Disclaimer

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All reference to The Just Culture reflects training received as part of Grandview Medical Center/Kettering Health Network’s arrangements with Outcome Engineering to train it leadership as facilitators for a Network-wide implementation of this program.

The content of this program reflects the authors interpretation of one use for The Just Culture principles.
In every human enterprise there will be times when we are asked to judge the behavior of others. How we judge, and how we allocate responsibility between the individual and the system in which they operate will ultimately dictate how well that individual and that system will perform across a variety of values—from safety to reputation, from customer satisfaction to fiscal responsibility.

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As a Physician Educator, these values are important to you---because of how you contribute to them and because of how they define your decision making.
Physician Educator Professional Duties
Three Categories

• Duty to produce an outcome
• Duty to follow a procedural rule
• Duty to avoid causing unjustifiable risk or harm
Manageable Behaviors

1. Error
2. Drift
3. Recklessness
Part 1

Increasing Awareness of Liability
Participation

What do you understand to be your liability as a program director for

- your own personal actions related to program operations?
- the actions of your faculty?
- the actions of your trainees?
Supervision

What do you believe represents proper supervision of

• your faculty?
• your residents?
Performance

What areas/aspects of your program represent the greatest risk for legal action by a trainee who fails to perform successfully after graduation?
Privacy

What defines the conditions under which Director’s and Operator’s (D&O) insurance will cover a DME, program director, and/or faculty?

What actions might cause a DME, program director or faculty member to be held personally responsible in a legal action brought forth by a trainee (outside of the D&O coverage)?
Part 2

Dealing with specific situations
Scenario 1

An internal medicine resident completes a vascular access procedure on one of your faculty’s patients.

A chest x-ray completed after the procedure demonstrates the resident left a guide wire in the patient.
Scenario 1

What information do you need to determine the answer to the following questions?

- Can you be held responsible for this act as program director?
- Can you be held responsible for this act as the attending physician?
Examples of information needed

• Were the instructions/directions clear?
• Was the trainee properly instructed in how to do the procedure?
• How was the trainee ‘credentialed’ to do the procedure?
• Was the trainee properly supervised for the level of ‘credentialing’ assigned?
• How much involvement was there by the attending physician?
• Is the attending a private practice physician or an employed physician?
Scenario 2

A woman presents to the emergency department with abdominal pain. The emergency medicine resident contacts the attending surgeon who is on-call from home. The attending surgeon has not had previous contact with the patient. The general surgery resident evaluates the patient and admits her to the med/surg unit. The general surgery resident notifies the attending surgeon several hours later when the patient begins to experience a significant worsening of her pain. The attending surgeon arrives on the unit 25 minutes later. Upon arrival the patient is taken immediately to the OR. An exploratory laparotomy reveals extensive evidence of bowel ischemia.
Scenario 2

What information do you need to determine the answer to the following question?

- Is the surgeon responsible for any injury because of negligent supervision?
Examples of information needed

• Was there a patient-physician relationship?
• What is the department policy on trainee supervision?
  • Is the physician required to be immediately available to supervise?
• Did the physician or trainee violate the department supervision policy?
Scenario 3

A recent graduate from your training program is having problems with his outcomes in private practice. He has been counseled by the institution’s CMO, has been reviewed by his department, and now is required to arrange for observation/assistance with his cases. A recommendation was made that he might consider additional training in order to refine his skills.
Scenario 3

You receive notification he intends to take legal action against your training program for failing to adequately prepare him for practice.

What information do you need to answer the following questions?

- Are you liable as program director for the dyscompetence of this physician/program graduate?
- Is your faculty liable for the dyscompetence of this physician/program graduate?
- Who is responsible for your or your faculty’s defense?
Examples of information needed

- What were the performance evaluations of this trainee and was the trainee aware of any issues?
- Were the performance evaluations done in a meaningful way?
- Did this resident attend learning opportunities?
- Were there learning opportunities available?
- Did the learning opportunities match the stated curriculum of the program?
- Did the faculty or the trainees lead these opportunities?
Examples of information needed

• Was the trainee ever on remediation?
• Was the remediation successful?
• What criteria were used to advance the trainee?
• Who was involved with the decision to advance?
• How did he perform on inservice examinations and other forms of assessment?
Scenario 4

A trainee recently brought legal action against their contracting hospital and program director alleging the program failed to create a training environment suitable for his success (including appropriate feedback and supervision) and denied him due process prior to dismissal. The hospital defended the program director involved, although it ultimately lost the case because of a failure to follow established process.
Scenario 4

A faculty member is subsequently overheard commenting about the dismissed trainee. An individual overhearing the conversation shares the comments made by the faculty member with the former trainee. The dismissed trainee brings legal action against the faculty member for violating their privacy.
Scenario 4

What information do you need to answer the following questions?

