence https://www.credentialingexcellence.org/About [https://perma.cc/6DVH-RRG8].

[59] *Id.*

[60] *See Accredited Program Search*, Inst. for Credentialing Excellence, https://ice.learningbuilder.com/Search/Public/MemberRole/ProgramVerification2?model.Organization=&model.Accrediation=&model.ProgramAcronym=&model.Industry=Fitness+and+Wellness&model.ProgramName=&performSearch=true&_o=&_d=&_p=0&_s=20 [https://perma.cc/G9TY-F59R].

[61] Inst. for Credentialing Excellence, Accreditation Through I.C.E.: A Benchmark of Quality 2 https://www.credentialingexcellence.org/Portals/0/Docs/Accreditation/I_C_E_-Accreditation-Brochure.pdf [https://perma.cc/79FR-6K73].

[62] *Code of Ethics*, Inst. for Credentialing Excellence, https://www.credentialingexcellence.org/About/Code-of-Ethics-Statement [https://perma.cc/GKM3-2VHE].

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receiving certificates and delivering wellness services.[63] Accredited organizations may have some standards for their students or members who earn certificates, but these are not typically comprehensive and enforcement mechanisms rarely exist to capture any program or participant failure to adhere to the code of ethics.[64] For example, the Principles of Ethical Behavior for members of the American College of Sports Medicine (ACSM), a membership organization that offers ICE-accredited certification programs in personal training and exercise physiology, are as follows:

- Treat and/or train people to maintain honesty and integrity.
- Treat or train people with the utmost care and to the highest level of their professional competence.
- Maintain confidentiality and protection of personal medical information and other data as required by relevant laws, policies, and ethical standards.
- Be aware of and adhere to international doping control standards as determined by the List of Prohibited Substances and Methods published by the World Anti-Doping Agency or by the relevant anti-doping authority when treating or training active people.
- Provide appropriate care and/or train people based on their physical and/or medical conditions.
- Support research integrity and not support plagiarism, duplicate publication, slandering reputation, etc.
- Not harass or retaliate against anyone participating in ACSM activities.[65]

This list of ethical principles lacks any guidance concerning marketing, billing practices, previous violations of law or acts of negligence, informed consent, or scope of practice concerns — which, as discussed in Part III, can harm consumers.

In addition, the National Board of Health and Wellness Coaching (NBHWC) has recently become involved in approving wellness certification programs. NBHWC approves health and wellness coaching programs affiliated with universities and other private entities.[66] NBHWC approval requires wellness coaching programs to meet certain standards, such as minimum numbers of instructional hours and practice coaching sessions, certain skills assessments, and certain faculty requirements (like retaining

[63] *Id.*

[64] For example, the American Council on Exercise (ACE) has wellness certificate programs accredited by ICE, but does not list anywhere on its website a code of ethics for individuals who complete that certificate. *See Standards & Professionalism*, Am. Council on Exercise, https://www.acefitness.org/about-ace/our-efforts/professionalism/ [https://perma.cc/VJ38-X2F5] (requesting exercise professionals to obtain a certification from an accredited program and stating that ACE participates in efforts to adopt standards in the wellness industry but not listing any ethical standards for ACE certificate holders specifically). Another ICE-accredited education organization, the National Exercise Trainers Association (NETA), fails to list any Code of Ethics for wellness certificate holders and does not list any grievance procedure for those adversely impacted by a NETA-trained individual. *See A Clear Path to Achieve All Your Personal & Professional Fitness Goals*, Nat'l Exercise Trainers Ass'n, https://www.netafit.org/ [https://perma.cc/K984-KLJS]. *Cf. ACSM Member Code of Ethics*, Am. Coll. of Sports Med., https://www.acsm.org/membership/member-code-of-ethics [https://perma.cc/8TFE-CRBQ] (American College of Sports Medicine (ACSM), which also has certificate programs accredited by ICE, but does have a Code of Ethics for members to follow. The website shows not only a Code of Ethics for ACSM members but also a complaint form that consumers can complete if they believe an ACSM member has violated the code of ethics); *see also Accountability*, Yoga All., https://www.yogaalliance.org/Our_Standards/Accountability [https://perma.cc/DB7P-FMMG] (last updated Apr. 9, 2021) (referencing and linking to a Code of Conduct for Yoga Alliance members and offering a complaint procedure and enforcement mechanism for those members who fail to adhere to the Yoga Alliance Code of Conduct, Ethical Practice and Standards). The Wellness Compliance Institute (WCI) offers a Code of Conduct for workplace wellness professionals, but there is no enforcement mechanism for failure to abide by the code. *See Codes of Conduct*, Wellness Compliance Inst., https://wellnessci.org/codes-of-conduct/ [https://perma.cc/D57E-Z5FD].

[65] *ACSM Member Code of Ethics, supra* note 64.

[66] *Approved Training Program*, Nat'l Bd. for Health & Wellness Coaching, https://nbhwc.org/find-an-approved-training-program/#!directory/ord=rnd [https://perma.cc/HE8U-DY25] (listing 126 health coach training programs at both universities and private organizations that have been "approved" by the National Board of Health and Wellness Coaching).

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faculty with coaching backgrounds health and wellness educational degrees).[67] As of 2024, NBHWC has accredited 126 health and wellness coaching certification programs.[68]

In 2016, NBHWC partnered with the National Board of Medical Examiners to create a "unified code of ethics, education, research, and credentials to standardize training and certification for health coaches."[69] The code of ethics applies to any NBHWC credentialed health and wellness coach.[70] Examples of NBHWC ethical guidelines include:

- Refraining from unlawful discrimination;
- Making verbal and written statements that are true and accurate about what health coaching offers;
- Accurately identifying coaching qualifications, expertise, experience, training and certifications;
- Avoiding conflicts of interest and disclosing those conflicts when they arise;
- Maintaining client confidentiality;
- Having a clear coaching services agreement and honoring the agreement;
- Avoiding sexual or romantic relationships with clients, employers, students, mentees and supervisees;
- Respecting the client's right to terminate the coaching relationship, subject to the provisions of the agreement and remaining alert to indications that there is a shift in the value received from the coaching relationship;
- Protecting the health, safety and welfare of the client by making appropriate referrals when necessary; and
- Continuing in the development of the coach's professional skills.[71]

Although more robust than the ACSM ethical guidelines, the NBHWC Code of Ethics offers little to no guidance about billing and other business practices; just like the ACSM code of ethics, no explicit accountability mechanism exists for coaches who do not adhere to the code.[72]

Despite ICE accreditation and NBHWC approval of a few wellness training programs, there is no enforcement authority or overarching, consensus-based wellness authority at the state or national level that can provide assurance to consumers, employers, and insurers that wellness practitioners are held to enforceable standards of competence and ethics. Moreover, programs accredited or approved by ICE and NBHWC do not capture the universe of wellness practitioners. As noted above, the wellness industry is vast and fragmented. Having standards that apply to all those who identify as "wellness practitioners" would give consumers, employers, and insurers a valuable resource to determine the quality of the wellness services offered.

[67] *Program Approval Published Standards*, Nat'l Bd. for Health & Wellness Coaching, https://nbhwc.org/program-approval-standards/ [https://perma.cc/NEQ4-JET3].

[68] *Approved Training Program, supra* note 66.

[69] Sarah Hays Coomer, *What Is a Health Coach and What Do They Do?*, Forbes, https://www.forbes.com/health/nutrition/what-is-a-health-coach/ [https://perma.cc/T2DJ-2TR4] (last updated Jan. 9, 2024).

