

# Legal Issues for Physical Therapists Who Provide Fitness Services

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Fitness programs for older adults carry unique responsibilities and liabilities for the physical therapist-fitness instructor. Considerations for appropriate screening, disclosure of a nontherapist-patient relationship, remuneration of services, and individual state licensure regulations are important to reduce legal and fiduciary liability. **Key word:** *liability*

**F**ITNESS, wellness, and preventative services for seniors are growing rapidly, as the population of aging adults in the United States is increasing. Although more people are healthier and more physically active, older adults are encouraged to integrate physical activity and exercise into their daily routine. The physical therapists' unique education and scope of practice makes them the provider of choice to prescribe fitness and rehabilitation programs for aging adults. As more and more physical therapists are offering fitness services, knowledge about how these services should be structured and billed to minimize liability and Medicare compliance risks is important. This article will discuss some of the unique legal issues and risks that arise for physical therapists who provide fitness and wellness programs.

## LIABILITY ISSUES IN OLDER ADULT FITNESS PROGRAMS

There are significant liability issues in working with older adults for obvious reasons. Medical issues are more common with age

and these medical issues may require precautions or pose safety concerns. Falls and injuries from falls are more common with age.<sup>1</sup> The greater the risk of injury, the greater the risk of a negligence or malpractice claim. Liability coverage may be specific to the traditional scope of physical therapy and therefore not cover wellness and fitness services. To understand the liability issues and minimize risks, we must discuss concepts of negligence and malpractice.

## NEGLIGENCE, MALPRACTICE AND THE DUTY OF CARE

Negligence is defined as a failure to exercise care toward another person that a reasonably prudent person would do in similar circumstances. *Malpractice* refers to negligence in exercising a standard of care or standard of conduct established by a profession. In a negligence or malpractice claim, the following questions are asked:

- What duty of care did the physical therapist (PT) owe the individual (or Plaintiff)?
- Did the PT breach that duty of care?
- Did the individual/plaintiff suffer any damages?
- Was the breach of the duty of care the primary cause of the individual's damages?

Defining the duty of care is the first step in determining whether negligence occurred. If

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there was no duty, there could be no breach. For instance, if a patient goes into cardiac arrest in the physical therapist's clinic, the physical therapist has a duty to do cardiopulmonary resuscitation (CPR). The duty does not exist merely because the therapist knows how to do CPR, but it exists because the therapist has a patient-therapist relationship. The same physical therapist would not have a duty to perform CPR on a stranger in the street (the therapist probably would do it, but would not have liability for the consequences if the therapist did not perform CPR).

The duty of care is determined by the expectations of the individual seeking the physical therapist's services as well as the qualifications of the person providing the service. When individuals seek fitness services from nonmedical instructors, they expect a general exercise program, not medical care; therefore, the fitness instructor's duty to the participant does not rise to the level of what is expected in a patient-therapist relationship. The fitness instructor has a general duty to instruct exercises that are safe but no duty to examine individual participants and modify their exercises when individuals complain of pain as they would if the participant was a patient.

So what duty of care is expected of the physical therapist acting as the fitness instructor? Generally speaking, if the physical therapist is carrying out the duties of a fitness instructor, the physical therapist should only be held to the fitness instructor's duty of care. However, if the credentials of the physical therapist are used to market the program, the participant may have higher expectations of service and expertise. In addition, physical therapists have the training and skills to recognize when an exercising individual is at risk that means physical therapists will be held to a higher standard when it comes to addressing any of the risk factors observed. The physical therapist who observes risk factors but ignores them, resulting in the individual being harmed, is negligent. Whereas, the fitness instructor, who does not have the knowledge to spot the risk factor (thus has no duty), is not negligent even if the individual is injured.

