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Recommended Citation

Barbara Zabawa, *No More Wild West: The Need for Wellness Professional Standards*, 50 American Journal of Law & Medicine 74 (2025).

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No More Wild West: The Need for Wellness Professional Standards
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Summer 2024

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 possibility that *Braidwood Management v. Becerra* will eliminate the no cost coverage of preventive services recommended by the US Preventive Services Task Force will likely accelerate consumer reliance on the wellness industry for preventive services. Asking consumers to rely on an industry that has no uniform professional standards is risky both from a consumer harm perspective, as well as a regulatory regime perspective. The wellness industry would be best served by using a “soft law” approach to creating standards of care and conduct before the government creates “hard laws” in wellness that will 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 paper explores the current state of the wellness industry, including who practices it, who uses it and why, and who trains, hires, insures and polices wellness practitioners. Part II explains why wellness practitioners should embrace professional standards, primarily because the lack of standards harms both wellness practitioners and consumers, 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 shows how the wellness industry could develop standards using a soft law approach such as creating a wellness Standards Development Organization.

Part 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 United States marketplace and the law, those two terms are distinguishable. In the law, those who work in wellness are unhinged 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 through the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) prohibits health status discrimination by “health care” insurers.³ Tax law allows

¹ 29 CFR § 2590.702(c)(3).

² 42 USC § 12112(d)(4).

³ Mary Crossley, “Discrimination Against the Unhealthy in Health Insurance,” Kansas L. R. 54, at 74 (2005); see also 29 CFR § 2590.702(a)(1); 45 CFR § 156.125.

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 doesn’t 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 and the American College of Sport Medicine

⁴ IRC § 213(d); see also Barbara J. Zabawa and JoAnn Eickhoff-Shemek, *Rule the Rules of Workplace Wellness Programs*, 2d. Ed., at 147-149 (ABA Publishing 2021) (noting that Section 213 is an exception carved out of the general rule of IRC § 262, which prohibits deductions for personal, living, or family expenses).

⁵ *Id.* (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 (citing IRS Publication 502).

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 (2014-2015): 1085-86 (citing 21 USC § 321(b) (2012)); FDA Guidance for Industry on Complementary and Alternative Medicine Products and Their Regulation by the Food and Drug Administration, at 7-8 (Feb. 2007), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/complementary-and-alternative-medicine-products-and-their-regulation-food-and-drug-administration> (last visited Nov. 17, 2023) (citing 21 USC § 321(g)(1) to define “drug”).

⁷ FDA Guidance for Industry on Complementary and Alternative Medicine Products and Their Regulation by the Food and Drug Administration, at 12 (Feb. 2007), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/complementary-and-alternative-medicine-products-and-their-regulation-food-and-drug-administration> (last visited Nov. 17, 2023); FDA, General Wellness: Policy for Low Risk Devices, Guidance for Industry and Food and Drug Administration Staff (September 27, 2019), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/general-wellness-policy-low-risk-devices> (last visited Nov. 17, 2023); see also Yvonne Abraham, Dietary Supplements, Largely Unregulated, Deserve the State’s Skepticism, *Boston Globe* (Jan. 29, 2020), available at <https://www.hsph.harvard.edu/news/hsph-in-the-news/dietary-supplements-unregulated-children-health/> (last visited Nov. 17, 2023).

⁸ See Robert I. Field, Why is Health Care Regulation So Complex?, *P&T*, Vol. 33, No. 10 (Oct. 2008) (stating “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), available at <https://www.statnews.com/2023/05/09/health-care-coaches-regulation/> (last visited November 17, 2023); see also Lisa Held, Psychic Mediums are the New Wellness Coaches, *New York Times* (March 3, 2019), available at <https://www.nytimes.com/2019/03/19/style/wellness-mediums.html#:~:text=While%20psychics%20have%20traditionally%20profited,they%20want%20out%20of%20life> (last visited November 17, 2023) (noting that psychic mediums are self-regulated).

[ACSM]), proof of education or certification in wellness is not required for someone to offer wellness programs.⁹

In the marketplace, wellness is also unhinged and encompasses a wide swath of products, services and practitioners. According to author Colleen Derkatch, wellness culture spans six vectors that encompass: 1) *insipient illness* (a state of pre-disease that requires monitoring and care); 2) *self-management* (the regulation of the body under neoliberal logics of health citizenship and choice); 3) *harm reduction* (the use of natural health products to counteract everyday “toxic” life); 4) *survival strategy* (to mitigate the exhaustion of daily living); 5) *optimization* (the drive to become maximally well by becoming more effective and more efficient); and 6) *performance* (the self-conscious enactment of self, identity, and virtue).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 more 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 wellness as a major priority for American consumers, who spend more than \$450 billion annually on wellness

⁹ S.E. Fair, *Wellness and Physical Therapy*, at 23 (Jones & Bartlett 2009), available at <https://www.studocu.com/ph/document/pamantasan-ng-lungsod-ng-maynila/physical-therapy/fair-se-2009-wellness-and-physical-therapy-jones-and-bartlett/43823672> (last visited Nov. 17, 2023).

¹⁰ Colleen Derkatch, *Why Wellness Sells*, ebook at 6 (Johns Hopkins U. Press 2022).

¹¹ Jessica Wapner, *Medicine’s Wellness Conundrum*, *The New Yorker*, at 2 (Nov. 6, 2021), available at <https://www.newyorker.com/science/annals-of-medicine/medicines-wellness-conundrum> (last visited Nov. 20, 2023).

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 entitled “Countering the Inherent Bias in Wellness through Wellness-Legal Partnerships,” I highlight the faultiness in this assumption.

products and services, and that number will increase at more than five percent per year.¹⁴ Consumers in the United States view wellness in six dimensions:

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

B. Who Are Wellness Practitioners?

Stepping in to help consumers achieve wellness is an army of “wellness practitioners.” These practitioners go by many names: health and/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 coaches, relationship coaches, spiritual coaches and healers, yoga teachers/practitioners, and even hypnotists and psychic mediums.¹⁶ This article refers to them generally as “wellness practitioners.” What these wellness practitioners have in common is that none of them require any credential to start working in that role. And a symptom of this lack of regulation is an ever-evolving nomenclature of who practices “wellness.”

¹⁴ McKinsey & Company, Still Feeling Good: The US Wellness Market Continues to Boom, at 2 (September 2022), available at <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/still-feeling-good-the-us-wellness-market-continues-to-boom#/auth-download/%2F~%2Fmedia%2Fmckinsey%2Findustries%2Fconsumer%20packaged%20goods%2Four%20insights%2Fstill%20feeling%20good%20the%20us%20wellness%20market%20continues%20to%20boom%2Fstill-feeling-good-the-us-wellness-market-continues-to-boom.pdf%3FshouldIndex%3Dfalse> (last visited November 16, 2023).

¹⁵ Id. at 3.

¹⁶ Wellpreneur, 32 Health and Wellness Business Ideas for 2022, available at <https://wellpreneur.com/health-and-wellness-business-ideas/> (last visited Nov. 17, 2023) (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); Lisa Held, Psychic Mediums are the New Wellness Coaches, New York Times (March 19, 2019), available at <https://www.nytimes.com/2019/03/19/style/wellness-mediums.html#:~:text=While%20psychics%20have%20traditionally%20profited,they%20want%20out%20of%20life> . (last visited November 17, 2023); see also Jenny Cowley, et al., Almost Anyone Can Become a Life Coach. A Hidden Camera Investigation Reveals why that’s a Problem, CBC (Feb. 26, 2022), available at <https://www.cbc.ca/news/canada/marketplace-life-coach-1.6364745> (last visited Dec. 2, 2023) (finding some life coaches trying to treat clients’ anxiety and depression without proper credentials and training).

Using yoga as an example, the typical demographics of who practices wellness is a white, upper socioeconomic status, middle-aged female.¹⁷ This data closely corresponds to statistics gathered from the career company Zippia, whose survey found that 66 percent of all wellness specialists are women, 65.9 percent of wellness specialists are white, and their average age is 47 years old.¹⁸ 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.¹⁹

Another noticeable trend among wellness practitioners are those who are leaving traditional health care system roles to work in wellness. A recent article in the Washington Post declares “nurses are leaving hospitals in droves” and establishing new careers, particularly in the wellness space.²⁰ According to a 2022 Department of Health and Human Services Issue Brief, 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.²¹ Over half of those nurses said they planned to seek another career, a non-direct care position, or retiring. The unregulated wellness industry can offer flexibility and growth that many burned out licensed health care practitioners crave.

¹⁷ Crystal L. Park, Tosca Braun, and Tamar Siegel, *Who Practices Yoga? A Systematic Review of Demographic, Health-Related, and Psychosocial Factors Associated with Yoga Practice*, J. Behav. Med., Vol 38, at 463 (2015).

