Starting Strength

# Raising the Bar:
## Legal Issues in Strength Training

by

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> "The minute you read something that you can't understand, you can almost be sure that it was drawn up by a lawyer."
>
> —Will Rogers

For the legally-untrained, the law can be a confusing morass, a seemingly random set of rules embodying one of William S. Borroughs's witty admonitions to a judge: "Be just. And if you can't be just, be arbitrary."

The reality, however, is that a lot of law is predictable – but that predictability rests upon fine distinctions that often would not occur to those who don't deal with legal issues for a living. For example, a layperson might see two cases involving nearly identical waiver clauses – one of which enforces the waiver, the other does not – and conclude that waivers are simply a coin flip depending on the personal predilections of the judge. But trained lawyers might readily spot the minor difference in the two clauses that explains the different outcomes.

The purpose of this article is to provide awareness regarding some of the legal issues facing us as strength coaches, and how tribunals have resolved those issues.*

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Above all, do not think for a second that you are capable of resolving your own legal issues, even if you are a trained lawyer, and even if you have memorized this article word-for-word. You should know better. Every matter is different, and legal work involves highly fact-specific determinations. The lawyer who represents himself has a fool for a client. Don't be a fool. If you have a legal question on a particular matter – including any question pertaining to the issues covered in this article – consult an attorney. Preferably me.

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I focus on three issues in particular:

1. Liability for personal injuries, and how coaches/gyms have avoided it;
2. Incorporation of a coaching business, and how it may or may not protect you from liability; and
3. Nutrition counseling, and the fuzzy line between merely providing information and unlicensed dietary advice.

## I. LIABILITY UNDER COMMON LAW

During a training session, your trainee becomes injured. He then seeks out an attorney – possibly the cheap-suited one whose comb-over is even more ridiculous than his TV slogan, or possibly a well-regarded member of the plaintiff's bar (yes, they exist). The lawyer gets ahold of your client's medical records and sees a bunch of hard-to-pronounce words, scribbles down some allegations in a Complaint, and files it with the local court. Two weeks later, you get served with the Complaint, which demands a lot of money. You have 21 days to respond.

Getting sued is nerve-wracking enough for most people. Here's the other unfortunate reality… even if you did nothing wrong, it will cost you tens of thousands of dollars for the privilege of trying to convince between 6 and 12 members of the public, who – even though likely well-meaning – likely have no firsthand knowledge of weight training, that you in fact did nothing wrong.

Point being, it is simply too expensive, and too uncertain, to prove that you're right on the ultimate issue in your case. And because of that expense, smart defense lawyers look for defenses that don't depend on your factual liability – that is, they seek defenses showing that *even if you screwed up*, the plaintiff *still* doesn't have a viable claim. The two most common of these defenses are waiver and acceptance of risk.

Of course, these defenses can't prevent you from being sued – people file meritless lawsuits every day, which is why you should *always* purchase personal training insurance even if you have the most ironclad legal defense in the history of mankind. But these defenses can at least significantly cut down on the expense to defend yourself in court, or set you up for a much more favorable settlement agreement. And make your insurer smile, too.

### A. A Quick Tort Law Lesson

Before getting into the defenses, here's a quick primer on tort law. A tort is, generally, a civil wrong committed against another person that results in harm to him or his property. Torts, and defenses to those torts, have traditionally been defined through "common law" (that is, law created through case decisions by judges), though many states now define certain torts by statute as well. For our purposes, torts fall into two categories: negligent torts and intentional torts.[1]

Intentional torts involve intentional acts that cause harm to another person – such as assault, battery, false imprisonment, trespassing, and fraud. Though the legal elements vary for each tort, the commonality is an *intent* to take a particular action that results in harm.

Outside of a sexual misconduct claim, a trainee is unlikely to assert intentional torts against a coach or facility – more likely, he will assert negligence. Negligence arises where a person is harmed

due to another's breach of the standard of care that a reasonable person would use. To prevail on a negligence claim, a plaintiff must establish four elements:

1. Duty – Defendant owed plaintiff a duty of care. The duty of care is determined based on what is reasonable – i.e., what the "ordinary, prudent person" would do under the circumstances.
2. Breach – Defendant breached that duty of care.
3. Causation – Defendant's breach of the duty of care must be the "cause in fact" of the harm. Moreover, the harm must be one that is reasonably foreseeable from defendant's breach (known as "proximate causation").
4. Damages – Plaintiff must have suffered harm.

A plaintiff's failure to demonstrate any of these four prongs will result in a judgment for the defendant.[2]

## B. Waivers and Releases

Written waiver and release forms are the most common and effective means of protecting coaches and gyms against liability from training injuries and equipment malfunctions.[3] Waivers have been enforced even in the face of catastrophic injuries (e.g., stroke;[4] rhabdomyolysis[5]) and clearly inane actions by personal trainers (e.g., instructing a trainee to remove his support belt while performing squats;[6] instructing a woman to use an incline bench press machine shortly after neck surgery despite her surgeon's orders that she was not to lift any weight overhead[7]).

Further, since the legal doctrines governing written waivers has developed over decades of common law, the law is well-developed and reasonably uniform across all states (New York excepted, as discussed below).

Because waivers involve relinquishing rights, however, courts read them narrowly and require that they be carefully drafted. In particular, courts have required waivers to satisfy three primary principles in order to be enforceable against a negligence claim:

***Principle 1: The waiver must fairly cover the type of injury.*** Because waiver of a legal right is so significant, courts require the releases to be conspicuous[8] and to fairly cover the type of injury involved. That is, the injury must be of a type that a person would reasonably assume falls under the waiver clause.

For example, in *Bhardwaj v. 24 Hour Fitness, Inc.*, plaintiff was injured while using a hack squat machine, which apparently had a manufacturing defect. As a condition of membership, plaintiff signed a waiver stating:

> The use of the Facilities . . . naturally involves the risk of injury to you or your guest, whether you or someone else cause[s] it. As such, you understand and voluntarily accept this risk and agree that [gym] will not be liable for any injury . . . or any damage to you . . . resulting from the negligence or other acts of [gym] or anyone on [gym]'s behalf or anyone using the Facilities.[9]

The court held that plaintiff's injury was "unquestionably one that was related to the use of the fitness facilities," which was a risk expressly assumed by plaintiff under the release.[10]

Two other cases, by contrast, illustrate where courts have found a waiver clause not to cover the injury at issue. In *Leon v. Family Fitness Center, Inc.*, plaintiff signed an exculpatory clause agreeing that:

> [The club] and its officers, employees and agents shall not be liable for . . . death, personal injury, property damage or loss of any kind resulting from or related to Member's use of the facilities or participation in any sport, exercise or activity within or without the club premises, and [the member] agrees to hold [the club] harmless from same.[11]

While plaintiff was reclining on it, a bench in the sauna broke and injured him. The court held that the club's negligence in maintaining the sauna bench "was not reasonably related to the object or purpose for which the release was given, that is, . . . injuries resulting from participating in sports or exercise rather than from merely reclining on the facility's furniture."[12] Accordingly, the release did not absolve defendant of liability.

In *Bailey v. Palladino*, plaintiff was injured while grappling with another Brazilian jiu-jitsu student at a gym's dojo, and he sued the gym. Plaintiff signed an exculpatory clause "releas[ing] and forever discharg[ing] [the gym's] instructors, officers, agents, employees, representatives, [and executors]." The court held that the plain language of the exculpatory clause did not release *the gym* from liability, but only its employees, instructors, and the like. Though acknowledging that this was likely a drafting error, the court held that "the agreement cannot be interpreted" to cover the gym.[13]

These cases illustrate that a waiver must identify (1) ***who*** is protected by the waiver (*Bailey*); (2) ***what*** is covered by the waiver (*Bhardwaj*/*Leon*); and (3) the location(s) ***where*** the waiver applies (*Leon*). A failure to expressly identify any of these could result in unintended liability for a coach or gym for an event that falls outside the language of the waiver.

***Principle 2: The waiver must state that it applies to one's own negligence.*** Consider the following four waiver clauses, each of which was cited by a defendant as a defense to a plaintiff's negligence action:

- I hereby waive, release and discharge [gym] . . . of any and all liability . . . related to, arising from, or in any way connected with, my participation [sic] [gym's] fitness programs/classes, including those allegedly attributed to the negligent acts or omissions of the above mentioned parties.[14]
- I do hereby waive, release and forever discharge [gym] and their officers, agents, employees, representatives, executors, and all others . . . from any and all responsibilities or liabilities from injuries or damages arriving [sic] out of or connected with my attendance at [the gym], my participation in all activities, my use of equipment or machinery, or any act or omission, including negligence by [gym] representatives.[15]
- I hereby voluntarily and knowingly release [the prospective employer] . . . from any and all liability and/or damages arising in any manner whatsoever in connection with my submitting to the physical performance testing, including, but not limited to, medical claims, and claims for personal injury arising out of such testing.[16]
- I do hereby waive, release and forever discharge [the gym's] instructors, officers, agents, employees, representatives, executors for all responsibilities or liability for injuries or damages resulting from my participation in any activities in [a fitness] program.[17]

The courts held that ***only the first two*** waiver clauses protected the defendants – the latter two did not. Wait…what!?

Actually, these results are quite sensible. Waiver of one's own negligence not only denies plaintiff a remedy for someone else's screw-up, but could encourage defendants to be less careful. Thus, courts require that a coach or gym clearly and expressly state an intent to absolve them from liability for their own negligence. Yes, this rule requires use of the magic word "negligence" or a variant – it is not enough to simply waive "all" actions against a coach or gym.

This explains the results concerning the four waiver clauses above – only the first two expressly referred to the negligence of the coach or gym.[18]

***Principle 3: A waiver cannot absolve intentional misconduct.*** Finally, coaches and gyms cannot absolve themselves of liability for *intentional* misconduct, such as fraud, battery, or sexual assault.[19] This makes plenty of sense for public policy reasons: courts do not want to immunize deliberate wrongdoing.

However, the distinction between negligence and intentional misconduct is not always clear cut. We know that a well-written waiver can protect a coach or gym owner against a negligent failure to maintain equipment that later injures a trainee. But what if the coach/owner *knew* that the equipment was defective, but nevertheless allowed a trainee to use it? Or what if he never inspected or maintained the equipment at all?

