

Legal Risk Management for Medical Fitness Facilities and Programs: Protect Yourself, Your Business, and Your Clients



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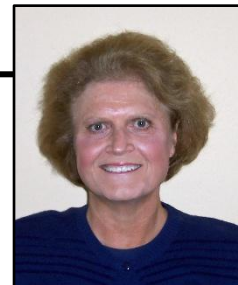
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MedFit Global Virtual Conference, October 2025



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Bio:

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Dr. Eickhoff-Shemek is the President of the Fitness Law Academy, LLC and Professor Emeritus at the University of South Florida. She is an internationally known researcher, author, and speaker in the areas of fitness safety, legal liability, and risk management. Dr. Eickhoff-Shemek has authored or co-authored more than 100 journal articles, several book chapters, and five textbooks including *Law for Fitness Managers and Exercise Professionals* and *Legal Toolkit for Health & Wellness Coaches and Managers* published in 2020 and 2025, respectively. She currently serves as the Fitness Safety Columnist for *ACSM's Health & Fitness Journal*.

Topics

- **Overview of Negligence**
- **Examples of 3 Negligence Lawsuits -- Improper Clinical Exercise Prescription**
- **Courts Determine Duty or the Standard of Care of an Exercise Professional**
- **Civil Law and Criminal Law in the Context of Clinical Exercise Prescription and Scope of Practice**
- **Risk Management Strategies to Minimize Legal Liability**

Disclaimer

The “educational” information in this presentation should not be construed to be the provision of legal advice. For individual legal advice, it is necessary to obtain legal counsel in the jurisdiction where appropriate advice can be provided.



QUICK QUIZ

	True	False
1. Professional scope of practice applies to all exercise professionals and legal scope of practice applies to all licensed professionals.		
2. Exercise professionals who prescribe exercise for individuals with medical conditions may be held to a different standard of care than those who prescribe exercise for apparently healthy individuals.		
3. In a negligence lawsuit, employers can be held “vicariously” liable and “directly” liable.		
4. The “professional standard of care” is applicable to all exercise professionals.		
5. When determining if a breach of duty occurred in a negligence lawsuit, the court will consider the competence (conduct) of exercise professionals more so than their credentials.		

Overview of Negligence

Causes of Injuries/Defenses to Negligence (1)

- **Risks Inherent in the Activity (Inherent Risks)** -- no one's fault; they just happen; inseparable from the activity
 - The defendants* will claim the plaintiff** assumed the risks
- **Ordinary Negligence** -- the fault of the facility personnel (e.g., “careless” conduct such as improper instruction and improper maintenance of exercise equipment)
 - The defendants will claim the release of liability (waiver) absolved them of any negligence
- **Gross Negligence** -- also referred to as willful/wanton conduct or reckless conduct (defendant has prior knowledge of risk and does not take steps to correct it; risk is clearly foreseeable)
 - The defendants will claim the release of liability (waiver) absolved them of any gross negligence

* Exercise professionals and/or fitness programs/facilities

** Injured party who files the negligence lawsuit

Overview of Negligence

Definition

Negligence is “failing to do something” that a reasonable, prudent professional would have done or “doing something” that a reasonable, prudent professional would not have done, given the same or similar circumstances (1).