The elevated duty of care for the physical therapist turned fitness instructor does not necessarily mean the physical therapist must treat fitness participants like patients, if the physical therapist. The physical therapist does not have to customize what is intended to be a general exercise program for individual participants to avoid liability. Although the physical therapist may have an elevated duty of care to ensure the participant's safety, there is no duty to care for the participant as a patient, especially when the participant is paying nominal fees to participate in a general exercise program. That being said, the physical therapist can unknowingly establish a patient-therapist relationship unintentionally thus, establishing a duty of care expectation. When questions are answered and fitness participants are examined as if the participants were patients, even though there is no patient-therapist relationship; the physical therapist is creating a duty of care expectation. For example, a fitness participant tells the physical therapist, who is serving as a fitness instructor about new aches and pains the participant is experiencing after starting the exercise program. The physical therapist, being conscientious, asks a few questions, examines the participant using a few special tests, offers a professional opinion about what is going on, and gives advice to the individual about what to do. As a consequence and quite unintentionally, the physical therapist may have established a patient-therapist relationship and may be held to the higher standard of care of a physical therapist even though the individual is not officially a "patient." Whether a physical therapist has established a patient-therapist relationship with an individual is not determined by whether the individual is a "paying" patient. If evidence to the contrary is absent, the presence of a patient-therapist relationship is based on whether the *individual* (not the physical therapist) thought a professional relationship had been established.

The physical therapist must be careful to distinguish between fitness advice and physical therapy advice in all communications with fitness participants. When fitness participants

have complaints of pain, the physical therapist must listen carefully. The physical therapist must make an assessment about whether the individual needs an examination or merely needs to modify the exercise program or even rest. Except in an emergency, the line should be drawn at performing a hands-on, specific examination of the individual. If the individual requires an examination, the physical therapist should advise the participant to seek a medical consultation or schedule them for a patient examination pursuant to the same procedures used for other patients. This keeps the physical therapy services separate from the fitness services and distinguishes the different duties of care.

#### **LIABILITY INSURANCE COVERAGE AND FITNESS UNDER THE PHYSICAL THERAPISTS' SCOPE OF PRACTICE**

Generally speaking, physical therapists' *malpractice* policy covers only "physical therapy" services. Typical professional liability policies simply state the policy covers "professional liability" for the "physical therapist," interpreted as covering the physical therapist when (and only when) the therapist is performing professional duties within the physical therapist's scope of practice. One must look at the relevant state physical therapist practice act to determine whether fitness, wellness, and prevention services are considered physical therapy. Sometimes wellness services are not specifically addressed in the statutory language of the practice act. Sometimes if the statutory language doesn't address wellness, the rules and regulations may. However, if the rules and regulations do not address wellness either, the physical therapist must look for an advisory opinion from the physical therapist licensure board. Because the policy coverage depends on state law, the same *malpractice* policy could provide different coverage in different states. Therefore, if state laws, rules, and existing opinions still do not answer the question, physical therapists should have a discussion with their *malprac-*

*tice* carrier about the services provided so additional coverage can be added to the standard policy if needed. For example, compare and contrast the physical therapist scope of practice in the following 2 states:

Maine's Physical Therapist Practice Act (32 M.R.S.A. 45-A §3111(5)) states:

"Physical therapy" means the evaluation, treatment, and instruction of *human beings* to detect, assess, *prevent*, correct, alleviate, and limit physical disability, bodily malfunction, and pain from injury, disease, and any other bodily condition; the administration, interpretation, and evaluation of tests and measurements of bodily functions and structures for the purpose of treatment planning; the planning, administration, evaluation, and modification of treatment and instruction; and the use of physical agents and procedures, *activities* and devices for *preventive* and therapeutic purposes; and the provision of *consultative, educational, and other advisory services* for the purpose of *reducing the incidence and severity* of physical disability, bodily malfunction and pain." (Emphasis added.)

Kentucky's Physical Therapist Practice Act (KRS 327.010) states:

"Physical therapy" means the use of selected knowledge and skills in planning, organizing, and directing programs *for the care of individuals whose ability to function is impaired or threatened by disease or injury*, encompassing preventive measures, screening, tests in aid of diagnosis by a licensed doctor of medicine, osteopathy, dentistry, chiropractic, or podiatry and evaluation and invasive or noninvasive procedures with emphasis on the skeletal system, neuromuscular, and cardiopulmonary function, as it relates to physical therapy. Physical therapy includes screening or evaluations performed to determine the degree of impairment of relevant aspects such as, but not limited to, nerve and muscle function including subcutaneous bioelectrical potentials, motor development, functional capacity, and respiratory or circulatory efficiency. Physical therapy also includes physical therapy treatment performed upon referral by a licensed doctor of medicine,

osteopathy, dentistry, chiropractic, or podiatry including, but not limited to, *exercises for increasing or restoring strength, endurance, coordination and range of motion, stimuli to facilitate motor activity and learning*, instruction in activities of daily living and the use of assistive devices and the application of physical agents to relieve pain or alter physiological status. . . .”<sup>\*</sup> (Emphasis added)

