

Neurofeedback Laws & Licensing: Unlock Brains' Potential But Be Legally Safe—

Part 1: Unlicensed Practice

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By Michael H. Cohen

Who can legally practice neurofeedback—only licensed professionals—and what laws govern neurofeedback practice?

Neurofeedback Law Case Studies—Sneak Preview

1. Paul the Psychologist writes: “I had begun to mentor an individual with a Ph.D. in psychology, but someone who was/is not licensed in any mental health or health profession. They maintain their own office and had been operating a private practice solely doing educational evaluations. They have begun to do neurofeedback with children and adults with a wide variety of issues (ADHD, anger, oppositional behavior, sleep issues, anxiety, RAD). I became concerned that I had liability exposure for their activities and discontinued the consultation. Were my concerns well founded? How is liability for mentoring or consultation determined?”

2. Phyllis the Psychiatrist writes: “Thanks for this opportunity. As a psychiatrist, I wonder if my offering neurofeedback (NF) to clients increases the risk of being sued. For example, if someone comes in with an anxiety disorder, and I suggest a trial of NF instead of medication, then what is my risk? If the patient does not respond well, and in fact his condition deteriorates, I'm left very exposed — this is outside standard psychiatric guidelines. In fact most psychiatrists have never heard of NF. So my question is, how can I best protect myself?”

3. Chris the Chiropractor has studied neurofeedback and wants to advertise on his website a spectrum of conditions that he can treat through neurofeedback, including not only stress, reduction and peak performance, but also: chronic pain, headaches, insomnia, mental foggiess, ADD/ADHD, autism, bruxism, chronic fatigue, cerebral palsy, fibromyalgia, IBS, Parkinson's, PMS, TBI- Traumatic Brain Injury, stroke, tics, Tourette Syndrome, addictions, anxiety, anger, depression, irritability, mood swings, fear, phobias, PTSD, mental disorders. What legal issues does Chris face?

The \$64,000 Question

There is a lot of Internet chat about neurofeedback being used by various practitioners, licensed and unlicensed, with questions rolling back and forth about what's permissible or not.

One comment asks:

Would someone please state the actual law in regards to using neurofeedback and licensing???

This is the proverbial “\$64,000 question.”

I often liken healthcare regulation to a Rubik's Cube. Just when you line up a row of colors, something else pops out of place, and you have to reconfigure the cube.

Or, it's like going to a casino where all the horizontal and vertical lines have to line up.

A diagonal "bingo" is not sufficient.

In lawyer terms: big caveat and disclaimer. You have an emerging area of healthcare practice where the legal rules can be ambiguous, archaic, or simply anarchic. Controversy surrounds the practice, and different professional societies and groups each have different answers. Any time anyone puts forth information on the Web, a hundred comments spring up ready to attack, and defend an antithetical position.

Caution: this discussion may create unusual and interesting brainwave patterns.

The Ideal Future and the Likely Reality

Let's frame the discussion of licensure with this quote:

There are two fundamental issues that need to be discussed. One is the ideal future toward which we should strive. The other is the likely reality to which we must accommodate.

Neurofeedback cannot succeed as a fringe discipline, or even as a subset of alternative and complementary medicine. Feedback and stimulation techniques will inevitably move to become the central organizing principle of psychology, of psychiatry, and of neurology. The core of these disciplines will be the increasing understanding of network relations within the cerebrum, and that will quite simply become the headline story for the decades to come.

I will even acknowledge that up to now we have not been able to hasten the day of mainstream acceptance. One can make just as good a case that we have induced mainstream professionals to take an adverse position prematurely, so that now there is a degree of hostility to neurofeedback that is unmatched among the related technologies such as deep brain stimulation, repetitive transcranial magnetic stimulation, vagal stimulators, etc. But who could have foreseen such mindless opposition by intelligent people?

Siegfried Othmer, [The Unlicensed Practitioner Again](#)

Introduction to Licensing Issues: "Unlicensed Practice of Neurofeedback"

A recent article online mentioned the "unlicensed practice of neurofeedback."