For public policy reasons, courts sometimes hold that the complete dereliction of duty or "willful blindness" is tantamount to intentional misconduct. In *Stelluti v. Casapenn Enterprises, LLC*, the New Jersey Supreme Court cautioned:

> Although it would be unreasonable to demand that a fitness center inspect every individual piece of equipment after every patron's use, it would be unreasonable, and contrary to the public interest, to condone willful blindness to problems that arise with the equipment for patrons' use. Thus, had [a gym's] management or employees been aware of a piece of defective exercise equipment and failed to remedy the condition or to warn adequately of the dangerous condition, or if it had dangerously or improperly maintained equipment, [the gym] could not exculpate itself from such reckless or gross negligence.[20]

In *Stelluti*, however, there was no evidence that the gym's employees were willfully blind or improperly maintained equipment, and so the court enforced a waiver against plaintiff's negligent maintenance claim.[21]

In short, willfulness not only includes acts of commission, but can include grossly negligent or reckless acts of *omission* as well. Thus, coaches should take *some* effort – and, preferably, document that effort – to ensure the safety of the equipment. And if they become aware of defective equipment, they should address the problem immediately.

**The Big (Apple) Exception: New York Law on Waivers**

There are at least 24 Starting Strength Coaches in New York, and thus I would be remiss if I didn't address one major exception to the foregoing rules: New York General Law 5-326. That provision states that for pools, gymnasiums, and other "places of public amusement or recreation," any release or waiver for the owner's, operator's, or person-in-charge's own negligence, and/or the negligence of his employees, is void and unenforceable.

Yeah, it's bad – but must it require, with apologies to Sherwood Anderson, that you New York readers "forget all that you have learned" in the sections above? Not entirely.

Although the law invalidates negligence waivers for places of ***recreation***, it does not invalidate negligence waivers for places of ***instruction***. That is, if your gym is instructional, General Law 5-326 does not apply to the gym.

In some cases, it is easy to tell whether a gym is recreational or instructional. For example, an unsupervised gym in the basement of an apartment building is clearly recreational, and thus a negligence waiver would be unenforceable.[22] But more often, strength coaches will work in "mixed-use" gyms, where both recreational and instructional activities occur under the same roof. How do you tell whether a mixed-use facility is recreational or instructional?

Unfortunately, New York courts have not consistently analyzed mixed-use cases.[23] Some courts have held that General Law 5-326 does not apply if the *plaintiff* is at a fitness center for instructional purposes.[24] Other courts have held that, regardless of the plaintiff's purpose for being at a facility, a waiver is unenforceable if the *facility's* purpose is primarily recreational.[25]

So aside from moving to Jersey, what options do New Yorkers have to protect themselves from this legal ambiguity? First, nothing in General Law 5-326 undermines acceptance of risk defenses (covered in the next section), including risks identified and acknowledged in a written agreement. So take steps to create a solid assumption of risk defense.

Second, note that the statute applies to ***places*** of amusement. Thus, if you are a freelance strength coach who is not employed by a gym, you arguably do not fall within the statute. Full disclosure, however: no New York decision appears to have discussed this issue, so the precise contours of when General Law 5-326 applies to individual coaches is not well-established.

Finally, if you run a gym, *you* control how it is presented to the public – so take advantage! If your gym is primarily instructional, you can emphasize this in the gym's name, corporate documents, advertising materials, website, and trainee agreements. If you cultivate an image of an instructional facility, a court will be more likely to deem you as such.[26]

## C. Assumption of risk

Assumption of risk says that a person who *voluntarily* accepts a *known* risk of an activity cannot later hold others accountable if that risk comes to pass. It is another powerful affirmative defense that is recognized in most states.

How do we know/ensure that someone "knows" of a risk and "voluntarily" accepts it? The first, and easiest, way is to expressly put it in a written agreement, which the participant must sign. Indeed, in belt-and-suspenders fashion, many of the contracts in the waiver cases cited above also included a statement of risks[27] – presumably as an alternative defense in case their waiver did not hold up for whatever reason.

Second, sometimes a potential risk is so obvious that a person is deemed to have known and accepted it.[28] For example, one who plays baseball is subject to an obvious risk of being hit with a batted ball – and thus he won't be able to sue a batter for injuries from a frozen rope. Courts have similarly found "obvious" risks of injury for weightlifting, and have dismissed negligence actions against trainers for injuries incurred during squats,[29] and against tournament organizers for injuries resulting from missed bench press attempts during powerlifting competitions (allegedly due to negligent spotting).[30]

One case even held that a personal trainer's working an overweight, out-of-shape client to the point of having a heart attack was immunized under assumption of risk – even though the trainer had not conducted any prior health evaluations of the plaintiff. The court reasoned:

> [T]he essence of plaintiff's claim is that [defendant], in his capacity as a plaintiff's personal fitness trainer, challenged plaintiff to perform beyond his level of physical ability and prowess. That challenge, however, is the very purpose of fitness training, and is precisely the reason one would pay for the services of a personal trainer. . . . The trainer's function in the training process is, at bottom, to urge and challenge the participant to work muscles to their limits and to overcome physical and psychological barriers to doing so. Inherent in that process is the risk that the trainer will not accurately assess the participant's ability and the participant will be injured as a result.[31]

Very well said.

Although assumption of risk is a powerful defense for coaches and gyms, it also has a critical limitation: a coach cannot act so negligently that he *unreasonably heightens the risks* normally associated with strength training. Which makes sense: a person assumes risks normally associated with an activity, not risks unreasonably created by others. What might "unreasonably heighten" the risks normally associated with strength training? Case law has some rather obvious/ridiculous examples:

- *Levy v. Town Sports Int'l, Inc.*: A trainer asked his trainee – who had osteoporosis and a recent surgery – to jump up and down *on an exercise ball*. You can't make this stuff up. As you have probably guessed, it didn't turn out well.[32]
- *Layden v. Plante*: A trainer instructed plaintiff, who had a history of back problems and a herniated disc, to perform a Smith squat. Asking a person with this injury profile to use the Smith machine is bad enough…but the trainer also instructed plaintiff to simply "stick her butt out" without telling her to keep her back straight.[33] Plaintiff herniated two discs.[34]

Against these fairly obvious examples of unreasonably heightening a risk, however, are more dubious ones. In *Mellon v. Crunch and Agt Crunch Acquisition, LLC*, the trainer asked the trainee to put one foot on top of a rectangular bench (about 2-3 feet off the ground) with the other foot on the ground, and to hop and switch feet. Though one might doubt the effectiveness of this exercise for…well…anything, it does not seem like a particularly hard or dangerous exercise, even for the untrained. Plaintiff, however, caught her left foot under the bench and fell backwards on the first attempt, and broke both wrists.[35] Though this case would seem to be a paradigm example of assumption of risk, the court found that there was sufficient evidence to suggest that the trainer unreasonably heightened plaintiff's risk, and it ordered a trial.[36]

Thus, although assumption of risk can be a very powerful defense against negligence suits by injured trainees, it is not bulletproof because courts can (sometimes questionably) hold that trainers unreasonably heightened the risk. Accordingly, coaches should be extremely careful when dealing with trainees with significant pre-existing injuries or illnesses – or simply avoid those trainees altogether for certain injuries – in the absence of a waiver clause specifically addressing the trainee's particular pre-existing pathology, and an insurance policy that covers suits for aggravation of such injuries.[37]

## D. Liability for "Homework"

So far, I've discussed cases involving negligence claims for injuries occurring during an accompanied training session. But our trainees aren't always with us – in fact, it's common for our trainees to see us once a week and venture into the gym on their own. Which raises the question: could a trainee claim that the coach negligently provided him with instructions or programming that, ultimately, led

to his injury? That is, can a strength coach be liable when a trainee is injured while performing his "homework," when the coach isn't even there?

Logically, the answer seems to be yes. If a trainee proved that his coach negligently provided him with improper or dangerous instructions, and the trainee is injured following those instructions, the four requirements of negligence seem to have been met. Though there is little case law on point, available authority seems to confirm this.

In *Layden v. Plante*, a trainer instructed plaintiff in various weightlifting moves, and then provided plaintiff with a set of written instructions to repeat later without supervision. Plaintiff informed the trainer prior to their first session that she had a history of back problems and a herniated disc. Two days later, plaintiff herniated two discs while performing a Smith squat following the trainer's written instructions.[38] The court found evidence suggesting that the trainer negligently instructed and unreasonably heightened the risk to plaintiff.[39] Two expert witnesses testified that a Smith squat was contraindicated for someone with a history of back problems and that the trainer improperly instructed plaintiff to "stick her butt out" without instructing that she keep her back straight.[40] The court held that plaintiff could take her negligence claim to the jury.

In *Schlobohm v. Spa Petite, Inc.*, defendant instructor created an exercise program that plaintiff was to perform unsupervised, which was periodically updated based on plaintiff's progress.[41] While plaintiff was using a leg extension machine, an unidentified woman (presumably a spa employee) suggested that she increase the weight from 20 lbs to 40 lbs. Plaintiff made the increase and severely injured her back, and she sued for negligence.[42] Although she stated a negligence claim, the court dismissed it based on a written waiver.[43]

The upshot from *Schlobohm* and *Layden* is that a coach or gym can be liable for negligently giving "homework" to a trainee. But those cases also indicate that affirmative defenses – including waiver and assumption of risk – apply to "homework" situations as well.

## E. Venue

There's one more non-intuitive factor that can dramatically impact the landscape of a potential negligence suit: *where* the suit is filed. Where the coach and trainee are in the same state, you don't need a law degree (or even a fully-functioning brain) to know where suit will be brought. But combine remote/internet coaching with potential "homework" liability discussed above, and things can get complicated. For example, assume a coach living in State X coaches a trainee in State Y, and the trainee is injured following the coach's programming.

1. Where can the trainee bring suit? State X? State Y? Both?
2. Which state's law applies – State X or State Y?

These are not merely academic considerations. A suit in State Y could cost the coach significant money to travel to State Y for court hearings, and may create some risk of "home court advantage" for the trainee (especially in plaintiff-friendly areas). And even though general principles surrounding the validity of contractual waivers are consistent among the 50 states, State Y's law may contain subtle differences that render the waiver's fate a little less certain than in State X. Or perhaps even major differences – remember General Law 5-326 in New York?

So let's address those issues. With respect to the forum, a plaintiff can always bring suit where a defendant resides – in our example, State X. But State Y also may be a valid forum. Nearly all states and the federal courts allow a plaintiff to bring suit where a substantial part of the events or omissions giving rise to the claim occurred,[44] or where the injury occurred.[45] Under either standard, a good argument can be made that State Y is a permissible forum. And if a court were to hold that suit in State Y is proper under venue laws, the only way to avoid the forum would be a personal jurisdiction challenge – a complicated constitutional issue well beyond the scope of this article.