[70] *Code of Ethics*, Nat'l Bd. of Health & Wellness Coaching, https://nbhwc.org/code-of-ethics/ [https://perma.cc/Q89Q-R3F5] (last updated Feb. 1, 2017). In addition to approving health coaching education programs, NBHWC also offers a "Board Exam" for health coaches that complete an NBHWC-approved education program, complete 50 health and wellness coaching sessions, and document that they have completed at least an associate's degree or 4,000 hours of work experience. *Become a National Board Certified Health and Wellness Coach (NBC-HWC): Eligibility Requirements*, Nat'l Bd. of Health & Wellness Coaching, https://nbhwc.org/exam-eligibility-requirements/ [https://perma.cc/E3EN-XB6L].

[71] *Code of Ethics, supra* note 70.

[72] *Id.* Although NBHWC mentions that the Code of Ethics are intended to be "enforceable standards" and asks NBHWC-credentialed coaches to pledge compliance with the Code of Ethics, there is no enforcement mechanism for consumers provided on its website.

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2. Who Hires?

Wellness practitioners can work independently for corporations as part of a corporate wellness program, insurance brokers,[73] health care providers,[74] fitness centers and health clubs,[75] or startup companies.[76] Again, unless a company hiring wellness practitioners requires certain credentials to obtain employment, there are no current legal or market-based requirements to which a wellness practitioner must adhere before calling themselves a "wellness practitioner" or working as one. According to a 2022 report on employee wellness industry trends, seventy-six percent of companies are investing in more stress management and resilience resources for their employees.[77] A *Forbes* article advises employers interested in investing in such resources to hire a "wellness consultant" or "chief wellness officer," which could be a "certified health coach" or some other "board-certified practitioner."[78] Based on the disorganized and unregulated nature of the wellness industry, employers have little guidance to determine whether someone who calls themselves a "wellness consultant" or "certified health coach" is competent or ethical. And yet, reputable organizations like *Forbes* encourages employers to seek out such individuals to help employees with stress and resilience.

3. Who Insures?

A number of professional liability insurers offer coverage to a wide variety of wellness practitioners, including CPH & Associates,[79] Alternative Balance,[80] Healthcare Providers Services Organization (HPSO),[81] and CM&F Group.[82] One insurer confirmed that they have no criteria or standards by which to measure a wellness practitioner's qualifications and insurability risk.[83] This insurer expressed significant interest in the creation and adoption of wellness practitioner standards.[84]

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[73]*See e.g.*, Coomer, *supra* note 69 (stating that health coaches, a type of wellness professional, can work for insurance companies, for corporate wellness programs or private practice); *see also* Suleta, *supra* note 8 (stating that health coaches can be hired independently from $50 to $150/session or through a workplace wellness program).

[74]Heather D. Bennett et al., *Health Coaching for Patients with Chronic Illness*, 17 Fam. Prac. Mgmt. 24, 24-29 (2010) (stating that health coaches can help family physicians as part of the care team).

[75]*Occupational Outlook Handbook: Fitness Trainers and Instructors*, U.S. Bureau of Lab. Stats., https://www.bls.gov/ooh/personal-care-and-service/fitness-trainers-and-instructors.htm (last visited Feb. 28, 2024).

[76]Serena Oppenheim, *How the Corporate Wellness Market has Exploded: Meet the Latest Innovators in the Space*, Forbes (June 11, 2019), https://www.forbes.com/sites/serenaoppenheim/2019/06/11/how-the-corporate-wellness-market-has-exploded-meet-the-latest-innovators-in-the-space/?sh=3a2c6e495d91 [https://perma.cc/V8BX-H3U8] (highlighting several innovative wellness startups in the corporate wellness space); *see also* Abdo Riani, *Four Innovative Startup Opportunities in Wellness and Mental Health*, Forbes (Aug. 31, 2023), https://www.forbes.com/sites/abdoriani/2023/08/31/4-innovative-startup-opportunities-in-wellness-and-mental-health/?sh=32a96e6d3747 (featuring four wellness startups that could employ wellness professionals).

[77]Victoria Franca, *The Rise of Corporate Wellness to Support Employee Retention*, Forbes (Nov. 4, 2022), https://www.forbes.com/sites/forbesbusinesscouncil/2022/11/04/the-rise-of-corporate-wellness-to-support-employee-retention/?sh=57ea7f124649 [https://perma.cc/J5AS-XL7T] (citing Wellable Labs, 2022 Employee Wellness Industry Trends Report 8 (2022)).

[78]*Id.*

[79]*See Individual Malpractice Insurance: Fitness, Wellness & Coaching*, CPH Ins., https://cphins.com/individual-wellness/ [https://perma.cc/46UG-JGKW] (offering professional liability insurance to those working in fitness, wellness and coaching).

[80]*See Health Coach Insurance*, Alt. Balance, https://alternativebalance.com/health-coach-liability-insurance/ [https://perma.cc/PH3G-NU96] (offering professional liability insurance to health coaches, ayurveda and aromatherapy professionals, yoga professionals, and energy work professionals, among others).

[81]*See Healthcare Professions Covered Through HPSO*, Healthcare Providers Serv. Org., https://www.hpso.com/Insurance-for-you/Individual-Practitioners/Other-healthcare-providers/Professions-covered [https://perma.cc/2Y2K-T2ZH] (offering malpractice insurance to fitness professionals, health coaches and wellness counselors, to name a few).

[82]*See Professional Liability Insurance Specialists for Over 100 Years*, CM&F Group, https://www.cmfgroup.com/ [https://perma.cc/R7NP-QDXS] (offering malpractice insurance to various health and wellness professionals, including coaches, nutritionists and reiki practitioners).

[83]Barbara Zabawa et al., Creating Standards for Wellness Professionals: The Why, Who, and How, Webinar for the National Wellness Institute (Oct. 26, 2023) (Charles Hodson stating that CPH & Associates, the professional liability insurance company he owns, does not have any standards by which to measure a policyholder's competency and insurability risk).

[84]*Id.*

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Another liability insurer has a client "code of ethics" with which insureds are expected to comply or face nonrenewal of their policy.[85] But, like the ethical codes for ACSM and NBHWC, this code is not comprehensive and omits guidelines regarding referrals to licensed practitioners, ethical business practices, and misrepresentation of services or credentials.[86] Importantly, this insurer's code applies only to those practitioners who self-select into holding a policy with this insurer. Also, consumers harmed by a wellness practitioner covered by this insurer have no recourse because the insurer is not a neutral arbiter of such a dispute. An insurer's duty and incentive are to defend the insured. Furthermore, no law requires wellness practitioners to obtain professional liability insurance. As a result, those who choose to purchase liability insurance are more likely to be risk averse and steer clear of engaging in harmful conduct. Thus, more comprehensive, national standards are necessary to capture the wider market of "wellness practitioners."

4. Who Polices?

As already noted, much of the wellness industry is unregulated. Although some wellness certification or membership organizations offer consumers a complaint procedure, such processes appear rare, narrowly applied, and scattered.[87] There is some policing of wellness activity at the federal level through the Federal Trade Commission (FTC) and the FDA, but that too is limited. For example, the FTC recently issued almost 700 warning letters to wellness companies that were making unsubstantiated claims about their products curing, mitigating, or treating serious diseases like cancer or heart disease.[88] The FDA Office of Criminal Investigation has brought cases against rogue wellness practitioners and companies, such as medical spas, for illegally obtaining drugs from China.[89]

Enforcement actions by the FDA or FTC do not directly address scope of practice, business practices, or ethical conduct by wellness practitioners, particularly when the wellness practitioner only offers services and does not sell products. Nearly all states prohibit the unlicensed practice of medicine, psychology, and dietetics.[90] These three licensed disciplines present the most legal risk for wellness practitioners because services permitted within those scopes of practice are often services that wellness practitioners would also like to offer, such as treatment of a client's physical or mental health condition or

[85] *Our Mission*, Alt. Balance, https://alternativebalance.com/mission-ethics/ [https://perma.cc/784G-QWNW]; *see also* E-mail from Miriam Ball, Chief Ins. Officer of Alt. Balance, to Barbara J. Zabawa, Assoc. Professor of L., U. of Mo. Kan. City Sch. of L. (Dec. 14, 2023) (on file with author) (stating that those insureds who do not share the company's standards are declined membership).