At first glance, the practice act in both these states looks similar. Both include the evaluation, treatment, and prevention of physical impairments, both include the use of exercise and physical agents, and both describe the purpose of physical therapy to improve function, decrease disability, and reduce pain. However, these 2 practice acts are slightly different in that Kentucky’s language seems to limit PT to “the care of individuals whose ability to function is impaired or threatened by disease or injury” whereas Maine’s language more broadly allows “*instruction of human beings to prevent... bodily malfunction. . . and any other bodily condition.*”

Maine’s Board of Physical Therapy Examiners has not been asked whether giving general fitness instructions or leading general fitness classes for healthy people is within the scope of physical therapy practice, but the plain language of the statute would imply that it is and there are no Board opinions to the contrary. Kentucky, on the other hand, has determined that leading a fitness class is not physical therapy. In a declaratory opinion, the Kentucky State Physical Therapy Board interpreted the physical therapist scope of practice as not to include wellness, fitness, or obstetrics programs.<sup>1</sup> The Board specifically stated:

“The Board interprets the general functions of pre- and postnatal classes, general calisthenics, preventative back exercise programs, and body mechanics instruction not to be the “practice of physical therapy” as defined by

KRS 327.010(1). Such persons who are credentialed by this Board should not call themselves physical therapists or physical therapist’s assistant during those services that may be misinterpreted by the public that those services being provided are indeed physical therapy services. The physical therapist or certified physical therapist’s assistant *shall not represent the instruction as carrying out physical therapy* or providing a therapeutic service other than the general functions and goals inherent in a wellness, fitness, or obstetrics programs.”

Note that the Kentucky Board did not state that physical therapists’ *could not provide fitness programs*, they merely stated these programs were not considered “physical therapy” per se. Absent a requirement to have some other license or certification, physical therapists and assistants can provide fitness classes as long as they do not mislead Kentucky consumers into thinking the fitness class is “physical therapy.” The Board’s opinion means that fitness classes are not under the Physical Therapy Board’s jurisdiction and the physical therapist and assistant do not have to worry about complying with Physical Therapy Board’s rules in the provision of fitness services. However, it also means that a professional malpractice policy covering negligent acts in the provision of “physical therapy” will not cover the physical therapist or physical therapist assistant while leading fitness classes. This results in the Kentucky physical therapist or physical therapist assistant having to purchase additional insurance coverage for any negligent acts that might occur in relation to the provision of fitness services if their physical therapy malpractice policy does not extend to fitness services.

Therapists who provide any type of non-traditional service, including consulting and fitness/wellness, should talk their malpractice carrier and determine whether the services they provide require additional coverage. Document the conversations with the carrier and obtain a letter from the carrier if clarity is needed. When in doubt, it may make sense to just add additional coverage for

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<sup>\*</sup>The Kentucky State Board of Physical Therapy’s opinion is available at <http://pt.ky.gov/krskar/> (accessed 5/20/10).

fitness services. Typically, additional coverage is provided for no additional fee.

### Privacy issues

The physical therapist fitness instructor may not technically be considered a “covered entity” under Health Insurance Portability and Accountability Act (HIPAA)<sup>2</sup> when merely providing fitness services. However, if the physical therapist is collecting personal health information, the participant will have an expectation of privacy. Even though the PT may not be obligated to provide a notice of privacy practices and may not be held to other HIPAA requirements (depending on the circumstances), the physical therapist should protect the confidentiality of the participant’s health information just as they would a patient’s. In some circumstances, the physical therapist may be required to comply with HIPAA, so the physical therapist should obtain legal advice specific to the circumstances and the services offered. Other privacy laws, including state laws, may apply as well, so it is recommended that the physical therapist use best practices to protect the privacy of any records that contain medical or personally identifiable information.