Now for applicable law. The United States consists of 50 independent states, all with their own laws and interests. As a show of respect for those interests (known as "comity"), every state has some sort of "choice of law" principle to determine what is the "right" law to apply. Where out-of-state interests are involved, it is not unusual for a state to apply the law of another state based on its choice of law principles. To illustrate, suppose that two citizens of Ohio get into a car accident in Indiana. One then brings a personal injury suit against the other in an Ohio state court (since, after all, they both live in Ohio). Although the lawsuit concerns two Ohio citizens, it involves conduct on Indiana's roadways, which implicates public interests of Indiana. Because of this, an Ohio court, out of deference to Indiana's state interests, would be more likely to apply Indiana law to the dispute instead of Ohio law.

For personal injury tort actions, some states apply the law of the state in which the injury occurred, known as *lex loci delicti*.[46] In our particular coach/trainee situation, a *lex loci delicti* state would likely apply the law of State Y, since that's where the trainee was injured. Most states, however, have adopted the "most significant relationship" test. Under this test, the law of the state where the injury occurred is presumptively applied, but can be overridden if another state has a "more significant relationship" to the matter.[47] Courts consider a slew of factors to determine if a more significant relationship exists, including the place where the injury occurred, the place where the conduct causing the injury occurred, the residence/place of business of the parties, and the place where the relationship between the parties was centered (if any).[48]

If all this seems complicated, it's because it is. Law students spend many weeks discussing these topics, and practitioners can spend a lot of billable time wrestling with these issues. It would certainly be ideal if we could just avoid the choice of law problem entirely.

Which, it turns out, we can – simply by setting the venue and law ahead of time. Say that our strength coach lives in Texas and wants to remotely coach someone in California. The coach wants Texas law to apply to both interpretation of the contract and any underlying tort action. He could simply insert the following clause in the coaching contract:

> This agreement shall be governed by Texas law. The parties' legal rights and obligations relating to this agreement and the services provided under in this agreement shall be governed by Texas law. Any suit brought under this agreement or in relation to services provided under this agreement shall be brought in the Texas 30th District Court in Wichita Falls, Texas, and both parties irrevocably consent to venue and personal jurisdiction in that court.

There. Now if the trainee wants to sue the coach for negligence, he must bring the suit in a particular Texas court,[49] and the suit will be governed by Texas law.[50]

And in case you're wondering – yes, choice of law clauses are generally enforceable, so long as (1) the chosen state's law has some reasonable relationship to the parties, and (2) the chosen law doesn't contradict a fundamental public policy of the state.[51] Forum selection clauses are likewise valid absent a strong showing of fraud or violation of a strong public policy.[52]

## II. INCORPORATION AND LIABILITY

You'll notice that I have not included "incorporation" as a defense to liability in the sections above. There's a good reason for this: in many circumstances relevant to strength coaching, incorporation *will not protect you personally*. This section will break down the circumstances in which incorporation can and cannot protect you from individual liability, and discuss the differences between entity and personal liability.[53]

### A. Entity Types

Before examining the nuances of so-called "limited liability," it might be helpful to discuss the six main types of business entities and the protection from personal liability provided by each: (1) sole proprietorships; (2) partnerships; (3) limited partnerships, (4) corporations; (5) limited liability companies; and (6) limited liability partnerships.

***Sole proprietorship.*** A sole proprietorship is exactly what it sounds like – one person owns and runs the entire business. There is no legal distinction between the owner and the business. Although sole proprietorships allow for significant flexibility in formation and management of the business, the owner is liable for all debts and obligations of the business…so if someone sues the business and gets a judgment, he can go after the owner's personal assets to satisfy it.

***General Partnerships.*** A partnership is an association of two or more persons carrying on a business for profit as co-owners. Partnerships are easy to form – they typically only require an objective manifestation of intent to form a partnership, and can be formed without filing any papers with the state – and they permit a lot of flexibility in the conduct of the business. Though the partnership is technically a distinct legal entity, partners generally are liable for the debts and obligations of the partnership.[54] Thus, if partnership assets are not sufficient to cover a judgment against the partnership, the judgment creditor can go after the partners' personal assets.

***Limited partnerships.*** Occasionally, people want to invest in a partnership, but have no interest in running the business or taking on personal liability. Thus, states have created limited partnerships (LPs). An LP consists of one or more general partners and one or more limited partners. General partners run the business and are personally liable for all partnership debts and obligations.[55] Limited partners provide capital investment but do not run the business; in exchange, they have "limited liability" – that is, they generally are not liable for the debts and obligations of the LP.[56] Limited partnerships typically require that documents be filed with the state to be formed.

***Corporations.*** A corporation is a means of protecting the owners (shareholders) of a business from personal liability for corporate debts. Generally, owners have limited liability, i.e., they are not liable for corporate debts and obligations even if the corporation lacks sufficient assets to cover a debt or judgment.[57] Unlike sole proprietorships or partnerships (where the owners report business income on their personal taxes), corporations are separately taxed – which often can be financially advantageous for the owners.

Corporations, however, must follow numerous statutory requirements to remain in good standing. For example, the corporation must file certain forms to come into existence, it must have a certain management structure, certain formalities must be followed for business decisions, and the corporation must hold annual shareholder meetings and record meeting minutes. The corporation must keep separate books and file separate tax forms, and not commingle its assets with its owners'. A failure to follow corporate formalities can result in loss of limited liability.

***Limited Liability Companies.*** In the 20th Century, states created yet another type of entity: the limited liability company (LLC). LLCs combine the tax structure and flexibility of management of a partnership with the limited liability of a corporation. Like corporations, LLCs are separate entities from owners (members), and owners have limited liability for LLC debts and obligations.[58] But LLCs are not required to follow many of the requirements governing corporations – such as holding annual meetings or having a certain number of owners.

***Limited Liability Partnerships.*** The Limited Liability Partnership, or LLP, was created in the early 1990s after the Savings and Loans crisis, where numerous partners in professional businesses became subject to substantial personal liability. LLPs are similar to LLCs (they are a bit more flexible), but are largely only used by professional businesses, such as law, accounting, and architectural firms.

The question of which entity is best *from a business standpoint* for a strength coach or a gym is a question for your business/tax attorney, and beyond the scope of this article. Nearly all commercial gyms, however, are corporations or LLCs. Thus, this article will examine liability from the perspective of a corporate or LLC owner who has limited liability protection.

**B. Limited liability as applied to strength coaches and gyms.**

You've filled out your LegalZoom documents (or, even better, hired a knowledgeable attorney to complete all necessary documents) and have filed your papers with your state's Secretary of State. Congratulations! You are now the proud owner of a new business: RipDrive, Inc. (or RipDrive, LLC). You're feeling so good about your business that you've even hired an employee, Biff Bro, to help you coach. Let's get into the nuts and bolts of liability issues.

***Contractual liability.*** You sign two contracts for RipDrive: a loan agreement with a bank and a personal training contract with Tina Trainee. Unfortunately, you forgot to make a loan payment on time, so the bank declared default and called the entire loan in. Moreover, you got the flu and didn't show up for six training sessions with Tina, so Tina has sued RipDrive for her money back.

Do you have to worry about personal liability?

Owners of a corporation/LLC are separate from the business, and are not liable the debts and obligations of the business solely by virtue of being owners. Thus, thanks to limited liability, you are not personally liable for either contract – though RipDrive will take a beating. (This assumes, of course, that you did not sign the contracts in your individual capacity, or sign a personal guarantee for either.)

***Tort liability.*** Tort liability is a little more complicated. Consider three scenarios:

Scenario 1 – Biff Bro commits a negligent act while training Tina Trainee, and Tina is injured. Tina sues Biff, you, and RipDrive.

Scenario 2 – While training Tina, you commit a negligent act, and Tina is injured. Tina sues you and RipDrive.

Scenario 3 – Tina accuses Biff of inappropriately touching her during a personal training session. She sues Biff, you, and RipDrive.

Let's look at your and RipDrive's potential liability for each of these three scenarios.

***Scenarios 1 and 2 – Your Liability.*** Although owners of corporations and LLCs are not liable for company actions solely by virtue of their ownership, they are liable for *their own torts*.[59] Thus, if an owner personally commits or directs a tort, he is liable to plaintiff. By contrast, if an owner had no involvement in a tort, then he cannot be held personally liable.[60]

In Scenario 2, you personally committed the allegedly negligent act, and, therefore, Tina can sue you directly for your own negligence. By contrast, in Scenario 1, you personally did not commit or direct Biff's negligence, and limited liability protects you from being personally liable solely because you own RipDrive. Thus, as a general matter, you will not have personal liability.

A caveat, however: if Tina showed that you negligently hired, trained, or supervised Biff, then you might be liable for your own negligence. Admittedly, this is an uphill battle for Tina, since the mere fact that Tina was injured does not alone show that you were negligent in hiring or supervising Biff.[61] Rather, Tina would have to show that (1) your negligently instructing Biff caused him to injure her,[62] or (2) you had notice of Biff's unfitness or incompetency, and that Biff's unfitness/incompetency subjected her to an unreasonable risk of harm.[63] Both are difficult to prove, and thus it is highly unlikely you would be liable under Scenario 1.

***Scenarios 1 and 2 – RipDrive's liability.*** There is a legal principle known as *respondeat superior*, which is Latin for "screw the employer."[64] *Respondeat superior* holds that an employer is vicariously liable for actions taken by its employees within the scope of their employment. *Respondeat superior* only applies to "employees"; it does *not* apply to "independent contractors."

Thus, RipDrive's liability under Scenarios 1 and 2 depends on whether Biff and you, respectively, are "employees" and not "independent contractors." A full discussion of the employer/independent contractor distinction is beyond the scope of this article, but the short version is that the more control an employer has over someone, and the more an employer facilitates that person's performance of work, the more likely that person will be deemed an employee and not an independent contractor.[65]

Whether a trainer falls into the "employee" or "independent contractor" bucket can vary from gym to gym. As a general matter, though, if RipDrive covers Biff's training expenses, makes him wear a shirt that says "RipDrive" while he's training clients, and controls (or has the option to control) how he trains clients, he will probably be an employee, and RipDrive will probably be liable under *respondeat superior* for his negligence. The same goes for you.

***Scenario 3 – Your liability and RipDrive's liability.*** Your and RipDrive's liability gets a little more nuanced for *intentional* wrongful acts. In contrast to negligence actions, an employer is generally ***not*** liable for the intentional torts of his employees unless the employee's action was not unexpected given the employee's duties.[66] Whether intentional conduct is expected in one's job is dependent on the nature of the work. For example, Best Buy would not expect a member of the Geek Squad to use physical force against a customer while installing WiFi, but might expect its loss prevention officers to to do so when detaining customers.[67]

Case law confirms that sexual assaults do not further an employer's business and, therefore, the employer is not vicariously liable when its employees commit sexual assaults.[68] Thus, you and RipDrive will not be liable solely based on Biff's employee status.