This is actually a misnomer. There is no unlicensed practice of neurofeedback, which is a modality. States license practitioners—physicians, chiropractors, acupuncturists, dentists, nurses, psychologists, social workers, physician assistants, physical therapists, and others. Unlicensed practice of one of these professional practices (for example, the unlicensed practice of medicine or of psychology) is prohibited by law.

There are really two fundamental legal questions:

- Is the practice of neurofeedback by a given individual who does not have any professional healthcare license, the unlicensed practice of medicine, psychology, or another licensed profession?
- Is the practice of neurofeedback by a licensed healthcare provider, such as a psychologist, within the legally authorized scope of practice for that licensed profession, according to state law?

These questions are related, in that a practitioner (say, a physical therapist where state law would not authorize the PT to practice neurofeedback) who goes beyond the authorized scope of practice, can be said to be practicing a licensed practice (for example, medicine or psychology).

What Is Neurofeedback

ISNR states:

Like other forms of biofeedback, NFT uses monitoring devices to provide moment-to-moment information to an individual on the state of their physiological functioning. The characteristic that distinguishes NFT from other biofeedback is a focus on the central nervous system and the brain. Neurofeedback training (NFT) has its foundations in basic and applied neuroscience as well as data-based clinical practice. It takes into account behavioral, cognitive, and subjective aspects as well as brain activity.

NFT is preceded by an objective assessment of brain activity and psychological status. During training, sensors are placed on the scalp and then connected to sensitive electronics and computer software that detect, amplify, and record specific brain activity. Resulting information is fed back to the trainee virtually instantaneously with the conceptual understanding that changes in the feedback signal indicate whether or not the trainee's brain activity is within the designated range. Based on this feedback, various principles of learning, and practitioner guidance, changes in brain patterns occur and are associated with positive changes in physical, emotional, and cognitive states. Often the trainee is not consciously aware of the mechanisms by which such changes are accomplished although people routinely acquire a "felt sense" of these positive changes and often are able to access these states outside the feedback session.

NFT does not involve either surgery or medication and is neither painful nor embarrassing. When provided by a licensed professional with appropriate training, generally trainees do not experience negative side-effects. Typically trainees find NFT to be an interesting experience. Neurofeedback operates at a brain functional level and transcends the need to classify using existing diagnostic categories. It modulates the brain activity at the level of the neuronal dynamics of excitation and inhibition which underlie the characteristic effects that are reported.

Research demonstrates that neurofeedback is an effective intervention for ADHD and Epilepsy. Ongoing research is investigating the effectiveness of neurofeedback for other disorders such as Autism, headaches, insomnia, anxiety, substance abuse, TBI and other pain disorders, and is promising.

(emphasis added)

In general, when a practitioner makes claims that a given modality (e.g., neurofeedback) treats disease—or a mental health condition—then that practice is considered practice of medicine (or possibly psychology).

So to the extent neurofeedback is used as "an effective intervention" for conditions, of ADHD, then neurofeedback is within the province of physicians (including psychiatrists) or clinical psychologist, or other mental healthcare practitioners (depending on their scope of practice).

Unlicensed Medical Practice

All states require a license to practice "medicine" and make it a crime to violate this requirement. State licensing laws typically define medicine in terms of diagnosis, operation, prescription, and treatment for any illness, disease or injury. Corporations cannot practice medicine and hence medical licensing laws are also said to prohibit the "corporate practice of medicine."

Here is a typical statutory definition of medical practice:

'Practice of Medicine,' which shall include the practice of medicine alone, the practice of surgery alone, or both, means the diagnosis, treatment or correction of, or the attempt to, or the holding of oneself out as being able to diagnose, treat or correct any and all human diseases, injuries, ailments or infirmities, whether physical or mental, organic or emotional, by any means,

methods, devices or instrumentalities, except as the same may be among the acts or persons not affected by this chapter.

This one is from Florida:

“Practice of medicine:” the “diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition.”

Where did this come from?