### PAYMENT ISSUES FOR MEDICARE BENEFICIARIES: COVERED VERSUS NONCOVERED SERVICES

More and more physical therapists are developing cash practices, either by accepting only cash payment for traditional therapy services or expanding nontraditional, noncovered services (fitness, wellness and prevention). Cash practice may allow the physical therapist to keep administrative costs low and eliminate the burden of having to prove medical necessity for services the client wants and is willing to pay for. The client can sometimes obtain reimbursement for covered therapy services by submitting the bill for services to the client’s private insurance company. In this case, the physical therapist merely has to give the client a bill on a Health Care Financ-

ing Administration 1500 form. The process can work well for most private-insured clients, but if the client is a Medicare Part B beneficiary, different rules apply. The therapist needs to understand the distinction between covered and noncovered services, when an advanced beneficiary notice is needed and when it is not, and when it is appropriate to bill a patient privately versus when it is prohibited, to avoid future legal and fraud-related problems.

If the client has Medicare coverage for the services being provided, the physical therapist is strictly prohibited from billing the client privately for the service *even if the client agrees to pay privately*.<sup>3</sup> This rule applies to physical therapists who are *and those who are not* Medicare providers.<sup>4</sup> Medicare rules have historically prohibited all health care providers from billing Medicare patients privately for services that were covered benefits. Section 4507 of the Balanced Budget Act of 1997 and Section 603 from the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (amendments to Section 1802(b)(5)(B) of the Social Security Act amended Medicare laws to allow physicians and certain other providers to bill patients privately if the provider “opts-out” of Medicare. However, physical therapists were not included in the amendments that listed which providers could opt out, and therefore physical therapists cannot “opt-out” of Medicare for a 2-year period.<sup>4</sup> This means the physical therapist is obligated to bill Medicare for services that are *covered* benefits. If the physical therapist is not a Medicare provider, there *is still* an obligation to bill Medicare as a nonparticipating provider. The Medicare Benefit Policy Manual, Chapter 15, Section 40, states that

The only situation in which non-opt-out physicians or practitioners, or other suppliers, are not required to submit claims to Medicare for covered services is where a beneficiary or the beneficiary’s legal representative refuses, of his/her own free will, to authorize the submission of a bill to Medicare. However, the limits on what the physician, practitioner, or other supplier may collect from the beneficiary continue to apply to charges for the

(A) Notifier(s):

(B) Patient Name:

(C) Identification Number:

**ADVANCE BENEFICIARY NOTICE OF NONCOVERAGE (ABN)**

**NOTE:** If Medicare doesn't pay for (D) \_\_\_\_\_ below, you may have to pay.

Medicare does not pay for everything, even some care that you or your health care provider have good reason to think you need. We expect Medicare may not pay for the (D) \_\_\_\_\_ below.

(D) _____	(E) Reason Medicare May Not Pay:	(F) Estimated Cost:

**WHAT YOU NEED TO DO NOW:**

- Read this notice, so you can make an informed decision about your care.
- Ask us any questions that you may have after you finish reading.
- Choose an option below about whether to receive the (D) \_\_\_\_\_ listed above.  
**Note:** If you choose Option 1 or 2, we may help you to use any other insurance that you might have, but Medicare cannot require us to do this.

(G) OPTIONS: Check only one box. We cannot choose a box for you.
<input type="checkbox"/> <b>OPTION 1.</b> I want the (D) _____ listed above. You may ask to be paid now, but I also want Medicare billed for an official decision on payment, which is sent to me on a Medicare Summary Notice (MSN). I understand that if Medicare doesn't pay, I am responsible for payment, but I can <b>appeal to Medicare</b> by following the directions on the MSN. If Medicare does pay, you will refund any payments I made to you, less co-pays or deductibles.
<input type="checkbox"/> <b>OPTION 2.</b> I want the (D) _____ listed above, but do not bill Medicare. You may ask to be paid now as I am responsible for payment. I <b>cannot appeal if Medicare is not billed.</b>
<input type="checkbox"/> <b>OPTION 3.</b> I don't want the (D) _____ listed above. I understand with this choice I am <b>not responsible for payment, and I cannot appeal to see if Medicare would pay.</b>

(H) Additional Information:

**This notice gives our opinion, not an official Medicare decision.** If you have other questions on this notice or Medicare billing, call 1-800-MEDICARE (1-800-633-4227/TTY: 1-877-486-2048).

