Is Health Coaching Legal aka Can You Function as a "Health Coach" and Avoid Medical Licensing or Board Discipline?

March 22, 2018
By Michael H. Cohen

Physicians, chiropractors, and other healthcare licensees often want to function as "health coaches" and avoid thorny laws. Can they?

Thou Shalt and Thou Shalt Not

If you think about how the law is structure, statutes often come in two basic varieties:

- Thou Shalt (something the law obligates you to do)
- Thou Shalt Not (something the law forbids you from doing)

There is also:

- Thou Mayest (something you're allowed to do)

In law school, my Criminal Law professor used to analogize to the Garden of Eden: thou mayest eat any fruit from the garden —*provided, however* (as we typically say in legal contracts) that thou shalt not (or "TSN" as he would say) eat from the Tree of Life.

And violating the TSN carried a harsh penalty—in this case, not simply an FDA or heavenly warning letter; but actual enforcement (in this case, expulsion).

The forbidden fruit was, simply put, taken off the market.

Much of what you will find in healthcare and FDA law is in the form of Thou Shalt Not. For example, Thou Shalt Not:

- Engage in **unlicensed practice of medicine**
- Engage in **unlicensed practice of psychology**
- Commit violations in terms of **false advertising**, or advertise in any manner that is **false or deceptive or misleading in any respect**
- Make **disease claims** for **cosmetics** or **dietary supplements**
- **Prescribe controlled substances** to a patient who lives in a state where you are not licensed as a an MD

- Overreach as an MSO (**management services organization** or MSO) and engage in the **corporate practice of medicine** (CPM or CPOM)
- Get paid or pay for **referrals** of the healthcare business, either where healthcare services are reimbursable by Medicare, or otherwise (under state law)

On the other hand, Thou Shalt:

- Have a healthcare license before practicing "medicine," "psychology," or other such professions, and read the statutes, regulations and cases so you don't intrude on boundaries of practice.
- Practice in an evidence-based way so that you are mindful of the standard of care.
- Provide sufficient **informed consent** to the patient.

And Thou Mayest:

- In *some States* (such as California, Minnesota, and Rhode Island), explicitly provide healthcare services under a legal safe harbor (in CA, known as "SB577), *so long as* you do not practice "medicine" or another licensed profession, and make certain disclosures.
- Market **dietary supplements**—so long as you only make structure/function claims, and your claims are substantiated by competent and reliable scientific evidence.
- Market **cosmetics**—*so long as*, you make only cosmetics claims, and your claims are substantiated by competent and reliable scientific evidence.
- Get paid a **commercially reasonable management fee, at fair market value**, for management and marketing services to a medical practice.
- Provide **telehealth** or **telemedicine** services, so long as certain legal rules are respected—for example, typically you must have a license in the remote state as well as the home state; and must abide by standard of care, informed consent, privacy and security, and other legal requirements.

And probably thou shouldest hire a healthcare lawyer (hint hint) who can give you superb and unparalleled legal advice on these nuances of healthcare and FDA law.

Now, let's drill down into **health coaching**.

Is Health Coaching Legal or Illegal

Healthcare practices and businesses typically formulate their questions to our healthcare lawyers in a couple of yes/no, black and white ways that do not advance their cause.

For example, is (health coaching, or substitute any given practice), legal or illegal?

The answer, as Rodney Dangerfield said to a 27-part question in *Back to School*, is "42."

As healthcare lawyers, we would never advocate or encourage clients to do any illegal activity, obviously.

Let's be clear. Some activities are clearly illegal. Robbing a bank. The statutory definition of "robbery" is clear and there is no ambiguity here. There's nothing gray about it—we've all seen the movies.

Is running a stop sign, illegal? Yes. Have you done it? Probably. Would we tell you that it is "ok," because enforcement is

light? No. Read this blog's lips: do not run a stop sign. Even if no one is looking.

The other day, one healthcare client proposed a healthcare compensation arrangement that was very clearly a violation of Stark and anti-kickback law. We counseled the client again and again that what they were proposing would likely bring enforcement crashing down, and there were no "creative solutions" to this particular proposal.

The client kept insisting and said: "we understand you are lawyers who have creative solutions and know how to *get around* the law."

That was a misperception, not a compliment.

To the quote the not-so-great Richard M. Nixon, "let me make one thing perfectly clear." We do *not get around* the legal rules. We do not specialize in *workarounds.* This isn't football, where you shake off the tackle and run into the million-dollar end zone.

We can think through creative *business* solutions, and we can advise clients on enforcement *risk*.