As with Scenarios 1 and 2, however, if Tina could demonstrate negligent hiring or retention, you and/or RipDrive could be liable – for example, if you knew that Biff had previously been convicted of sexual assault, or was fired from his previous employment based on accusations of sexual misconduct. This tort is, admittedly, difficult to prove, and case law confirms that a negligent hiring/supervision claim does not lie where the employer had no reason to suspect that its personal trainer would commit intentional misconduct.[69] Thus, to hold you and RipDrive liable, Tina will have to provide evidence that you/RipDrive knew or should have known of Biff's violent or criminal propensities.[70]

In short, so long as you had no reason to suspect that Biff might commit intentional misconduct, you and RipDrive will likely be off the hook for Biff's sexual assault of Tina.

## III. NUTRITION – WHEN DOES ADVICE BECOME A LEGAL PROBLEM?

### A. Problems With Nutritional Advice

Steve Cooksey was a Type II diabetic who, after performing independent research, decided to ignore his dietitian's recommendations of a low-fat, high-carb diet and instead follow the "Paleo" diet, a high-fat, high-protein, low-carb diet consisting primarily of meat and vegetables, with limited fruits, nuts, and dairy products. He had incredible results – his blood sugar normalized, he lost 78 pounds, and he could stop taking insulin and his other medications.

Cooksey was so thrilled with his results, and so eager to help others diagnosed with Type II diabetes, that he created a website, www.diabetes-warrior.net. The website told his story and discussed some of his personal meal plans and favorite recipes. It also provided (1) an advice column, where he would select certain visitor questions and answer them (in what was referred to as a "Dear Abby" format), (2) a forum for others to post questions or share stories about diet and exercise, which Cooksey sometimes responded to, and (3) a fee-based "Diabetes Support Life-Coaching" service. The website expressly stated that Cooksey was not a licensed dietician and did not hold himself out as one.

In January 2012, the North Carolina Board of Dietetics/Nutrition demanded that Cooksey shut down various parts of his site and cease providing coaching services, claiming that he violated North Carolina law by giving unauthorized nutrition advice without a dietitian license.[71]

We generally know that weight training progress requires both smart programming and good nutrition. And when we see good gains with our program and our eating habits, we like to share both with others. Why not? It's exciting to share things we've learned and to help others in their quest to better themselves.

But could our enthusiasm for sharing our own success stories turn us into the next Steve Cooksey? If we strength coaches recommend that our skinny trainee try GOMAD, or tell our plateauing trainee that he should consume more protein and saturated fat, or recommend to our trainee-on-the-web that he eat at least 3,500 calories a day to meet his weightlifting goals, are we potentially subjecting ourselves to legal sanction?

## B. The law regarding nutritional advice

***1. Categorization of state laws.*** The primary difficulty with answering the foregoing questions is that states' laws regarding dispensing of dietary and nutrition advice vary widely. State laws fall into three primary categories, which for simplicity I'll call Category I, Category II, and Category III:

1. Category I – The state has no statutes pertaining to dietitians or dispensing of nutritional advice.
2. Category II – The state prohibits representing oneself as a dietitian or nutritionist without a license, but does not otherwise prohibit giving nutritional advice.[72]
3. Category III – The state prohibits representing oneself as a dietitian or nutritionist without a license ***and*** prohibits giving certain types of nutritional advice.[73]

Here's a nifty chart showing the breakdown (as of April 7, 2014):

| **Category I**<br>No regulations (3) | **Category II**<br>Regulates use of title only (24) | | **Category III**<br>Regulates use of title and practice of dietetics (23) | |
|---|---|---|---|---|
| Arizona | Alaska | Oklahoma | Alabama | Mississippi |
| Colorado | California | Oregon | Arkansas | Missouri |
| New Jersey | Connecticut | Pennsylvania | Delaware | Montana |
| | Hawaii | S. Carolina | Florida | Nebraska |
| | Idaho | Texas | Georgia | Nevada |
| | Indiana | Utah | Illinois | New Mexico |
| | Iowa | Vermont | Kansas | N. Carolina |
| | Kentucky | Virginia | Louisiana | Ohio |
| | Massachusetts | Washington | Maine | Rhode Island |
| | New Hampshire | W. Virginia | Maryland | S. Dakota |
| | New York | Wisconsin | Michigan | Tennessee |
| | N. Dakota | Wyoming | Minnesota | |

Since neither Category I nor Category II states regulate the giving of nutritional advice, we are not particularly concerned about how they define the practice of dietetics. The important point is to not represent yourself – either expressly or impliedly – as a dietitian or nutritionist.

Though they do differ, the statutes governing the practice of dietetics in Category III states are remarkably similar. Generally, they prohibit the practice of "dietetics/nutrition" or provision of "nutrition care services" without a license. Most Category III states define dietetics/nutrition practice as something to the effect of: "the integration and application of the principles derived from the sciences of nutrition, biochemistry, food, physiology, management, and behavioral and social sciences to achieve and maintain people's health through the provision of nutrition care services."[74]

They then define "nutrition care services" as:

1. Assessing the nutritional needs of individuals and groups, and determining resources and constraints in the practice setting;
2. Establishing priorities, goals, and objectives that meet nutritional needs and are consistent with available resources and constraints;
3. Providing nutrition counseling in health and disease according to established guidelines of care;
4. Developing, implementing, and managing nutrition care systems; and
5. Evaluating, making changes in, and maintaining appropriate standards of quality in food and nutrition care services.[75]

Eight states have slightly different statutory definitions of prohibited activities, but they generally are substantively similar to those described above. For example, Ohio forbids the "practice of dietetics," defined as:

1. Nutritional assessment to determine nutritional needs and to recommend appropriate nutritional intake, including enteral and parenteral nutrition;
2. Nutrition counseling or education as components of preventative, curative, and restorative health care; [or]
3. Development, administration, evaluation, and consultation regarding nutritional care standards.[76]

***2. What exactly is prohibited by Category III states?*** Unfortunately, these definitions are broad and vague, and don't really tell us if particular nutrition information is illegal. The three reported legal cases discussing the Category III dietitian statutes are not helpful either, as none of them meaningfully discusses the line between permissible and impermissible nutritional information.[77]

Every Category III state, however, specifically exempts certain activities from its definition of "dietetics practice," and many of these exemptions are directly applicable to strength coaches without a dietitian license who desire to discuss certain nutritional issues with their clients. These exemptions provide a reasonable guide to determining the scope of permissible nutrition information that a non-licensed strength coach could give.

*(1) Weight control programs.* Nebraska, Rhode Island, and Tennessee allow one to provide nutrition information and instructions as part of a weight control program.[78] This is contrary to most states' laws, which require dietary programs for weight control to be pre-approved by a licensed dietitian. Thus, strength coaches practicing in those states have significant leeway to give individual dietary advice to meet a trainee's weight control goals.

*(2) Providing free nutrition information to certain people.* Minnesota permits individuals to provide free nutrition information to "family," Missouri permits the same for "family" and "friends," and Rhode Island permits the same for "family," "friends," or "acquaintances."[79]

*(3) Licensed health professionals.* Many strength coaches also hold professional certifications in health-related fields (e.g. doctors or physical therapists). Nearly all Category III states allow licensed health professionals to practice dietetics when incidental to the practice of his/her profession – though the lists of exempted professionals vary across Category III states.[80]

This exception, however, only permits giving dietary advice in connection with one's profession – it would not permit a doctor who moonlights as a strength coach to simply hand out nutrition advice to his trainees. However, if trainees are also patients of the health professional, the health professional may have substantial leeway to give nutrition advice.

*(4) Dissemination of literature; classes and seminars.* Eight states permit free dissemination of nutrition-related information or literature;[81] four of these states also permit conducting classes or seminars related to non-medical nutrition.[82] Tennessee permits conducting classes or seminars, but does not expressly permit free dissemination of nutrition information.[83]

The "free dissemination" exception is likely intended to allow publication, distribution, and sale of books and pamphlets (including electronic books or websites) on nutrition-related information by people without a dietitian license. The First Amendment permits these activities anyway, so the exception may be superfluous. Indeed, it is noteworthy that the North Carolina Board of Dietetics limited its concerns with Cooksey's website to his recommendations to particular individuals, even though North Carolina does not have a "free dissemination" exception in its dietitian statutes.[84]

By its very nature, however, "free dissemination" involves information that is not targeted to any specific individual. The same is true of seminars, classes, and speeches related to nutrition. Thus, although these exceptions might permit a strength coach to provide general nutrition guidelines or meal plans to a trainee (for example, a pre-printed meal plan for people who want to bulk up/lean out/maintain),[85] it would not allow him to provide individual counseling to a trainee as to nutrition or meal plans.

*(5) General nutrition information.* Finally, 12 states allow one to furnish general nutritional information of some type.[86] Additionally, 3 states allow dissemination of information about food, food materials, or food supplements,[87] and 6 states allow furnishing general nutritional information in connection with marketing or distributing food, food products, or dietary supplements.[88]

So what is "general nutrition information" (or "nonmedical nutrition information" in some states)? Unfortunately most states don't provide a meaningful definition, and there isn't any case law discussing the exception. There is, however, a helpful legal opinion from the Maryland Attorney General, which opined that unlicensed nutritionists could provide the following information under the "nonmedical nutrition" exception:

> '[T]he right . . . to provide services and information related to nonmedical nutrition' means that an unlicensed nutritionist may offer nutritional counseling or information if the consumer seeks the service or information to achieve overall fitness, medically unsupervised weight loss, or a generally healthier diet. By contrast, only a licensed dietitian or licensed nutritionist may offer nutritional services or information in response to a consumer's specific physiological complaint or in relation to any medical diagnosis.[89]

The Maryland AG further clarified that nonmedical nutritional services "are of the kind traditionally provided in settings like . . . fitness centers." *Medical* nutritional information, by contrast, "pertains to the link between diet and a specific health care question," such as diabetes or insomnia.[90]

The Maryland AG opinion offers significant leeway for strength coaches to provide dietary information. Under the Maryland AG's interpretation, a strength coach could provide macronutrient breakdowns and recommended caloric intakes, and even could provide a list of foods to eat or avoid for general health purposes, as long as the recommendations are for "overall fitness" or a "generally healthier diet" and not for treatment or prevention of specific diseases or physiological issues.

