

## Scope of Practice Issues for Fitness Professionals

Fitness professionals are presently not regulated by any United States jurisdiction except in Louisiana which currently regulates Clinical Exercise Physiologists and the District of Columbia (D.C.) which is now developing regulations for the practice of Personal Fitness Training (PFT). As a consequence, there are few authoritative resources which can be used by fitness professionals to determine what the permissible scope of practice may be in their delivery of service to consumers.

While many states have adopted laws or regulations defining various health care professions and specifying what health care services they may provide while also prohibiting the unauthorized practice of defined health care services, such enactments may be the only reference available to fitness professionals to consider which services they can and cannot lawfully provide to consumers. However, references to what can't be done don't really provide much guidance as to what can be done by fitness professionals. As a consequence, such professionals need to define and carry out services pursuant to an appropriate and lawful scope of practice.

Many fitness professional organizations such as the American College of Sports Medicine (ACSM), publish job task analysis statements which attempt to define what various fitness professionals, such as personal trainers, typically perform in their delivery of service to clients. Such statements often deal with intake and screening issues, testing considerations, exercise prescription, instruction, supervision and related matters. However, these and other similar statements do not resolve all issues.<sup>1</sup>

The business of fitness professional certification, especially for personal trainers and group exercise instructors has grown dramatically over the last 20 years. Emphasis on the accreditation of personal trainer certifications was promoted in 2006 when the International Health, Racquet & Sportsclub Association (IHRSA) adopted the following corporate resolution:

Whereas, given the increasing importance of personal training in health, fitness and sports clubs, IHRSA recommends that, beginning January 1, 2006, member clubs hire personal trainers holding at least one current certification from a certifying organization/agency that has begun third-party accreditation of its certification procedures and protocols from an independent, experienced, and nationally recognized accrediting body.

Furthermore, given the twenty-six year history of the National Organization for Competency Assurance (NOCA) as an organization dedicated to establishing quality standards for certifying agencies, IHRSA has identified the National Commission for Certifying Agencies, the accreditation body of NOCA, as being an acceptable accrediting organization.

IHRSA will recognize other, equivalent accrediting organizations contingent upon their status as an established accreditation body recognized by the Council for Higher Education Accreditation and/or the United States Department of Education for the purposes of providing independent, third-party

accreditation.

This resolution led to the recognition of the Distance Education Training Council (DETC) now known as the Distance Education Accrediting Commission (DEAC) as such an equivalent accreditation body. It also led to some standardization of certification procedures in the United States for personal trainers but did very little to provide clear scope of practice guidelines for those fitness professionals. Moreover, while the proliferation of basic certifications for personal fitness trainers and group exercise instructors resulted in thousands of fitness professionals becoming certified by accredited certifiers in these practice areas, secondary or sometimes so-called “soft certifications” also developed for other, somewhat new practice areas – life/ health/ wellness coaching, or for professionals such as strength and conditioning specialists or coaches, sports conditioning professionals, nutritional counseling personnel, sports nutritionists, weight management specialists, sport specific training specialists/coaches, etc. and many others. While the number of such certification offerings may well lead to the sale of more certifications by those providing certifications in the industry, care needs to be taken to insure that fitness professionals do not exceed permissible practice areas and enter the defined domains reserved for provision by health care professionals.<sup>2></sup> Even the improper delegation of care to subordinates or other licensed or unlicensed personnel may lead to improper delegation of care issues.<sup>3</sup> If such concerns arise, fitness professionals can exceed their scopes of practice and may experience civil suit as well as potential criminal prosecution for, by way of example, the unauthorized practice of medicine. Personal training services are clearly not medical in nature<sup>4</sup> and do not currently equate with other areas of licensed and/or regulated health care practice.<sup>5</sup>

Fitness professionals providing service under the umbrellas provided by so-called secondary or soft certifications should also be careful in selecting the names under which their services are to be provided. For example, providing health or wellness coaching services under the name of Dr. Fitness or Dr. Wellness may not be the best way to present those services to the public who may believe the use of such titles to be tantamount to the delivery of health care services.

To illustrate what can happen in this regard, fitness professionals should consider the facts involved in a real case from Ohio. In this recent and interesting case, a cosmetologist spa owner was convicted of practicing medicine without a license. The facts of the case were reported as follows:

[i] Eickhoff- Shemek, J.M., Ph.D., FACSM, “Potential Issues with the Job Task Analysis”, THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 2, No. 4 (July, 2013):54-57, footnote in original omitted, commenting on Berger, C.G., PhD, ACSM HFS, CSCS, “Scope of Practice in the Health Sciences: A Tutorial and Call to Action for Fitness Professionals”, THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 2, No. 4 (July, 2013):49, 51-54.