Signing below means that you have received and understand this notice. You also receive a copy.

(I) Signature:	(J) Date:
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According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0938-0566. The time required to complete this information collection is estimated to average 7 minutes per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate or suggestions for improving this form, please write to: CMS, 7300 Security Boulevard, Attn: PRA Reports Clearance Officer, Baltimore, Maryland 21244-1850.

Form CMS-R-131 (03/08)

Form Approved OMB No. 0938-0566

**Figure 1.** Advanced Beneficiary Notice (ABN). FORM CMS-R-131 (03/08). Available at [www.cms.hhs.gov/BNI/02-ABN.asp](http://www.cms.hhs.gov/BNI/02-ABN.asp)

covered service, notwithstanding the absence of a claim to Medicare.

Physical therapists may only bill for covered services that Medicare doesn't pay for if the physical therapist obtains the patient's signature on an Advanced Beneficiary Notice (ABN)<sup>5</sup> (See Figure 1). The ABN informs the patient in advance that Medicare is not likely to pay for the service. Patients are directed to

mark the form to indicate whether they wish to receive the service and accept the risk of self-pay for the service if Medicare does not pay.

The requirement to use an ABN *does not apply* to services that are excluded from Medicare coverage.<sup>6</sup> Fitness services are not statutorily covered services; therefore, as long as the fitness service is not skilled physical therapy in disguise, no ABN is required and the

therapist may accept cash payment. Physical therapists should be careful not to characterize skilled therapy as “fitness” or other non-therapy services just so cash payments can be collected from the client. Providers telling patients that services are not covered by Medicare so that the provider can bill the patient privately (sometimes at higher rates) when the services, in fact, covered has received the attention of the Office of the Inspector General for the Department of Health and Human Services (OIG). The OIG specifically addressed this issue in their 2010 work plan<sup>6</sup> and announced their intention to be on the lookout for this type of abuse. If a provider is caught billing a patient privately in violation of the Medicare rules, the provider may be subject to civil money penalties.<sup>7</sup> These penalties may be returned to the patient or client to provide restitution for what was paid out-of-pocket.<sup>8</sup> The ability to recoup out of pocket expenses provides an incentive for patients or clients to complain to Medicare or the OIG if they believe Medicare *may have* covered their PT services.

## **BENEFICIARY INDUCEMENTS**

The law prohibits health care providers from offering any item or service for free or less than fair market value to induce someone to purchase items or obtain services that Medicare or any other Federal payer must pay for.<sup>9</sup> The offering of such items or services, including waiving co-pays or deductibles in violation of the law, subjects the provider to civil money penalties.<sup>7</sup> The government has discretion in enforcing the law and several OIG advisory opinions have indicated that the OIG is not interested in pursuing providers who only offer promotional items of insignificant value. However, when an item or service has a fair market value of more than \$10, the OIG’s opinion changes.<sup>10</sup>

In OIG advisory opinion 06-01, a home health agency asked whether they would be subject to penalties for offering a physical therapist “safety” assessment to patients who

were about to undergo surgery for a joint replacement that was free and over the phone. The OIG stated that this service could be an inducement and thus subject to civil money penalties and could generate prohibited remuneration under the Antikickback Law because the assessment had a significant dollar value and the relationship established with the patient through the assessment was likely to induce the patient to obtain post-op physical therapy services from that same agency.<sup>11</sup> It follows, therefore, that the offering of free fitness or injury screenings could be characterized as an inducement, especially if the screening resulted in a recommendation that the individual obtain physical therapy services. The offering of free fitness memberships for a period of time to patients upon discharge may also be considered an inducement. Even 1 month has a value greater than what the OIG has considered nominal and therefore could be characterized as an inducement or a kickback to patients coming to that clinic for their rehab.

The physical therapist should charge a fair market value for any fitness or wellness screenings, memberships, or other services provided. To avoid any appearance that the fitness screening is intended to induce individuals to use their Medicare therapy benefit, physical therapists can provide names of other facilities that can provide physical therapy services when a fitness screening identifies a need for skilled therapy. There is an exception to this rule for patients or clients who have a financial need, but any discounts or waivers of the patients’ portion of their bill must be carefully structured in a policy and procedure that the therapist strictly follows.