Negligence is “careless” conduct by either

OMISSION

or

COMMISSION



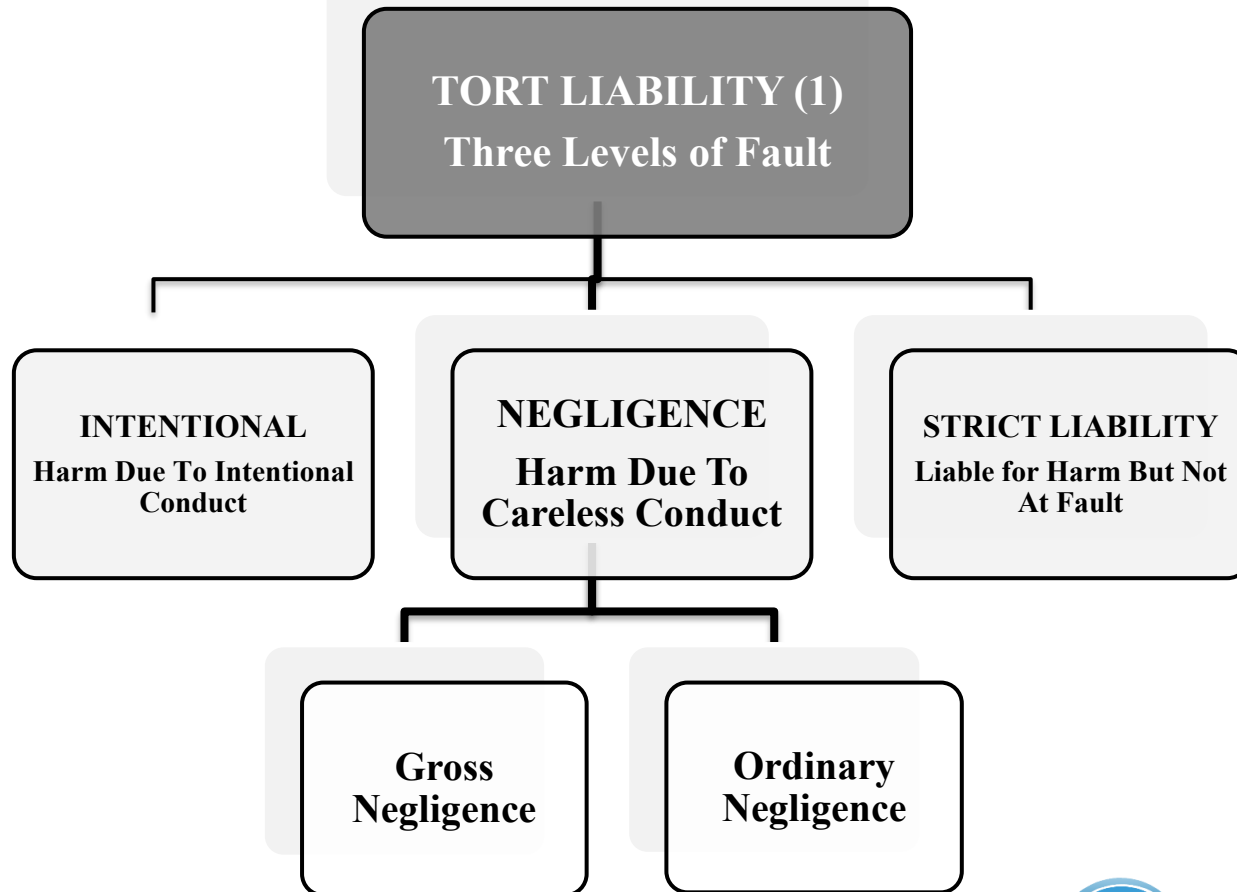
Failure to Perform



Improper Performance



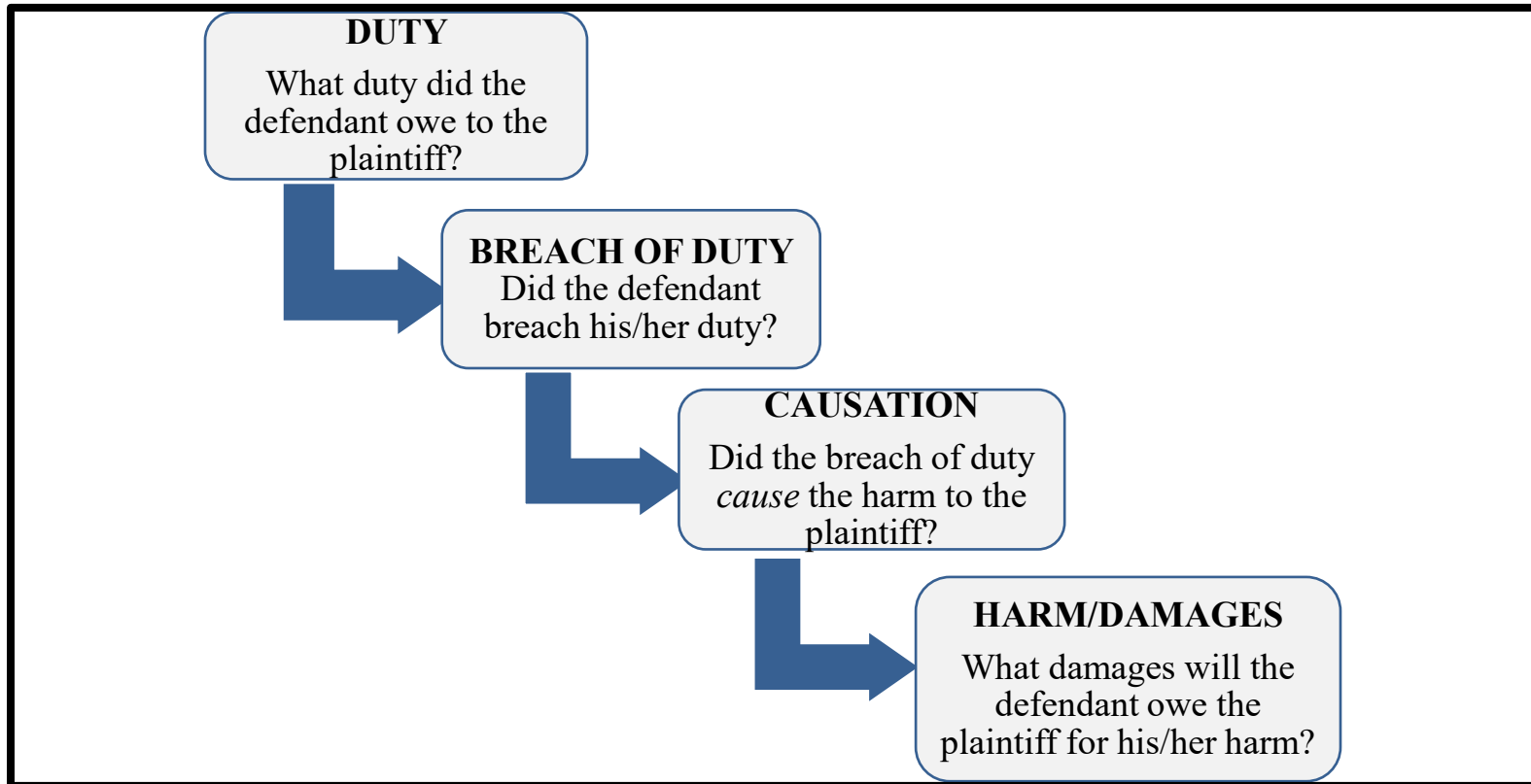
Overview of Negligence



Ordinary Negligence = Careless Conduct
Gross Negligence = Willful/Wanton or Reckless Conduct

Overview of Negligence

Four Elements of Negligence – Plaintiff Must Prove (1)



Compensatory Damages – plaintiff seeks monetary (compensation) damages:

Economic (e.g., medical expenses, lost wages)

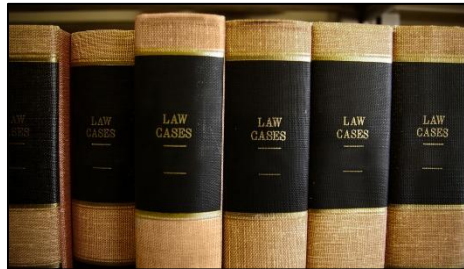
Non-economic (e.g., pain and suffering)

Punitive Damages – plaintiff seeks “additional” damages for gross negligence

Case Law Examples of Negligence Lawsuits

- Case #1: *Levy v. Town Sports International, Inc.* (2)
- Case #2: *Layden v. Plante* (3)
- Case #3: *Bartlett v. Push to Walk* (4)

These cases are described as a “case brief” – Facts, Issue(s), Court’s Ruling, and Court’s Reasoning



Case #1 – *Levy v. Town Sports International, Inc.*

➤ Facts:

- Personal trainer had his client, Levy, with known osteoporosis perform a series of jump repetitions on a BOSU ball
- After a few reps, she lost her balance and fell fracturing her wrist that required surgery to have a plate and screws inserted into her wrist
- She filed a negligence lawsuit against the defendant facility
- The facility filed a **motion for summary judgment*** claiming she “assumed” the risks
- Trial court granted the defendant’s motion, and the plaintiff appealed

➤ Issue:

- Did the trial court err when it granted the defendant’s motion for summary judgment based on the primary assumption of risk doctrine?

*Motion for summary judgment – a legal procedure in which one party argues there are no significant questions of facts based on the law and, thus, the case should be dismissed.

Levy v. Town Sports International, Inc. – Cont.

➤ Court's Ruling:

- Yes, the appellate court reversed the trial court's ruling

➤ Court's Reasoning:

- The trainer, knowing Levy had osteoporosis (and recent surgery), **unreasonably increased the risk of harm** to her by having her perform an advanced exercise

Primary Assumption of Risk (A/R) Defense: An Effective Defense IF

- The plaintiff knows, understands, and appreciates the “inherent” risks of the activity and voluntarily assumes them

➤ Note:

- Inherent risks are not assumed until the plaintiff has had proper instruction and adequate experience with a new activity
- When an exercise professional **increases the risks over and above those that are inherent**, it is likely negligent conduct

Case #2 – *Layden v. Plante*

➤ Facts:

- Prior to beginning a personal training program with a certified personal trainer, Layden informed her trainer that she had back problems and a herniated disc
- The trainer instructed her on how to perform a Smith squat
- While performing the squat on her own, using the written instructions from her trainer, Layden injured her lower back that resulted in a surgical procedure to correct two herniated discs
- Layden filed a lawsuit against the trainer (improper instruction) and against the owner under the legal doctrine, *respondeat superior*
- Both defendants filed a motion of summary judgment, based on the primary A/R defense which the trial court granted, and the plaintiff appealed

➤ Issue:

- Did the trial court err when it granted the motions for summary judgment in favor of the defendants?