¹⁸ Fact Sheet, Wellness Specialist Demographics and Statistics in the UUS, Zippia (2021), available at <https://www.zippia.com/wellness-specialist-jobs/demographics/> (last visited November 20, 2023). Zippia 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. Id. at <https://www.zippia.com/wellness-specialist-jobs/what-does-a-wellness-specialist-do/> (last visited November 20, 2023).

¹⁹ Id. at https://www.zippia.com/wellness-specialist-jobs/education/?src=chatbot_popout_displayed (last visited November 20, 2023). It is unclear from the data whether the certificate statistic overlaps with the degree statistic.

²⁰ Jennifer Miller, *Why are Nurses Quitting? Ask the Nurse No Hospital will Hire*, Washington Post (Feb. 21, 2023), available at <https://www.washingtonpost.com/lifestyle/2023/02/21/katie-duke-instagram-nursing-pandemic/> (last visited Nov. 20, 2023). 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 COVID19.

²¹ Issue Brief, *Impact of the COVID-19 Pandemic on the Hospital and Outpatient Clinician Workforce*, Assistant Secretary for Planning and Evaluation Office of Health Policy, Dept. of Health and Human Services, at 13 (May 3, 2022), available at <https://aspe.hhs.gov/sites/default/files/documents/9cc72124abd9ea25d58a22c7692dcc6/aspe-covid-workforce-report.pdf> (last visited Nov. 20, 2023).

Finally, it is worth noting that many businesses incorporate the word “wellness” to destigmatize their product or service offering.²² For example, psychedelic drug clinics, such as Ketamine clinics, promote themselves as “wellness clinics,”²³ cannabis has been re-branded as a wellness product,²⁴ and as noted earlier, even psychic mediums promote themselves as “wellness coaches.”²⁵

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

In the United States, wellness consumer demographics mimic those of wellness practitioners, which make sense since many wellness consumers become apostles of wellness after having a positive experience with a wellness product or service. According to the Centers for Disease Control and Prevention (CDC), non-Hispanic white women were more likely to use yoga, meditation, and chiropractors than men or Hispanic and non-Hispanic black adults.²⁶ Dietary supplement use was also higher among older, white females.²⁷

According to the Pew Research Center, 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.²⁸ Many of these alternative treatment services are provided by wellness practitioners. Another 29 percent of Americans have used alternative

²² See e.g., Rina Raphael, *The Gospel of Wellness*, at 266 (discussing how egg freezing start-ups use trendy terms like “self-care” transforms a medical procedure into something more empowering and destigmatizes fertility treatment).

²³ Marisa Meltzer and Dani Blum, *A Ketamine Clinic Treads the Line Between Health Care and a “Spa Day for Your Brain,”* *New York Times* (March 11, 2022), available at <https://www.nytimes.com/2022/03/11/well/mind/wellness-ketamine-mental-health.html> (last visited November 20, 2023).

²⁴ Dana Goodyear, *California Makes Marijuana a Wellness Industry*, *The New Yorker* (January 31, 2018), available at <https://www.newyorker.com/culture/photo-booth/california-makes-marijuana-a-wellness-industry> (last visited November 20, 2023) noting that thousands of people, disproportionately people of color, have been arrested or jailed on marijuana-related charges, but is now being marketed to affluent Californians as a way to optimize personal experience, regulate moods, appetites, pain and creative flow).

²⁵ Lisa Held, *Psychic Mediums are the New Wellness Coaches*, *New York Times* (March 3, 2019), available at <https://www.nytimes.com/2019/03/19/style/wellness-mediums.html#:~:text=While%20psychics%20have%20traditionally%20profited,they%20want%20out%20of%20life> . (last visited November 17, 2023) (noting that psychic mediums are self-regulated).

²⁶ Fact Sheet, Tainya C. Clark, et al., *Use of Yoga, Meditation, and Chiropractors Among U.S. Adults Aged 18 and Over*, CDC National Center for Health Statistics (November 2018), available at <https://www.cdc.gov/nchs/products/databriefs/db325.htm> (last visited November 20, 2023) (noting that past research has identified yoga, meditation, and seeing a chiropractor as some of the most commonly used complementary health approaches).

²⁷ Fact Sheet, Suruchi Mishra, Ph.D., et al, *Dietary Supplement Use Among Adults: United States, 2017-2018*, CDC National Center for Health Statistics (February 2021), available at <https://www.cdc.gov/nchs/products/databriefs/db399.htm> (last visited November 20, 2023).

²⁸ Fact Sheet, *Americans’ Health Care Behaviors and Use of Conventional and Alternative Medicine*, Pew Research Center (February 2, 2017), available at <https://www.pewresearch.org/science/2017/02/02/americans-health-care-behaviors-and-use-of-conventional-and-alternative-medicine/#:~:text=Half%20of%20U.S.%20adults%20say,49%20and%2050%2D64> (last visited Nov. 20, 2023).

medicine in conjunction with conventional medical treatments.²⁹ People may use wellness products and services for a wide range of psychological, emotional and physical reasons and conditions. As Colleen Derkatch postulates, wellness sells because it creates an ambiance of a good life full of purpose and meaning.³⁰ That can be 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.”³¹ 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 attract a whole new set of consumers and elevate the use of the product or service.

For many other people, wellness offers respite from chronic illness. Individuals with chronic conditions are more likely to use alternative medical treatments than those who do not have a chronic condition or disease.³² For example, research shows individuals turn to yoga for postmenopausal symptoms, low back pain, cancer and heart disease.³³ As Derkatch observes, consumer interest in wellness may “in part 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.”³⁴ Indeed some studies have noted a growing distrust in conventional health care providers.³⁵

The failure of conventional health care to offer support to consumers suffering from the demands of modern life is a critical aspect of consumer attraction to wellness, particularly for

²⁹ Id.

³⁰ Colleen Derkatch, *Why Wellness Sells: Natural Healing in a Pharmaceutical Culture*, ebook at 11 (stating that “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.”).

³¹ Id. at 24-25 (also quoting Nicole Cliffe who mused on Twitter that “the person who came up with ‘wellness’ as a product adjective is probably living in a castle carved out of gold right now.”).

³² Fact Sheet, *Americans’ Health Care Behaviors and Use of Conventional and Alternative Medicine*, Pew Research Center (February 2, 2017), available at <https://www.pewresearch.org/science/2017/02/02/americans-health-care-behaviors-and-use-of-conventional-and-alternative-medicine/#:~:text=Half%20of%20U.S.%20adults%20say,49%20and%2050%2D64> (last visited Nov. 20, 2023).

³³ Crystal L. Park, Tosca Braun and Tamar Siegel, *Who Practices Yoga? A Systemic Review of Demographic, Health-Related, and Psychosocial Factors Associated with Yoga Practice*, *J. Behav. Med.*, Vol. 38, at 460 (2015).

³⁴ Derkatch, *Why Wellness Sells*, at 13 (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).

³⁵ Rina Raphael, *The Gospel of Wellness*, at 125 (Henry Holt Publishing 2022); see also Richard S. Isaacs, *5 Steps to Restore Trust in U.S. Health Care*, *Harvard Business Review* (September 8, 2022), available at <https://hbr.org/2022/09/5-steps-to-restore-trust-in-u-s-health-care> (last visited December 3, 2023); Paul Hudson and 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 of study by Sanofi, *Fortune* (January 31, 2023), available at <https://fortune.com/2023/01/31/people-trust-health-medical-system-ethnic-minority-disabilities-identify-lgbtq-study-sanofi-hudson-williams/> (last visited December 3, 2023).

marginalized groups who are frequently dismissed by conventional health care.³⁶ For example, one reason so many people, particularly women, turn to wellness practitioners is possible “medical gaslighting” by conventional medicine.³⁷ This gaslighting, or dismissing a patient’s symptoms, is likely due in part to the little time that physicians spend with patients during a typical medical visit, which is between nine and twenty-four minutes per patient per visit.³⁸ One study found physicians listen to their patients for an average of eleven seconds before interrupting.³⁹ Other surveys show that the vast majority of consumers want the traditional health system to be more involved with wellness activities such as healthy eating and exercise, but currently there is a disconnect.⁴⁰ Another U.S. survey by the Harris Poll found that 19 percent of respondents complained about the medical system’s lack of focus on preventive care and wellness.⁴¹ The Harris Poll found that the most common ways the U.S. healthcare system is falling short for consumers relate to getting appointments, costs, and the system being focused on treating acute problems rather than preventative care and wellness.⁴² Thus, when it comes to focusing on an individual’s overall wellbeing and offering more holistic services and attention to consumers, the wellness industry stands ready to fill the ever-growing gap left by

³⁶ Id.; see also Francesca Butler, Is the Wellness Industry Dangerous for our Health? The Health Policy Partnership Blog (July 3, 2023), available at <https://www.healthpolicypartnership.com/is-the-wellness-industry-dangerous-for-our-health/> (last visited December 2, 2023) (citing Rina Raphael, *The Gospel of Wellness*, who states 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, as well as the significant gaps in the provision of mental health services mean many people have to find wellness as an alternative means of helping themselves).