The Ohio Board of Dietetics also has provided helpful documents interpreting the scope of its "general nonmedical nutrition information" exception.[91] "Guideline F," which clarifies Ohio's dietetics law for unlicensed health and fitness professionals (including personal trainers), defines "general nonmedical nutrition information" as:

1. principles of good nutrition;
2. foods to be included in a daily diet;
3. the essential nutrients needed by the body;
4. recommended amounts of these nutrients;
5. the action of these nutrients on the body;
6. the effects of deficiencies in these nutrients; or
7. foods and supplements that are good sources of essential nutrients.[92]

(These examples, it so happens, are identical to Montana's statutory definition of "general nutrition information,"[93] and similar to Nevada's.[94] Montana and Nevada are the only states that statutorily define "general nutrition information.")

Similarly, in "Bulletin 8," the Ohio Board provides additional examples of information that fall under the general nonmedical nutrition exception:

1. demonstrating how to prepare and cook food;
2. providing information about food guidance systems, healthy eating out or healthy snacks;
3. talking about carbohydrates, proteins, fats, vitamins, minerals, and water as essential nutrients needed by the body and how nutrient requirements may vary through the life cycle;
4. giving statistical information about the relationship between chronic disease and the excesses or deficiencies of certain nutrients; and
5. providing information about nutrients contained in food or supplements.[95]

Concededly, Ohio's Guideline F and Bulletin 8 are not as explicit as the Maryland AG opinion. Nevertheless, the Ohio Board's examples of permissible information are fairly broad and appear to encompass most, if not all, of what the Maryland AG opinion allows.

If Ohio and Maryland are any indication for how other states are likely to interpret their general nutrition information exceptions, then strength coaches can breathe a little more easily. The most important thing to bear in mind is that nutrition information *cannot* be given for purposes of treating a disease or physiological condition without a dietetics license in Category III states. Steve Cooksey would have been in trouble even in relatively-permissive Maryland or Ohio because his advice and counseling was aimed at treating a specific disease, which is inherently medically-related nutritional information. So long as strength coaches limit their nutritional information to improving

one's athletic performance or general well-being, they have a strong claim that they are not practicing dietetics without a license.

That said, a cautionary note is warranted. Whether particular conduct runs afoul of a particular state's dietetics laws will depend solely on the judgment of that state's board of dietetics. Maryland's and Ohio's interpretations of statutory language may be persuasive to those other state boards, but they are not binding, and it is very possible that states will reach inconsistent decisions on what falls under the general nutrition information exception. While Maryland and Ohio appear to permit, say, macronutrient and caloric recommendations to trainees to reach nonmedical athletic goals, other states may conclude that this type of information is too specific to a particular trainee and constitutes dietetics practice. This is especially true for those states that allow non-licensed individuals to provide only very limited general nutrition information – such as North Carolina. (And indeed, the North Carolina board of dietetics complaint regarding Steve Cooksey took a very restrictive view of the types of information that an unlicensed individual could provide.)

Put simply, there is still substantial gray area as to what is permissible, and one should carefully examine an individual state's dietetic statutes and regulations before providing even general, nonmedical nutrition information.

### C. Which state's law applies? Problems with the internet.

There is one more thorny issue to address: what state's law applies to your giving nutritional information? This may seem like a silly question at first. After all, if you live and train people in Ohio, obviously Ohio's law would apply to your giving nutritional advice. But the internet and remote coaching can significantly confuse matters. Consider two scenarios:

> Scenario 1: You live and primarily conduct business in State A, but you remotely coach a trainee in State B. You give nutritional information to the trainee. Does State A's dietitian law apply to you? State B's? Both?
>
> Scenario 2: You live and primarily conduct business in State A, and put nutrition information on a website. Someone in State B reads that information. Does State A's dietitian laws apply to you? State B's? Both? Neither?

If State A is a Category I or II state, but State B is a Category III state, then the applicability of State B's law could mean the difference between free disclosure and severe restrictions on giving nutritional information.

There are two legal principles that can help us unpack Scenarios 1 and 2:

*Principle 1: The state in which the strength coach is present while providing dietary information can apply its dietitian law.*

This is fairly straightforward: if the strength coach is sitting in State A, then State A can apply its dietitian laws to the strength coach. Indeed, that is precisely what happened in the Cooksey matter – Cooksey lived and ran his website in North Carolina, but provided information to people around the world. Ultimately, North Carolina brought the action against him.[96]

*Principle 2: The state in which the trainee receiving dietary information is present can apply its dietitian law to the strength coach providing the information.*

There is no case law indicating whether or not a state may bring an action against an out-of-state person for providing dietary advice to someone living in the state. However, authority relating to other licensed professions indicate that the state could do so.

States have brought actions against out-of-state doctors and pharmacists for violations of the state's pharmacy and medical practice laws,[97] and the American Medical Association has acknowledged that a doctor seeking to treat a person in another state through electronic means must obtain a license in that state absent an exception in state or federal law.[98] Courts have held that attorneys can engage in the unauthorized practice of law by handling court matters for clients in states in which the attorneys did not hold a license – even if the attorneys communicated exclusively through telephone, computer, or other electronic means and never physically set foot in the state.[99] Courts have also upheld state law restrictions against out-of-state businesses attempting to sell products to in-state consumers through the internet.[100]

There is no reason to suspect that states would treat dietary statutes differently from any other licensing scheme. Thus, we should assume as strength coaches that any remote coaching will subject us to the dietary licensing laws of the state in which our trainee resides.

The answers to our two scenarios are apparent from these two principles. In Scenario 1, State A's law applies because you were in State A when you gave the nutritional information. Because the recipient of the information resides in State B, State B's law applies as well. Thus, your conduct will have to comply with both State A's and State B's laws.

In Scenario 2, State A's law applies because you were in State A when you posted the information. But unlike in Scenario 1, you are not purposefully directing your conduct to a person in State B – the person just happened to come across the information. Since you are not providing information in State B, State B's law does not apply. In fact, it would likely be unconstitutional for State B to impose its law on you because, under the Commerce Clause of the U.S. Constitution,[101] a state may not regulate commerce that takes place wholly outside of the state's borders, even if the commerce has some effect in the state.[102]

So in summary: You will be subject to the dietitian statutes in the state in which you live and work. Further, if you purposefully direct nutritional information to someone out of state, you may be subject to that state's dietitian statutes as well.

## CONCLUSION

This article is, of course, not intended to be exhaustive – either in the topics considered or the explanations for each topic – but meant simply to provide insight into some of the legal issues that could face us as strength coaches. And so in conclusion, to borrow the words of Samuel Kent, an ex-federal judge who was convicted of obstruction of justice and later impeached: "After this remarkably long walk on a short legal pier, . . . [this author] has endeavored, primarily based upon [his] affection for [the Starting Strength community], but also out of [his] own sense of morbid curiosity, to resolve what [he] perceived to be the legal issue[s] presented. . . . [T]he [author] believes [he] has satisfactorily resolved [those] matter[s]."[103]

Or, for those of you disappointed by the lack of definite answers in this article – which I assure you are seldom available in legal practice – perhaps you might prefer the words of the late Chief Justice

William Rehnquist on his role during the impeachment trial of President Bill Clinton: "I did nothing in particular, and I did it very well."

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After Brodie removes his "S" cape after an honest day of fighting for justice, he endeavors to keep his squat, deadlift, and bench press among the highest for attorneys in northeast Ohio. Which is a lot like the 2007 Cleveland Browns' endeavor to being the best Browns team since 1999.

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## Notes and References

**1** There are also strict liability torts, where the tortfeasor is liable even if he acted completely reasonably at all times. Many states' products liability laws fall into this category. Since gyms and their coaches are typically service businesses, however, products liability claims generally do not operate to hold them liable for defective equipment. *See, e.g.*, *Bhardwaj v. 24 Hour Fitness, Inc.*, No. H021263, 2002 Cal. App. Unpub. LEXIS 3288, at *17-20 (Cal. App. Mar. 8, 2002) (holding that since gym was a service-based business with no role in the design, manufacture, marketing, or distribution of a defective hack squat machine, the gym was not liable under products liability theory to a patron who was injured by the machine).

Courts have also generally imposed strict liability for injuries resulting from "ultrahazardous" activities – that is, activities that are dangerous by their very nature, and where the risk of injury cannot be significantly mitigated even with substantial precautions (think explosives, wrecking balls, and transporting toxic chemicals). As a general matter, we are not concerned with strict liability torts in the context of coaching injuries.

**2** *See, e.g.*, *Thomas v. Sport City, Inc.*, 738 So. 2d 1153, 1157-58 (La. App. 1999) (plaintiff could not prove that gym's failure to instruct how to use a hack squat machine caused his injuries because plaintiff already knew how to use the squat machine and admitted that had he used a latching mechanism properly, he would not have been injured by the machine).

**3** *Hussein v. LA Fitness Int'l, LLC*, 987 N.E.2d 460 (Ill. App. 2013) (dismissing plaintiff's claim of negligent maintenance of assisted dip/chin station); *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678 (N.J. 2010) (dismissing plaintiff's claim of negligent maintenance of exercise bike).

**4** *Herren v. Sucher*, 750 S.E.2d 430, 433-34 (Ga. App. 2013).

**5** *Pineda v. Town Sports Int'l, Inc.*, No. 113493/05, 2009 N.Y. Misc. LEXIS 5082, at *6 (Nov. 5, 2009).

**6** *Shields v. Sta-Fit, Inc.*, 903 P.2d 525 (Wash. App. 1995), *review denied*, 129 Wn. 2d 1002 (1996).

**7** *Lund v. Bally's Aerobic Plus, Inc.*, 78 Cal. App. 4th 733 (2000).

**8** Where waivers are part of a larger agreement, coaches and gyms typically place them in a different typeface from the remainder of the document – for example, all capital letters, or bold type. Coaches and gyms also may have trainees execute a separate document clearly identified as a waiver. The upshot is that trainees must be expected to notice the provision for it to be enforceable. *See Quintana v. Crossfit Dallas, LLC*, 347 S.W.3d 445, 451 (Tex. App. 2011) (waiver clause in a two-page contract was conspicuous where the word "release" was in larger, bold type before the two-paragraph waiver provision); *contrast Leon v. Family Fitness Center, Inc.*, 61 Cal. App. 4th 1227, 1233 (1998) (holding that release clause in "undifferentiated type located in the middle of a document," without any heading prefacing it or any other distinguishing characteristics, was not sufficiently conspicuous).