For example, if you read OIG (Office of the Inspector General) advisory opinions on federal anti-kickback law, some situations are so-called "technical" violations of anti-kickback law; however, the OIG deems the risk of fraud and abuse low, and finds that there are some *safeguards* in the proposed compensation arrangement; and as such, OIG advises that it likely will not proceed with enforcement.

This all has to be read carefully, as these kinds of situations can be very fact-specific. We can advise on risks of enforcement and safeguard in the same way that OIG can opine on these.

So, back to healthcare coaching. Is it a Thou Shalt, Thou Shalt Not, or Thou Mayest? If not legal or illegal, what kind of legal advice can one give?

The Big Yellow

Most healthcare ventures carry some risk of regulatory enforcement. The rules are tough, and the market is innovative. It's that simple.

In the warp and woof and actual practice and legal advice, there is typically an algorithm that involves something like:

- The extent to which the proposed arrangement will likely trigger enforcement scrutiny because the rules are strict;
- The extent to which the proposed arrangement will likely trigger enforcement scrutiny because the business model is innovative, and legal rules are slower to adapt (as happens so often, for example, in telemedicine; mobile apps; and other technological developments, where the law is catching up in spurts);
- The extent to which the practice or business owners are willing to take measured and informed risks;
- The extent to which good and creative legal advice can build in safeguards to mitigate enforcement risk.

Every situation is different. Put all these together, and the risk of enforcement can vary.

There are very few, if any, statutes (as mentioned) that say: "Thou mayest coach clients on their health."

Why?

Go back to **medical licensing** laws, and you'll see that most of these go back to the 1880's. The idea was that there was a way to practice "medicine;" that involved "diagnosis" and "treatment" (which was basically defined as anything that would help

people with a disease, ailment, illness, or condition), and that required a license.

It took decades and decades for other practitioners, such as chiropractors, to gain licensure; and there is a legal patchwork among states for practitioners such as acupuncturists and naturopathic physicians. Nurses, of course, are largely dependent on physician supervision or at least collaboration in many states; and physician assistants and medical assistants must have physician supervision as defined under state law.

Medical licensing laws are TSN statutes. There is an absolute prohibition. Corporate practice of medicine extends the prohibition to corporations and business entities.

The idea of health coaching is to find a wedge in the law, so to speak, where one can practice without running afoul of these TSN prohibitions.

It's a carve-out from the prohibition, as opposed to an activity that is explicitly allowed by law.

See for example:

Health Coaching and Telemedicine

Are you wanting to move your medical practice or other clinical healthcare practice into more of an coaching service? Worried about telemedicine laws and unlicensed practice rules? Wanting to […]

Physician health coaching raises telemedicine issues

Physician health coaching raises telemedicine issues, as it's challenging (but not impossible) for medical doctors (like any professional) to remove the professional hat. Below.

Health Coaching Online Ventures

Some of our healthcare clients are individuals who want to launch a health coaching practice—for example, it could be a person who does not have a healthcare license but wants to do Reiki, nutritional counseling, or something else; or a physician who wants to function as a health coach in a state where the physician is not licensed (or online). Others are business that want to operate a health coaching arm

One of our business clients was relying on a physician who had his medical license suspended, and wanted to operate as a "health coach" in the interim.

Sometimes we may advise that the MD, chiropractor, or other healthcare licensee have a prominent asterisk disclaiming their license and role and clarifying—so that the marketing is clear—that they are functioning in a non-licensed, healthcare coaching role.

Sometimes we will advise that the physician, chiropractor or other healthcare licensee (or non-licensed individual) who wants to function as health coach, in fact stay away from activities that could put them back in the licensed realm, such as:

- Reviewing and interpreting lab tests
- Reviewing and interpreting genetic data
- Making treatment plans based on lab tests, genetic data, medical questionnaires, health history, or other information

Ironically, individuals can get their own lab tests, genetic data, and other information, and make their own treatment decisions

based on all of this material; but when this is given by the “health coach,” then can be risk of charges of:

- Unlicensed practice of medicine
- Unlicensed practice of psychology
- Unlicensed practice of nutrition or dietetics
- Unlicensed practice of genetics counseling
- Unlicensed practice of other professions

Licensure is a big deal, and the State takes it seriously. It’s important to read the statutes, regulations, cases, and the Boards’ policy statements to understand the legal boundaries. Only then can someone craft a “health coaching” practice or business that doesn’t waive the red flag at enforcement authorities.

“Health coaching” is a term lots of practitioners want to use. But remember that there are few, if any, laws that expressly allow someone to set themselves up as a “health coach.” Licensing laws control, and enforcement priorities shift from state to state.