³⁷ Allana Akhtar, 3 Shady Ways Wellness Brands Lure Women into Buying Expensive, Useless Products, According to New Book “The Gospel of Wellness,” Business Insider (October 27, 2022), available at <https://www.insider.com/rina-raphael-gospel-of-wellness-alternative-medicine-supplements-natural-organic-2022-10> (last visited November 20, 2023) (defining “medical gaslighting” as dismissing a patient’s symptoms and noting that for many women, traditional Western medicine seems built to make a buck, not to significantly care for their needs).

³⁸ Jessica Wapner, Medicine’s Wellness Conundrum, *The New Yorker*, at 4-5 (Nov. 6, 2021), available at <https://www.newyorker.com/science/annals-of-medicine/medicines-wellness-conundrum> (last visited Nov. 20, 2023).

³⁹ 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. Fact Sheet, Jack Resneck, Jr., MD, Burnout is a Health Crisis for Doctors – and Patients, American Medical Association (March 9, 2023), available at <https://www.ama-assn.org/about/leadership/burnout-health-crisis-doctors-and-patients> (last visited Nov. 20, 2023).

⁴⁰ Report, 2022 State of the Healthcare Consumer Report: Who Will Help Consumers Put the Pieces Together?, Kauffman Hall, at 9 (Sept. 2022), available at https://www.kauffmanhall.com/insights/research-report/2022-state-healthcare-consumer-report?utm_source=agcy&utm_campaign=consumer-report&utm_medium=pr&utm_term=220927 (last visited Nov. 20, 2023) (stating that seventy percent of surveyed respondents report wanting health systems to be more actively involved in supporting their health management activities).

⁴¹ Report, The Patient Experience: Perspectives on Today’s Healthcare, Harris Poll, at 7 (2023), available at <https://www.aapa.org/download/113513/?tmstv=1684243672> (last visited December 11, 2023). This poll was conducted in English and Spanish online in the United States and surveyed 2,519 adults age 18+ between February 23 - March 9, 2023. Id. at 4.

⁴² Id. at 7.

conventional medicine.⁴³ It is this alarming consumer desire to replace traditional health care with unregulated wellness products and services that best supports the urgent and desperate need for wellness practitioner standards.

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

1. Who trains and certifies?

Just like the wellness practitioners themselves, the entities that train, certify, hire and insure wellness practitioners are vast, varied and fragmented. Training programs may be marketed as “wellness certificate”⁴⁴ programs, especially for purposes of worksite wellness programming, or more specific training programs that focus on a particular aspect of

⁴³ Jessica Wapner, Medicine’s Wellness Conundrum, The New Yorker, at 4-5 (Nov. 6, 2021), available at <https://www.newyorker.com/science/annals-of-medicine/medicines-wellness-conundrum> (last visited Nov. 20, 2023). Even with the wellness industry standing ready to fill in gaps left by conventional medicine, it too is not meeting all consumers’ needs. 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. McKinsey & Company, Still Feeling Good: The US Wellness Market Continues to Boom, at 9-10 (September 2022), available at <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/still-feeling-good-the-us-wellness-market-continues-to-boom/#/auth-download/%2F~%2Fmedia%2Fmckinsey%2Findustries%2Fconsumer%20packaged%20goods%2Four%20insights%2Fstill%20feeling%20good%20the%20us%20wellness%20market%20continues%20to%20boom%2Fstill-feeling-good-the-us-wellness-market-continues-to-boom.pdf%3FshouldIndex%3Dfalse> (last visited November 16, 2023). 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. Id. at 10. Also, many young people are turning to Tik Tok for mental health needs, leading to untrained social media influencers to deliver misinformation about mental illness. Ash-Har Quaraishi, Amy Corral and Ryan Beard, Teens Turning to TikTok for Mental Health Advice are Self-Diagnosing, CBS News online (Feb. 27, 2023), available at <https://www.cbsnews.com/news/social-media-mental-health-self-diagnosis/> (last visited December 11, 2023) (noting that what is online is a “free-for-all” and that there is no accountability and no responsibility taken).

⁴⁴ See e.g., National Wellness Institute Certified Wellness Practitioner (CWP) at <https://nationalwellness.org/certification/> (last visited November 26, 2023); Chapman Institute Certified Wellness Program Coordinator at [https://chapmaninstitute.com/wp-content/uploads/Level I Course Workbook Live 2018.pdf](https://chapmaninstitute.com/wp-content/uploads/Level%20I%20Course%20Workbook%20Live%202018.pdf) (last visited November 26, 2023).

wellness such as nutrition,⁴⁵ fitness,⁴⁶ coaching,⁴⁷ energy healing,⁴⁸ or mental wellness.⁴⁹ Given the wide range of wellness “specialties,” thousands of programs and organizations exist to educate wellness practitioners. For example, according to Yoga Alliance in 2021, there were more than 6,000 registered yoga schools alone.⁵⁰ A simple Google search for a “list of wellness certifications” reveals a long list of different wellness education organizations, including university programs as well as non-university programs.⁵¹ And it’s worth repeating that certifications are not even necessary to start working in wellness.⁵²

⁴⁵ See e.g., Precision Nutrition Certification in Nutrition Coaching at <https://web.archive.org/web/20230324005825/https://www.precisionnutrition.com/nutrition-certification> (last visited November 26, 2023); Institute for Integrative Nutrition Health Coach Program at https://course.integrativenutrition.com/the-health-coach-training-program?_gl=1*x13icb*_ga*OTEzNTMwMjkyLjE3MDEwMTIzMTg.*_ga_4XRZQ05ZKR*MTcwMTAxMjMxOC4xLjEuMTcwMTAxMzI0NC40NS4wLjA. (last visited November 26, 2023).

⁴⁶ Brochure, Dr. Steve Aldana, 22 Best Wellness Certifications, Personal Training and Health Coaching in 2023, WellSteps, available at <https://www.wellsteps.com/blog/2020/01/02/wellness-certifications-health-coach-certifications-personal-training-certifications/> (last visited November 26, 2023) (listing six fitness training organizations).

⁴⁷ Id. (listing nine health coaching certification organizations); see also Sarah Haye Coomer and Aleana Hall, Best Health Coach Certification Programs 2023, Forbes (September 25, 2023), available at <https://www.forbes.com/health/wellness/best-health-coach-certification/> (last visited November 26, 2023) (listing six health coaching programs); National Board of Health and Wellness Coaching Approved Training Programs at <https://nbhwc.org/find-an-approved-training-program/#!directory/ord=rnd> (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).

⁴⁸ See e.g., Sacred Wellness School of Healing Arts at <https://www.sacredwellness.co/> (last visited November 26, 2023) (offering an “Energy Medicine Practitioner Diploma,” Reiki certifications, and crystal energy healing certifications).

⁴⁹ Brochure, The Best Mental Health Coach Certifications in 2023, Life Coach Magazine, available at <https://www.lifecoachmagazine.com/best-mental-health-coach-certification/> (last visited November 26, 2023) (listing five programs in mental health and wellness coaching).

⁵⁰ Annual Report, Yoga Alliance, at 16-17 (2020-21), available at https://issuu.com/yogaalliance/docs/annual_report_2020-2021_final (last visited November 25, 2023).

⁵¹ See e.g., https://www.google.com/search?q=list+of+wellness+certifications&sca_esv=585426870&rlz=1C5CHFA_enUS702US702&ei=yLxjZZuzF-HH0PEPvOi56Ag&ved=0ahUKEwibwPy09uGCAxXhlzQIHtX0Do0Q4dUDCBA&uact=5&oq=list+of+wellness+certifications&gs_l=Egxnd3Mtd2l6LXNlcnAiH2xpc3Qgb2Ygd2VsbG5lc3MgY2VydGlmaWNhdGlbnMyBRAhGKABMgUQIRigAUi00AFQyW9Yrs4BcAF4AZABA5gBpAKgAfNVqgEHMC40OC4xMbgBA8gBAPgBAagCCsICBBAAGeFCahMQABiABBikBRixAXiARahhGGPkbWgIOEAAYgAQYigUYsQMYkQLCAGsQABiABBikBRiRAsICDhAAGIAEGloFGMcKDGJECwgILEAAYgAQYigUYkgPCAg4QLhiABBjHARivARiOBcICCBAAAGIAEGLEDwglqEAAYgAQYigUYsQMYkQIYRhj5ARiXBRiMBRjdBBhGGPQDGPU DGPYD2AEbwglWEAAYAXiPARjIAhjqAhi0AhiMA9gBASiCERAUgIAEGloFGMcBGNEDEGJECwgIREC4YgAQYsQMYgwEYxwEY0QPCAgS QLhiABBixAXiDAcICDhAUgIAEGloFGLEDGIMBwgIOEC4YgAQYsQMYxwEY0QPCAgUQABiABMICCxAuGIAEGMcBGNEDEwglgEC4YgAQYigUYxwEY0QMYkQIYlwUY3AQY3gQY4ATYAQPCAhYQLhiABBikBRixAXiDARjHARjRAXhDwglKEAAYgAQYigUYQ8ICExAuGIAEGloFGLEDGMBGNEDEGPCAggQLhiABBixA8ICBBAAGAPCag4QABiABBikBRixAXiDAcICBRAuGIAEWglGEAAYFhgewglLEAAYgAQYigUYhPiAwQYACBBiAYBkAYlugYGCAEQARgTugYECAlYCroGBggDEAEYFA&sclient=gws-wiz-serp#ip=1

⁵² *Infra*, n. 9.