**9** No. H021263, 2002 Cal. App. Unpub. LEXIS 3288, at *7-8 (Cal. App. Mar. 8, 2002).

**10** *Id.* at *14-15.

**11** 61 Cal. App. 4th 1227, 1231 (1998).

**12** *Id.* at 1235.

**13** No. A-0504-05T5, 2006 N.J. Super. Unpub. LEXIS 1774, at *12-13 (N.J. App. Div. July 27, 2006).

**14** *Quintana*, 347 S.W.3d at 451-52.

**15** *Anderson v. McOskar Enters.*, 712 N.W.2d 796, 801 (Minn. App. 2006).

**16** *Blankenship v. Spectra Energy Corp.*, No. 13-12-546, 2013 Tex. App. LEXIS 10169, at *2-3 (Tex. App. Aug. 15, 2013).

**17** *Bailey v. Palladino*, No. A-504-05T5, 2006 N.J. Super. Unpub. LEXIS 1774, at *13-14 (N.J. Super. July 27, 2006).

**18** For additional examples where waiver clauses were enforced because they expressly referred to defendant's own negligence, *see Kotcherquina v. Fitness Premier Mgmt., LLC*, No. 4:11-cv-342, 2012 U.S. Dist. LEXIS 27675, at *7 (E.D. Ark. Mar. 2, 2012); *Pruitt v. Stron Style Fitness, LLC*, No. 96332, 2011 Ohio App. LEXIS 4343, at *11-12 (Ohio App. Oct. 13, 2011); *Lund v. Bally's Aerobic Plus, Inc.*, 78 Cal. App. 4th 733, 738-39 (2000).

**19** *Anderson*, 712 N.W.2d at 800 ("[A] release of liability will not be enforced if . . . it 'purports to release the benefited party from liability for intentional, willful or wanton acts[.]'"); *Pruitt*, 2011 Ohio App. LEXIS 4343, at *8 ("[A] [waiver] clause is ineffective where the party seeking protection failed to exercise any care whatsoever [or] where there was willful or wanton misconduct[.]"); *Lund*, 78 Cal. App. 4th at 739; *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982) ("[Waiver] clauses [are] invalid if they purport to exonerate a party from willful or wanton recklessness or intentional torts.").

**20** *Stelluti*, 1 A.3d at 694. The court held that this rule was a "fair and proper balance" between respecting contractual rights and public policy considerations, and that the court's "decision cannot reasonably be read to signal that health clubs will be free to engage in 'chronic or repetitive patterns of inattention to the safety of the[ir] equipment.'" *Id.* (citation omitted).

**21** *Id.*

**22** *Roer v. 150 West End Ave. Owners Corp.*, 30 Misc. 3d 1211(A), 924 N.Y.S.2d 312 (2010).

**23** As lamented by a New York trial court: "In assessing whether a facility is instructional or recreational, courts have examined, *inter alia*, the organization's name, its certificate of incorporation, its statement of purpose and whether the money it charges is tuition or a fee for use of the facility. . . . In some cases, courts have found that [New York law] voids the particular release where the facility provides instruction only as an "ancillary" function, even though it is a situation where the injury occurs while receiving some instruction. In other mixed-use cases, courts focused less on a facility's ostensible purpose and more on whether the person was at the facility for the purpose of receiving instruction." *Mellon v. Crunch and Agt Crunch Acquisition, LLC*, 32 Misc. 3d 1214(A), 2011 N.Y. Misc. LEXIS 3379, at *14 (July 8, 2011) (citations omitted).

**24** *See, e.g.*, *Evans v. Pikeway, Inc.*, 7 Misc. 3d 348, 351 (2004).

**25** *Debell v. Wellbridge Club Mgmt., Inc.*, 40 A.D.3d 248, 249-50 (2007) (emphasis in original).

**26** *See Lemoine v. Cornell Univ.*, 2 A.D.3d 1017, 1019 (2003) (mixed-use facility was instructional given that the defendant was an educational institution and that "the brochure and course materials in the record indicating that the purpose of the climbing wall facility was 'for education and training in the sport of rockclimbing'").

**27** *See, e.g.*, *Quintana*, 347 S.W.3d at 448, 451-52; *Kotcherqina*, 2012 U.S. Dist. LEXIS 27675, at *3 ("I am aware that weight training is a calculated risk activity and that working with a [personal trainer] involves inherent risks and dangers, including loss or damage of personal property, serious personal injury and/or death. . . . I voluntarily assume and freely chose [sic] to incur any and all such risk[.]"); *Anderson*, 712 N.W.2d at 798-99.

**28** A minority of states do not appear to recognize assumption of risk as a defense outside the context of a written consent form. *See, e.g.*, *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758-59 (Tex. 1971) (assumption of risk abolished in negligence cases, though it is still retained in strict liability cases and cases in which the party signed an express written consent to the dangerous activity or condition).

**29** *Blume v. Equinox Holdings, Inc.*, 40 Misc. 3d 1216(A), 2013 N.Y. Misc. LEXIS 3161 (July 17, 2013) (client injured while performing 300 lbs. squat); *Baltierra v. Corono-Norco Unified Sch. Dist.*, No. E036720, 2006 Cal. App. Unpub. LEXIS 4007 (Cal. App. May 9, 2006) (student injured while performing a 1RM of a squat as part of a football training program).

**30** *Am. Powerlifting Ass'n v. Cotillo*, 934 A.2d 27, 35 (Md. 2007); *Lee v. Maloney*, 180 Misc. 2d 992, 993-94 (1999); *aff'd*, 270 A.D.2d 689 (2000).

**31** *Rostal v. Neste Enters.*, 138 Cal. App. 4th 326, 334 (2006).

**32** 101 A.D.3d 519 (2012).

**33** *Layden v. Plante*, 101 A.D.3d 1540, 1541-42 (2012).

**34** *Id.* at 1540, 1542.

**35** 32 Misc. 3d 1214(A), 2011 N.Y. Misc. LEXIS 3379, at *2 (July 8, 2011).

**36** *Id.* at *16.

**37** Mark Rippetoe and Jonathon Sullivan, M.D., have suggested that coaches should avoid training individuals with certain eating disorders (such as anorexia), various types of cardiovascular and intracranial pathologies (such as aneurysms

or tumors), seizures, and a variety of other illnesses, due to the potential for serious injury. *See "Pathologies prohibiting training"*.

Somewhat relatedly, Dr. Jonathon Sullivan, M.D., Ph.D., has written of a disturbing legal case suggesting that strength coaches could potentially be liable for failing to warn of the potential dangers of stroke while using a Valsalva maneuver – even though there is little to no data or a credible physiological model suggesting that weightlifting under Valsalva poses any meaningful danger of cerebrovascular incidents (indeed, Dr. Sullivan notes that the Valsalva maneuver is likely protective). Jonathon Sullivan, *The Valsalva and Stroke: Time for Everyone to Take a Deep Breath*, The Aasgaard Company (2013). Nonetheless, because a strength coach can still be sued, Dr. Sullivan recommends including a written assumption of risk of cardiovascular, ocular, pulmonary, or cerebrovascular complications from exercising under the Valsalva. *Id.* at 14-15.

I agree with Dr. Sullivan's recommendation, but also add that a well-written waiver clause that covers a strength coach's own negligence also should absolve a strength coach of liability for any alleged "failure to warn" of the dangers of stroke under Valsalva, since "failure to warn" is a subspecies of negligence claims.

Interestingly, I could only locate a single published case where a court considered any potential link between a Valsalva maneuver and stroke. In *Thomopoulos v. Tom Cat Restaurant*, No. A-2954-06T1, 2008 N.J. Super. Unpub. LEXIS 2614 (N.J. Super. Ct. June 10, 2008), a worker had a cerebral vascular accident (CVA) shortly after lifting a grill at a restaurant. The worker argued that his lifting the grill directly caused his CVA, and, therefore, he should be covered under New Jersey's workers' compensation fund. The State argued that the worker's pre-existing health problems caused the stroke. A medical expert on behalf of the worker argued that the worker would have used a Valsalva maneuver to lift the heavy grill, and because of the Valsalva maneuver's elevation of blood pressure, "a person who has [an] underlying condition can and does sometime[s] dislodge a larger part of a clot that goes on and blocks one of the important vessels, usually in the brain." *Id.* at *12. The State's medical expert testified that the worker's stroke was brought on by a series of pre-existing conditions and poor life decisions by the worker – including a failure to take his medications. The trial court found the State's expert more persuasive given the worker's medical history. Though not directly presented with the question of whether lifting under Valsalva, in and of itself, could lead to a stroke, the worker's expert opinion is consistent Dr. Sullivan's conclusion that there is "no indication that resistance training increases the risk of ICH in the absence of severe uncontrolled hypertension, coagulopathy, congenital aneurysm or other underlying cerebrovascular pathology." Sullivan, *supra*, at 6.

**38** 101 A.D.3d at 1540.

**39** The court found that plaintiff's claim was not barred by the release signed by plaintiff because the release did not "plainly and precisely" state that it extended to the trainer's negligence. *Id.* at 1543.

**40** *Id.* at 1541-42.

**41** 326 N.W.2d at 921-22.

**42** *Id.* at 922.

**43** *Id.* at 926.

**44** *See, e.g.*, Ark. Code § 16-55-213(a)(1); Miss. Code § 11-11-3(1)(a)(i); Ohio R. Civ. P. 3(B)(6); Tex. Civ. Prac. Code § 15.002(a); 28 U.S.C. § 1391(b).

**45** *See, e.g.*, Cal. Civil Code § 395(a).

**46** *See, e.g.*, *Middleton v. Caterpillar Indus.*, 979 So. 2d 53, 57 (Ala. 2007).

**47** Restatement (Second) of Conflict of Laws § 146.

**48** Restatement (Second) of Conflict of Laws § 145(2).

**49** *Compare Carematrix of Mass., Inc. v. Kaplan*, 385 F. Supp. 2d 195, 198-99 (S.D.N.Y. 2005); *Pong v. Am. Capital Holdings, Inc.*, No. 2:06-cv-2527, 2007 WL 657790, at *4 (E.D. Cal. Feb. 28, 2007).

**50** *Compare Caton v. Leach Corp.*, 896 F.2d 939, 943 & n.3 (5th Cir. 1990); *English Mt. Spring Water Co., Inc. v. AIDCO Int'l, Inc.*, No. 3:07-cv-324, 2008 U.S. Dist. LEXIS 43478, at *7-8 (E.D. Tenn. May 30, 2008).

**51** *Caton*, 896 F.2d at 942; *AIDCO*, 2008 U.S. Dist. LEXIS 43478, at *5-6.

**52** *See, e.g.*, *Kostelac v. Allianz Global Corp. & Specialty AG*, 517 F. App'x 670, 675 (11th Cir. 2013) (stating rule and citing cases); *In re Exide Techs.*, 544 F.3d 196, 218 n.15 (3d Cir. 2007).