[86] Alt. Balance, *supra* note 85.

[87] *See supra* note 64 and accompanying text.

[88] Press Release, U.S. Fed. Trade Comm'n, FTC Warns Almost 700 Marketing Companies that They Could Face Civil Penalties if They Can't Back up Their Product Claims (April 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-warns-almost-700-marketing-companies-they-could-face-civil-penalties-if-they-cant-back-their [https://perma.cc/TQ3J-L4FL] (stating that the FTC sent notices of penalty offenses that could total up to $50,120 per violation to "approximately 670 companies involved in the marketing of OTC drugs, homeopathic products, dietary supplements, or functional foods" and putting them on notice that they "could incur significant civil penalties if they fail to adequately substantiate their product claims").

[89] *See, e.g.*, Press Release, U.S. Food & Drug Admin., KC Medical Spa Owner Pleads Guilty to Illegal Treatments, (July 27, 2022), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/press-releases/kc-medical-spa-owner-pleads-guilty-illegal-treatments (finding owner of Kansas City, Missouri medical spa guilty of obtaining "Botox and Juvederm Ultra 3 over the internet and without a prescription from a website in China" and then used those illegally obtained drugs to treat patients without physician supervision; ten patients suffered adverse effects from the non-FDA approved products, which is what triggered the FDA investigation).

[90] *See* Taylor J. Newman & Angela E. Surrett, *A "License to Kale" - Free Speech Challenges to Occupational Licensing of Nutrition and Dietetics*, 52 St. Mary's L.J. 1181, 1191 (2021) (noting that by 1905 almost all states in the U.S. had enacted a medical licensing scheme regulating who could practice medicine) (citing Paul Starr, The Social Transformation of American Medicine (1982)); Rosemond v. Markham, 135 F. Supp.3d 574, 579 (E.D. Ky. 2015) (noting that many states have "a statutory framework for regulating the practice of psychology"); *see also Nutrition Practice Laws*, Council of Holistic Health Educators, https://holisticcouncil.org/nutrition-laws/ [https://perma.cc/R2AL-N4MM] (identifying 14 states that require a license to practice dietetics).

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advice on diet and nutrition.[91] Although it is illegal to practice medicine without a license,[92] a recent survey of thirty-one state medical boards revealed that most do not police the unlicensed practice of medicine. The survey asked the medical boards if they were aware of any cases of the unlicensed practice of medicine by wellness practitioners and, regardless of their response, whether they had any desire to take action against those practitioners; responses are summarized in Table 1.[93]

These survey findings suggest that state medical boards lack the interest or capacity to police the unlicensed practice of medicine. As a result, the wellness industry may benefit from having its own mechanism to hold practitioners accountable when engaging in unethical business practices or practicing outside of the scope of any certification. Consumers can police wellness practitioners through legal action; Part II highlights a few such cases. But lawsuits are often cost prohibitive and ineffective at creating lasting change,[94] particularly because there are no authoritative standards by which to measure wellness practitioners' duties to their clients. Creating universally accepted standards could help consumers, employers, and insurers evaluate the financial risk of litigation as well as the quality and legitimacy of wellness practitioners.

Part II: Why the Health and Wellness Industries Should Embrace Wellness Professional Standards

There are several reasons why both the health care and wellness industries should embrace wellness practitioner standards. First, in the absence of systematic data collection about wellness outcomes, anecdotal evidence indicates that some wellness practitioners physically, mentally, and financially harm their clients. Wellness standards could more clearly distinguish between health care and wellness and thereby keep patients safe. Second, there is currently no way for consumers, insurers, and employers to confidently judge the qualifications of wellness practitioners — or even the scope of practice of those practitioners. At the moment, many wellness practitioners and companies largely use "wellness" as a marketing gimmick rather than a legitimate method of improving well-being. This harms consumers as well as practitioners concerned with the legitimacy and respectability of their work. Third, creating wellness standards can preempt state government regulation and thus maintain the regulatory flexibility upon which so many in wellness depend.

A. Wellness Harms

Despite limited enforcement by state licensing boards, there is evidence of physical, emotional, and financial harm to individuals by the wellness industry. Indeed, one recent study investigated alternative health care harms, many of which occur within the unregulated wellness industry. The researchers gathered information on alternative health care services, including homeopathy, ayurvedic medicine,

[91] *See, e.g.*, U.S. Fed. Trade Comm'n, *supra* note 88 (warning wellness companies to not claim their products can cure, mitigate or treat a serious disease such as cancer or heart disease unless they can back up that claim through accepted standards of scientific testing); Petition for a Writ of Certiorari at 2, Del Castillo v. Fla. Dep't of Health, 26 F.4th 1214 (11th Cir. Apr. 27, 2022) (No. 19-13070), 2022 WL 7684540, *cert denied*, 143 S. Ct. 486 (stating the petitioner was communicating individualized diet advice without a license in Florida); *see also* Cooksey v. Futrell, 721 F.3d 226, 230 (4th Cir. 2013) (unlicensed wellness practitioner calling himself a "Diabetes Warrior" investigated by North Carolina Dietetics Board for providing individualized advice to clients with diabetes); Meg Jordan & John B. Livingstone, *Coaching vs. Psychotherapy in Health and Wellness: Overlap, Dissimilarities, and the Potential for Collaboration*, 2 Global Advances in Health & Med. 20, 20 (2013); *see also* Cowley et al., *supra* note 16 (finding some life coaches in Canada trying to treat clients' anxiety and depression without proper credentials and training).

[92] *See, e.g.*, Nathan Cortez, *The Law of Licensure and Quality Regulation*, 387 New Eng. J. Med. 1053, 1054 (2022).

[93] Barbara Zabawa & Mark Mollenhauer, Raw Data from Telephone Survey Conducted between January and May 2022 (2022) (unpublished) (on file with author).

[94] Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 Ind. Health L. Rev. 139, 149 (2006) (stating a failure of malpractice litigation as a major tool to prevent errors and improve quality of care is the random selection of cases, the high cost of litigation, and the resistance of health care institutions to use the information gained in lawsuits).

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Table 1. State Medical Board Survey Results Regarding Actions Taken Against Unlicensed Wellness Practitioners

State	Any Known Cases of Unlicensed Practice of Medicine by Wellness Practitioners?	Any Desire by Licensing Board to Take Action Against Unlicensed Individuals?
Alabama	No	Not really. Likely to get a warning on first offense.
Alaska	No	Unable to connect with board
Arizona	No	Unable to confirm with board
Arkansas	No	No
California	Exception in Statute BPC § 2053.6	As long as exception in statute met, likely not.
Colorado	No	Unlikely first offense fine would be more than $500.
Connecticut	No	Not sure.
Delaware	No	No
Florida	Yes, but not medicine. Dietetics. See below on Florida Dietitian	Not sure.
Georgia	No	Unable to confirm with board.
Hawaii	No	Unlikely first offense fine would be more than $1000.
Idaho	No	No
Illinois	No	Unable to confirm with board.
Indiana	No	Yes. If unlicensed individual gave medical or nutritional advice, board would likely charge them with a level 5 felony and prohibit that individual from applying for state's license until they have served their time in jail and paid the fine.
Iowa	No	Stated they would likely pursue violators of unlicensed practice of medicine as a Class D felony, but our research found the board only issued cease and desist letters to unlicensed technicians in a laser center and did not pursue a Class D felony.
Kansas	No	No, unless someone gets harmed.
Kentucky	No	Yes, if the unlicensed person had financial gain from the unlicensed practice.
Louisiana	No	No.
Maine	No	No.
Maryland	No	Unable to confirm with board.
Massachusetts	No	No
Michigan	No	No
Minnesota	No	Unable to confirm with board.
Mississippi	No, but see dietary advice case, below	Unable to confirm with board.
Missouri	No	No
Montana	No	No
Nebraska	No	Unable to confirm with board.
Wisconsin	No	No