[ii] Herbert, D.L., JD, “Exercise Stress Test Performed by Nurses and Supervised by a Physician

was a Medical Procedure,” THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 1, No. 4 (July, 2012):49, 51, 52.

[iii] Herbert, D.L., JD, “Alleged Improper Delegation of Care/Supervision of Physical Therapy Assistants and Aides Results in Court Ruling in West Virginia”, THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 3, No. 1 (January, 2014): 1, 3.

[iv] Herbert, D.L., JD, “Services of a Personal Trainer are Not Medical in Nature”, THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 3, No. 5 (September, 2014):74, 75.

[v] Herbert, D.L., JD, “A Personal Trainer is Not a Licensed Athletic Trainer”, THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 1, No. 6 (November, 2012):81, 83-86.

*“The voluminous testimony in this case revealed the following facts. Annable, a cosmetologist, was the owner of Bella Derm Medi Spa in Westlake, Ohio. The spa’s slogan was ‘the feel of a spa, the care of a physician.’ One of the services offered at the spa was mesotherapy. Clients receiving mesotherapy signed a ‘mesotherapy patient consent form’ and a form explaining ‘mesotherapy post-treatment instructions.’ The clients also completed and signed a ‘medical questionnaire’ that included a “pre-operative medical history.” The state’s expert witness, Dr. Diane Maiwald, a board-certified dermatologist and founding member of the American Board of Mesotherapy, explained mesotherapy. Dr. Maiwald testified that mesotherapy is used to treat conditions such as arthritis, back pain, fat reduction, and cellulite. She stated that the therapy requires the injection of medication, either with a hypodermic needle or medical roller, under the upper layer of skin. Dr. Maiwald testified that injection, or puncturing of the skin, is necessary so that the required high concentrations of medication can be released into the body. Dr. Maiwald further testified that mesotherapy is a medical procedure that requires medical supervision and described various precautions that a doctor performing the procedure should take. For example, she testified that the injected medication needed to be tailored to each person and that the medical rollers should never be reused. Dr. Maiwald also testified that most of her patients undergoing the procedure required prescription medication for pain management. She testified that she had never heard of a cosmetologist performing the procedure [footnotes omitted].”*

Based upon these facts, the spa was investigated by various law enforcement officials and both the Ohio State Medical Board as well as the Ohio State Board of Cosmetology. The criminal investigation commenced when one of the spa employees complained that the therapy “*just looked wrong*“. The activity which led to the employee’s investigative complaint was described as follows:

*“[The spa owner] would numb the clients’ skin with ice packs, and while she (the employee) held the clients’ skin ‘tight,’ Annable would apply a roller with needles to the area. The employee*

*testified that the clients would usually bleed from the rollers, and that she saw the same roller being used on more than one patient. According to the employee, “these people were in a lot of pain.” The employee also testified that in the nearly a year that she worked at the spa, she never saw a doctor on the premises.*

*Another employee of the spa, a licensed practical nurse (“LPN”), testified that she began performing the procedure at the spa on her own after Annable ‘trained’ her. The LPN testified that some rollers would be used on more than one client. The LPN also described the numbing with ice packs and testified that some of the clients would bleed. The LPN further testified that she saw only one doctor on the spa premises, but that doctor did not have anything to do with the mesotherapy.”*

The cosmetology spa owner was indicted on one count of theft and 30 counts of practicing medicine without a license. He was convicted of theft and 12 counts of practicing medicine without a license.

*“[At time of trial] several of the spa’s mesotherapy clients testified for the state. Collectively, they testified that they believed Annable was a doctor, and based on that belief, they undressed for him for examinations. Annable told the clients that he would inject the area to be treated with amino acids that would ‘break down the fat.’ They described the procedure as ‘painful.’ Some of the clients testified that they had had special medical conditions to which they alerted Annable and which Annable told them he would manage. The clients stopped the treatments because they were too painful. The clients prepaid for the services. Several of the clients requested a refund, but never received one.*

*Three doctors testified about their relationship with Annable. First, Dr. Harry Simmons testified that he and Annable had agreed that Dr. Simmons would work as an independent contractor at the spa one or two days a week. Simmons testified that he was to receive training on some of the services the spa offered, and then he would choose which of the services he would perform or oversee. Simmons testified that he observed one or two mesotherapy procedures, but never performed one.*