As I've written elsewhere (see also the AMA [Virtual Mentor piece](#)):

For over 120 years, the Supreme Court has upheld the principle that states may regulate the practice of medicine and determine what is and is not lawful [1]. In *Dent v. West Virginia*, the State of West Virginia refused a license to Frank Dent, a member of the “eclectic” sect of physicians who incorporated botanical remedies into medicine. Dent had graduated from the American Medical Eclectic College of Cincinnati, but could not establish that he had attended a medical college recognized by West Virginia, passed a designated examination, or practiced in West Virginia for 10 years.

Dent argued that, by refusing him a license, West Virginia deprived him of due process of law. The Supreme Court disagreed, holding that “the power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud” [2].

Around the time of *Dent*, the states began enacting medical licensing statutes. Today, all states define the “practice of medicine,” in part, by using such words as diagnosis, treatment, prevention, cure, and prescribe, in connection with disease, injury, and mental or physical condition [3]. State law came to designate the practice of medicine without a license as a crime.

Subsequent cases relied on the *Dent* holding to interpret the medical licensing statutes and uphold prosecutions against a variety of complementary and alternative medicine (“CAM”) practitioners. For example, in *People v. Amber*, an acupuncturist argued that the statutory prohibition on unlicensed “practice of medicine” referred only to “Western allopathic medicine” and did not encompass systems such as Chinese acupuncture, which differs in its “philosophy, practice and technique” [4]. The court disagreed, holding that any “‘sizing up’ or a comprehending of the physical or mental status of a patient” constitutes diagnosis, which is part of the practice of medicine [5]. Similarly, other cases involved prosecutions of practitioners of modalities such as hands-on healing [6], iridology [7], and homeopathy [8]. In each case, courts interpreted statutory terms such as “diagnosis” and “treatment” broadly. Courts have also resisted constitutional challenges to health care licensure on a variety of fronts, including challenges based on free exercise and due process limitations [3].

[Citations omitted.]

The courts, and state attorneys general, interpret the practice of “medicine” very broadly. Even the “Caveman Blogger” has gotten in trouble with the state medical board for making nutritional and dietary recommendations to his followers in North Carolina.

See also, [Legal lines blur between coaching, hypnotherapy, and psychology \(unlicensed practice\)](#).

California Law for Non-Licensed Practitioners

In California, SB 577 (codified into the Business & Professions Code) allows non-licensed practitioners of the healing arts to engage in certain practices, so long as they provide a disclosure document and meet other statutory criteria. This statute gives non-licensed healers and other practitioners a legal foothold.

However, one of the criteria is that the practitioner must not practice medicine.

And, medical and psychological licensing laws exist side by side with the statute allowing non-licensed practice.

Other states, such as Minnesota, have similar statutes for non-licensed practice—again, coexisting with medical and psychological licensing statutes.

(If you need help structuring a non-licensed healthcare practice, [contact](#) our law firm.)

Neurofeedback, Life Coaches, Nutritionists: Enforcement Priorities & Discretion

Many “life coaches” skirt the legal and regulatory edges of the practice of psychology, and attempt to carve out a space in which they focus on setting and achieving goals.

The practice of psychology is defined so broadly in most states that it sweeps in a great deal of activity.

In part, life coaches exist at the legal periphery because enforcement priorities vary by state and by agency and prosecutor. Broad statutory and administrative definitions of professional practice, however, leave life coaches at legal risk.

Witness again, for example, the case of the Caveman Blogger—whose area of coverage, nutrition, was slightly different, but who found himself embroiled in an investigatory process for unlicensed practice, for counseling clients about the Paleolithic diet.

Boards of nutrition, like boards of psychology and medicine, have investigatory discretion to pursue unlicensed activity.

Many of our clients have found themselves targets of investigation and enforcement, and contacted our firm to deal with unexpected and unwanted regulatory attention for activities the clients’ previously considered not only legally safe, but beneficial for their own clients.

Does Working Under Physician Supervision Mitigate Unlicensed Practice Issues

Some people believe that working “under the supervision” (or “under the license”) of a doctor or psychologist, mitigates unlicensed professional practice issues.