## **RECOMMENDATIONS FOR REDUCING LIABILITY AND COMPLIANCE RISKS**

### **Screening fitness participants**

Because the physical therapist has some inherent, elevated duty to ensure the safety of the individuals, the therapist-fitness instructor should take steps to ensure that

individuals participating in their exercise programs are safe and healthy enough to do so. This may require the physical therapist to obtain a medical history, medical clearance for participation, and/or perform a basic physical screening. These screening measures help minimize the therapist-fitness instructor liability while also identifying individuals who may not be appropriate for a group fitness program or who qualify for or require traditional therapy services before beginning a fitness program. If the physical therapist does not make an effort to screen out individuals who are unsafe to participate, the therapist may find that the extra supervision required not only increases their liability risk but also takes time away from the other participants in the class. There are many resources for fitness screenings such as the basic and medical Par-Q.\* Rikli and Jones also provide sample screening forms and liability waivers (discussed below) in their text *Senior Fitness Test Manual*.<sup>12</sup> At a minimum, the screening should be designed to match the safety requirements of the fitness activity for which the individual will be participating. For example, if the class is designed to address fall risk, baseline fall risk should be obtained. Specific questions about the presence of osteoporosis and previous falls are useful in physical activity programs for older adults.

## LIABILITY WAIVERS

A liability waiver takes informed consent a step further by asking clients to acknowledge they have assumed responsibility for the risks of the activity and have waived liability against the physical therapist and/or the physical therapist's business for injuries that may result from those known or unknown risks. Liability waivers do not prevent lawsuits. The participant still has a right to expect the therapist to meet the assumed duty of care; there-

fore, the liability waiver does not protect the therapist if found negligent. But the waiver does *discourage* the client or participant from filing a frivolous lawsuit against the therapist for incidents in which the therapist had no control or the injury resulted from a foreseeable risk of the activity. The liability waiver also provides evidence that the therapist explained the risk to the client and the client assumed the risk.

The liability waiver can simultaneously inform the client that the fitness service was *not* physical therapy. The layperson client, especially the one who has never had physical therapy, will have a tendency to think that because the service was provided by a therapist, *it was physical therapy*. Many therapists think providing a disclaimer that distinguishes physical therapy from fitness is unnecessary, even excessive because the difference should be obvious to the client. This may be true if the fitness service is not co-mingled with the physical therapist's business. But if fitness participants and patients are seen in the same space at the same time or if the individual starts out as a patient and later transitions to a fitness program doing the same exercises that they did in physical therapy, the distinction may not be clear. Without a disclaimer or some evidence that the service was not physical therapy, the physical therapist may be held to physical therapist standards under the state's practice act, including requirements to perform evaluations and meet documentation standards, should the licensure board receive a complaint. The therapist could also be held to have a physical therapist duty of care as previously stated.

The Kentucky Physical Therapy Board indicated in the opinion discussed above that the therapist has a duty to inform the client when the service they are providing *is not* physical therapy. The Kentucky Board took it a step further to state that therapists should not even present themselves as physical therapists when providing nontherapy services. Although it may lessen confusion for clients if they did not know their fitness instructor was a physical therapist, it is not practical to

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\*[uwfitness.uwaterloo.ca/PDF/par-q.pdf](http://uwfitness.uwaterloo.ca/PDF/par-q.pdf) and [uwfitness.uwaterloo.ca/PDF/parmedx](http://uwfitness.uwaterloo.ca/PDF/parmedx).