Layden v. Plante – Cont.

➤ Court's Ruling:

- Yes, the appellate court reversed the trial court's ruling

Expert
Testimony

➤ Court's Reasoning:

➤ Liability of the trainer

- Two experts testified (a) that the Smith squat, even if properly performed, is contraindicated for someone with a herniated disc (vertical loading the spine places extreme stress on the lower back), and (b) the trainer did not provide proper instruction (increased risks)

➤ Liability of the owner

- Owner testified that she was not liable under the theory of *respondeat superior* because the trainer was an independent contractor, not an employee
- But the court stated an “analysis of the extent of the fitness center’s power to regulate the manner in which the trainer performed her work, and the parties’ conflicting evidence poses factual questions as to this issue” (3, p. 462)

Independent Contractor Versus Employee

- **Vicarious Liability** – employers can be held liable for the negligent acts of their employees under the theory of *respondeat superior*, but not if the worker is a “true” independent contractor (Vicarious liability is a form of strict liability)
- If the employer exhibits **behavioral control** (controls how workers perform their jobs) – then the worker is an employee based on IRS Publication 1779*
 - If a worker received extensive instructions on how the work is to be done, such as how, when, or where to do the work – the worker would be classified as an employee (the court in this case questioned whether the trainer was an IC or employee – given the evidence that the owner regulated how the trainer performed the job)

* **Independent Contractor or Employee? Publication 1779. Department of Treasury Internal Revenue Service. [Publication 1779 \(Rev. 3-2023\)](#)**

Case #3 – *Bartlett v. Push to Walk*

➤ Facts:

- Bartlett, a 36-year-old quadriplegic participated in personal training at Push to Walk, a specialized gym for people with spinal cord injuries; He had used a wheelchair for 18 years and had a variety of medical conditions
- The trainer had a degree in exercise science, 4 years experience at Push to Walk, and ACSM's personal trainer certification (she had on-the-job training at Push to Walk, but no formal education in the area of neuroscience, although her title was neuroexercise trainer)
- On the day of the injury, the trainer wanted Bartlett to try a kneeling technique – he expressed his concerns, but was willing to try
- She informed him that she was not concerned about any risks given his progression after 1-year at Push to Walk and that he could stop if he felt uncomfortable

Bartlett v. Push to Walk – Cont.

➤ **Facts – Cont.**

➤ **According to Bartlett, his trainer and other employees who assisted:**

- “rotated me over onto my stomach, which was already uncomfortable because I had not laid on my stomach in ten years, and when you do that with a spinal cord injury,... it’s very painful and very uncomfortable. You’re then pulled into a kneeling position backwards They grab you from behind by the hips and literally pull you back upward up in a kneeling position, and immediately when I was on my knees, it was much worse than when I was in the standing frame. I was lightheaded...I knew that this was not a good situation. I could tell that they did not have control of my body, just because of my size, and I needed to lay down. I did not feel well, and I asked them to put me down, and they did, and when I laid down, I was tingling, I was lightheaded, and I was nauseous” (4, p. 3).

Bartlett v. Push to Walk – Cont.

➤ **Facts – Cont.**

- **His trainer then told him that she would like him to perform the exercise one more time**
 - Bartlett said that would not be a good idea, but went ahead and tried it again
 - This time his hips buckled to the left and he fell forward to his right
 - In addition to similar symptoms (lightheadedness, nausea), he had pain shooting up his right side (he thought he had a cracked rib)
 - At the hospital -- no cracked ribs but still experiencing pain
 - Soon after being discharged from the hospital, he noticed his right leg/knee began to swell
 - At the emergency room, he was diagnosed having a fractured leg for at least 3 weeks – surgery to repair was too risky given his spinal cord injury

Bartlett v. Push to Walk – Cont.

➤ **Facts – Cont.**

- **Bartlett filed a lawsuit against the defendants on three counts**
 - Negligence
 - Negligent hiring
 - Gross negligence
- **Defendants filed a motion for summary judgment because of the waiver Bartlett signed (waiver defense)**



➤ **Issue:**

- Did the court grant the motion for summary judgment in favor of the defendants in reference to the three counts?

➤ **Court's Ruling:**

- Yes, for the first two counts but not for the third count

Bartlett v. Push to Walk– Cont.

➤ Court's Reasoning:

- **Count 1:** The waiver did not violate public policy in New Jersey – the waiver was enforceable and protected the defendants (trainer and employer) from their own “ordinary” negligence.
- **Count 2:** Negligent hiring is recognized in New Jersey if the employer knew or should have known the employee was violent, aggressive, or engaged in injurious conduct toward a third party. The trainer did not conduct any intentional acts.
 - Note: Employers can be “**directly**” liable for negligent hiring, training supervision, and retention (different than vicarious liability).
- **Count 3:** Court defined **negligence** as the failure to exercise ordinary or reasonable care that leads to a natural and probable injury and **gross negligence** as the failure to exercise slight care or diligence.

Bartlett v. Push to Walk – Cont.

➤ **Count 3 – Cont.**

- The appellate court concluded that the trainer's conduct was **grossly negligent** when she knew that Bartlett's first attempt did not go well and then pressed him to try a second time when the injury resulted.

Key Point from the Court: Programs like Push to Walk that serve injured individuals “May impose particular duties that an ordinary health club would not have...What would constitute ordinary negligence would differ between an ordinary health club and a facility like Push to Walk” (4, p. 7).

- In other words, the standard of care (duty) may be different (e.g., courts may recognize additional duties) toward individuals in facilities that market to and provide programs for individuals with medical conditions.

Courts Determine Duty or the Standard of Care of an Exercise Professional

Courts determine duty (or the standard of care)— Not attorneys, juries, plaintiffs, or defendants

Courts may consider the credentials of an exercise professional such as degrees, certifications, and experience but, more importantly, courts will consider the **conduct or behavior of the professional given the situation.**