Many of the wellness certifications do not require any specific amount of education or experience, even from the most prestigious universities in the United States. For example, a “health enthusiast” with no other prerequisites other than an interest in wellness can obtain a certificate from Harvard Medical School in “Health and Wellness: Designing a Sustainable Nutrition Plan.”⁵³ Or, in two weeks a “wellness professional” can earn a Wellness Counseling certificate from Cornell College of Human Ecology.⁵⁴ 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).⁵⁵ ICE does not specialize specifically in establishing and enforcing wellness standards, but rather accredits programs that offer wellness certifications as well as certifications offered by many other types of industries such as construction, management, food and beverage, financial, manufacturing, and health care organizations, to name a few.⁵⁶ Of the thousands of wellness certification programs that exist both in Universities and private companies, only 18 organizations offer wellness certification programs that are accredited by ICE, and most of those are in fitness certifications.⁵⁷

To obtain accreditation through ICE, wellness certification programs are expected to adhere to “defined standards by a third party”⁵⁸ and a “code of ethics.”⁵⁹ These standards and ethical codes, however, are for the organization delivering the wellness certification

⁵³ Brochure, “Health and Wellness: Designing a Sustainable Nutrition Plan” Certificate Program, Harvard Medical School Executive Education, available at https://exeonline.hms.harvard.edu/health-and-wellness?utm_source=Google&utm_network=g&utm_medium=c&utm_term=health%20course&utm_location=9023887&utm_campaign_id=19488556529&utm_adset_id=144586142123&utm_ad_id=646073131370&utm_campaign=NonBrand%7CCertificate-ShortForm%7CHMS-LIME%7CUS%7CNew&utm_adgroup=&gad_source=1&gclid=Cj0KCQiApOyqBhDIARIsAGfnyMpCyiTzThEhB_ZaN8ZN_Y28VWqPZ79Bcil7B36abparT5UnO_dLBTGMaAkM3EALw_wcB (last visited November 26, 2023).

⁵⁴ Brochure, “Certificate in Wellness Counseling,” Cornell College of Human Ecology, available at https://ecornell.cornell.edu/certificates/healthcare/wellness-counseling/?authGate=1&utm_source=google&utm_medium=cpc&utm_campaign=nutrition_US+-+Wellness+Counseling&utm_term=wellness%20coach%20training&utm_content=g_670968362538_e&creative=670968362538&keyword=wellness%20coach%20training&matchtype=e&network=g&device=c&url=https://ecornell.cornell.edu/certificates/healthcare/wellness-counseling/&target=&position=&gad_source=1&gclid=Cj0KCQiApOyqBhDIARIsAGfnyMqxGABBrmdkCcDz1iZS7WUicPLwCKgLxBrcSOXbpgP2ZvKKMHgci44aAt5QEALw_wcB#viewpdfDIModal (last visited November 26, 2023).

⁵⁵ Brochure, “Institute for Credentialing Excellence – About Us,” available at <https://www.credentialingexcellence.org/About> (last visited November 26, 2023).

⁵⁶ Id.

⁵⁷ See <https://ice.learningbuilder.com/Search/Public/MemberRole/ProgramVerification2?model.Organization=&model.Accreditation=&model.ProgramAcronym=&model.Industry=Fitness+and+Wellness&model.ProgramName=&performSearch=true&o=&d=&p=0&s=20> (last visited November 26, 2023).

⁵⁸ Brochure, “Accreditation through I.C.E.,” Institute for Credentialing Excellence, available at https://www.credentialingexcellence.org/Portals/0/Docs/Accreditation/I_C_E_-Accreditation-Brochure.pdf?ver=dN1jaDq83E-CMCROIsX2ow%3d%3d (last visited November 28, 2023).

⁵⁹ Brochure, “Code of Ethics,” ICE, available at <https://www.credentialingexcellence.org/About/Code-of-Ethics-Statement> (last visited November 28, 2023).

program, not the individuals delivering the services.⁶⁰ Some organizations that are accredited may have some standards for their students or members who earn the certificate, but often these are not comprehensive and there is rarely an enforcement mechanism should any program or participant fail to adhere to the code of ethics.⁶¹ 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 the following:

- 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.
- Do not harass or retaliate against anyone participating in ACSM activities.⁶²

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, below, can harm consumers.

⁶⁰ Id.

⁶¹ 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 <https://www.acefitness.org/about-ace/our-efforts/professionalism/> (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 <https://www.netafit.org/>. Compare 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. See ACSM website at <https://www.acsm.org/membership/member-code-of-ethics> (showing 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 Yoga Alliance website at https://www.yogaalliance.org/Our_Standards/Accountability (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) (last visited November 26, 2023). 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 <https://wellnessci.org/> (last visited November 28, 2023).

⁶² Brochure, Principles of Professional Ethical Behavior, ACSM, available at <https://www.acsm.org/membership/member-code-of-ethics> (last visited November 28, 2023).

Another organization that has recently become involved in approving wellness certification programs is the National Board of Health and Wellness Coaching (NBHWC). NBHWC approves health and wellness coaching programs, both at the university level as well as those delivered by private entities.⁶³ NBHWC approval requires wellness coaching programs to meet certain standards, such as a certain number of instructional hours, a certain number of practice coaching sessions, certain skills assessments, and certain faculty requirements (such as having faculty who have a coaching background and health and wellness educational degrees).⁶⁴ Thus far, NBHWC has accredited 126 health and wellness coaching certification programs.⁶⁵

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.”⁶⁶ The code of ethics applies to any NBHWC credentialed health and wellness coach.⁶⁷ 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;

⁶³ National Board of Health and Wellness Coaching Approved Training Programs at <https://nbhwc.org/find-an-approved-training-program/#directory/ord=rnd> (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

⁶⁴ Brochure, NBHWC Program Approval Published Standards, NBHWC Website, available at <https://nbhwc.org/program-approval-standards/> (last visited November 29, 2023).

⁶⁵ *Infra*, n. 59.

⁶⁶ Coomer and Hall, What is a Health Coach and What do they Do?, *Forbes*, *infra* n. ____.

⁶⁷ Brochure, NBHWC Code of Ethics, NBHWC Website, available at <https://nbhwc.org/code-of-ethics/> (last visited November 29, 2023). 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. Brochure, Become a National Board Certified Health and Wellness Coach (NBC-HWC) Eligibility Requirements, NBHWC Website, at <https://nbhwc.org/exam-eligibility-requirements/> (last visited November 29, 2023).

- Continuing in the development of the coach's professional skills.⁶⁸

Although more robust than the ACSM ethical guidelines, the NBHWC Code of Ethics offers little to no guidance about billing and other business practices and just like the ACSM code of ethics, there is no explicit mechanism to hold coaches accountable who do not adhere to the code.⁶⁹

As a result, even with the few wellness training programs that are accredited or approved by ICE or NBHWC, 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 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.

2. *Who hires*

Wellness practitioners can work independently, for corporations as part of the corporate wellness program, for insurance brokers,⁷⁰ for healthcare providers,⁷¹ fitness centers and health clubs,⁷² or for startup companies.⁷³ 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

⁶⁸ Brochure, National Board of Health and Wellness Coaching Code of Ethics, NBHWC Website, at <https://nbhwc.org/code-of-ethics/> (last visited November 29, 2023).

⁶⁹ 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.

⁷⁰ See e.g., Sarah Hayes Coomer, What is a Health Coach and What do they Do?, *Forbes Health* (September 22, 2023), last visited November 28, 2023 (stating that health coaches, a type of wellness professional, can work for insurance companies, for corporate wellness programs or private practice); see also Katie Suleta, Health Coaches are the Next Big Thing. They're Also Completely Unregulated, *Stat* (May 9, 2023), available at <https://www.statnews.com/2023/05/09/health-care-coaches-regulation/> (last visited November 28, 2023) (stating that health coaches can be hired independently from \$50 to \$150/session or through a workplace wellness program).

⁷¹ Heather D. Bennett, et al., Health Coaching for Patients, *Family Practice Management*, Vol. 17, Issue 5, at 24-29 (Sept. 2010), available at <https://www.aafp.org/pubs/fpm/issues/2010/0900/p24.html> (last visited November 28, 2023) (stating that health coaches can help family physicians as part of the care team).

