

## **Risk Management Steps for Practitioners of Energy Therapies**

### **How energy medicine practitioners can avoid legal problems**

The purpose of this article is to provide vital information to non-licensed energy medicine practitioners about how to avoid legal problems because of their websites. Being knowledgeable about the legal pitfalls and using risk management tools to decrease potential liability empowers energy medicine practitioners to do their healing work without the threat of being charged with practicing medicine without a license.

There are a number of ways that non-licensed energy medicine practitioners can find themselves in costly and debilitating legal dilemmas because of what is published on their websites. Most practitioners using innovative energy based techniques are not aware of the various legal issues that impact and govern their ability to represent themselves to the public via their websites. In this article we will discuss some of the legal principles that generate these potential legal problems and provide some steps for managing the risks practitioners face because of the innovative nature of energy therapies. This is a multi-layered approach because there are several areas in which practitioners can encounter a legal problem. This article will cover three major legal areas....licensing statutes, the Federal Trade Commission, and misrepresentation.

There are actual cases where complaints have been filed by various licensing boards against energy oriented practitioners not because a formal complaint was received by the board from a client but solely because of the content of their websites. The result was these practitioners had to close their practices after spending thousands of dollars in legal fees to answer the complaints and defend themselves because they were unknowingly in violation of their state's laws applicable to licensed health care providers. These unfortunate situations could have been avoided had the practitioners been aware of the laws in their state and had taken some simple steps to reduce and manage their legal risks. Many energy medicine practitioners could be unknowingly in violation of their state laws, including their medical and/or psychological practice acts. Please be aware that state licensing boards are routinely looking at websites and targeting those that are in violation of the law. This applies to both licensed and non-licensed practitioners and covers all professional health care practitioners.

First of all, it's important to understand that you must operate within the current legal and regulatory framework that governs how health care is provided in this country. How did this framework evolve into our current health care system? It all starts with the 10<sup>th</sup> Amendment to the Constitution which grants states the right to protect the safety and well-being of their citizens. As a result, states have passed numerous laws, regulations, and administrative rules to regulate a number of occupations and professions, including, physicians, psychologists, nurses, chiropractors, counselors, lawyers, dentists, dietitians, real estate agents, etc. The underlying regulatory value upon which all licensing statutes, regulations, and administrative rules are based is public health, safety, and welfare.

Innovative energy medicine methods, therapies, techniques, whatever you choose to call them, are considered experimental and unsubstantiated and are therefore, not part of any established "standards of care" or "scope of practice" in any licensed health care profession, including the practice of medicine. In order for new innovative therapies such as those used in energy medicine to be accepted, they must pass the "evidence-based" test. This hasn't happened yet although the Office of Complementary and Alternative Medicine within the National Institutes of

Health is conducting research to support the safety and efficacy of energy medicine methods. Consequently at this time, even if you believe energy techniques are helpful therapeutic tools, the powers that be, by and large do not. So it's important for you as a practitioner using energy techniques to be aware of how energy therapies are perceived by the authorities, especially state medical boards, because it directly impacts your ability to do your healing work in the world.

## **BEING IN VIOLATION OF LICENSING STATUTES**

For purposes of illustration, we will focus primarily on the practice of medicine but the principles and issues discussed below generally apply to all licensed health care professionals. All 50 states license the practice of medicine. One area of significant risk you face as a practitioner of energy therapies is to be in violation of your state's medical practice act unless your state provides exemptions and/or exceptions for non-licensed healers. So obviously it is imperative to do some careful legal research.

As a general rule there are two components to the laws that govern the practice of medicine. One is the title portion of the law and the other is the definition of the practice of medicine.

### **Title – What you call yourself**

Generally state medical practice acts restrict the use of the word "physician" to only those individuals who have obtained a license to practice medicine. Most non-physician energy medicine practitioners don't represent themselves as "physicians" so aren't violating this part of the statute. However, words of caution for those energy medicine practitioners that have PhD's and use the word "Doctor" or any abbreviation thereof in representing themselves because they possibly could be in violation of their medical practice act. For example in Oregon, a person is considered to be practicing medicine if he/she *"uses the word "Doctor".....or any abbreviation or combination, thereof,.....in connection with the name of the person, or any trade name in which the person is interested, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human diseases or conditions mentioned in this section"* (ORS 677.085). If you have a PhD it's important to disclose on your website and other marketing materials what discipline you earned your PhD in and to state you are not a licensed physician.