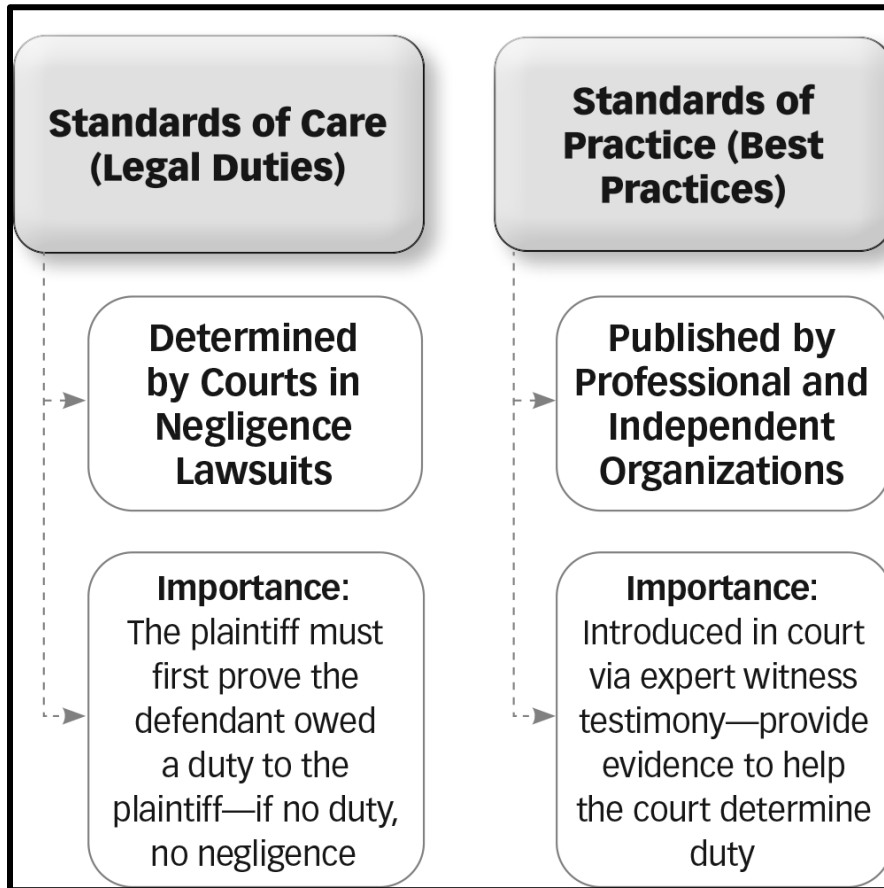
A breach of duty is some type of behavior: A failure to act or improper action.

When determining the duty (or the standard of care) the defendant owed to the plaintiff, courts often rely on the testimony of experts.

- A major role of an expert witness is to educate the court as to the duty owed to the plaintiff and if the defendant breached that duty (as in the *Layden* case)
- Expert witnesses will often refer to **standards of practice**, published by professional organizations, *e.g.*, standards, guidelines, and position/white papers.

Courts Determine Duty or the Standard of Care of an Exercise Professional

Distinguishing Standards of Care and Standards of Practice (1)



Published standards are not substantive law (i.e., they are not primary sources of law) but provide admissible evidence to establish the standard of care (duty) in negligence cases*

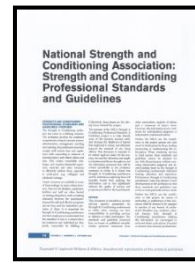
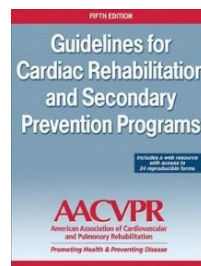
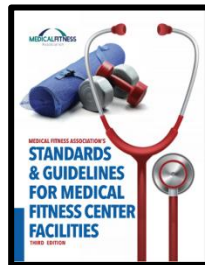
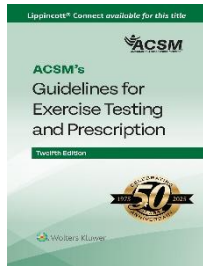
****Elledge v. Richland/Lexington School District Five, 341 S.C. 473 (S.C. Ct. App., 2000).***

PUBLISHED STANDARDS OF PRACTICE

➤ Two General Categories:

➤ Desirable Operating Procedures

- Primarily published by professional organizations
- Standards, guidelines, position papers, etc.
- Examples include:



➤ Technical Physical Specifications

- Primarily published by independent organizations; Examples include:

ASTM (American Society for Testing and Materials) International

- Standardized Specifications for Motorized Treadmills (F115- 12) – specifies 2 meters clearance behind treadmill
- Standard Specification for Fitness Equipment and Fitness Facility Safety Signage and Labels (F1749 – 15)

Exercise Equipment Manuals (provided to purchasers)

- Published by equipment manufacturers (e.g., installation, maintenance, safety procedures)

PUBLISHED STANDARDS OF PRACTICE

Perspectives of Experienced Expert Witnesses:

➤ Expert witness Harvey Voris:

“The published standards by ASTM, ACSM and NSCA do establish a standard of care for the fitness industry that manufacturers and operators can be held accountable to if they elect to ignore them” (5, p. 97).

➤ Expert witness Doug Baumgarten:

There have been occasions in which the court...says, 'Well, those are just recommendations. There's no legal requirement,'"..."But when I get hired by a plaintiff...I always use the ACSM manual as a published standard, and very often it carries a lot of weight” (6, p. 6).

Factors that Determine the Standard of Care of an Exercise Professional

The late Betty van der Smissen stated: “if one accepts responsibility for giving leadership to an activity or providing a service, one’s performance is measured against the standard of care of a qualified professional *for that situation* (7, p. 40).

Note: A “qualified” professional possesses **proper credentials** and is **competent***.

“For that situation” is determined by reference to the following three factors:

The Nature of the Activity

The Type of Participants

The Environmental Conditions

***Competent Employee:** Knows how (has the knowledge and practical skills) to design and deliver proper exercise programs.

Nature of the Activity

The exercise professional must be aware of the skills and abilities the participant needs to participate “safely” in the activity, *e.g.*, if these are complex, difficult, or advanced, the professional must have the knowledge/skills to teach these skills safely, given the abilities of the participant.



Does the exercise professional have the knowledge, skills, and experience to fully understand the precautions that must be taken to safely teach “complex, difficult, or advanced exercises” to participants in the program?

For example, jumping reps onto a BOSU ball, as in the *Levy* case, is an “advanced” exercise – the trainer did not have the knowledge/skills to safely teach this advanced exercise or perhaps realize that it was an advanced exercise.

Types of Participants

The exercise professional must be aware of individual factors of the participant, *e.g.*, health conditions that impose increased risks and know how to minimize those risks.

Exercise professionals that teach/train individuals with medical conditions, (*e.g.*, diabetes, pregnancy, high blood pressure, back problems) need to fully understand the potential risks that can occur with exercise and the precautions they need to take when designing and delivering exercise programs for these individuals.

Data from 2023 indicate that 76.4% of adults in the U.S. are living with at least one chronic health condition. More than half of all adults, 51.4%, report having multiple chronic conditions. From: [What Percentage of People Have at Least One Comorbid Condition? - Biology Insights.](#)

Environmental Conditions

The exercise professional must be aware of any conditions that may increase risks, *e.g.*, heat, humidity, slippery floor surfaces, and know how to minimize those risks.

The professional needs to be aware of, understand, and be able to apply the latest scientific information, *e.g.*, the professional should be current on ways to prevent heat injuries by being familiar with position papers published by professional organizations that describe specific precautions that need to be adhered to in order to minimize the risk of heat injuries.

Courts Determine Duty or the Standard of Care of an Exercise Professional

- The *Restatement of Law Third, Torts* states: “If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person” (8, pp. 82-83).
- If exercise professionals hold themselves out as having a higher level of knowledge and skill than they possess or take on responsibilities beyond their level of education and training (e.g., professionals who market themselves as a clinical exercise physiologist but do not possess credentials/competence in clinical exercise), the professionals will likely be held to that enhanced level of knowledge/skill.