⁷² Brochure, Fitness Trainers and Instructors, U.S. Bureau of Labor Statistics Occupational Outlook Handbook, available at <https://www.bls.gov/ooh/personal-care-and-service/fitness-trainers-and-instructors.htm> (last visited November 28, 2023).

⁷³ Serena Oppenheim, How the Corporate Wellness Market has Exploded, *Forbes* (June 11, 2019), available at <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> (last visited November 28, 2023) (highlighting several innovative wellness startups in the corporate wellness space); see also Abdo Riani, 4 Innovative Startup Opportunities in Wellness and Mental Health, *Forbes* (Aug. 31, 2023), last visited on November 28, 2023 (featuring four wellness startups that could employ wellness professionals).

themselves a “wellness practitioner” or working as one. And according to a 2022 report on employee wellness industry trends, 76% of companies are investing in more stress management and resilience resources for their employees.⁷⁴ 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.”⁷⁵ Based on the disorganized, fragmented 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*

There are a number of professional liability insurers that offer coverage to a wide variety of wellness practitioners. A few examples are CPH & Associates,⁷⁶ Alternative Balance,⁷⁷ HPSO,⁷⁸ and CM&F Group.⁷⁹ One insurer confirmed that they have no criteria or standards by which to measure a wellness practitioner’s qualifications and insurability risk.⁸⁰ This insurer expressed significant interest in creating and adopting wellness practitioner standards.⁸¹

Another liability insurer has a client “code of ethics” with which insureds are expected to comply or face nonrenewal of their policy.⁸² But, like the ethical codes for ACSM and NBHWC, the code is not comprehensive and omits guidelines regarding referrals to licensed practitioners,

⁷⁴ Victoria Franca, The Rise of Corporate Wellness to Support Employee Retention, Forbes (Nov. 4, 2022), available at <https://www.forbes.com/sites/forbesbusinesscouncil/2022/11/04/the-rise-of-corporate-wellness-to-support-employee-retention/?sh=57ea7f124649> (last visited November 29, 2023) (citing to the 2022 Employee Wellness Industry Trends Report by Wellable Labs).

⁷⁵ Id.

⁷⁶ See <https://cphins.com/individual-wellness/> (offering professional liability insurance to those working in fitness, wellness and coaching).

⁷⁷ See <https://alternativebalance.com/health-coach-liability-insurance/> (offering professional liability insurance to health coaches, ayurveda and aromatherapy professionals, yoga professionals, and energy work professionals, among others).

⁷⁸ See <https://www.hpso.com/Insurance-for-you/Individual-Practitioners/Other-healthcare-providers/Professions-covered> (offering malpractice insurance to fitness professionals, health coaches and wellness counselors, to name a few).

⁷⁹ See <https://www.cmfgroup.com/> (offering malpractice insurance to various health and wellness professionals, including coaches, nutritionists and reiki practitioners).

⁸⁰ National Wellness Institute Webinar with Barbara Zabawa, Charles Hodson and Jonathan Posey, October 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).

⁸¹ Id.

⁸² Fact Sheet, Alternative Balance Mission & Ethics, website, available at <https://alternativebalance.com/mission-ethics/> (last visited December 14, 2023); see also email from Miriam Ball, CIO of Alternative Balance, to Barbara J. Zabawa, December 14, 2023 (stating that those insureds who do not share the company’s standards are declined membership).

ethical business practices and misrepresentation of services or credentials, as examples.⁸³ Importantly, this insurer's code applies only to those practitioners who self-select to be insured by this insurer. The code is not applicable to those who are not policyholders of this insurer. Also, there is no resource for consumers harmed by a wellness practitioner as the insurer is not a neutral arbiter of such a dispute. An insurer's incentive and duty is to defend the insured. Furthermore, there is no law that requires wellness practitioners to obtain professional liability insurance. As a result, those wellness practitioners 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 offerings seem to be rare, narrowly applied and scattered. There is some policing of wellness activity at the federal level through the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA), but that too is very narrowly applied. 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 a serious disease such as cancer or heart disease.⁸⁴ The FDA Office of Criminal Investigation has brought cases against rogue wellness practitioners and companies, such as medical spas, for obtaining drugs illegally from China.⁸⁵

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 wellness products.

Most, if not all, states prohibit the unlicensed practice of medicine, psychology, and dietetics.⁸⁶ These three licensed disciplines often present the most legal risk for wellness practitioners. This

⁸³ *Id.*

⁸⁴ Press Release, FTC Warns Almost 700 Marketing Companies That They Could Face Civil Penalties if They Can't Back Up Their Product Claims, FTC Website (April 13, 2023) at <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> (last visited November 29, 2023) (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 placing them on notice that they will incur significant civil penalties if they fail to adequately substantiate their product claims).

⁸⁵ See e.g., Press Release, KC Medical Spa Owner Pleads Guilty to Illegal Treatments, FDA Website (July 27, 2022) at <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/press-releases/kc-medical-spa-owner-pleads-guilty-illegal-treatments> (last visited November 29, 2023) (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).

⁸⁶ See Taylor J. Newman and Angela E. Surrent, 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

is because services permitted within the scope of practice of these three disciplines are often services that wellness practitioners would also like to offer, such as treat a client’s physical or mental health condition or advise on diet and nutrition.⁸⁷

Although it is illegal to practice medicine without a license, a recent survey of 31 state medical boards revealed that most of these boards are not policing 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 to the first question, whether they had any desire to take action against those practitioners.⁸⁸ Table 1 summarizes the responses from the survey:

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

the U.S. had enacted a medical licensing scheme regulating who could practice medicine) (citing Paull 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 Council of Holistic Health Educators Website at <https://holisticcouncil.org/nutrition-laws/> (identifying 14 states that require a license to practice dietetics).

⁸⁷ See e.g., Press Release, FTC Warns Almost 700 Marketing Companies that they could Face Civil Penalties if they Can’t Back Up their Product Claims, FTC (April 13, 2023), available at <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> (last visited December 2, 2023) (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); *Del Castillo v. Fla. Dept. of Health*, Petition for Writ of Certiorari, Case No. 19-13070, at 2 (April 27, 2022) (*cert denied*) (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 and John b. Livingstone, *Coaching vs. Psychotherapy in Health and Wellness: Overlap, Dissimilarities, and the Potential for Collaboration*, *Global Advances in Health and Medicine*, Vol. 2, No. 4, at 20 (July 2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3833547/pdf/gahmj.2013.036.pdf> (last visited December 2, 2023) (noting how psychotherapy and health coaching bump up against each other); see also Jenny Cowley, et al., *Almost Anyone Can Become a Life Coach. A Hidden Camera Investigation Reveals why that’s a Problem*, CBC (Feb. 26, 2022), available at <https://www.cbc.ca/news/canada/marketplace-life-coach-1.6364745> (last visited Dec. 2, 2023) (finding some life coaches trying to treat clients’ anxiety and depression without proper credentials and training).

⁸⁸ Barbara Zabawa and Mark Mollenhauer, *Raw Data from Telephone Survey conducted between January and May 2022*, University of Wisconsin Milwaukee Department of Health Informatics and Administration (2022).

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

This survey suggests that there is not much interest or capacity by state medical boards 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 practicing outside their scope or engaging in unethical business practices.

Consumers can police wellness practitioners through filing of lawsuits, and there have been a few cases, as highlighted in Part II. But lawsuits are often cost prohibitive and ineffective at creating lasting change,⁸⁹ particularly since there are no authoritative standards by which to

⁸⁹ Louise G. Trubek, New Governance and Soft Law in Health Care Reform, *Indiana Health Law Rev.*, Vol. 3, at 149 (2006) (stating a failure of malpractice litigation as a major tool to prevent errors and improve quality of care is the

measure wellness practitioners' duty to 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 industry and the wellness industry should embrace wellness practitioner standards. First, though no one is systematically collecting data, there is anecdotal evidence that people are getting harmed both physically, mentally and financially by wellness practitioners. Wellness standards can more clearly define the separation 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 wellbeing. This harms both consumers and practitioners who want what they do to be respected and legitimate. Third, creating wellness standards can preempt state government regulation and keep the regulatory flexibility upon which so many in wellness depend.

A. Wellness Harms

Despite limited enforcement by state licensing boards, there is evidence of individual harm either physically, emotionally and/or financially by the wellness industry. Indeed, one recent study gathered data on alternative health care harms, many of which are part of the unregulated wellness industry, such as homeopathy, ayurvedic medicine, reflexology, hydrotherapy, herbal remedies, supplements, diets, aromatherapy, detoxification therapies, meditation, hypnotherapy, and yoga, among others.⁹⁰ The researchers identified numerous direct and indirect harms, as listed in Table 2, below.⁹¹

Other evidence of harm by wellness practitioners include: 1) false advertising about services offered;⁹² 2) not responding to client requests for help;⁹³ 3) administering medical spa treatments (such as Botox) without physician oversight;⁹⁴ 4) having sexual relations with

random selection of cases, the high cost of litigation, and the resistance of health care institutions to use the information gained in lawsuits).