Even though the discussion above addresses the practice of medicine, other laws may also apply to what you can legally call yourself. For example, you may be legally prohibited from using the words "counselor" or "therapist" unless you are a licensed mental health professional.

**Key Risk Management Step – all practitioners need to determine what they can call themselves according to the laws and regulations in their state.**

### **Definition of the practice of medicine – how you describe your services**

In addition to title issues, all practitioners using energy techniques are subject to legal problems if on their websites the description of their services violates the "practice definition" of any laws that apply to licensed health care professionals. The most obvious health care professional would be a "physician", but it also includes laws governing psychologists, social workers, professional counselors, marriage and family therapists, body workers, nurses, and potentially even dietitians if you provide any kind of nutritional advice.

Over the last hundred years there have been numerous cases adjudicated about what constitutes the practice of medicine. These cases are helpful in our inquiry as to whether or not using energy healing techniques is considered the practice of medicine. There have been a few cases dealing with alternative healers where criminal convictions of healers were upheld for unlawfully practicing medicine. For example, in *Smith v People*, a defendant who purported to cure diseases by laying on hands was convicted for "practicing medicine" without a license, even though he did not share with clients what was the matter with them, did not have an official office but practiced out of a home, and used only his hands. The court noted that defendant used the title "Healer" to indicate that he was engaged in the business of treating the sick. The court further emphasized that a public health statute must be construed liberally. The Smith court decided the "practice of medicine" to mean "the practice of the healing art commercially, regardless of the curative agency employed". The foregoing is typical of decisions made by courts in other jurisdictions. Because state medical practice acts have been so broadly construed by the courts, they have basically created for MD's a monopoly over health care in this country, asserting that any healing modality, present or future, must come within the sphere of "medicine." Consequently, judicial opinions treating alternative practitioners reflect the dominance of the medical profession over the delivery of health care.

As an example, in Oregon the "practice of medicine" is defined as to "*offer or undertake to diagnose, cure or treat in any manner, or by any means, methods, devices or instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity, defect or abnormal physical or mental condition of any person*".(ORS 677.085(4)). Unfortunately, the laws that govern the practice of medicine and how those laws have been interpreted by the courts are antiquated based on a 19<sup>th</sup> century regulatory paradigm that doesn't fit into the expanded use of energy techniques in the delivery of health care in this country.

So the bad news is healers potentially face being charged with the crime of practicing medicine without a license. However, the good news is that a few states have passed legislation that creates exemptions and exceptions for non-licensed practitioners of the healing arts. The National Health Freedom Action organization has been instrumental in getting laws passed in New Mexico, Arizona, Louisiana, Rhode Island, Minnesota, Idaho, and California that protects energy healers from being charged with practicing medicine without a license provided healers comply with the requirements set forth in the law. [www.nationalhealthfreedom.org](http://www.nationalhealthfreedom.org).

It's not only non-licensed practitioners that face legal risks but also licensed physicians as well. All physicians must comply with the "standards of care" and "scope of practice" as defined by their respective licensing laws, regulations, and administrative rules. As I mentioned above, energy oriented therapies are considered experimental and they have not been substantiated by mainstream medicine. Consequently, they are deemed to be outside the traditional "standards of care" and "scope of practice" definitions that all licensed physicians must follow in treating patients. Licensed physicians could be subject to professional discipline for using energy healing methods with patients because it could be determined that these methods are per se outside the scope of practice or fall below the standards of care. Physicians face the risk of suspension; having to eliminate energy oriented therapies from their practices and/or losing their licenses. Some states have passed legislation that protects physicians from facing professional discipline for practicing complementary or alternative medicine provided the physicians meet certain conditions such as training and competency.