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reflexology, hydrotherapy, herbal remedies, supplements, diets, aromatherapy, detoxification therapies, meditation, hypnotherapy, and yoga.[95] The researchers identified numerous direct and indirect harms, included below in Table 2.[96] Other evidence of harm by wellness practitioners include: false advertising about services offered;[97] not responding to client requests for help;[98] administering medical spa treatments (e.g., Botox) without physician oversight;[99] having sexual relations with clients;[100] taking financial and emotional advantage of clients and accepting financial gifts from clients;[101] and promoting sexual conversion therapy to clients struggling with their sexuality and expressing suicidal tendencies.[102]

Table 2. Examples of Wellness Harms and Standards to Address Those Harms

Harm Category	Harm Example	Standard
Experimental Interventions	• Using interventions that are experimental and may have adverse health effects.[103] • Failure to get informed consent.[104]	• Not offer to treat or cure an illness in violation of state or federal law. • Obtain informed consent before offering products or services. • Disclose that the wellness service does not substitute for medical care. • Obtain client's authorization to disclose alternative intervention to client's licensed primary care provider. • Encourage clients to seek medical care. • Not misrepresent services or qualifications, nor falsely advertise. • Substantiate any claims made with reliable evidence.
Financial Harms	• Financial loss through payment for ineffective interventions, deceptive advertising, highly priced products or false claims about wellness products or services.[105]	• Offer refunds and only bill for services actually provided. • Disclose financial conflicts of interest. • Do no harm. • Disclose source of recommended products and risks and oversight (or lack thereof) of the same.

(Continued)

[95]Bernie Garrett et al., *A Taxonomy of Risk-Associated Alternative Health Practices: A Delphi Study*, 30 Health Soc. Care Cmty. 1163, 1166 (2022).

[96]*Id.* at 1169-74. Each of these harms were supported by at least three citations of evidence. *Id.* at 1167.

[97]*See, e.g.*, Plaintiff's Original Petition at 3, Texas v. Davis, No. DC-22-01388 (D. Tex. Feb. 1, 2022), 2022 WL 348709, at *3 (alleging wellness influencer's online nutrition and fitness plans were not delivered to consumers as advertised).

[98]*Id.* at 7 (alleging that one consumer of defendant wellness influencer almost passed out from inadequate nutrition and defendant did not respond to consumer's emails asking for assistance).

[99]U.S. Food & Drug Admin., *supra* note 89 (noting that during the three-year operation of the medical spa, "there was never a medical doctor associated with the spa, nor was there a doctor overseeing procedures").

[100]State v. McFadden, No. CAAP–14–0000802, 2015 WL 5567996, at *1 (Haw. Ct. App. Sept. 21, 2015) (energy healer accused of sexually assaulting client); Dep't of Licensing and Regul. Affs. v. Duncan, No. 345778, 2020 WL 359648, at *1-2 (Mich. Ct. App. Jan. 21, 2020) (disciplining licensed professional counselor who also worked as a life coach and while allegedly serving a client as a life coach, sexually assaulted her; life coach claimed he did not violate any counseling standard because he was acting as a life coach when alleged sexual encounter occurred).

[101]Monier-Kilgore v. Flores, Nos. C054502, C056348, 2009 WL 1865126 at *2-3 (Cal. Ct. App. June 30, 2009) (massage therapist, reiki master and clairvoyant who befriended a client, engaged in sexual relations with her, encouraged client to avoid her family, accepted large financial gifts, including when client died, her entire estate and life insurance proceeds).

[102]Cowley et al., *supra* note 16 (video shows a Canadian life coach that provides sexual conversion therapy and asks a client to reenact a sexual assault, causing the client overdose on drugs).

[103]Garrett et al., *supra* note 95, at 1169-74, tbl.5.

[104]*Id.*

[105]*Id.*; *see also* Plaintiff's Original Petition, *supra* note 97, at 3 (alleging wellness influencer's online nutrition and fitness plans advertised as providing one-on-one coaching and personalized plans but in fact provided cookie cutter plan to all consumers).

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Table 2. *Continued*

Harm Category	Harm Example	Standard
		• Not use or recommend illegal substances or items. • Not misrepresent services or qualifications, nor falsely advertise.
False Claims	• False claims about treating medical conditions beyond the practitioner's scope of practice.[106]	• Operate within one's scope of practice as defined by the practitioner's education, training, experience, and state licensing laws. • Not misrepresent services or qualifications, nor falsely advertise.
Poor Research	• Poorly designed and regulated research and using those studies to legitimize products or services.[107]	• Require health research training before conducting alternative health/wellness research studies on patients/clients. • Obtain informed consent before using experimental services.
Lack of Training to Handle Adverse Events	• Lack of practitioner experience with acute and emergency care to deal with adverse reactions.[108]	• Obtain training by accredited program. • Refer clients to emergency health care or other licensed health care providers as needed. • Require approved continuing education, particularly around health risks. • Neither use nor recommend illegal substances or items.
Lack of Hygiene	• Contamination or other preparation issues.[109]	• Use sanitary methods of storage, administration, and disposal of products.
Illegal Imports	• Use of illegally imported or compounded items circumventing regulatory control.[110]	• Neither use nor recommend illegal substances or items. • Not compound items illegally or outside training, education, experience.
Toxic Products or Remedies	• Toxicity with specific Ayurvedic remedies, such as lead poisoning due to manufacturing processes and poor–quality control.[111]	• Use/recommend products from reputable, high–quality sources that meet manufacturing standards.
Improper Dosage	• Doses in supplements are much larger than normally orally ingested.[112] • Adverse effects of bleach therapy to treat various conditions.[113]	• Follow manufacturer's instructions for use. • Use/recommend products from reputable, high–quality sources that meet manufacturing standards. • Obtain informed consent before offering products and services. • Obtain client authorization to disclose alternative intervention to client's licensed primary care provider. • Encourage clients to seek medical care.

(Continued)

[106]Garrett et al., *supra* note 95 at 1169, tbl.5.
[107]*Id.*
[108]*Id.* at 1171, tbl 5.
[109]*Id.*
[110]*Id.*
[111]*Id.*
[112]*Id.* at 1173, tbl.5.
[113]*Id.* at 1174, tbl.5.

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Table 2. *Continued*

Harm Category	Harm Example	Standard
Personal Boundary Issues	• Engaging in sexual or personal relationships with current or recent clients.[114]	• Require appropriate client boundaries.
Ignoring Serious Medical Conditions	• Engaging clients with known eating disorders into diet and fitness programs.[115]	• Refer clients to emergency health care or other licensed health care providers as needed. • Operate within one's scope of practice as defined by the practitioner's education, training, experience, and state licensing laws.
Conflicts of Interest	• Accepting large financial gifts from clients.[116]	• Not accept large financial gifts. • Require appropriate client boundaries.
Inappropriate Therapies	• Providing sexual conversion therapy to clients struggling with their sexuality and expressing suicidal tendencies.[117]	• Do no harm. • Operate within one's scope of practice as defined by the practitioner's education, training, experience, and state licensing laws. • Refer clients to emergency health care or other licensed health care providers as needed. • Require approved continuing education, particularly around health risks.

1. Standards Can Reduce Consumer Harm

Table 2 incorporates the non-exhaustive harms identified from the sources above and proposes standards that could be established to mitigate these harms.

It is not only the incidents of harm that should cause an outcry for wellness practitioner standards, but also the wellness industry's emphasis on personal responsibility as the predominant path to achieving wellness. Many wellness practitioners and programs are oblivious to the role social and structural determinants play in achieving wellness.[118] This is because it is easier to blame individuals for poor health status and to place responsibility on them to improve their status than it is to zoom out and

[114]Dep't of Licensing & Regul. Affs. v. Duncan, No. 345778, 2020 WL 359648, at 1-2 (Ct. App. Mich. Jan. 21, 2020) (disciplining licensed professional counselor who also worked as a life coach and while allegedly serving a client as a life coach, sexually assaulted her; life coach claimed he did not violate any counseling standard because he was acting as a life coach when alleged sexual encounter occurred).