⁹⁰ Bernie Garrett, et al., A Taxonomy of Risk-Associated Alternative Health Practices: A Delphi Study, Health Soc. Care Community, Vol. 30, 1163, 1166 (2022).

⁹¹ Id., Table 5, at 1169-1174. Each of these harms were supported by at least three citations of evidence. Id. at 1167.

⁹² See e.g., Texas v. Brittany Dawn Davis, Plt's Orig. Petition, Case No. DC-22-91388 (Tx 95th Dist. 2022) (alleging wellness influencer's online nutrition and fitness plans were not delivered to consumers as advertised)

⁹³ Id. (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).

⁹⁴ Press Release, KC Medical Spa Owner Pleads Guilty to Illegal Treatments, Dept. of Justice (July 27, 2022) <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/press-releases/kc-medical->

clients⁹⁵; 5) taking financial and emotional advantage of clients and accepting financial gifts from clients;⁹⁶ and promoting sexual conversion therapy to clients struggling with their sexuality and expressing suicidal tendencies.⁹⁷

i. Standards Can Reduce Consumer Harm

Using the harms identified from the sources above, which are by no means intended to be exhaustive, Table 2 shows what standards could be created to help address these harms:

Table 2
Examples of Wellness Harms and Standards to Address those Harms

Harm Category	Harm Example	Standard
Experimental Interventions	<ul style="list-style-type: none"> Using interventions that are experimental and may have adverse health effects.⁹⁸ Failure to get informed consent.⁹⁹ 	<ul style="list-style-type: none"> Standard to not offer to treat or cure an illness in violation of state or federal law. Standard to obtain informed consent before offering products or services Standard to disclose the wellness service does not substitute for medical care Standard to obtain client's authorization to disclose alternative intervention to client's licensed primary care provider

[spa-owner-pleads-guilty-illegal-treatments](#) (last visited November 29, 2023) (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).

⁹⁵ State v. McFadden, 136 Hawaii 190 (unpublished Ct. App. Hawaii 2015) (Energy healer accused of sexually assaulting client); Dept. of Licensing and Regulatory Affairs v. Duncan, 2020 WL 359648, at 1-2 (unpublished Ct. App. Mich. 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).

⁹⁶ Monier-Kilgore v. Flores, 2009 WL 1865126 (unpublished Ct. App. 3d Cal 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).

⁹⁷ Jenny Cowley, et al., Almost Anyone Can Become a Life Coach. A Hidden Camera Investigation Reveals why that's a Problem, CBC (Feb. 26, 2022), available at <https://www.cbc.ca/news/canada/marketplace-life-coach-1.6364745> (last visited Dec. 2, 2023) (Video shows a life coach that provides sexual conversion therapy and asks a client to reenact a sexual assault, causing the client overdose on drugs).

⁹⁸ Garrett, et al., Table 5, at 1169-1174

⁹⁹ Id.

		<ul style="list-style-type: none"> • Standard to encourage clients to seek medical care • Standard to not misrepresent services, qualifications or falsely advertise • Standard to substantiate any claims made with reliable evidence
Financial Harms	<ul style="list-style-type: none"> • Financial loss through payment for ineffective interventions, deceptive advertising, highly priced products or false claims about wellness products or services¹⁰⁰ 	<ul style="list-style-type: none"> • Standard to offer refunds and only bill for services actually provided • Standard to disclose financial conflicts of interest • Standard to do no harm • Standard to disclose source of recommended products and risks and oversight (or lack thereof) of the same • Standard to not use or recommend illegal substances or items • Standard to not misrepresent services, qualification or falsely advertise
False Claims	<ul style="list-style-type: none"> • False claims about treating medical conditions beyond the practitioner's scope of practice¹⁰¹ 	<ul style="list-style-type: none"> • Standard to operate within one's scope of practice as defined by the practitioner's education, training, experience and state licensing laws • Standard to not misrepresent services, qualifications or falsely advertise
Poor Research	<ul style="list-style-type: none"> • Poorly designed and regulated research and using those studies to legitimize products or services¹⁰² 	<ul style="list-style-type: none"> • Standard requiring health research training before conducting alternative health/wellness research

¹⁰⁰ Id; See also, Texas v. Brittany Dawn Davis, Plt's Orig. Petition, Case No. DC-22-91388 (Tx 95th Dist. 2022) available at file:///Users/barbarazabawa/Downloads/2022_WL_348709.pdf (last visited December 6, 2023) (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).

¹⁰¹ Garrett, et al., Table 5, at 1169-1174.

¹⁰² Id.

		<p>studies on patients/clients</p> <ul style="list-style-type: none"> • Standard to obtain informed consent before using experimental services
Lack of Training to Handle Adverse Events	<ul style="list-style-type: none"> • Lack of practitioner's experience with acute and emergency care to deal with adverse reactions¹⁰³ 	<ul style="list-style-type: none"> • Standard to obtain training by accredited program • Standard to refer clients to emergency health care or other licensed health care providers as needed • Standard for obtaining approved continuing education, particularly around health risks • Standard to not use or recommend illegal substances or items
Lack of Hygiene	<ul style="list-style-type: none"> • Contamination or other preparation issues¹⁰⁴ 	<ul style="list-style-type: none"> • Standard to use sanitary methods of storage, administration and disposal of products
Illegal Imports	<ul style="list-style-type: none"> • Use of illegally imported or compounded items circumventing regulatory control¹⁰⁵ 	<ul style="list-style-type: none"> • Standard to not use or recommend illegal substances or items • Standard to not compound items illegally or outside training, education, experience.
Toxic Products or Remedies	<ul style="list-style-type: none"> • Toxicity with specific Ayurvedic remedies, such as lead poisoning due to manufacturing processes and poor-quality control¹⁰⁶ 	<ul style="list-style-type: none"> • Standard to use/recommend products from reputable, high quality sources that meet manufacturing standards
Improper Dosage	<ul style="list-style-type: none"> • Doses in supplements are much larger than normally orally ingested¹⁰⁷ • Adverse effects of bleach therapy to treat various conditions¹⁰⁸ 	<ul style="list-style-type: none"> • Standard to follow manufacturer's instructions for use • Standard to use/recommend products from reputable, high quality sources that

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

		meet manufacturing standards <ul style="list-style-type: none"> • Standard to obtain informed consent before offering products and services • Standard to obtain client authorization to disclose alternative intervention to client's licensed primary care provider • Standard to encourage clients to seek medical care
Personal Boundary Issues	<ul style="list-style-type: none"> • Engaging in sexual or personal relationships with current or recent clients¹⁰⁹ 	<ul style="list-style-type: none"> • Standard requiring appropriate client boundaries
Ignoring Serious Medical Conditions	<ul style="list-style-type: none"> • Engaging clients with known eating disorders into diet and fitness programs¹¹⁰ 	<ul style="list-style-type: none"> • Standard to refer clients to emergency health care or other licensed health care providers as needed • Standard to operate within one's scope of practice as defined by the practitioner's education, training, experience and state licensing laws
Conflicts of Interest	<ul style="list-style-type: none"> • Accepting large financial gifts from clients¹¹¹ 	<ul style="list-style-type: none"> • Standard to not accept large financial gifts • Standard requiring appropriate client boundaries
Inappropriate Therapies	<ul style="list-style-type: none"> • Providing sexual conversion therapy to clients struggling with their sexuality and expressing suicidal tendencies¹¹² 	<ul style="list-style-type: none"> • Standard to do no harm • Standard to Standard to operate within one's scope of practice as defined by the practitioner's education,

¹⁰⁹ Dept. of Licensing and Regulatory Affairs v. Duncan, 2020 WL 359648, at 1-2 (unpublished Ct. App. Mich. 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).

¹¹⁰ See e.g., Texas v. Brittany Dawn Davis, Plt's Orig. Petition, Case No. DC-22-91388 (Tx 95th Dist. 2022) available at file:///Users/barbarazabawa/Downloads/2022_WL_348709.pdf (last visited December 6, 2023).

¹¹¹ Monier-Kilgore v. Flores, 2009 WL 1865126 (unpublished Ct. App. 3d Cal 2009).

¹¹² Jenny Cowley, et al., Almost Anyone Can Become a Life Coach. A Hidden Camera Investigation Reveals why that's a Problem, CBC (Feb. 26, 2022), available at <https://www.cbc.ca/news/canada/marketplace-life-coach-1.6364745> (last visited Dec. 2, 2023) (Video shows a life coach that provides sexual conversion therapy and asks a client to reenact a sexual assault, causing the client overdose on drugs).