*Dr. Simmons later learned that his name was listed on some of the spa’s therapy information sheets as being the doctor who performed procedures, including mesotherapy, that he never performed. After discovering this, Simmons confronted Annable and terminated his relationship with him.*

*The second doctor, Dr. Dominick Catalano, operated a medical spa in Streetsboro, Ohio, and he and Annable had discussed the possibility of merging their businesses. During their discussions, Annable told Catalano about mesotherapy; Catalano had never heard of it and had never performed it.*

*Catalano and Annable eventually agreed to work together. Catalano testified that under their*

*agreement, only he (Dr. Catalano) would perform medical procedures in either spa, and Annable was to perform cosmetic services relating to hair, nails, and superficial skin resurfacing. Catalano testified that Annable never told him that he had been performing mesotherapy and that if he had known that, he never would have agreed to work with him.*

*Dr. Catalano came to learn that mesotherapy is a ‘highly specialized form of practice. [It] involves advance knowledge of certain compounds that will be infused into the skin, as well as the potential for side effects and what to do from the side effects from the medications.’ Dr. Catalano severed his relationship with Annable after he saw him perform mesotherapy.*

*The third doctor who testified about his relationship with Annable was Dr. Nicholas Diamantis. Dr. Diamantis testified that he and his partner at the Western Reserve Center for Oral and Facial Cosmetic Surgery, Dr. Matthew Goldschmidt, occasionally worked at Annable’s spa as independent contractors. According to Dr. Diamantis, he and Dr. Goldschmidt would provide their own equipment and staff whenever they worked at the spa. Dr. Diamantis testified that Annable displayed his picture and referred to Diamantis as ‘medical director’ on literature advertising the spa without his permission. Dr. Diamantis testified that he never discussed with Annable being the medical director of the spa and, furthermore, never served in that capacity. Drs. Diamantis and Goldschmidt severed their relationship with Annable out of concern that they ‘may inadvertently violate certain ethical restrictions placed on [them] regarding the unauthorized practice of medicine.’*

Annable testified at trial. He admitted performing mesotherapy. It was Annable’s belief that it was proper for a cosmetologist to provide services that may have a medical or healing benefit. He admitted that he had never received permission to perform the procedure from the Medical Board or the Cosmetology Board [footnotes *omitted*].”

The spa owners’ cosmetology license was also revoked after the Ohio State Medical Board and the Ohio State Cosmetology Board found that he was practicing medicine without a license. The spa owner appealed his criminal convictions asserting claims that the trial court committed various substantive and procedural errors. While the appellate court rejected these claims, this court made several rulings of import to the spa and fitness industries:

1. “Practicing medicine without a license is not limited to administering drugs.”
2. Cosmetologists were not permitted “to puncture the first layer of skin, introduce a foreign substance into the body, or treat medical conditions”.
3. A radio advertisement in which the spa owner was described as “Dr. Annable” could be used to impeach him if he testified, as he did at trial, when, despite the wording of the ad, he stated he never held himself out as a doctor. The appellate court held that the evidence supported the convictions.

Those engaged in providing services in the spa, wellness, exercise, fitness, sports or sports

medicine fields should remember that overstepping the scopes of practice for these areas of professional service could well lead to criminal charges and even convictions. The use of the title “Dr.” or “Doctor” or similar titles by those not authorized by state law to use these terms or holding one’s self out as a physician or other licensed health care provider may well expose those individuals to criminal charges and potential convictions.<sup>6</sup>

[i] Herbert, D.L., JD, “Spa Owner Convicted of Practicing Medicine Without a License”, THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 1, No. 2 (March, 2012): 24, 25.

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***Adapted from a Declaration of Principles of the American Bar Association and Committee of Publishers and Associations***

<sup>1</sup>Eickhoff- Shemek, J.M., Ph.D., FACSM, "Potential Issues with the Job Task Analysis", THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 2, No. 4 (July, 2013):54-57, footnote in original omitted, commenting on Berger, C.G., PhD, ACSM HFS, CSCS, "Scope of Practice in the Health Sciences: A Tutorial and Call to Action for Fitness Professionals", THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 2, No. 4 (July, 2013):49, 51-54.

<sup>2</sup>Herbert, D.L., JD, "Exercise Stress Test Performed by Nurses and Supervised by a Physician was a Medical Procedure," THE EXERCISE, SPORTS AND SPORTS MEDICINE STANDARDS & MALPRACTICE REPORTER, Vol. 1, No. 4 (July, 2012):49, 51, 52.

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