[115]*See, e.g.*, Plaintiff's Original Petition, *supra* note 97, at 3.

[116]Monier-Kilgore v. Flores, Nos. C054502, C056348, 2009 WL 1865126 at *12-13 (Cal. Ct. App. June 30, 2009).

[117]Cowley et al., *supra* note 16 (video shows a Canadian life coach that provides sexual conversion therapy and asks a client to reenact a sexual assault, causing the client overdose on drugs).

[118]Jessica L. Roberts & Leah R. Fowler, *How Assuming Autonomy May Undermine Wellness Programs, Health Matrix*, 27 Health Matrix 101, 105 (2017) (noting that the social determinants of health constrain certain people's ability to make healthier choices and as a result, behavioral interventions may not impact those individuals resulting in unsuccessful wellness programs); *see also* Laura D. Hermer, *The Means and Ends of Wellness Programs*, 23 J. Health Care L. & Pol'y, 227, 228 (2021) (noting that medical care only plays a small role in most people's overall health and often social, environmental and personal factors are far more important); Carrie Griffin Basas, *What's Bad About Wellness? What the Disability Rights Perspective Offers About the Limitations of Wellness*, 39, J. Health Polit. Pol'y & L., 1035, 1052 (2014) (stating that the wellness imperative shifts the attention from societal barriers to health, discrimination based on perceived unhealthy states, and inequitable resource allocation to personal improvement and paternalistic intervention).

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address the "underlying social determinants of health and structural inequalities that precipitate poor health."[119]

Standards can foster wellness practitioner awareness of the social, political, legal, and environmental barriers that prevent many people from attaining wellness, such as systemic racism, food deserts or food swamps, unsafe neighborhoods, and poverty. They can also reduce the shame and guilt wellness consumers may feel when interacting with wellness practitioners. The tendency to blame the consumer for making poor choices without accounting for environmental factors beyond the consumer's control can cause harmful feelings of shame and guilt, undermining a consumer's wellness rather than improving it.

Moreover, standards for wellness practitioners can help ensure that wellness consumers receive referrals to conventional health care providers when necessary. Wellness services should be complementary to traditional health care, not a substitute for it. Both wellness practitioners and consumers must learn to respect the difference between health care services and wellness services and use each appropriately.[120] While the U.S. health care system is rife with problems, it still offers evidence-based care that can save lives. For example, as pointed out by author Rina Raphael:

> Steve Jobs shunned what might have been timely and lifesaving cancer surgery in lieu of alternative therapies and a strict vegetable diet. (Jobs had a rare form of pancreatic cancer, a neuroendocrine tumor, which is less lethal than the more common forms of pancreatic cancer.) He died at age fifty-six. His biographer, Walter Issacson, reported that he later regretted his rejection of orthodox medical treatment.[121]

The proposed standards in Table 2 are not meant to be exhaustive or authoritative, but rather a starting point. The intent of Table 2 is to evoke alarm that such basic standards, often found in state licensing statutes for licensed health care professionals, do not currently exist in the broader wellness industry, despite the evidence of harm that occurs. The method by which the wellness industry can create more comprehensive and authoritative standards is discussed further in Part III.

2. Standards Can Help Consumers, Insurers, Courts and Employers Know Who (and What) to Trust

The lack of standards in the wellness industry not only permits consumer harm to occur more frequently, but also creates uncertainty and confusion for wellness consumers, practitioners, insurers, courts, and employers about whom and what to trust. Standards have the potential to offer reliable guidance for these stakeholders. For example, standards can offer helpful guideposts on what wellness practitioners can and cannot do.[122] They set proper expectations for wellness industry consumers and a benchmark by which courts can measure whether the wellness practitioner acted appropriately.[123]

[119]Hermer, *supra* note 118, at 251.

[120]Of course, the health care industry must earn this respect by doing a better job of listening to patients, meeting their needs (particularly with preventive care and chronic conditions). *See generally* Raphael, *supra* note 24, at 131 ("There is a level of connection, compassion, and tailor-fit care [missing from institutionalized medical care]. Someone has to take time to ask you questions, discuss your background and body composition … It's so personal and so detailed. And I think that's what is attracting women to wellness."). *See also* Germeza, *supra* note 44, at 15.

[121]Raphael, *supra* note 24, at 145. Steve Jobs is by far not the only cancer patient to die from choosing alternative treatments. According to a Yale study, cancer patients using alternative health care in favor of medicine contributed to higher death rates. Garrett et al., *supra* note 95, at 1164.

[122]Vera Lúcia Raposo, *Complementary and Alternative Medicine, Medical Liability and the Proper Standard of Care*, 35 Complementary Therapies Clinical Prac. 183, 183 (2019) ("The definition of the proper standard of care is crucial for patients, so they can conform their expectations in what regards the type of health care to be provided by complementary and alternative medicine (CAM) practitioners. It is relevant for CAM practitioners because they must know what is expected from them – by patients, health authorities, and courts – in what regards their services. It is also important for the ones that will assess the activity of the CAM providers, especially for courts in case of legal proceedings."); *see also* Cary Coglianese & Angel Reed, Opinion, *Law's Interaction with Voluntary Codes and Standards*, Regul. Rev. (Aug. 22, 2022), https://www.theregreview.org/2022/08/22/coglianese-reed-laws-interaction-with-voluntary-codes-and-standards/ [https://perma.cc/F8B9-WZWT].

[123]Coglianese & Reed, *supra* note 122.

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For insurers and employers, standards can help determine whether the practitioner is a safe risk to insure or hire.[124]

The appetite for wellness industry standards is palpable, especially by professional liability insurers. For example, the chief executive officer of one professional liability insurance company that insures about 5,000 wellness practitioners stated that their current professional liability insurance application is uncomfortably limited in the information it gathers about the qualifications and competence of wellness practitioners.[125] The threshold question on the insurance application is whether the wellness practitioner's certification or training is currently valid.[126] If the answer is "no," then the insurer asks if any training or certification is needed in their state to practice.[127] As discussed above, because most wellness practices are unregulated, the answer to that question will most always be "no." This means that the liability insurer has no way of knowing if the applicant is a good insurance risk. The same can be said for employers that hire wellness practitioners or place them inside a workplace wellness program. Because there are no universally accepted standards for wellness practitioners, employers are uncertain whether wellness practitioners are qualified or competent.[128] Even if a wellness practitioner has a certification, it is challenging for an employer to judge the quality of that certification because no overarching accreditation body has stepped up to oversee the wellness industry.[129]

3. Standards Can Address Preventive Service Concerns After *Braidwood v. Becerra*

The Northern District of Texas court decision in *Braidwood v. Becerra* has placed into jeopardy many preventive services that the ACA requires insurers to cover at no cost.[130] The rationale for this decision is that the ACA *requires* insurers to cover preventive services that the USPSTF recommends.[131] The *Braidwood* Court concluded that the USPSTF members are not properly appointed under the Constitution.[132] Because they are not properly appointed, health plans should not be required to adopt their recommendations.[133]

Opponents of the *Braidwood* decision fear that if upheld by the Supreme Court, insurers, including employer-based plans, will no longer offer preventive services or, at a minimum, require cost-sharing. An amicus brief surmises that the "District Court's decision to vacate all agency actions taken to implement the USPSTF's recommendations since the enactment of the ACA, and to enjoin enforcement of all future recommendations will allow insurers to either drop preventive care coverage altogether or to reintroduce

[124] *Id.*

[125] Charles Hodson, Chief Exec. Officer, CPH & Assocs., Address at the National Wellness Institute Webinar on Creating Wellness Standards (Oct. 26, 2023).