This is a myth. There is no such thing as physician or psychologist supervision of an unlicensed person.

We have licensed physician assistants, psychological assistants, nursing assistants, chiropractic assistants, medical assistants, and other licensed adjunctive providers. And we have providers that practice dependently under the supervision of another provider (for example, an RN under an MD). These categories are all defined by law, and their legal parameters must be met for practice.

But you could not walk into my law office, for example, and ask me to adjust your spine “under the supervision” or “under the license” of a chiropractor.

A lawyer doesn’t have the legal authority to perform spinal manipulation. Nor does your grocer, even under the chiropractor’s supervision.

Here’s what New York State says about working “under” a psychologist:

May psychologists use unlicensed individuals to perform any practices defined as the “practice of psychology” in Article 153?

No. The use of unlicensed persons, persons without a limited permit, or persons who do not meet the exemption requirements, by licensed psychologists to perform any services or activities that fall within the statutory definition of psychology could result in professional misconduct charges or in the criminal charge of aiding and abetting illegal practice. The same principle applies with respect to what may be considered medical practice.

Now, it may be that there is a role for technicians with respect to biofeedback—but this would exclude anything considered diagnosis and treatment. Here is a statement to contemplate from the ISNR Standards of Practice:

Those providing neurofeedback services to individuals with diagnostic conditions as defined in ICD or DSM manuals and who are not licensed to work with such conditions should be evaluated and supervised by a professional who is licensed to treat such condition(s) and is on-site providing full time face-to-face supervision with the person providing the direct service. They should provide supervised services only after the licensed professional has evaluated the patient and set a treatment plan. The tasks assigned to such unlicensed individuals should be in keeping with their demonstrated level of competence and training and with applicable state law governing the health professions and the statute under which the supervisor is licensed. It is recognized that the level of supervision may vary depending on the complexity of the condition and individual being treated. The ultimate ethical responsibility and accountability for services performed by unlicensed persons to persons with diagnostic conditions rests with the licensed supervisor who reviews the assessment, treatment plans, course of treatment, and outcomes. Thus the nature of the supervisory relationship should be explicitly communicated in writing and written agreements with the unlicensed technician. Such a document should detail their duties, range of responsibilities, types of services, limits of independent actions, and responsibilities for reporting side effects or adverse reactions to their supervisor.

This is one attempt to delineate what the licensed vs. unlicensed person does, although it does not provide any detail on what tasks are contemplated for the non-licensed person.

Unlicensed Medical Practice: A Continuing Saga

There are many older cases of iridologists, energy healers, hypnotherapists, and others hoisted on the petard of unlicensed medical practice. Before chiropractic was licensed, the profession's slogan was, "go to jail for chiropractic!"

Unlicensed practice of medicine investigations and prosecutions continue. In more recent times, an acupuncturist dispensed pills and advertised curing cancer. In appeal from a Department of Health determination, the court stated:

As to the severity of the penalty, the Court finds that the DOH had overwhelming evidence to conclude that the Appellant preyed upon vulnerable individuals in times of personal crisis. He made numerous empty promises to extort disproportionate sums of money for the services he provided. To add insult to injury, he published advertisements that contained reproductions of his State-issued license to practice acupuncture to lend credence to this disgusting operation. As such the record evidence demonstrates the necessity of the penalty to protect the public from potential harm at the hands of Dr. Mai. Therefore, the Court not only refuses to disturb the decisions and orders of the DOH but, rather, wholly endorses the penalty imposed on Dr. Mai.

See [Unlicensed health care provider statute interpreted in RI](#).

In Colorado, a hypnotherapist received a cease and desist for practicing hypnotherapy.

Medical and psychological licensing statutes define the scope of their licensed professions very broadly, so that unlicensed practitioners can easily run afoul of regulatory tripwires.

If you have specific legal questions about neurofeedback legal issues, consult our [healthcare and FDA lawyers](#).



Contact our [healthcare law](#) and [FDA attorneys](#) for legal advice relevant to your healthcare venture.