NOTE: In addition to “standard of care” issues, exercise professionals/fitness facilities may face violations of the Federal Trade Commission Act (FTCA): a consumer protection law that prohibits false or misleading advertising/marketing.

See: [Advertising and Marketing | Federal Trade Commission](#)



Civil Law and Criminal Law in the Context of Clinical Exercise Prescription and Scope of Practice

Legal Scope of Practice is defined within the context of licensed health care professions, *e.g.*, the Federation of State Medical Boards provides the following definition:

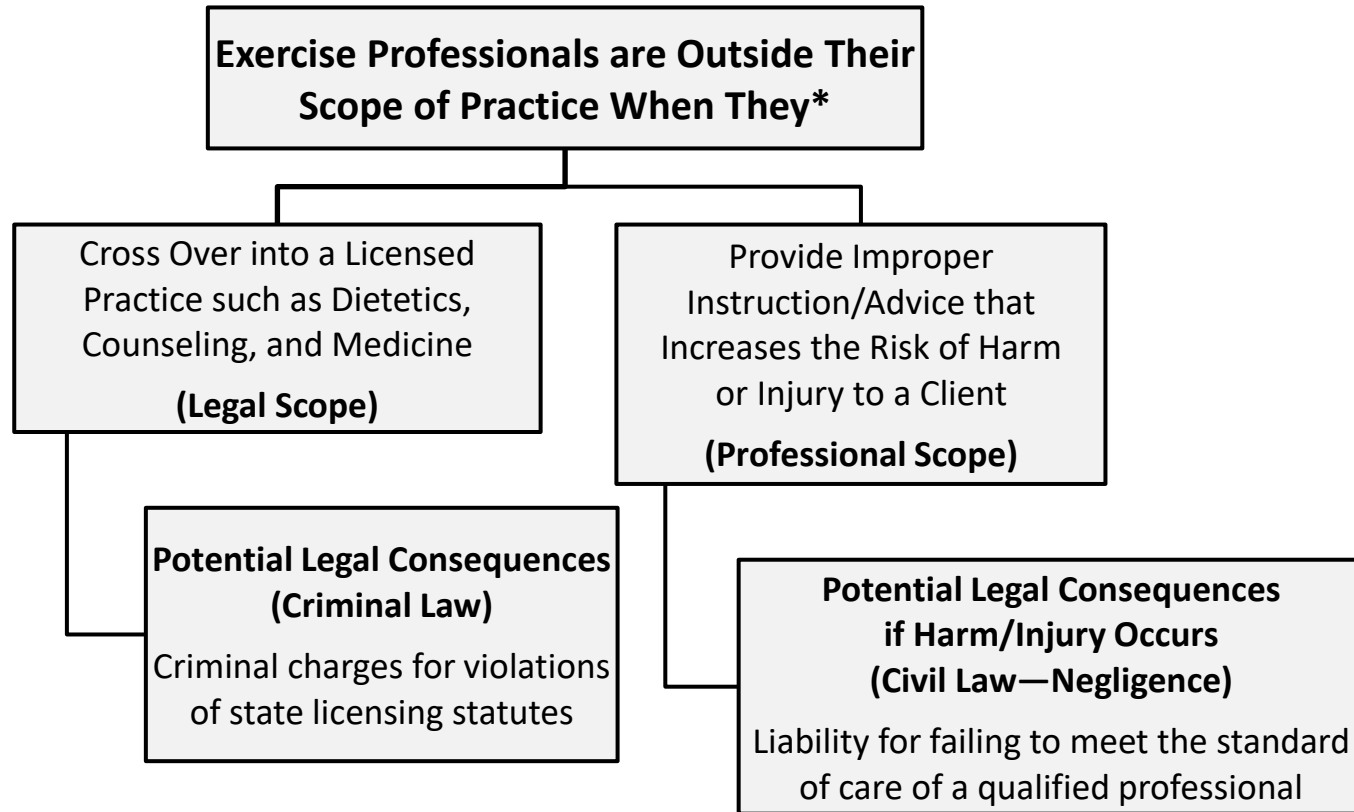
Scope of practice is defined as the activities that an individual health care practitioner is permitted to perform within a specific profession. Those activities should be based on appropriate education, training, and experience. Scope of practice is established by the practice act of the specific practitioner's board, and the rules adopted pursuant to that act (9, p. 8).

Note: Louisiana is only state that has licensure for clinical exercise physiologists (since 1996). See: <https://a.storyblok.com/f/150540/x/4d47d5c0ff/cep-practice-act-may-2024.pdf>.

Professional Scope of Practice is applicable to all professions that require special knowledge, skills, and training – not only licensed professionals. All non-licensed professionals such as exercise professionals should practice within their education, training, experience, and practical skills to stay within their professional scope of practice.



Civil Law and Criminal Law in the Context of Clinical Exercise Prescription and Scope of Practice



*Adapted from *Law for Fitness Managers and Exercise Professionals* (1)

MedFit Scope of Practice* - In Part

Addresses both legal and professional scope of practice:

In Part:

Medical Fitness Specialists shall first and foremost adhere to the scope of practice as defined by their primary fitness certification, shall also follow all local, regional, state, and/or national regulations... and shall adhere to the procedures and actions applicable to their credentials. (legal and professional)

Medical Fitness Specialists shall **not diagnose** injury, chronic disease, or any other medical condition, **nor provide treatment** beyond the scope of their training, and shall refer clients with such needs to properly licensed medical and/or allied healthcare professionals. (legal)

Medical Fitness Specialists are also trained to take a thorough health history, monitor their client through accurate record-keeping and, once again, to work within the scope of their respective education and training. (professional)

*[Scope of Practice | MedFit Classroom](#)

Scope of Practice

- Cases previously described (*Levy, Layden, and Bartlett*) involved the professional scope of practice - negligence lawsuits (civil law)
- Case examples involving health and wellness coaches – legal scope of practice (criminal law)
 - *Del Castillo v. Secretary, Florida Department of Health* (10)
 - Case described by Chris Kessler (11)

Practice within Your Legal and Professional Scope

Scope of Practice

Case #1:

Del Castillo had clients complete a health history form that included dietary health questions and then provided dietary advice such as taking supplements.

A licensed dietitian filed a complaint against Del Castillo alleging she violated the Florida Dietetics and Nutrition Practice Act. Fla. Stat. §§ 468.501–.518. This ACT prohibits conducting **nutritional assessments** and **counseling** unless licensed.

The Florida Department of Health sent her a citation and a cease-and-desist order. Del Castillo had to pay a fine for violating the Florida Act.

Civil Law and Criminal Law in the Context of Clinical Exercise Prescription and Scope of Practice

Criminal Penalties, In Part, Florida Statute: Unlicensed Practice of a Health Care Profession*

Cease and desist notice: Issued by the state department or appropriate regulatory board within the department when there is probable cause a person who is not licensed has violated any provision specified in the statute. The penalty shall be a fine of not less than \$500 nor more than \$5,000 as established by rule of the department. Each day that the unlicensed profession continues after issuance of a notice to cease and desist constitutes a separate violation.