[126] E-mail from Charles Hodson, Chief Exec. Officer, CPH & Assocs., to Barbara Zabawa, Assoc. Professor of L., U. of Mo. Kan. City Sch. of L. (Nov. 30, 2023) (on file with author).

[127] *Id.*

[128] Zabawa & Eickhoff-Shemek, *supra* note 4, at 176-79.

[129] *Id.* It should be noted that workplace wellness programs are also not required to be accredited or based on particular evidence-based standards. *See* Jennifer L. Pomeranz, *Workplace Wellness Programs: How Regulatory Flexibility Might Undermine Success*, 104 Am. J. Pub. Health 2052, 2053-54 (2014) (noting that the federal wellness plan incentive rules promulgated at 78 FR 33158 (June 3, 2013) do not require health contingent wellness programs to be accredited or based on particular evidence based standards and that there is no evaluation component built into the wellness plan regulations to determine whether the wellness program is effective); *see also* Camila Strassle & Benjamin E. Berkman, *Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion*, 61 Wm. & Mary L. Rev. 1663, 1683 (2020) (stating that HIPAA regulations for wellness programs do not need to have a scientific record that the method promotes wellness).

[130] Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (finding the U.S. Preventive Services Task Force (PSTF), which recommends the preventive services that health plans ultimately must cover at no cost, violates the Appointments Clause under the U.S. Constitution and therefore insurers are not required to cover any recommendations made by the PSTF since the enactment of the Affordable Care Act in 2010).

[131] *Id.* at 644. The PSTF is a group of volunteer experts who make evidence-based scientific recommendations about the contemporary standard of care in preventive medicine. *Id.*

[132] *Id.* at 646.

[133] *Id.* at 647.

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cost sharing for all preventive services."[134] Economists have pointed out that prior to the ACA, comprehensive free preventive coverage was extremely limited because it is not in insurers' interest to make a long-term economic investment in members' health.[135] Eliminating the ACA preventive services provision will lead to a decrease in use of preventive services within the traditional health care system.[136] As noted previously, consumers are already disappointed and frustrated that traditional health care is not focused enough on prevention.[137] Upholding the *Braidwood* Court's decision to eliminate (or at least undermine) the preventive service requirement under the ACA will likely accelerate use of the wellness industry for preventive care. With this prospect in mind, creating standards for the wellness industry is even more urgent and important.

4. Standards Can Preempt State Action

Because there is evidence of harm by wellness practitioners, and because many people use wellness services to replace conventional health care, eventual government interest in regulating wellness is not only possible, but likely.[138] State governments are not afraid to add occupations to their licensure statutes. States have created, or have tried to create, licensure requirements for occupations that are not even close to being as potentially harmful as many wellness services. For example, some states engaged in licensing battles for florists, tour guides, bartenders, interior designers, pest exterminators, African-style hair braiders, and house painters.[139]

Moreover, states are not slowing down their rush to license occupations. According to a joint 2020 report by the National Conference of State Legislatures, the National Governors Association, and the Council of State Governments, occupational licensing has grown exponentially over the last sixty years, "comprising nearly 25% of the U.S. workforce, up from 5% nearly 60 years ago."[140] Importantly, the report also points out that this increased interest in state occupational licensing has made practicing these licensed occupations in multiple states challenging because of varying licensing requirements.[141] Increased licensing has also created barriers to work for certain populations, such as those with lower incomes.[142] Given this growing interest by states in occupational licensing, it is not outlandish to assume that wellness practitioners may be next. Indeed, one researcher has already predicted that

[134]Brief for Am. Cancer Soc'y & Am. Cancer Soc'y Cancer Action Network et al. as Amici Curiae Supporting Appellants, Braidwood Mgmt. Inc. v. Becerra, 2023 WL 3244310, at *11 (5th Cir. 2023) [hereinafter Brief for Am. Cancer Soc'y].

[135]MaryBeth Musumeci & Sara Rosenbaum, *The ACA's Promise of Free Preventive Health Care Faces Ongoing Legal Challenges*, Commonwealth Fund (Oct. 20, 2023), https://www.commonwealthfund.org/blog/2023/acas-promise-free-preventive-health-care-faces-ongoing-legal-challenges [https://perma.cc/2SVA-6NP2].

[136]Brief for Am. Cancer Soc'y, at *11, *supra* note 134. *See also* Sabrina Geisler, *Braidwood Mgmt. v. Becerra & a Texas District Court's Decision to Stop Enforcement of Preventive Care Coverage Requirements Under the ACA*, 49 Am. J.L. & Med. 112, 119 (2023) (noting a likely reduction in access to health care services should private insurers implement cost sharing for preventive services).

[137]*See* Germeza, *supra* note 44, at 6-7.

[138]Carl F. Ameringer, State Medical Boards and the Politics of Public Protection 15 (1999)

(writing about the history of the medical profession and stating that changing public perception of medicine and of professions in general created the need for enhanced oversight and accountability and that medicine's leaders were well aware that if the profession did not act, government would).

[139]Paul J. Larkin, Jr. et al., *Telemedicine and Occupational Licensing*, 73 Admin. L. Rev. 747, 771 (2021) (noting the spread of licensing requirements over the last fifty years that now include hundreds of services including those provided by barbers, bartenders, florists, interior designers, housepainters, and tour guides); Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 Wm. & Mary L. Rev. 1111, 1121 (2019) (noting the Eight Circuit upholding a state's requirement that African-style hair braiders obtain a cosmetology license and the Ninth Circuit striking down a California Structural Pest Control Board's requirement that exterminators of rats, mice and pigeons — but not those of skunks and squirrels — obtain a state license).

[140]Nat'l Conf. of State Legislatures, Occupational Licensing: Assessing State Policies and Practices 9 (Dec. 2020), https://documents.ncsl.org/wwwncsl/Labor/NCSL_DOL_Report_05_web_REVISED.pdf [https://perma.cc/F5NN-QA3Q].

[141]*Id.*

[142]*Id.* at 9, 71.

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complementary and alternative medicine (or "wellness") activities will be "forced to become more regulated," warning the legal system to prepare itself for wellness provider malpractice claims and that, in order to do so, it must define the standard of care for those providers.[143]

The call to action in this article is for the wellness industry to collaborate to create universally accepted, national standards to keep state licensure at bay so that wellness practitioners can escape the state-by-state licensing landmines that currently exist in health care. Adopting a national framework will allow wellness practitioners to practice nationally using telehealth rather than subjecting them to the burdensome fifty-state licensing framework, which is outdated given the abundant virtual platform technologies upon which so many people now rely.[144] Specifically, telehealth use is hampered by state licensure requirements, whose statutes require health practitioners to be licensed in each state where a patient resides.[145] It is impractical and expensive for most health practitioners to seek licensure in all fifty states. And yet, for many licensed professions, that is necessary to practice their licensed profession using modern telehealth technology.[146]

Creating universally accepted, national standards for wellness can also help the industry avoid price increases for consumers that would inevitably occur under a state licensing model.[147] Licensing has been shown to increase barriers to entry that adversely affect those with lower incomes and those who already experience barriers to employment, such as young single moms, the formerly incarcerated, and people with disabilities.[148] This is because licensing leads to higher wages for licensed workers but lower wages to those who are denied access.[149] The result is higher prices for consumers.[150] Industry-created national standards could find a better balance between ensuring wellness professional quality and competence through standards while still allowing more people to enter the wellness field than would be possible through licensing. Given the wellness industry's lack of diversity, access to the field of practice remains an important consideration when crafting controls for the industry.