		<p>training, experience and state licensing laws</p> <ul style="list-style-type: none"> • Standard to refer clients to emergency health care or other licensed health care providers as needed • Standard for obtaining approved continuing education, particularly around health risks
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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 tone deaf to the role social and structural determinants play in achieving wellness.¹¹³ 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 address the “underlying social determinants of health and structural inequalities that precipitate poor health.”¹¹⁴

Standards can foster wellness practitioner awareness of social, political, legal and environmental barriers that prevent many people from attaining wellness, such as systemic racism, food deserts or food swamps, unsafe neighborhoods, poverty, just to name a few. Wellness practitioner standards can 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 are referred 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.¹¹⁵ While the United States health care system is rife with

¹¹³ Jessica L. Roberts and Leah R. Fowler, How Assuming Autonomy May Undermine Wellness Programs, *Health Matrix*, Vol. 27, at 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, *J. of Health Care L. & Policy*, Vol. 23, at 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, *J. Health Politics, Policy and Law*, Vol 39, at 1052 (Oct. 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).

¹¹⁴ Hermer, *The Means and Ends of Wellness Programs*, at 251.

¹¹⁵ 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* Rina Raphael, *The Gospel of Wellness*, at 131 (“There is a level of connection, compassion, and tailor-fit care missing from institutionalized

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.¹¹⁶

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, 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.

ii. 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 and practitioners, insurers, courts, and employers about who 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.¹¹⁷ They set proper expectations for wellness industry consumers, and a benchmark by which courts can measure whether the wellness practitioner acted appropriately.¹¹⁸ For insurers and employers, standards can help determine whether the practitioner is a safe risk to insure or hire.¹¹⁹

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 Harris Poll Report, *infra* note 44.

¹¹⁶ Rina Raphael, *The Gospel of Wellness*, 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. Bernie Garrett, et al., *A Taxonomy of Risk-associated Alternative Health Practices: A Delphi Study*, *Health Soc. Care Community*, Vol. 30, at 1163, 1164 (2022).

¹¹⁷ Raposo, at 183 ("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 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 and Angel Reed, *Law's Interaction with Voluntary Codes and Standards*, *Opinion*, *The Regulatory Review* (Aug. 22, 2022), available at <https://www.theregreview.org/2022/08/22/coglianese-reed-laws-interaction-with-voluntary-codes-and-standards/#:~:text=For%20criminal%20lawyers%2C%20forensic%20analysis,and%20transformed%20into%20binding%20law>. (last visited December 8, 2023).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

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 information it gathers about the qualifications and competence of the wellness practitioner.¹²⁰ The threshold question on the insurance application is whether the wellness practitioner's certification or training is currently valid.¹²¹ If the answer is "no," then the insurer asks if any training/certification is needed in their state to practice.¹²² 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.¹²³ Even if a wellness practitioner has a certification, it is challenging for an employer to judge the quality of that certification because there is no overarching accreditation body that has stepped up to oversee the wellness industry.¹²⁴

iii. Standards can Address Preventive Service Concerns after Braidwood v. Becerra

In *Braidwood v. Becerra*, the Northern District of Texas Court's decision has placed into jeopardy many preventive services that the Affordable Care Act (ACA) requires insurers to cover at no cost.¹²⁵ The rationale for this decision is that the ACA *requires* insurers to cover preventive services that the U.S. Preventive Services Task Force (PSTF) recommends.¹²⁶ The *Braidwood* court concluded that the PSTF members are not properly appointed under the U.S.

¹²⁰ Charles Hodson, CEO of CPH & Associates, Speaker, National Wellness Institute Webinar on Creating Wellness Standards (October 26, 2023).

¹²¹ Email from Charles Hodson, CEO of CPH & Associates, to Barbara Zabawa (November 30, 2023).

¹²² *Id.*

¹²³ Zabawa and Eickhoff-Shemek, at 176-179.

¹²⁴ *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*, Am. J. Pub. Health, Vol. 104, No. 11, at 2052-2054 (Nov. 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 and Benjamin E. Berkman, *Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion*, 61 William & Mary L. Rev., Issue 6, at 1683 (2020) (stating that HIPAA regulations for wellness programs do not need to have a scientific record that the method promotes wellness).

¹²⁵ *Braidwood Management Inc. v. Becerra*, 627 F.Supp.3d 624 (N.D. Tx 2022) (finding the US 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).

¹²⁶ *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.*

Constitution.¹²⁷ Because they are not properly appointed, health plans should not be required to adopt their recommendations.¹²⁸

Opponents of the *Braidwood* decision fear that if upheld by the U.S. 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 cost sharing for all preventive services.”¹²⁹ Economists have pointed out that prior to the ACA, comprehensive free preventive coverage was extremely limited because it is not in the insurers’ interest to make a long-term economic investment in members’ health.¹³⁰ Eliminating the ACA preventive services provision will lead to a decrease in use of preventive services within the traditional health care system.¹³¹

As noted previously, consumers are already disappointed and frustrated that traditional health care is not focused enough on prevention.¹³² 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.

iv. 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.¹³³ 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

¹²⁷ Id. at 646.

¹²⁸ Id. at 647.

¹²⁹ *Braidwood Management Inc. v. Becerra*, Amicus Br. Filed by the American Cancer Society, 2023 WL 3244310, at 11 (5th Circ. 2023).

¹³⁰ MaryBeth Musumeci and Sara Rosenbaum, *The ACA’s Promise of Free Preventive Health Care Faces Ongoing Legal Challenges*, Blog, The Commonwealth Fund (October 20, 2023), available at <https://www.commonwealthfund.org/blog/2023/acas-promise-free-preventive-health-care-faces-ongoing-legal-challenges#:~:text=Six%20individuals%20and%20the%20owners,want%20or%20need%20such%20care>. (last visited December 11, 2023).

¹³¹ *Braidwood Management Inc. v. Becerra*, Amicus Br. Filed by the American Cancer Society, 2023 WL 3244310, at 11 (5th Circ. 2023); 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 healthcare services should private insurers implement cost sharing for preventive services).

¹³² See Harris Poll Report, *infra* notes 44-45.

¹³³ Carl F. Ameringer, *State Medical Boards and the Politics of Public Protection*, at 15 (Johns Hopkins U. Press 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).

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.¹³⁴

And states are not slowing down in their rush to license occupations. According to a joint 2020 Report by the National Conference of State Legislatures (NCSL), the National Governors Association (NGA) and the Council of State Governments (CSG), occupational licensing has grown exponentially over the last 60 years, “comprising nearly 25% of the U.S. workforce, up from 5% nearly 60 years ago.”¹³⁵ 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.¹³⁶ Increased licensing has also created barriers to work for certain population groups, such as those with lower incomes.¹³⁷ 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 complementary and alternative medicine (CAM) (or “wellness”) activities will be “forced to become more regulated” and warned the legal system to prepare itself for wellness provider malpractice claims and to do so, it must define the standard of care for those providers.¹³⁸

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 50-state licensing framework, a framework that is outdated given the abundant virtual platform technology upon which so many people now rely.¹³⁹ Specifically, telehealth use is hampered by state licensure requirements, as state licensing statutes require health practitioners to be licensed in each state where the patient resides.¹⁴⁰ It is impractical and expensive for most health practitioners to seek licensure in all 50

¹³⁴ Paul J. Larkin, Jr., et al., *Telemedicine and Occupational Licensing*, 73 Admin. Law Rev. 747, 771 (Fall 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 (March 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).

¹³⁵ Occupational Licensing Final Report, Assessing State Policies and Practices, NCSL, NGA and CSG, at 9 (December 2020), available at https://documents.ncsl.org/wwwncsl/Labor/NCSL_DOL_Report_05_web_REVISED.pdf (last visited December 9, 2023).

¹³⁶ Id.

¹³⁷ Id. at 9 and 71.

¹³⁸ Raposo, at 184.

¹³⁹ Larkin, 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.”).

¹⁴⁰ Id. at 773-782.

states. And yet, for many licensed professions, that is what they must do in order to practice their licensed profession using modern telehealth technology.¹⁴¹

Creating universally-accepted, national standards for wellness can also help the industry avoid the inevitable price increases for consumers that would occur under a state licensing model.¹⁴² Licensing has been shown to increase barriers to entry that adversely affects those with lower incomes and those who already experience barriers to employment, such as young single moms, the formerly-incarcerated and people with disabilities.¹⁴³ This is because licensing leads to higher wages for licensed workers but lower wages to those who are denied access.¹⁴⁴ The result is higher prices for consumers.¹⁴⁵ 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 licensing would. And the wellness industry needs more diversity, which as noted earlier is mostly white and female.

Standards can help create a more systematic reporting mechanism regarding harm in the wellness industry and help with data collection about consumer harm. As observed by Garrett, et al., who tried to research harm in the “alternative health care” industry (which is arguably synonymous with the wellness industry as 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.”¹⁴⁶

If the wellness industry wants to maintain as much flexibility as possible and avoid the burdensome 50-state regulatory landscape currently faced by 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 of what standards might look like to address the known harms from wellness practitioners, the process for developing authoritative, industry-accepted standards should be inclusive of industry stakeholders if those standards are to be adopted widely. To avoid the patchwork of regulatory landmines of the state licensure system while facilitating national practice through telehealth, this process should rely on a “soft law” model such as Standards Development Organizations (SDOs).