Third degree felony: The practice, attempt to practice, or offer to practice a health care profession without an active, valid Florida license. The minimum penalty is a fine of \$1,000 and a minimum mandatory period of incarceration of one year.

Second degree felony: The practice results in serious bodily injury. The minimum penalty is a fine of \$1,000 and a minimum mandatory period of incarceration of one year.

First degree misdemeanor: The practice, attempt to practice, or offer to practice a health care profession with an inactive or delinquent license for any period of time up to 12 months. The minimum penalty is imprisonment of 30 days and a fine of \$500. For 12 months or more it is a third degree felony.

*Unlicensed Practice of a Health Care Profession. FL ST § 456.065 (2024).

Scope of Practice

Case #1 – Cont.

Del Castillo brought an action against the Department claiming the Act violated her constitutional free speech rights - now a federal case because it dealt with a U.S constitutional first amendment issue.

This U.S. district court (trial court) ruled in favor of the Department stating that “professional speech” is a unique category of speech exempt from First Amendment principles and that states may regulate professional conduct, even though that conduct incidentally involves speech.

Del Castillo appeals to the U.S. 11th Circuit Court of Appeals. They ruled against Del Castillo stating:

“Because the Act ‘is a professional regulation with a merely incidental effect on protected speech,’ it is “constitutional under the First Amendment” (10, p. 1226), and “Assessing a client’s nutrition needs...developing a nutrition care system... are not speech. They are “occupational conduct”; they’re what a dietitian or nutritionist does as part of her professional services” (10 pp. 1225-1226).

Scope of Practice

Case #2: Described by Chris Kessler

A health coach recommended a high dose of dehydroepiandrosterone (DHEA) to a client based on the client's saliva hormone test. DHEA is a hormone naturally produced in the adrenal gland.

The coach did not realize that a high dose of DHEA could have a negative effect on the client's pre-existing hyperthyroid condition. The client experienced many symptoms and had to be taken to the emergency room.

The **client sued the health coach and the program** that trained the coach on how to interpret such tests and recommend treatment based on the test results.

The outcome of this civil case (negligence lawsuit) is unknown—likely settled out of court as are most negligence cases.

Scope of Practice

Case #2 – Cont.

The conduct of the health coach in this case reflects that type of conduct that only licensed health care providers can provide (making a **diagnosis** from a medical test and then providing **treatment** based on the diagnosis).

This case is a good example of how a HW coach could face both criminal charges (*e.g.*, practicing medicine without a license—a violation of state statutes) and, as in this case, civil claims such as negligence due to the harm suffered by the client.

Also, a good case example of employer/program liability based on vicarious liability (legal principle of *respondeat superior*).

Scope of Practice

Tips for Fitness/Wellness Professionals that Provide Nutrition Education and Advice

- To avoid criminal charges (practicing dietetics without a license), provide general nutrition education only.
 - Avoid conducting nutritional assessments and counseling (conduct reserved for licensed dietitians as specified in state licensing statutes).

Note: In states that do not require licensure, conducting individual nutritional assessments and counseling may be okay. Check with legal counsel and state licensing laws – see: <https://www.cdrnet.org/LicensureMap>

- **Practicing across state lines:** The legal status of cross-border practice is determined by the location of the client. For example, a fitness/wellness professional who lives in Nebraska can provide nutrition assessments/counseling to clients in California (no state licensure requirements), but not in North Carolina (has state licensure requirements).

Risk Management to Minimize Legal Liability

Risk Management Definition

A proactive administrative process that will help minimize legal liability risks facing exercise professionals, managers, and employers.

Risk management (RM) is like **preventive law**.

Like **preventive medicine** that focuses on preventing disease, **preventive law** focuses on preventing criminal charges and civil lawsuits (1)

Both preventive medicine and preventive law are **proactive** (preventing problems before they arise) versus **reactive** (responding to problems after they arise).

Risk Management to Minimize Legal Liability

“General” Legal Duty of Exercise Professionals and Fitness Managers:

To provide “reasonably safe” programs and facilities for their participants

Reasonably safe means:

Taking steps (developing and implementing risk management strategies) to help prevent foreseeable risks of injuries (1)



Risk Management to Minimize Legal Liability

Managers/Owners

Fitness Program and Facility Managers have the overall responsibility to help ensure all their employees are carrying out their legal duties and risk management responsibilities.

They have a vested interest to do so due to **vicarious liability** (*respondeat superior*) and **direct liability** (failure to properly hire, train, and supervise employees).

Protect Yourself, Your Business, and Your Clients

Risk Management to Minimize Legal Liability

Managers/Owners

First, organize a RM planning team to assist with the steps needed to develop a Comprehensive RM Plan, such as:

- Experts in the legal, medical, and insurance areas
- Stakeholders, *e.g.*, those who have a vested interest in the program (executives, board members)
- Experienced exercise professionals that are employees of the program/facility

Risk Management to Minimize Legal Liability

Managers/Owners

Four RM Steps (1):

Step 1: Assessment of Legal Liability Risks

- Applicable Laws – Federal and State

- Published Standards of Practice

Step 2: Development of Written RM Strategies

- Loss Prevention Strategies

 - Minimize legal liability risks (criminal and civil)

- Contractual Transfer of Risks

 - Release of liability (waiver) and liability insurance

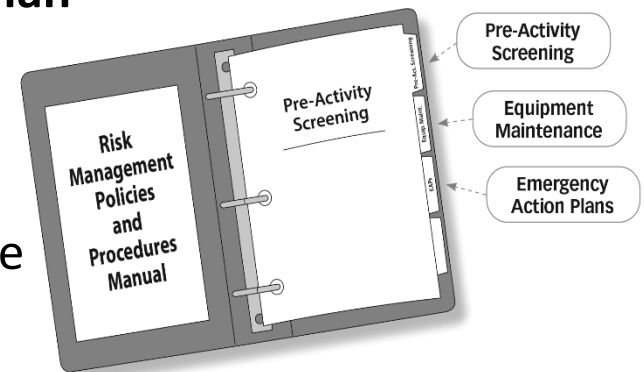
Risk Management to Minimize Legal Liability

Managers/Owners

Four RM Steps (1): -- Cont.