Standards can also help create a more systematic reporting mechanism regarding consumer harm in the wellness industry and help with data collection. As observed by researchers who tried to study harm in the "alternative health care" industry (which is arguably synonymous with the wellness industry because most of the alternative treatments overlap with wellness services), "no systematic reporting frameworks existed and much of the activity occurred in private practice or was undocumented."[151] If the wellness industry wants to maintain as much flexibility as possible and avoid the burdensome fifty-state regulatory landscape that currently exists in health care, then it must preempt government action by creating its own standards.

Part III: Developing Wellness Practitioner Standards Using a Soft Law Model

Although Part II of this Article provides some ideas for what standards might look like to address the harms known to result from some wellness practitioner conduct, the process for developing authoritative, industry-accepted standards should include industry stakeholders if the standards are to be adopted widely. To avoid the patchwork of regulatory landmines within the state licensure system while

[143]Raposo, *supra* note 122, at 184.

[144]Larkin, Jr. et al, *supra* note 139, at 769 ("A principal hurdle to more widespread use of telemedicine — to making those temporary exceptions permanent — is the longstanding institution of state licensing of physicians.").

[145]*Id.* at 773-82.

[146]*Id.* at 778. There are state licensure compacts that try to help cross-border licensed practice, but as noted by Larkin, et al., interstate compacts are insufficient.

[147]Alexander C. Lemke & Alexander Macdonald, *Getting a Second Wind: Reviving Natural Rights Clauses As a Means to Challenge Unjustified Occupational Licensing Regulations*, 41 Pace L. Rev. 56, 56-57, 59 (2021).

[148]*Id.* at 67.

[149]*Id.* at 59.

[150]*Id.*

[151]Garrett et al., *supra* note 95, at 1167.

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facilitating national practice through telehealth, this process should rely on a "soft law" model such as SDOs.

A. What Is "Soft Law?"

According to one recent article, when it comes to managing the consequences that can arise from an industry or technology, "society has two alternatives at its disposal."[152] The first is traditional government regulation or "hard law."[153] Hard law can "force entities to behave in a particular manner through the monopoly power that society has assigned to public authorities."[154] For purposes of managing the consequences from the wellness industry, state licensure would be a hard law approach.

The second alternative is "soft law" programming, a governance tool that industry stakeholders can use to define substantive expectations that are not directly enforceable by the government.[155] According to one scholar, soft law approaches are advantageous over hard law approaches because they avoid legislative gridlock and judicial review, making them more adaptable over time.[156] Compliance costs are lower because of soft law's voluntary nature, and there is more legitimacy to the governance mechanism when numerous industry stakeholders voluntarily comply.[157] Voluntary stakeholder involvement also facilitates innovation and can help diffuse best practices within the industry.[158] The voluntary nature of soft law governance encourages competition from different standards, producing a "'race-to-the-top' effect, leading either to the survival of the most credible system or at least fostering increased rigor across competitors."[159] Finally, soft law governance may reinforce hard law by providing hard law standards and benchmarks by which to measure compliance.[160]

Louise Trubek notes that soft law can encourage mutual cooperation among competing stakeholders to exchange knowledge and foster consensus, as well as increase data collection and systemization.[161] It can also create informal processes to resolve grievances and disputes.[162] Soft law approaches to resolving grievances and disputes can be superior to malpractice litigation to improve quality.[163] Trubek observes, "The random selection of cases, the high cost of litigation, and the resistance of health care institutions to use the information gained in lawsuits are all problems with malpractice litigation."[164] Given these advantages, and the disadvantages of an impractical state licensure scheme that prevails in traditional health care, this Article advocates for a soft law approach to create and implement standards for wellness practitioners. Although "soft law programs come in a variety of shapes, sizes and roles,"[165] one type of soft law program is an SDO, the basic principles of which the wellness industry could adopt.

B. Standards Development Organizations (SDOs)

Federal law defines an SDO as a nongovernmental voluntary consensus standards body, as defined in section 2(e) of the Office of Management and Budget Circular A-119, that adheres to the American

[152]Carlos Ignacio Gutierrez et al., *Lessons for Artificial Intelligence from Historical Uses of Soft Law Governance*, 61 Jurimetrics J. 133, 134 (2020).
[153]*Id.*
[154]*Id.*
[155]*Id.*
[156]Cary Coglianese, *Environmental Soft Law as a Governance Strategy*, 61 Jurimetrics J. 19, 48-49 (2020).
[157]*Id.*
[158]*Id.*
[159]*Id.*
[160]*Id.*
[161]Trubek, *supra* note 94, at 150.
[162]*Id.* at 149.
[163]*Id.*
[164]*Id.*
[165]Guiterrez et al., *supra* note 152, at 134.

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National Standards Institute (ANSI) Essential Requirements for Due Process for American National Standards.[166] A voluntary consensus standards body is a type of association, organization, or technical society that plans, develops, establishes, or coordinates voluntary consensus standards development using a process that includes: (1) openness and transparency, with meaningful opportunities for interested parties to participate; (2) meaningful involvement from a broad range of parties with no single interest dominating the decision-making; (3) due process with regard to publicly available policies and procedures, adequate notice of meetings and standards development, sufficient time to review drafts and prepare objections, access to views and objections from participants and a fair and impartial process for resolving conflicting views; (4) an appeals process; and (5) consensus (which does not necessarily mean unanimity).[167]

According to ANSI, SDOs in the United States are generally private-sector, not-for-profit organizations that typically receive funding through membership, publication sales, and certification services, or some combination of the three.[168] They are not typically subsidized by the federal government and tend to focus on developing standards that fit a particular market need.[169] To allow competitors in the marketplace to create consensus-based standards, the Standards Development Organization Advancement Act of 2004 (SDOAA) extended antitrust protections to SDOs provided by the National Cooperative Research and Production Act of 1993 (NCRPA).[170] The NCRPA affords certain antitrust protections to joint ventures engaged in research, development, and production.[171] The SDOAA expanded the NCRPA to include SDOs.[172] SDOs and other joint ventures interested in limiting possible antitrust damage exposure must file a notification with the Antitrust Division of the Department of Justice (DOJ) and the FTC.[173]

Some SDOs have taken advantage of the SDOAA protection. For example, the Gap Year Association (GYA) is a national non-profit member association that works to coordinate the growing gap year movement for young adults trying to navigate life after high school.[174] It is an SDO recognized by the DOJ and FTC.[175] GYA's work revolves around four core areas: (1) research; (2) equity and access; (3) resources; and (4) *standards and accreditation.*[176] GYA also conducts surveys and systematic data collection, promotes scholarships and inclusivity within the gap year community, and provides professional development opportunities for gap year professionals.[177] GYA's standards cover the following areas:

- **Philosophy and Integrity:** includes having experiential pedagogical elements, staff training, financial responsibility, admissions, student supervision, insurance, and incident reporting; gap year program materials must reflect actuality of the programs offered; must have cross-cultural awareness.

[166] 42 U.S.C. § 18952(a) (2022).

[167] Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Assignments (Jan. 27, 2016). Not every standard developing organization must qualify as an SDO. There are more flexible organizations that create standards called "Consortia" or "standards setting organizations" (SSOs) that consist of groups of like-minded participants who place a priority on developing standards quickly enough to meet market demands or harmonize or differentiate specifications within an industry. *U.S. Standards System: SDOs (Private Sector)*, Am. Nat'l Standards Inst., https://www.standardsportal.org/usa_en/standards_system/sdo_private.aspx [https://perma.cc/UE5E-EU5E].

[168] *U.S. Standards System: SDOs (Private Sector)*, *supra* note 167.

[169] *Id.*

[170] Press Release, Dep't of Just., Justice Department Implements the Standards Development Organization Advancement Act of 2004 (June 24, 2004).

[171] *Id.*

[172] *Id.*

[173] *Filing a Notification Under the NCRPA*, Dep't of Just., https://www.justice.gov/atr/filing-notification-under-ncrpa [https://perma.cc/6GKG-8K4S].

[174] *About the Gap Year Association*, Gap Year Ass'n, https://www.gapyearassociation.org/about-gya/ [https://perma.cc/WT9G-ZFGS].