**53** Analysis under this section primarily references Delaware law, since most limited liability companies and corporations are formed in Delaware. (Over 50 percent of publicly traded corporations and 60 percent of Fortune 500 companies are incorporated in Delaware.) Delaware is a popular place for incorporation for two primary reasons. First, Delaware's general corporate law allows for a significant amount of flexibility in corporate form and practice, and is considered among the most friendly to business in the nation. Second, the Delaware Chancery Court, which has existed since 1792, is arguably the best forum in the country to litigate business disputes. The chancery court has created a wealth of precedent interpreting nearly every portion of Delaware's business code, and the judges are known to be very considered in their decisions. The chancery court is thus a very predictable forum that Delaware businesses can take advantage of in the event of a business law dispute.

**54** 6 Del. Code § 15-306(a).

**55** 6 Del. Code § 17-403(a), (b).

**56** 6 Del. Code § 17-303(a).

**57** *See, e.g.*, *Japan Petrol. Co. (Nigeria), Ltd. v. Ashland Oil Co.*, 456 F. Supp. 831, 838 (D. Del. 1978); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) ("A basic tenant of American corporate law is that the corporation and its shareholders are distinct entities.").

**58** 6 Del. Code § 18-303(a).

**59** *See, e.g.*, *Spaulding v. Honeywell Int'l, Inc.*, 185 N.C. App. 317, 321 (2007) (stating rule and holding that members were not liable because they did not personally commit tort); *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 142-43 (2005) (member of LLC was personally liable for violation of state environmental laws where he personally directed clear-cutting of trees); *Gonzales v. Pollution Control Bd.*, 960 N.E.2d 772, 779 (Ill. App. 2011) (member of LLC was personally liable for dumping where he took deliberate actions in violation of the statute).

**60** *McFarland v. Va. Retirement Servs. of Chesterfield, LLC*, 477 F. Supp. 2d 727, 738-40 (E.D. Va. 2007), provides a good example of this principle. There, the court considered whether officers and directors of an LLC were liable for a wrongful termination. The court held that plaintiff could bring an action against both the company and the manager who personally participated in the wrongful termination. However, since there were no allegations that the remaining managers or officers personally participated in or otherwise directed the company's tortious actions, they were dismissed from the suit.

**61** *See Ramsey v. Gamber*, No. 3:09-cv-919, 2011 U.S. Dist. LEXIS 11893, at *9 n.1 (M.D. Ala. Feb. 7, 2011) ("[T]he mere fact that an injury has occurred is not evidence of negligence and . . . in negligent supervision cases negligence will not be found by inference." (citation omitted)).

**62** *See, e.g.*, *id.* ("Managers can be held directly liable for negligent supervision of subordinates."); *Lerner v. Soc'y for Martial Arts Instruction*, No. 106366/11, 2013 N.Y. Misc. LEXIS 4292, at *5-6 (Sept. 26, 2013).

**63** *See, e.g.*, *Rice v. Brakel*, 310 P.3d 16, 21-22 (Ariz. App. 2013); *Voyager Ins. Cos. v. Whitson*, 867 So. 2d 1065, 1073 (Ala. 2003); *Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 815 (2006).

**64** Okay, not really – it actually translates to "let the master answer." Lawyers traditionally have used Latin to sound more intelligent, though this tactic ironically backfires with some frequency since very few lawyers outside Vatican City know how to correctly pronounce many Latin words (e.g. *amici*, *ejusdem generis*, or *ipse dixit*).

For a discussion about *respondeat superior*, *see Ramsey*, 2011 U.S. Dist. LEXIS 11893, at *6.

**65** Courts look to all sorts of factors to make this legal determination, including the degree of control the employer retains over the employee's performance of his duties, the method that the employee is paid (and how taxes are paid), whether the employer or employee furnishes equipment used for the work, and the extent to which the employer may terminate the employment relationship. *See* Restatement (Second) of Agency § 220; *Lathan Roof Am., Inc. v. Hairston*, 828 So. 2d 262, 265-66 (Ala. 2002); *Benner v. Wichman*, 874 P.2d 949, 952-53 (Alaska 1994); *Simon v. Safeway, Inc.*, 173 P.3d 1031, 1035-36 (Ariz. App. 2007).

**66** Restatement (Second) of Torts § 245 (1958); *Tyus v. Pugh Farms, Inc.*, No. W2011-826, 2012 Tenn. App. LEXIS 176, at *23-24 (Tenn. App. Mar. 19, 2012); *Kirlin v. Halverson*, 758 N.W.2d 436, 444-45 (S.D. 2008); *Regions Bank & Trust v. Stone Cty. Skilled Nursing Facility, Inc.*, 345 Ark. 555, 567 (2001); *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55, 59 (Mo. 1973).

**67** Some cases have held employers vicariously liable for strange actions by employees. For example, South Dakota law

holds that it is reasonably foreseeable that construction workers will get into physical altercations with each other – and, therefore, their employer is vicariously liable for injuries caused by those altercations. *See Kirlin*, 758 N.W.2d at 444-45.

**68** *Jessica H. v. Equinox Holdings, Inc.*, No. 103866/08, 2010 N.Y. Misc. LEXIS 1215, at *11-12 (N.Y. Sup. Ct. Jan. 6, 2010) ("Sexual assaults committed by an employee are not in furtherance of an employer's business, and the employer will not thereby be held vicariously liable for the employee's actions.").

**69** *Jessica H.*, 2010 N.Y. Misc. LEXIS 1215, at *15-16 (plaintiff alleged that her personal trainer, an employee of a fitness club, repeatedly sexually assaulted her at club's premises; the court dismissed the negligent hiring claim against the club because the club had no indication of personal trainer's propensity to engage in sexual assault, and there were no allegations prior to the plaintiff's that the trainer had committed any sexual offenses against the health club's members or employees); *Geiger v. McClurg Court Assocs.*, No. 86-cv-4419, 1987 U.S. Dist. LEXIS 11971, at *4 (N.D. Ill. Dec. 4, 1987) (plaintiff claimed that a masseuse sexually molested her while she was using spa facilities; the court dismissed plaintiff's negligent hiring and retention claim because the spa had no knowledge of any allegations of sexual misconduct by the masseuse, a background check and prior references failed to disclose any such prior misconduct, and the masseuse had not been accused of sexual misconduct or assault prior to plaintiff's lawsuit).

**70** *Regions Bank & Trust v. Stone Cty. Skilled Nursing Facility, Inc.*, 345 Ark. 555, 568 (2001); *Heard v. Mitchell's Formal Wear, Inc.*, 549 S.E.2d 149, 151 (Ga. App. 2001).

**71** Cooksey complied, but then filed a federal lawsuit against North Carolina claiming that its law violated his right to free speech, which is scheduled for trial in October 2014. The case is captioned *Cooksey v. Futrell*, Case No. 3:12-cv-336. The American Civil Liberties Union has filed briefs on behalf of Cooksey.

**72** Alaska Stat. § 8.38.010; Cal. Bus. Code § 2585(c); Conn. Rev. Stat. § 20-206p; Haw. Rev. Stat. § 448B-12; Idaho Code § 54-3503; Ind. Code § 25-14.5-7-1; Iowa Code § 152A.2, 3; Ky. Rev. Stat. § 310.070(1); Mass. Gen. Laws § 206; N.H. Rev. Stat. § 326-H:5(I); N.Y. Educ. Law § 8002; N.D. Code § 43-44-06; Okla. Stat. § 59-1736; Or. Rev. Stat. § 691.415; Pa. Code § 21.702; S.C. Code §§ 40-20-30, 40-20-130(A); Tex. Occ. Code § 701.251; Utah Code § 58-49-9; Vt. Stat. § 3382; Va. Code § 54.1-2731; Rev. Code Wash. § 18.138.020; W. Va. Code § 30-35-1; Wis. Stat. § 448.76; Wyo. Stat. § 33-47-106(g).

Although Kentucky prohibits the practice of dietetics without being licensed as a dietician, Ky. Rev. Stat. § 310.070(1), it expressly states that such prohibition "shall not . . . be construed to affect any other person who provides nutritional or dietary advice . . . if the person does not use the title dietician, licensed dietitian, or certified nutritionist." Ky. Rev. Stat. § 310.070(3). Accordingly, Kentucky appears to be most appropriately deemed a Category II state rather than a Category III state.

Some Category II states clarify that they do not prohibit non-certified persons from engaging in dietician practice so long as they do not hold themselves out as being certified dietitians/nutritionists. *See, e.g.*, Conn. Rev. Stat. § 20-206t(1) ("Nothing in [the dietitian law] shall be construed as prohibiting . . . [a] person who does not hold himself out to be a Connecticut certified dietitian-nutritionist . . . from engaging in dietetics or nutrition practice[.]"); Idaho Code § 54-3512(1) (noting that the statutes applicable to dietitians "shall not be construed to prevent any person from engaging in activities set forth in Section 54-3505(3) [i.e., practice of dietetics]").

**73** *See, e.g.*, Ala. Code § 34-34A-15(a); Ark. Code §§ 17-83-103, 17-83-301; Del. Code § 24-3810; Fla. Stat. § 468.504; Ga. Code § 43-11A-16; Ill. Code §§ 225-30-15(a), 225-30-15.5(a); Kan. Stat. § 65-5903(a); La. Rev. Stat. § 3091; Me. Rev. Stat. § 32-9906(1); Md. Health Occ. Code §§ 5-401, 5-402; Mich. Comp. Laws §§ 333.18353, 333.18357(1); Minn. Stat. § 148.630(a); Mont. Rev. Stat. § 37-25-301; Neb. Rev. Stat. § 38-1812; Nev. Rev. Stat. § 640E.360; N.M. Rev. Stat. § 61-7A-4; N.C. Stat. §§ 90-365(1), (2); Ohio Rev. Code §§ 4759.02(A), (B); R.I. Gen. Laws § 5-64-4; S.D. Code § 36-10B-2; Tenn. Code § 63-25-104(a).

Mississipp[i] and Missouri prohibit practice of dietetics for compensation, but do not appear to categorically prohibit providing nutritional information for free. *See* Miss. Code § 73-10-7; Mo. Rev. Stat. §§ 324.205(2), 324.206(6). New Mexico's dietitian statutes will be repealed effective July 1, 2016, absent further action from the legislature.

**74** Ala. Code § 34-34A-3(7); *see also* Ark. Stat. § 17-83-103(5); Ga. Code § 43-11A-3(4); La. Rev. Stat. § 37-3083(1); Minn. Stat. § 148.621(9); Mo. Rev. Stat. § 324.200-2(3); N.M. Rev. Stat. § 61-7A-3(E); N.C. Stat. § 90-352(2); S.D. Code § 36-10B-2.