Step 3: Implementation of the Comprehensive RM Plan

- Organize the RM strategies into a RM Policies and Procedures Manual (RMPPM)
- Conduct Staff Training Using the RMPPM
Initially upon hiring and for on-going in-service trainings



Step 4: Evaluation of the Comprehensive RM Plan

- Formative—Situations arise that may indicate a revision of the plan and/or staff re-training
- Summative—Formal, annual review of the plan to determine if revisions are needed, *e.g.*, changes in laws or published standards of practice

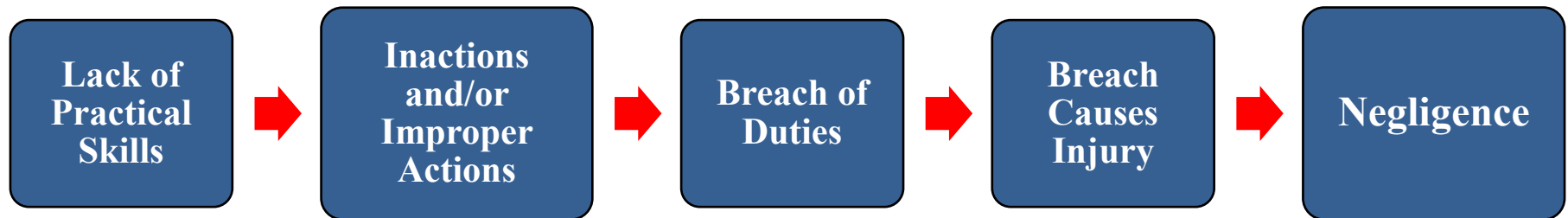
Risk Management to Minimize Legal Liability



RM Tips for Exercise Professionals

1. **Obtain the necessary knowledge and skills to design/deliver an exercise program for individuals with medical conditions.**
 - The exercise professionals in *Levy*, *Layden*, and *Barlett* did not possess the needed knowledge and skills (e.g., did not know important precautions, contraindications, given the individual's medical conditions).

The Connection Between the Lack of Practical Skills and Legal Liability (1)



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RM Tips for Exercise Professionals – Cont.

2. Always practice within your scope – legal and professional
3. Make proper referrals when needed
 - To the individual's health care provider (e.g., changes in the client)
 - To an exercise professional who has expertise in the medical condition(s) of the client

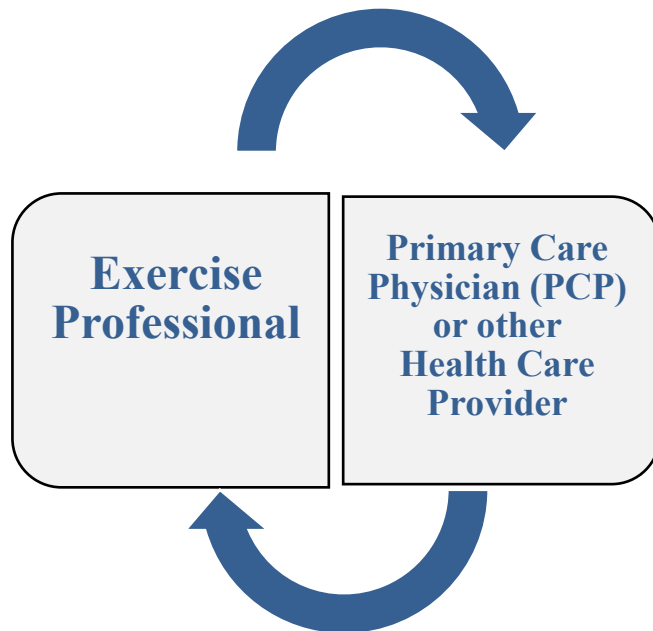
NOTE: Physicians can be liable for medical malpractice if they knew or should have known that the health care provider to whom they referred their patient was incompetent or referral to an unaccredited medical facility (12). Liability associated with improper referrals applies to all professionals (use due care to investigate prior to referral).

4. Retain Documentation -- medical history, medical clearance, fitness assessments, lesson plans, contracts (e.g., release of liability, informed consent), etc.
 - When facing a negligence lawsuit, documents will help provide evidence that the exercise professional met the standard of care.

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RM Tips for Exercise Professionals – Cont.

5. Establish two-way communication – EP and PCP (1)



Begins when:

- Obtaining medical clearance
- Health care provider refers a patient to an exercise professional
- Exercise professional works for a health care provider/medical clinic
- Exercise professional/facility contracts with a covered entity (e.g., health care organization) as a business associate

NOTE: This 2-way communication can help show that the exercise professional is working with the PCP to support the treatment plan established by the PCP versus the exercise professional establishing a treatment plan or practicing medicine without a license.

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RM Tips for Exercise Professionals and Managers/Owners

Follow Federal and State Laws

- Numerous laws are applicable to the exercise profession such as those related to **data privacy, security, and breach notification** – HIPAA FTCA, and State Breach Notification Laws (data breaches are common and costly)– review the following links:

What are the penalties for HIPAA violations? *The HIPAA Journal*:

<https://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/>.

Provides a listing of the **covered entities** (e.g., health plans, health care organizations) and **business associates** (vendors of health care providers or health plans that provide services to providers/plans) in violation and the financial penalties (2016-2025).

Also see: The HIPAA Compliance Checklist at: <https://www.hipaajournal.com/hipaa-compliance-checklist/>.

Risk Management to Minimize Legal Liability

RM Tips for Exercise Professionals and Managers/Owners

Federal Trade Commission Act (FTCA) Breach Notification Rule

- In situations where HIPAA does not apply, the FTCA's breach notification rule will likely apply – similar to the HIPAA breach notification rule.
- Note the following recent policy statement from the Federal Trade Commission (FTC) as part of the FTCA's breach notification rule regarding health apps and other connected devices (in part)

“As many Americans turn to apps and other technologies to track diseases, diagnoses, treatment, medications, fitness, fertility, sleep, mental health, diet, and other vital areas, this Rule is more important than ever. Firms offering these services should take appropriate care to secure and protect consumer data. The Commission intends to bring actions to enforce the Rule consistent with this Policy Statement. Violations of the Rule face civil penalties of \$43,792 per violation per day” (13, p. 2).

Federal Trade Commission Act: <https://www.ftc.gov/legal-library/browse/statutes/federal-trade-commission-act>

Risk Management to Minimize Legal Liability

RM Tips for Exercise Professionals and Managers/Owners

State Data Breach Notification Rules

- All 50 states have data breach notification laws which, generally, require entities to report a data breach to individuals whose personal information was affected as well as to government authorities.
- A listing of these state laws is available at: <https://www.ncsl.org/technology-and-communication/security-breach-notification-laws>.

Recommendations:

- Consult with a cybersecurity lawyer and/or expert to help ensure systems are in place to prevent data breaches. Examples include:
 - Data privacy: Password-protected platforms, secure devices
 - Data security: Two-factor authentication, secure servers
- Consider purchasing cybersecurity insurance.