**Key Risk Management Step – all practitioners need to determine how they can describe their services on their websites so they are not in violation of any laws or regulations in their state.**

## **RISK OF RECEIVING A COMPLAINT FROM THE FEDERAL TRADE COMMISSION (FTC)**

The Federal Trade Commission is the nation's consumer protection agency. The FTC's Bureau of Consumer Protection works for the consumer to prevent fraud, deception, and unfair business practices in the marketplace. Last year the FTC put together a task force to review websites offering health care products or services that make questionable claims of curative ability; are exaggerated, or unproven. The FTC is specifically targeting "newly discovered" therapies that claim to help cure a wide range of ailments. This would include all of the energy based techniques that are part of the field of energy medicine. The FTC is checking websites looking at several items:

1. The type of modality, technique, or therapy offered by the practitioner
2. The qualifications of the practitioner
3. The claims of effectiveness
4. Violations in the use of restricted language such as non-licensed practitioners using the word "treatment" on their websites
5. Lack of scientific proof for the modality, technique, or therapy

To view an article regarding this issue published by the FTC go to:

<http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt025.shtm>

What are the consequences of having a complaint filed against you by the FTC based on the contents of your website? At the very least you will incur significant legal fees in answering a complaint filed by the FTC and at worst you could be subject to a substantial fine. As an example, in an actual case, in 1998 the FTC brought a complaint against Dr. Roger Callahan and a Decision and Order was published by the FTC (Docket No. C-3797). The FTC determined that Dr. Callahan's Addiction Breaking System lacked competent and reliable scientific evidence among other things. Dr. Callahan and his attorneys entered into a consent order and he was fined Fifty Thousand Dollars (\$50,000) and was subject to a number of restrictions. Obviously all practitioners want to avoid running afoul of the FTC.

**Key Risk Management Step – all practitioners need to make sure their websites are in compliance with FTC rules regarding advertising their services to the public and the use of testimonials**

## **RISK OF A LEGAL COMPLAINT BY A VISITOR TO YOUR WEBSITE**

From a legal standpoint what you say about you and your services on your website is like a binding contract with each visitor to your website. Many practitioners do not understand the legal vulnerabilities they face because of the language they use of their websites to describe their credentials, their services or the effectiveness of the therapies they offer to clients. Here is sample language that demonstrates a legal problem:

*"Chances are that you've been searching for a way to get relief from your pain and distress-- whether emotional or physical. You're about to read about a rapid and effective way to do just*

*that! You can truly resolve these issues so they no longer cause distress. Today, a revolutionary new method called XXXXXXXXXX can provide relief for allergies, back pain, traumatic memories: childhood abuse, war, auto accident, etc. (you can insert any physical or mental problem)”*

Here is another statement from another website:

*“XYZ is a gentle, fast and reliable technique to achieve quick and lasting relief from negative emotions, trauma, fears and many physical symptoms.”*

Both of these statements make claims of curative ability without scientific evidence. Also by using the word “pain” the FTC would say the practitioner is providing medical services because if a person has “pain” then there’s a medical problem. In addition, if a visitor read these statements and then engaged the practitioner to help them and as a result did not get the resolution promised on the website, the visitor (now client) could file a legal complaint for misrepresentation. Now the practitioner has to hire a lawyer even if the complaint is without merit. Practitioners can avoid this kind of pitfall by carefully auditing the language on their websites and by having a legally sound website disclaimer specifically drafted for them.

**Key Risk Management Step – all practitioners need to review the language on their websites to make sure they are not at risk for a legal claim**

**Key Risk Management Step – all practitioners need to have a legal disclaimer drafted specifically for them on their websites.**

The good news is that energy oriented practitioners are helping clients heal and are making a significant contribution to the health care field. Energy medicine methods are becoming better known which also means the authorities are beginning to take notice. Along with this success comes the concurrent responsibility to make sure you are conducting yourself in an ethical manner and are in compliance with applicable laws and regulations. Failure can bring painful consequences both financial and from a career perspective. It is advisable to take each of the key risk management steps to reduce the potential for legal problems associated with your website.

**Disclaimer** The information provided in this article is for educational purposes only as well as to give you general information and a general understanding of the law, not to provide specific legal advice.