

Health Promotion Program Legal Update: Q2 – 2020 (June 17, 2020)

Barbara J. Zabawa, JD, MPH

HEALTH COACHING LEGAL GUIDANCE

Barbara J. Zabawa, JD, MPH
Center for Health and Wellness Law, LLC
JoAnn M. Eickhoff-Shemek, PhD, FACSM, FAWHP
Fitness Law Academy, LLC

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AGENDA

- Scope of Practice Legal Issues for Health Coaches (Barbara)
- Case Examples (JoAnn)
- Suggested Legal Guidelines for Health Coaches (Barbara & JoAnn)
- Q&A with Attendees

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WHY SHOULD WORKPLACE WELLNESS CARE ABOUT HEALTH COACH PRACTICE?

- If not delivered competently, wellness services can adversely impact an employee's health.
- Professionals must account for an employee's health status, work and home environment, prescriptions or other medications.
- Need to know:
 - Are they qualified? Training, education, experience
 - Do they have the appropriate certifications or licenses?
 - Are those certifications or licenses up to date? How do they stay up to date?

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WHY SHOULD WORKPLACE WELLNESS CARE ABOUT HEALTH COACH PRACTICE?

- Scope of practice laws provide protection for licensed professionals,
- Not all wellness professionals hold state-issued licenses.
- How do employers and liability insurers know whether the professional is qualified?
 - Lack of uniform standards of practice and expectations for all workplace wellness professionals.
 - Many wellness certifications lack government regulation and may be deficient in prior training, education or practical application of concepts.
- Employers who hire unqualified personnel who then cause injury can be held liable under *respondeat superior* doctrine.

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SCOPE OF PRACTICE

- Activities that an individual health care practitioner is permitted to perform within a specific profession.
- Activities should be based on appropriate:
 - Education
 - Training
 - Experience
- Established by the “practice act” of the specific practitioner’s state board, and the rules adopted pursuant to that act.

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SCOPE OF PRACTICE

- Addresses professions licensed by the state
- May include:
 - Athletic Trainers
 - Dietitians
 - Therapists
 - Chiropractic
 - Nurses
 - Physicians

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SCOPE OF PRACTICE

- Violations can be:
 - Criminal
 - Civil
 - Negligence actions



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SCOPE OF PRACTICE

- Examples of criminal behavior:
 - Crossing into practice of medicine (e.g., diagnosing and treating a medical condition) without a license in medicine, physical therapy, athletic training.
 - Practicing "dietetics" (or portraying oneself as a dietitian) without a dietitian's license.
 - Practicing "counseling" without a social work or psychology license.

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SCOPE OF PRACTICE

- How to avoid criminal charges:
 - **REFER** employee clients to appropriately-licensed professionals.
 - A poor referral could also increase liability if harm occurs
 - Familiarize yourself with the state licensing statutes and regulations that may cross over into your practice domain
 - If coach does not hold a state-issued license, avoid providing individualized advice and services.
 - General education is less risky.
 - U.S. Dietary Guidelines: <https://www.dietaryguidelines.gov/current-dietary-guidelines>
 - U.S. Physical Activity Guidelines: <https://health.gov/our-work/physical-activity/current-guidelines>

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SCOPE OF PRACTICE

Penalties for Violating State Licensing Statutes*

A Cease and Desist Notice: Issued to any person violating this statute. The violation can result in a fine between \$500 and \$5000. Each day the unlicensed practice continues after the notice, a separate violation can be charged.

3rd Degree Felony: Minimum penalty -- Fine of \$1000 and mandatory period of incarceration of 1 year.

2nd Degree Felony: Practice results in serious bodily injury; Minimum penalty same as 3rd degree felony.