Risk Management to Minimize Legal Liability

Additional RM Tips

- The above RM tips for fitness managers/owners and exercise professionals focused on **preventing** injuries and subsequent negligent lawsuits.
- Also, it's important to have effective RM Strategies after being named as a defendant in a negligent lawsuit:
 - Waiver (Release of Liability) and Assumption of Risk Document (contract)
 - These contracts contain an exculpatory clause section and an assumption of risk section
 - Liability Insurance (carefully review the policy)
- **Waiver Law is complex – based on state law**
 - Unenforceable for personal injury in certain states
 - How explicit the exculpatory clause needs to be
 - Certain font requirements/bolded terms
 - How is it administered, e.g., did the client have time to read it?
 - Always have a competent lawyer review/prepare the waiver



Risk Management to Minimize Legal Liability

Benefits of a Compressive Risk Management Plan (1)

- Decrease in legal liability risks and costs associated with litigation
 - Lawsuits also are stressful (may take years before the case is settled or goes to trial), take a great deal of time, and can affect the reputation of the exercise professional, program, and facility
- Increase in management efficiency, e.g., well-trained employees will allow managers to spend less time in a reactive mode (putting out fires) and more time in a proactive mode (continued improvement and expansion of the program)
- Increase in the quality of the program (e.g., clients experience positive outcomes/satisfaction)
- Increase in credibility and opportunities (e.g., verification of complying with laws is needed to work with health care providers/organizations)
- Increase in the reputation and advancement of the exercise profession
- Creates a **Safety Culture** within the fitness program/facility

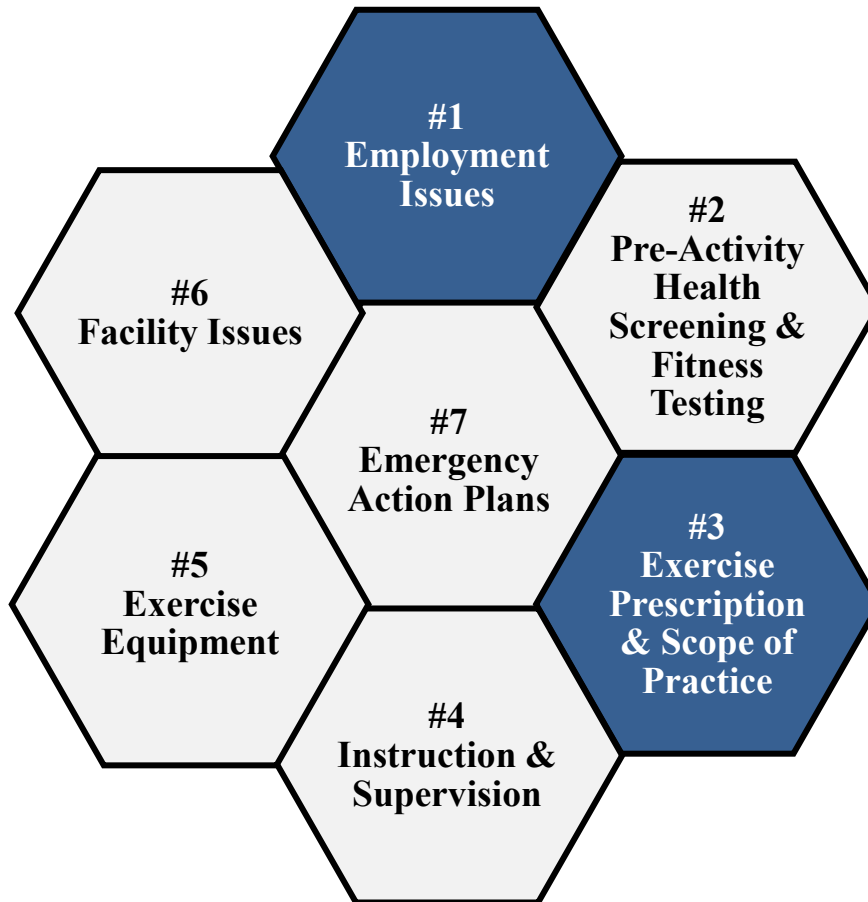
QUICK QUIZ

	True	False
1. Professional scope of practice applies to all exercise professionals and legal scope of practice applies to all licensed professionals.	✓	
2. Exercise professionals who prescribe exercise for individuals with medical conditions may be held to a different standard of care than those who prescribe exercise for apparently healthy individuals.	✓	
3. In a negligence lawsuit, employers can be held “vicariously” liable and “directly” liable.	✓	
4. The “professional standard of care” is applicable to all exercise professionals.	✓	
5. When determining if a breach of duty occurred in a negligence lawsuit, the court will consider the competence (conduct) of exercise professionals more so than their credentials.	✓	

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Additional Legal Liability Risks

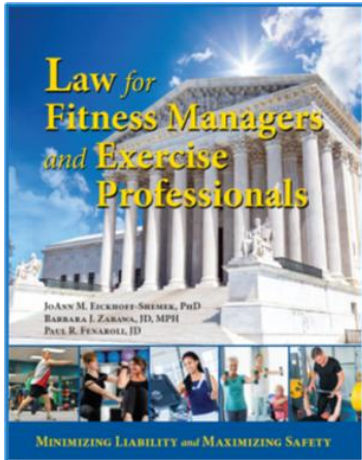


7 Areas of Legal Liability Risks (1)

Numerous legal liability risks (e.g., situations that increase a risk of injury or reflect noncompliance with laws) exist in each of these 7 areas. Fitness managers and exercise professionals need to be aware of these and take steps to minimize them through comprehensive risk management.

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Resources and Continuing Education Programs



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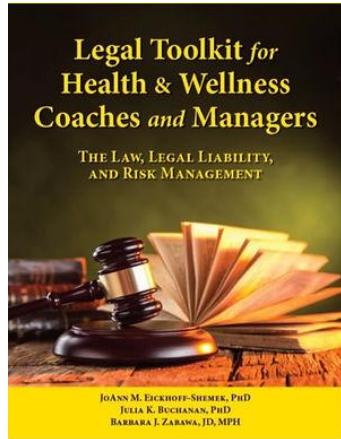


Two Self-Study CE Courses that accompany this text:

- ACSM "Self-Study" Course for members and non-members: **Law for Fitness Managers** - Earn 11 CECs by completing 5 self-study modules. For more information and to register, click: <https://www.pathlms.com/acsm/courses/93980>
- Fitness Law Academy Course: **Minimize Legal Liability and Maximize Fitness Safety** - Earn 22 ACSM CECs and/or 2.0 NSCA CEUs. For more information and to register, click: [Educational Courses](#).
- The Fitness Law Academy also provides a faculty training program for exercise science academicians who want to teach a legal/risk management course or a legal/risk management unit in an existing course. See: [Educational Courses](#).

To Learn More:

Resources and Continuing Education Programs



For Exercise Professionals who are also Health and Wellness Coaches

Fitness Law Academy Course: **Law For Health & Wellness Coaches and Managers** (Self-Study Continuing Education Course – Earn 4.0 CEs – an NBHWC-Approved Course). For more information and to register, click: [Textbook](#).

**Available on Amazon:
(only \$22)**

[Legal Toolkit for Health & Wellness Coaches and Managers: The Law, Legal Liability, and Risk Management: Eickhoff-Shemek PhD, JoAnn M., Buchanan PhD, Julia K., Zabawa JD, Barbara J.:](#)
[9798302985484: Amazon.com:](#)
[Books](#)

The Legal Toolkit and the CE Course are for:

1. Educators who prepare health and wellness coaches and their students
2. Health and wellness coaches who are employees or independent contractors
3. Managers and employers of health and wellness coaches and programs
4. Entrepreneurs: Health and wellness coaches who have established a business

Thank you!

QUESTIONS?

For more information contact:

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