<p><b>Senior Fitness Program</b></p> <p>Orthopaedic Physical Therapy Associates (OPTA) offers open gym hours in our physical therapy clinic for seniors on Mondays, Wednesdays, and Fridays from 8:30 to 11:00 AM. Participants are required to complete a fitness screening prior to participation in the program. The purpose of the screening is to make sure you meet the Conditions of Participation and to identify medical conditions that may require you to take precautions to exercise independently and safely. The screening does not substitute for a medical or physical examination by your physician or physical therapist. If you have been under the care of a physician, you should notify your physician that you are participating in this program and ask your physician if you have any limitations or precautions for exercise.</p>	
<p><b>Conditions of Participation:</b></p> <ul style="list-style-type: none"> <li>• No medical history of severe heart conditions, high blood pressure (over 160/90), or strokes.</li> <li>• Physician approval for participation if under a physician's care.</li> <li>• Good balance and no history of falls.</li> </ul> <p>At the conclusion of the screening, participants will be instructed on general stretching, strengthening, and conditioning exercises and how to use the exercise equipment. You may then come at any time during the open gym hours to exercise independently. An OPTA employee will be present and available to supervise and answer questions. This program is not intended to substitute for one-on-one personal training or physical therapy services. If you are interested in those services or your fitness screening indicates you need services beyond the scope of this independent exercise program, we will discuss this with you and inform you of your options for services, including options for referral to other facilities and providers.</p>	
<p><b>Fitness Screening Consent and Liability Waiver</b></p> <p>I, _____ hereby consent to participate in the fitness screening required prior to my participation in the Senior Fitness Program. I have read the conditions of participation and do not have any medical problems that would prohibit participation in the program.</p> <p>I understand that the fitness screening does not substitute for a medical or physical exam by my physician or physical therapist. I also understand that this exercise program is not considered physical therapy and is not covered by my health insurance or Medicare. I understand that I must be able to exercise independently to participate in the program. I also understand that if I do not meet the Conditions of Participation at any time throughout the program or the OPTA staff recommends discontinuation for any other reason, I may be dismissed from the program. I understand that there are risks inherent in participating in any exercise program. I agree to assume those risks personally and hereby release all OPTA staff and associates from any and all claims or liability for any injuries I may sustain as a result of my participation in the program.</p>	
<p>_____</p> <p>Participant's Signature</p>	<p>_____</p> <p>Reviewed and witnessed by (staff)</p>

**Figure 2.** Program and screening consent and liability waiver forms. (Example)

expect the physical therapist to conceal earned credentials, especially when the fitness services are being provided in the therapy clinic. The liability waiver, therefore, can also provide evidence that the physical therapist made reasonable efforts to comply with the Board's expectation while informing the client that the physical therapy licensure board does not have jurisdiction over the therapist providing a fitness service.

A liability waiver/disclaimer from a physical therapy clinic that offers open gym times

for seniors who want to exercise independently just as they would at a fitness club is presented in Figure 2. The form does the following things:

- Informs the participant about the program
- Requires the participant to meet conditions of participation at the onset *and* throughout the client's entire participation in the program.
- Informs the participant that the fitness screening does not substitute for a

medical or physical therapy exam and puts responsibility on the participant to inform the participant's personal physician of the client's participation in the program in case the physician has any restrictions.

- Distinguishes the supervision provided in the fitness program from one-on-one care (either personal training *or* physical therapy)
- Informs the participant that the services received *are not* physical therapy and therefore are not reimbursable under a personal insurance plan. This also helps remove the service from the jurisdiction of a physical therapist licensing board. It also provides the necessary proof that the service was not a covered benefit under Medicare, which entitles the therapist to accept cash payment.
- Informs the participant that there are risks in participating in any exercise program (the form could elaborate more on what these risks are) and waives liability claims.
- Provides proof that the fitness screening is not merely intended to induce the client to seek additional physical therapy services by stating that the physical therapist will inform the client of options for referral to other providers if physical therapy is recommended.
- The form *does not* tell the participant about what expectations the client should have of the physical therapist to protect personal health information.

This information should be added to the form if the physical therapist or clinic does not intend to protect the privacy of the fitness participant's personal health information with the same vigor that it protects its patients' protected health information under HIPAA.

The liability waiver offered here is only an example of a form that addresses the risks that have been discussed. It may not meet the needs of every fitness offering; therefore, legal counsel is recommended to draft a liability waiver form that provides the greatest protection for specific programs and services.

## SUMMARY

The rules and risks of providing fitness/wellness services are not the same as in a traditional physical therapy practice. Therapists should not venture out into the fitness/wellness world without giving thought to how they may need to change their business practices. They should analyze whether the services they offer are technically considered "physical therapy" by their state licensure board and Medicare so they can determine which laws and rules apply to all the services they offer. Therapists should also analyze their liability risks and determine whether they have adequate liability insurance that covers nontherapy services. Most importantly, therapists should not overlook the importance of obtaining legal advice specific to their circumstances and services.

## REFERENCES

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