**75** Ala. Code § 34-34A-3(8); Ark. Stat. § 17-83-103(9); Ga. Code § 43-11A-3(4); La. Rev. Stat. § 37-3083(1); Mich. Comp. Laws § 333.18351(c); Minn. Stat. § 148.621(10); Mo. Rev. Stat. § 324.200-2(3); N.M. Rev. Stat. § 61-7A-3(F);

N.C. Stat. § 90-352(4); S.D. Code §§ 36-10B-1(8), 36-10B-5.

Some states simply define "dietetics practice" or the "practice" of dietetics as including these items, and dispense with a separate definition of "nutrition care services." *See, e.g.*, Kan. Stat. § 65-5902(d), (e); Md. Health Occ. Code § 5-101(h)(1); Mont. Rev. Stat. § 37-25-301.

**76** Ohio Rev. Code § 4759.01; *see also* Fla. Stat. § 468.503(4); Ill. Code § 225-30-10; Me. Rev. Stat. § 9902(4); Miss. Code § 73-10-3(j); Neb. Rev. Stat. § 38-1809; Nev. Rev. Stat. § 640E.070; Tenn. Code § 63-25-103(3). Rhode Island merely prohibits the unlicensed practice of "dietetics," defined as "the professional discipline of applying principles derived from the sciences of nutrition, biochemistry, physiology, management, and behavioral and social sciences in the provision of dietetic service." R.I. Gen. Laws § 5-64-3(4).

**77** *Cooksey*, discussed above, involved individual nutrition counseling for pay to treat a specific disease. Cooksey appears to concede that he violated North Carolina's dietetics laws given that his legal challenge is based solely on the First Amendment. In *Strandwitz v. Ohio Bd. of Dietetics*, 614 N.E.2d 817 (Ohio App. 1992), a self-described "clinical nutritionist" was found to be practicing dietetics without a license. His conduct, however, was not identified in the court opinion, and he challenged the law on its face rather than as applied to him. In *Ohio Bd. of Dietetics v. Brown*, 614 N.E.2d 855 (Ohio App. 1993), the defendant performed nutritional assessments, recommended nutritional supplements, engaged in nutritional counseling, and represented himself as a nutritionist without a certification. *Id.* at 857. His legal challenges were primarily on state and federal constitutional grounds.

**78** Neb. Rev. Stat. § 38-1812(9); R.I. Gen. Laws § 5-64-12(1); Tenn. Code § 63-25-104(b)(7)(A)(1).

**79** Minn. Stat. § 148.632(11); Mo. Rev. Stat. § 324.206(1); R.I. Gen. Laws § 5-64-12.

**80** Ala. Code § 34-34A-10(4); Del. Code § 24-3810(1); Fla. Stat. § 468.505(1)(a); Ga. Code § 43-11A-18(3); Kan. Stat. § 65-5912(b)(1); La. Rev. Stat. § 37-3093(3); Mich. Comp. Laws § 333.18363(a); Minn. Stat. § 148.632(3); Miss. Code § 73-10-13(e); Mo. Rev. Stat. § 324.206(3); Mont. Rev. Stat. § 37-25-304(2), (3); Neb. Rev. Stat. § 38-1812(1), (5); Nev. Rev. Stat. § 640E.090(1)(a); N.M. Rev. Stat. § 61-7A-4(B)(1); N.C. Stat. § 90-368(1); Ohio Rev. Code § 4759.10(A); R.I. Gen. Laws § 5-64-12(2); S.D. Code § 36-10B-15(7); Tenn. Code § 63-25-104(b)(1).

**81** Fla. Stat. § 468.505(2); Ill. Code § 225-30-20; Kan. Stat. §§ 65-5912(b)(5), 65-5912(b)(16); Md. Health Occ. Code § 5-103(d); Miss. Code § 73-10-13(i); Mo. Rev. Stat. § 324.206(6); Neb. Rev. Stat. 7 38-1812(7); Ohio Rev. Code § 4759.10(G).

**82** Fla. Stat. § 468.505(2); Ill. Code § 225-30-20; Md. Health Occ. Code § 5-103(b)(4); Neb. Rev. Stat. § 38-1812(7).

**83** Tenn. Code § 63-25-104(b)(7)(A)(4).

**84** *See Cooksey v. Futrell*, 721 F.3d 226, 232 (4th Cir. 2013) (detailing complaints of Cooksey's "addressing diabetic's specific questions," "helping [a website visitor] with this issue," "recommending [a meal plan] directly to people you speak to or who write you," and "work[ing] one-on-one with individuals"; the Board expressly said that providing a general meal plan was "acceptable").

**85** *See, e.g.*, Ohio Bd. of Dietetics, *Guideline F: For Fitness Facilities and Personal Trainers*, at 2 (Nov. 2007) ("Often personal trainers promote healthy eating habits by distributing handouts, books or newsletters to clients. They may also distribute data reports from manual or computer based programs.").

**86** Ill. Code § 225-30-20(j) (provided that this "does not include the development of a customized nutrition regimen for a particular client or individual"); Me. Rev. Stat. § 9915(2); Md. Health Occ. Code § 5-103(d); Miss. Code § 73-10-13(i); Mo. Rev. Stat. 7 324.206(6); Mont. Rev. Stat. § 37-25-304(7); Nev. Rev. Stat. § 640E.090(1)(d). Although Ohio statutory law does not expressly permit furnishing general nutritional information, Ohio administrative code permits an individual to "provid[e] general non-medical nutrition information." Ohio Admin. Code § 4759-2-01(C).

Delaware permits any individual to "recommend[], advise[], or furnish[] nonfraudulent information about, herbs, vitamins, minerals, amino acids, carbohydrates, sugars, enzymes, food concentrates, foods, other food supplements, or dietary supplements," which, for all intents and purposes, appears to cover general nutrition services. Del. Code § 24-3810(4).

Rhode Island allows a person to "furnish[] nutritional information . . . to the general public for educational purposes" so long as they "do not engage in nutrition counseling for the management of disease." R.I. Gen. Laws § 5-64-12(1).

Nebraska permits people to "conduct[] classes or disseminat[e] information related to general nutrition services." Neb. Rev. Stat. § 38-1812(7). General nutrition services include, but are not limited to, "[i]dentifying the nutritional needs of individuals and groups in relation to normal nutritional requirements" and "[p]lanning, implementing, and evaluating nutrition education programs for individuals and groups in the selection of food to meet normal nutritional needs throughout the life cycle." Neb. Rev. Stat. § 38-1807.

North Carolina permits a person to "furnish[] nutrition information on food, food materials, or dietary supplements" or provide "nonfraudulent specific nutritional information and counseling about the reported or historical uses of herbs, vitamins, minerals, amino acids, carbohydrates, sugars, enzymes, food concentrates, or other foods." N.C. Stat. §§ 90-368(9), (10).

Rhode Island's, Nebraska's and North Carolina's exemptions appear narrower than those that allow provision of general nutrition information.

**87** Ga. Code § 43-11A-18(8); Kan. Stat. § 65-5912(b)(5); Tenn. Code § 63-25-104(b)(7)(A)(4). Georgia law requires that any such information not be "deceptive or fraudulent."

**88** Ala. Code § 34-34A-10(7); Ark. Stat. § 17-83-102(b); La. Rev. Stat. § 37-3093(7); N.M. Rev. Stat. § 61-7A-4(3); S.D. Code § 36-10B-15(5); Tenn. Code § 63-25-104(b)(7)(A)(3).

**89** Md. Att'y Gen. Op. No. 86-051, 1986 Md. AG LEXIS 20, at *1-2 (Sept. 17, 1986).

**90** *Id.* at *6-7.

**91** Ohio administrative code permits unlicensed individuals to "provid[e] general non-medical nutrition information." Ohio Admin. Code § 4759-2-01(C).

**92** Ohio Bd. of Dietetics, *Guideline F: For Fitness Facilities and Personal Trainers*, at 1 (Nov. 2007).

**93** Mont. Rev. Stat. § 37-25-102(5).

**94** *See* Nev. Rev. Stat. § 640E.090(2).

**95** Ohio Board of Dietetics, *Bulletin 8: General Non-Medical Nutrition Information*, at 1 (Sept. 2009).

**96** This is consistent with other case law as well. *See, e.g.*, *Vacco v. Lipsitz*, 174 Misc. 2d 571, 579-80 (1997) (New York attorney general could bring consumer fraud action against individual who operated a website and conducted business in New York, even if the effects were felt outside New York).

**97** Ross D. Silverman, *Regulating Medical Practice in the Cyber Age: Issues and Challenges for State Medical Boards*, 26 Am. J.L. & Med. 255, 273 (2000) (citing sources).

**98** Carl F. Ameringer, *State-Based Licensure of Telemedicine: The Need for Uniformity But Not a National Scheme*, 14 J. Health Care L. & Pol'y 55, 58 & n.21 (2011) (noting "general consensus . . . that the practice of medicine occurred wherever the patient was located, notwithstanding the physician's location in another state," and citing authority); Daphne C. Ferrer and Peter M. Yellowlees, *Telepsychiatry: Licensing and Professional Boundary Concerns*, 14 A.M.A. J. Ethics 477, 478 (June 2012) (noting that doctor wishing to directly practice telepsychiatry with patients in four states outside of his home state "would need to obtain four separate state licenses . . . in addition to his license in [his home state]").

**99** *See, e.g.*, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5-6 (Cal. 1998) (noting that unauthorized practice of law "in California" did "not necessarily depend on or require the unlicensed lawyer's physical presence in the state," and that "one may practice law in the state . . . by telephone, fax, computer, or other modern technological means").

All states, however, provide means for out-of-state attorneys to practice in their courts, the most common being admission *pro hac vice* to a particular proceeding.

**100** *See, e.g.*, *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001) (upholding prohibition of Ford Motor Company from selling used vehicles to Texas consumers via its website because the Ford Motor Company itself did not have a dealer's license as required under Texas law).

**101** U.S. Const. Art. I, § 8 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes[.]").

**102** *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also, e.g.*, *Nat'l Fed. of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 959 (N.D. Cal. 2006) (noting that several courts have permitted regulation of internet activities that were "targeted

at recipients in particular geographical areas," such as email, so long as those laws did not regulate internet postings that were "accessible to any internet user, regardless of location," and citing cases).

Some cases have gone so far as to hold that *any* state regulation of internet activities is invalid under the Commerce Clause. *See, e.g.*, *Am Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

**103** *Bradshaw v. Unity Marine Corp., Inc.*, 147 F. Supp. 2d 668, 672 (S.D. Tex. 2001).