1st degree Misdemeanor: Minimum penalty is a fine of \$500 and imprisonment for 30 days

*Florida's Law: Unlicensed practice of a health care profession. Fla Stat. § 456.065

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SCOPE OF PRACTICE

Practice of Dietetics and General Non-Medical Nutrition Information

Practice of Dietetics* -- restricted to those with a license

- Nutritional assessment to determine nutritional needs and to recommend appropriate nutritional intake, including enteral and parenteral nutrition.
- Nutritional counseling or education as components of preventive, curative, and restorative health care.
- Development, administration, evaluation, and consultation regarding nutritional care standards.

* Dietetics, Ohio Rev, Code Ann § 4759-01, 2013. <http://codes.ohio.gov/orc/4759>

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SCOPE OF PRACTICE

- General Non-Medical Nutrition Information** -- not restricted
- Providing information on the following:
 - principles of good nutrition and food preparation;
 - food to be included in the normal daily diet;
 - the essential nutrients needed by the body;
 - recommended amounts of the essential nutrients;
 - the actions of nutrients on the body;
 - the effects of deficiencies or excesses of nutrients; or
 - food and supplements that are good sources of essential nutrients

• ** Dietetics, Ohio Rev, Code Ann § 4759-2-01(M), 2009.
• <http://www.dietetics.ohio.gov/bulletins/bulletin8.pdf>.

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CASE EXAMPLE

- Wellness professional in Ohio represented himself as nutritionist. He performed nutritional assessments, recommended nutritional supplements and engaged in nutritional counseling for the purpose of treating certain complaints and ailments of his clients. The Ohio Board of Dietetics found the professional to be practicing dietetics without a license, even though he did not identify himself as a dietitian. The Board issued a “cease-and-desist” notice.
- Regarding his title of “nutritionist”, the court stated:
“the acts defendant performs are more important than his title and since does not possess a license to provide nutritional counseling and assessments, defendant’s acts are in violation of R.C. 4759.02(A)”

Ohio Board of Dietetics v. Brown, 83 Ohio App. 3d 2424 (Ohio Ct.App. 1993).

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CASE EXAMPLE

- Wellness professional started a website called “Diabetes Warrior” that provided various types of nutrition information, including a fee-based “Diabetes Support Life-Coaching” service in which the professional charged a fee for providing individualized dietary advice.
- The North Carolina Board of Dietetics/Nutrition informed the professional that the coaching services on the website must be removed because those services constituted the practice of dietetics without a license pursuant to North Carolina law.
- The Board’s director stated that the professional should not be addressing a diabetic’s specific conditions. The professional is no longer just providing information when he or she engages in assessing and counseling. Those activities require a license.
- *Cooksey v. Futrell*, 724 F.3d 226 (4th Cir. 2013).

NOTE: See the disclaimer now at the bottom of each page on the Diabetes Warrior website. In part, states:

Personal advice will not be given on this site. This site is ONLY intended for educational purposes.

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SCOPE OF PRACTICE

International Consortium for Health & Wellness Coaching (ICHWC) Health & Wellness Coach Scope of Practice*

Health and wellness coaches work with individuals and groups in a client-centered process to facilitate and empower the client to develop and achieve self-determined goals related to health and wellness. Coaches support clients in mobilizing internal strengths and external resources, and in developing self-management strategies for making sustainable, healthy lifestyle, behavior changes. **While health and wellness coaches per se do not diagnose conditions, prescribe treatments, or provide psychological therapeutic interventions, they may provide expert guidance in areas in which they hold active, nationally recognized credentials,** and may offer resources from nationally recognized authorities such as those referenced in ICHWC's healthy lifestyle curriculum. As partners and facilitators, health and wellness coaches support their clients in achieving health goals and behavioral change based on their clients' own goals and consistent with treatment plans as prescribed by individual clients' professional health care providers. Coaches assist clients to use their insight, personal strengths and resources, goal setting, action steps and accountability toward healthy lifestyle change.

*From: <http://www.nccchw.org/wp-content/uploads/2015/03/ICHWCHealthWellnessCoachScopeofPractice-FinalFeb12017.pdf>

CERTIFICATION: National Board Certified Health & Wellness Coach (NBC-HWC)**

Requires successful completion of formal education, practical experience, and assessment of practical skills PRIOR to taking national board certification exam.