A. What is “Soft Law?”

¹⁴¹ 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. Id.

¹⁴² Alexander C. Lemke and Alexander Macdonald, Getting a Second Wind: Reviving Natural Rights Clauses as a Means to Challenge Unjustified Occupational Licensing Regulations, 41 Pace L. Rev. 371, 374 (Spring 2021).

¹⁴³ Id. at 381.

¹⁴⁴ Id. at 374.

¹⁴⁵ Id.

¹⁴⁶ Garrett, et al., at 1167.

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.”¹⁴⁷ The first is traditional government regulation or “hard law.”¹⁴⁸ Hard law can “force entities to behave in a particular manner through the monopoly power that society has assigned to public authorities.”¹⁴⁹ For purposes of managing the consequences from the wellness industry, state licensure would be a hard law approach.

The second alternative is “soft law” programs, which is a governance tool that industry stakeholders can use to define substantive expectations that are not directly enforceable by the government.¹⁵⁰ 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.¹⁵¹ Compliance costs are lower because of soft law’s voluntary nature, and when numerous industry stakeholders voluntarily comply, there is more legitimacy to the governance mechanism.¹⁵² Also because of voluntary stakeholder involvement, innovations can occur and can help diffuse best practices within the industry.¹⁵³ 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.”¹⁵⁴ Finally, soft law governance may reinforce hard law by giving hard law standards and benchmarks by which to measure compliance.¹⁵⁵

Louise Trubek notes that soft law can encourage mutual cooperation among competing stakeholders to exchange knowledge and foster consensus, data collection and systemization.¹⁵⁶ It can also create informal processes to resolve grievances and disputes.¹⁵⁷ Soft law approaches to resolving grievances and disputes can be superior to malpractice litigation to improve quality.¹⁵⁸ “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.”¹⁵⁹

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

¹⁴⁷ Carlos Ignacio Gutierrez, Gary Marchant, and Lucille Tournas, Lessons for Artificial Intelligence from Historical Uses of Soft Law Governance, 61 *Jurimetrics J.* 133, 134 (Fall 2020).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Cary Coglianese, Environmental Soft Law as a Governance Strategy, 61 *Jurimetrics J.* 19, 48-49 (Fall 2020).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Louise G. Trubek, New Governance and Soft law in Health Care Reform, 3 *Indiana Health L. Rev.* 137, 149-50 (2006).

¹⁵⁷ *Id.* at 149.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

implement standards for wellness practitioners. “[S]oft law programs come in a variety of shapes, sizes and roles.”¹⁶⁰ One type of soft law program is a Standards Development Organization (SDO), the basic principles of which the wellness industry could adopt.

B. Standards Development Organizations (SDOs)

Federal law defines SDOs as a nongovernmental voluntary consensus standards body as defined in section 2(e) of the Office of Management and Budget Circular A-119 and that adheres to the American National Standards Institute (ANSI) Essential Requirements for Due Process for American National Standards.¹⁶¹ A voluntary consensus standards body is a type of association, organization or technical society that plans, develops, establishes or coordinates voluntary consensus standards using a voluntary consensus standards development 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).¹⁶²

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/or certification services.¹⁶³ They are not typically subsidized by the US government and tend to focus on developing standards that fit a particular market need.¹⁶⁴

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).¹⁶⁵ The NCRPA affords certain antitrust protections to joint ventures engaged in research,

¹⁶⁰ Guterrez, at 134.

¹⁶¹ 42 USC § 18952(a).

¹⁶² OMB Circular A-119, at 16 (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. Brochure, The Role of Standards Developing Organizations and Consortia, ANSI website, available at https://www.standardsportal.org/usa_en/standards_system/sdo_private.aspx (last visited December 13, 2023).

¹⁶³ Brochure, The Role of Standards Developing Organizations and Consortia, ANSI website, available at https://www.standardsportal.org/usa_en/standards_system/sdo_private.aspx (last visited December 13, 2023).

¹⁶⁴ Id.

¹⁶⁵ Press Release, Justice Department Implements the Standards Development Organization Advancement Act of 2004, Dept. of Justice (June 24, 2004), available at https://www.justice.gov/archive/opa/pr/2004/June/04_at_443.htm (last visited December 13, 2023).

development, and production.¹⁶⁶ The SDOAA expanded the NCRPA to include SDOs.¹⁶⁷ 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 Federal Trade Commission (FTC).¹⁶⁸

Some SDOs have taken advantage of the SDOAA protection. For example, the Gap Year Association (GYA) is a national nonprofit member association that works to coordinate the growing gap year movement for young adults trying to navigate life after high school. It is an SDO recognized by the DOJ and FTC.¹⁶⁹ GYA's work revolves around four core areas: 1) research; 2) equity and access; 3) resources; and 4) *standards and accreditation*.¹⁷⁰ 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.¹⁷¹ 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.
- **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, 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.¹⁷²

¹⁶⁶ Id.

¹⁶⁷ Id.

¹⁶⁸ Brochure, Filing a Notification under the NCRPA, Dept. of Justice, available at <https://www.justice.gov/atr/filing-notification-under-ncrpa#:~:text=Through%20the%20process%20of%20providing,activities%2C%20and%20any%20changes%20thereto> (last visited December 13, 2023).

¹⁶⁹ Fact Sheet, About the Gap Year Association, GYA Website, available at <https://www.gapyearassociation.org/about-gya/> (last visited December 13, 2023).

¹⁷⁰ Id. (Emphasis added.)

¹⁷¹ Id.

¹⁷² Fact Sheet, GYA Standards and Accreditation, GYA website, available at <https://www.gapyearassociation.org/standards-accreditation/> (last visited December 13, 2023).

Gap year programs that meet these standards can receive an accreditation “seal of approval” from the GYA.¹⁷³ Such a seal of approval could give comfort to parents before they entrust their children to gap year organizations and invest thousands of dollars on these gap year programs.

C. The Case for a Wellness SDO

Similar to how GYA’s standards can give assurance to nervous parents, wellness practitioner standards can give 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 specific to the broader wellness industry and as noted earlier, their standards are not comprehensive and do not address the behavior and needs of the various types of wellness practitioners. 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 only accredits some wellness certification programs. ACSM and NBHWC have created some professional standards, but they are not comprehensive, not created using typical SDO processes and there is 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.¹⁷⁴ The biggest challenge will be finding or creating such an organization to take on this responsibility.

A. Encouraging Compliance

Wellness practitioners would be encouraged to comply with the wellness SDO standards through several mechanisms. First, adopting the SDO processes means an inclusive and transparent standard development process, which promotes buy-in from the industry, including wellness practitioners. 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.

¹⁷³ *Id.*

¹⁷⁴ There is an organization based in the United Kingdom that aims to regulate wellness brands to ensure that they provide credible information. Rina Raphael, *The Gospel of Wellness*, at 273 (discussing WellSpoken). WellSpoken has a seal of approval and code of conduct for wellness information providers. See WellSpoken website at <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, training in health communications. See Code of Ethics and Conduct, WellSpoken (2017-18), available at <https://wearewellspoken.com/wp-content/uploads/2017/10/Code-of-Ethics-and-Conduct-2017-2018-2.pdf> (last visited December 17, 2023). 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 <https://wearewellspoken.com/contact-us/>.

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.¹⁷⁵

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.¹⁷⁶ 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.

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

A wellness SDO would clarify wellness practitioner expectations about 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 the U.S. Constitution to “alternative healthcare practitioners” who offer therapies and treatments outside of mainstream medicine.¹⁷⁷ 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 and sanctions.¹⁷⁸ 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.”¹⁷⁹ Both groups claim to have been in existence for decades.¹⁸⁰ 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 using Constitutional rights of freedom of speech and exercise of religion as a shield from being accused of practicing a health profession without a license. 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 wellness services and give more legitimacy to the industry.

¹⁷⁵ See e.g., Gutierrez, at 134-140 (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).

¹⁷⁶ Trubek, at 163 (noting that public information about outcomes and commitment to protocols is a soft law regulatory tool)

¹⁷⁷ Fact Sheet, Private Membership Association, ProAdvocate Group Website, available at <https://www.proadvocate.org/private-membership-associations-pma/> (last visited December 13, 2023).

¹⁷⁸ Id.

¹⁷⁹ Fact Sheet, Protect Your Services: How Can Joining the PWA Benefit Your Holistic Services?, Professional Wellness Alliance Website, available at <https://www.pwai.us/license-benefits> (last visited December 13, 2023).

¹⁸⁰ Id.; Fact Sheet, Private Membership Association, ProAdvocate Group Website, available at <https://www.proadvocate.org/private-membership-associations-pma/> (last visited December 13, 2023).

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 needs, and under *Braidwood v. Becerra*, that deficiency is likely to worsen. 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 that it is past time to be more patient-centered, and to the legal industry to recognize wellness law as a necessary legal practice area.