[175] *Id.*

[176] *Id.* (emphasis added).

[177] *Id.*

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- **Backcountry/Remote Area Risk Management**: includes standards around risk management in locations where emergency medical care is more than two hours away, and/or in other remote/under-resourced areas; medical kits, supervisory support and training, and membership in the Overseas Security Advisory Council (OSAC).
- **Service-Learning or Community-Based Learning**: must include the community served in planning; must have supervisory training.
- **Independent Student Learning and Internships**: must include independent learning, student preparation, internship vetting, and contingency plans.
- **Partnerships**: must include clear and documentable understanding of who is responsible for what if the gap year program outsources activities and ensure that GYA's standards are continued throughout all partnerships.[178]

Gap year programs that meet these standards can receive an accreditation "seal of approval" from the GYA.[179] Such a seal of approval could give comfort to parents before they entrust their children to gap year organizations and invest thousands of dollars in them.

C. The Case for a Wellness SDO

Similar to how GYA's standards can offer assurance to nervous parents, wellness practitioner standards can offer assurance to consumers, employers, and insurers. The wellness industry could create its own standard setting organization, a "wellness SDO," similar to GYA for the gap year industry. Existing credentialing organizations within wellness like ICE, ACSM, and NBHWC are not set up as SDOs particularized for the broader wellness industry; as noted earlier, their standards are not comprehensive and do not address the behaviors or needs of the various types of wellness practitioners.[180] There is no evidence that these organizations adopt the voluntary consensus standards development process for wellness practitioner stakeholders.

Moreover, ICE does not create professional standards, but rather only accredits some wellness certification programs. ACSM and NBHWC have created some professional standards, but they are not comprehensive, do not use typical SDO processes, and provide no grievance or dispute resolution component should violations of standards occur. As a result, there is room for another standard setting organization that is willing to adopt an SDO, consensus-based approach specifically to wellness practitioner standard creation.[181] The biggest challenge will be finding or creating such an organization to take on this responsibility.

[178] *GYA Standards and Accreditation*, Gap Year Ass'n, https://www.gapyearassociation.org/standards-accreditation/ [https://perma.cc/HM5R-528W].

[179] *Id.*

[180] *See generally* Am. Coll. of Sports Med., https://www.acsm.org/certification [https://perma.cc/DL3J-GJAS]; Inst. for Credentialing Excellence, https://www.credentialingexcellence.org/certification [https://perma.cc/P6GP-NCKS]; Nat'l Bd. for Health & Wellness Coaching, https://nbhwc.org/why-become-board-certified/ [https://perma.cc/VJR4-EJUV].

[181] There is an organization based in the United Kingdom that aims to regulate wellness brands to ensure that they provide credible information. Raphael, *supra* note 24, at 273 (discussing WellSpoken). WellSpoken has a seal of approval and code of conduct for wellness information providers. *See We Are WellSpoken*, WellSpoken (Dec. 5, 2023), https://web.archive.org/web/20231205151722/https://wearewellspoken.com/. The code of conduct addresses endorsement of inaccurate and potentially dangerous health or wellbeing advice, ensuring information aligns with current European Union and UK legislation, ensuring information is substantiated by robust scientific evidence, not disparaging other healthcare professionals, not misrepresenting or misleading the public, being transparent and credible in the area the provider is communicating, and training in health communications. *See* Code of Ethics and Conduct 2017-2018, WellSpoken (Oct. 20, 2019), https://web.archive.org/web/20191020203202/https://wearewellspoken.com/wp-content/uploads/2017/10/Code-of-Ethics-and-Conduct-2017-2018-2.pdf. The website offers an email for individuals to contact the organization if the see a piece of wellness content that the individual believes "falls below a credible standard." *See WellSpoken Contact*, WellSpoken (Dec. 5, 2023), https://web.archive.org/web/20231205153158/ttps://wearewellspoken.com/contact-us/.

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1. Encouraging Compliance

Several mechanisms would encourage wellness practitioners to comply with the wellness SDO standards. First, adopting the SDO processes involves an inclusive and transparent standard development process, which promotes buy-in from the industry, including wellness practitioners themselves. Second, industry buy-in increases the likelihood that industry stakeholders like employers, insurers, and wellness certification programs will incorporate the standards into their processes. For example, ICE, ACSM, and NBHWC may incorporate the consensus-based standards as part of their membership or accreditation requirements. Employers may require wellness practitioners to adopt the standards as a condition of employment. Liability insurers may require the standards as a condition of insurance, or at least offer a premium discount if the wellness practitioner meets the standards.[182] Third, the wellness SDO could serve as a resource to consumers who have been harmed by wellness practitioners by offering a grievance process and a publicly available list of practitioners who have been found to violate the standards.[183] Finally, the wellness SDO could offer wellness practitioner trainings on best practices and help practitioners understand the importance of meeting the standards from a business, legal, and ethical perspective.

2. Wellness SDO Offers Transparency, Structure, and Legitimacy — Not a Veil

A wellness SDO would clarify expectations for wellness practitioners delivering wellness services, while offering consumers some protections and an outlet for grievances. Until a wellness SDO is created, other types of wellness organizations are stepping in to give some structure and guidance to wellness practitioners, but these organizations do not benefit all stakeholders. For example, Pro Advocate Group is a private membership association that gives "legal cover" under the First and Fourteenth Amendments to "alternative healthcare practitioners" who offer therapies and treatments outside of mainstream medicine.[184] The group promises to eliminate illegal investigations and sanctions by state licensing boards and to allow the practice of alternative medical modalities without fear of discrimination.[185] The Professional Wellness Alliance is a similar association that offers its members a "defendable legal basis" to practice holistic health by offering a "professional license" by the "#1 health & wellness ministry in the world."[186] Both groups claim to have been in existence for decades.[187] But, rather than setting standards to improve the quality of wellness services provided to consumers, these groups focus on insulating the wellness practitioner from legal action by using constitutional rights of freedom of speech and exercise of religion as a shield against accusations of practicing a health profession without a license.[188] A wellness SDO can offer all wellness industry stakeholders an opportunity to be transparent about the purpose of wellness services, which in turn can elevate them and give more legitimacy to the industry.

Conclusion

As with many technological advancements, the law is not keeping pace with the growth of the wellness industry. Much of this growth is fueled by a traditional health care system that is not meeting patient

[182] *See, e.g.*, Gutierrez et al., *supra* note 152, at 134-40 (noting that cybersecurity insurers give premium discounts to clients that apply National Institute of Standards and Technology cybersecurity framework and that some other indirect enforcement mechanisms include audits, certifications, internal or external reporting and oversight, insurance requirements, and litigation).

[183] Trubek, *supra* note 94, at 163 (noting that public information about outcomes and commitment to protocols is a soft law regulatory tool).

[184] *Private Membership Association*, ProAdvocate Grp., https://www.proadvocate.org/private-membership-associations-pma/ [https://perma.cc/KV63-EFM8].

[185] *Id.*

[186] *Protect Your Services: How Can Joining the PWA Benefit Your Holistic Services?*, Pro. Wellness All., https://www.pwai.us/license-benefits [https://perma.cc/62RW-BTL6].

[187] *Id.*; ProAdvocate Grp., *supra* note 184.

[188] ProAdvocate Grp., *supra* note 184.

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needs, and that deficiency is likely to worsen under *Braidwood*. Given the increasing number of occupational licenses issued by states and the significant hurdles state licensing requirements present to health care practitioners, the wellness industry should heed the warning signs and act swiftly to create a wellness SDO. This SDO can offer all wellness practitioner stakeholders some guidance and protection, and hopefully give more credibility to those practitioners. A wellness SDO could also serve as a wake-up call to traditional health care providers emphasizing that it is past time to adopt more patient-centered practices, and to the legal industry to recognize wellness law as a necessary legal practice area.

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