** From: <https://www.nccchw.org/individuals/>

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NEGLIGENCE CLAIMS

- Occur when a wellness professional is accused of causing harm.
- To determine if wellness professional is negligent, the professional is measured against the "standard of care" of a qualified professional for that situation.

The plaintiff (injured party) must prove the following

- Duty – what duty or standard of care was owed to the plaintiff
- Breach of duty – Did the defendant (wellness professional) breach that duty
 - Inactions (Failing to act) or Improper actions/conduct (e.g., improper instruction/advice)
- Causation – Was the breach of duty the **cause** of the harm
- Harm/Damages – Monetary damages owed to the plaintiff if the defendant was found liable

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NEGLIGENCE CLAIMS

- **Qualified professional:**

- Possesses necessary credentials (education, certification, experience)
- Is competent
- Expert witnesses will judge the conduct (or competence) of the professional -- did the professional breach a standard of care (duty)

Importance of Practical Skills from a Legal Perspective:

Lack of skills ➡ Inactions/Improper Actions ➡ Breach of Duties ➡ Cause Harm ➡ NEGLIGENCE

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CASE EXAMPLE

- Mrs. Capati was a young mother of two children who was also taking medication for hypertension. Her personal fitness trainer advised her to take a variety of nutritional and dietary supplements, including some that contained ephedra.
- One day while performing squats with her trainer, Mrs. Capati became very ill and later died of a stroke at the hospital. Her husband filed a \$320 million wrongful death claim against the trainer, the fitness club, the Vitamin Shoppe and others, seeking compensatory and punitive damages.
- The trainer admitted that he did not inform Mrs. Capati that the foods or supplements he recommended might have negative health consequences while on hypertension medication and while working out. It is likely that the trainer did not realize that the combination of hypertension medication and ephedra can be lethal.
- The case was settled out of court for more than \$4 million, with the trainer and club being liable for \$1.75 million and the other defendants being held liable for the remainder.
 - *Capati v. Crunch Fitness (1999).*

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FDA RECALL OF SUPPLEMENTS

- Participants may believe that the FDA conducts a premarket safety review of dietary supplements, but they do not.
- There is no legal requirement to help ensure the supplement is safe (e.g., contains no prohibited substances) or that the supplement's claims are true.
- The FDA has recalled numerous supplements with potentially harmful ingredients including:
 - more than 40 products marketed for weight loss
 - more than 70 products marketed for sexual enhancement
 - more than 80 products marketed for body building*

*Beware of Fraudulent Dietary Supplements. Available at: <https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-dietary-supplements>. Accessed May 21, 2019.

Resources for clients:

- Office of Dietary Supplements (<https://ods.od.nih.gov>)
- National Center for Complementary and Integrative Health – Dietary and Herbal Supplements and (<https://nccih.nih.gov/health/supplements>)

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CASE EXAMPLE EXPERT WITNESS TESTIMONY

- During a steps aerobics class, Ms. Santana fell while performing simultaneous exercises (stepping and arm exercises with a Dynaband) as directed by the instructor. While performing the simultaneous exercises, the participants were instructed to look straight ahead at their reflection in a mirror versus looking at their feet. Ms. Santana fractured her ankle, requiring surgery.
- A expert witness (PhD) stated that the instructor increased the risks over and above those inherent in the activity when participants performed the simultaneous exercises. The court found that the trainer and club were negligent; they could not rely on the "assumption of risk" defense because the risk was beyond an inherent risk.
 - Santana v. Women's Workout and Weight Loss Centers, Inc., 2001 WL 1521959 (Cal. Ct.App. 2001).

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CASE EXAMPLE CLIENTS “TRUST” THEIR PROFESSIONAL

- Baldi-Perry, a female with known back/neck injuries, informed her personal trainer of her health history prior to training. He told her that he had extensive experience training individuals with such injuries and that he could design a safe program for her.
- One day prior to starting the training session, the trainer informed Baldi-Perry that he had established a new routine for her (circuit training with no/little rest periods) that was being performed by many at his fitness center. She reminded him of her past injuries and he responded by stating that she need to trust him; he was the professional and did this for a living.
- Baldi-Perry performed the routine, but it resulted in many injuries and serious outcomes such as herniated cervical discs, required surgery to decompress and fuse cervical discs, ongoing pain/medical care, and future surgery. Baldi-Perry sued the trainer and facility and won her case, receiving jury verdict of \$1.4 million. She was awarded \$980,000 because she was found to be 30% at fault.
- *Baldi-Perry v. Kaifas and 360 Fitness Center, Inc.*

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LESSONS LEARNED

- Clients trust their coaches and follow their instructions.
- The general public often believes that if a coach is “certified,” he or she is automatically qualified and competent.
- It is essential that only coaches with advanced knowledge and proper licensing and skills train or advise individuals who have medical conditions.
 - 60% of US adults have at least one chronic condition; 40% have two or more
- CDC: About Chronic Diseases. <https://www.cdc.gov/chronicdisease/about/index.htm>
- Employers can be held liable for the negligent conduct of their employees via the respondeat superior doctrine (vicarious liability) and can also be held liable for failing to properly hire, train and supervise employees (direct liability).

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HEALTH COACH LEGAL GUIDELINES

- Do NOT:
 - Advise on diet, exercise or mental health issues unless licensed
 - Make claims that certain products/programs can treat, cure or diagnose medical or psychological conditions
 - Unless supported with scientific evidence
 - Practice outside your scope/education/experience
 - Misrepresent qualifications
 - In *D'Amico v. LA Fitness*^{*} the facility was found liable for violating the Connecticut Unfair Trade Practices Act (CUTPA) because of deceptive acts
 - Defendants held themselves as having "experience and expertise in providing physical fitness and personal training facilities", but "employed and retained inexperienced and and/or unqualified personnel to supply personal training services"

^{*}57 Conn. L. Rptr. 242 (Conn. Super. Ct., 2013)

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HEALTH COACH LEGAL GUIDELINES

- Obtain liability insurance
- Consider separate legal entity
- Educate clients about healthy choices and provide reputable sources
- Maintain competency
- Abide by codes of conduct created by certification boards or professional associations
- Have clients sign acknowledgement form and informed consents
- Refer clients to appropriate licensed professionals
- Model and encourage nondiscriminatory standards of behavior

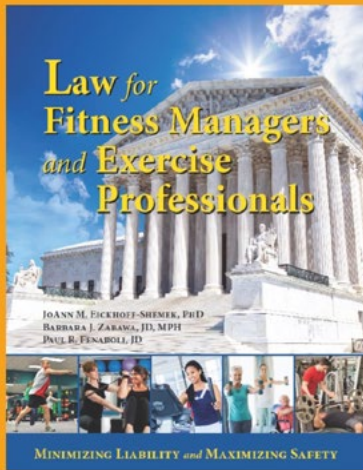
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Reference

Most of the content presented comes from:



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JoAnn M. Eickhoff-Shemek, Ph.D.

Barbara J. Zabawa, JD, MPH

Paul P. Fenaroli, JD

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Q&A REMINDER

The following Q&A session does NOT constitute legal advice and should not be used as such. It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.

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Q&A

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QUESTIONS?



- For more information, contact:
Barbara J. Zabawa, JD, MPH
The Center for Health and Wellness Law, LLC
Phone: 608-579-1267
Email: bazabawa@wellnesslaw.com
Website: www.wellnesslaw.com
Twitter: @wellnessatty
LinkedIn: www.linkedin.com/in/barbarazabawa
Instagram: wellnessattorney
Facebook: @centerforhealthandwellnesslaw



For more information contact:
JoAnn M. Eickhoff-Shemek, PhD, FACSM, FAWHP
Professor Emeritus, University of South Florida
President, Fitness Law Academy, LLC
Email: drjes2014@gmail.com
Website: www.fitnesslawacademy.com

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