• Who is responsible for the faculty member’s defense?
• How will it be determined if the hospital’s D&O insurance will defend the faculty member?
• What is the basis of the trainee’s legal action against the faculty member?
• Does FERPA apply in the case?
Examples of Needed Information

• What was the purpose of the conversation?
  • Was the faculty member’s conversation taking place as part of a program debriefing on the dismissal?
  • Was there intent to harm the dismissed trainee?
  • Is the overheard information accurate or false?

• Was the faculty member’s conversation related to his or her teaching duties?
Examples of Needed Information

• Was there an effort to protect the dismissed trainee during the conversation?
• What is FERPA?
• What constitutes defamation?
• What constitutes a violation of privacy?
Part 3

Professional Liability in GME
Professional Liability

- Vicarious liability
- Failure to supervise
- Educational malpractice/legal right
- Defamation/Privacy Law
Vicarious Liability

Indirect legal responsibility for injury

Historically expressed through the legal doctrine of “captain of the ship”

- Minimal influence outside of the operating room
- Largely rejected by today’s courts
Vicarious Liability

The potential still exists for vicarious liability through the actions of resident physicians and others

- The nature and extent of the attending physician’s control over the practice environment or situation is important
- Claims are more likely to be successful against private practice physicians than against employed physicians

Absent negligent instructions or direct involvement in the decision making or procedure (assuming supervision is appropriate), an attending physician may not be held vicariously liable (Shull v Schwartz)
Vicarious Liability

Key Points

1. Supervision was appropriate
2. There was no direct involvement by the physician in the point of care decision making or procedure
3. Negligence was absent from the instructions
Failure to Supervise

This is a form of direct liability

- It holds an attending physician liable for negligent oversight of care provided by resident physicians

Supervision is a duty and an inherent part of the teaching (attending) physician’s job

- Precise contours are not yet well-defined in case-law, partly because of evolving expectations of what defines proper supervision
  - Increasing public demand will likely impact this in the future
Failure to Supervise

“On-call” is an area of particular uncertainty and fertile ground for use as a litigation strategy

- “On-call” definitions of the patient-physician relationships are changing
  - An “on-call” agreement may be sufficient to establish a relationship and a duty to supervise if residents are involved with patient care (*Lownsbury v VanBuren*)

To date passive supervision from home has not risen to the level of negligence, but recent decisions suggest the courts are willing to consider it

Failure to Supervise

Key Points

1. Failure to follow established resident supervision policy/expectations
   • On-call status becomes important when it establishes a doctor-patient relationship and a resident is involved in the care of the patient
Educational Malpractice

Negligent breach of a duty to educate

- Failure of an educating body to meet its responsibility to educate its students
  - This is represented by functional illiteracy among high school graduates
  - This is represented by dyscompetency among physicians in practice
    - 6-12% of practicing physicians may be ‘challenged’ in one or more of the competency domains
Educational Malpractice

Educational malpractice cases have been routinely dismissed by the American courts

- There are challenges to this on the horizon
Educational Malpractice

Favorable conditions to eventually support a tort claim of educational malpractice exist for several reasons:

1. Formalization of the teaching profession, including self-regulation
   - Such as basic standards, program requirements, milestones, etc.

2. Ascendancy of accountability
   - IOM expectations

3. The current fiscal climate requiring sponsoring organizations ‘to do more with less’

4. Willingness of the courts to expand the standards of legal liability to which educators are held
Educational Malpractice

The issue of causation

- Historically, proving a causal link between an educator’s conduct and a student’s injury (failure to learn) has been difficult
  - The student may have failed to learn for reasons not related to the educator’s efforts
  - This is unlike medical malpractice, where the client bears little if any responsibility for the outcome of professional services rendered
The issue of *legal rights theory* offers an alternative basis for recovery of loss.

- It is based upon the *legal* right to an education.

  A person has a legal right if the interests of that person are a sufficient reason for holding another person to be under duty.
Education Liability Risk

1. Your trainees sign a contract to receive an education

2. Your standards/requirements mandate how that education must be delivered

3. Teaching physicians receive services from the trainees under contract
Education Liability Risk

1. Your trainees sign a contract to receive an education
   • They are required to be active participants
   • Standard/requirements mandate they attend a certain number of academic activities

2. Your standards/requirements mandate how that education must be delivered
   • The absence of a curriculum or the failure to follow a printed curriculum likely increases your risk

3. Teaching physicians receive services from the trainees under contract
   • Teaching physicians can be construed as having a duty to provide for the education of trainees under the same contract
Educational Liability Risk

There are three main areas of concern:

1. The classroom
2. Patient care areas
   - Wards/rounds
   - Operating room/surgery
   - Emergency room
   - Training clinics
3. “On-call” activities
You could be at risk if you have graduates who:

• Feel they are dyscompetent and/or ill-prepared for practice
• Have difficulty finding jobs
• Have difficulty acquiring letters of recommendation from their trainers
• Have difficulty passing their board examinations
Defamation/Privacy Law

Defamation

• The act of making untrue statements about another which damages his/her reputation.
• Communication of a statement that causes or has the potential to cause harm to an individual, organization, or other entity
  • Must generally be false
  • Must be made to someone other than the person defamed

Privacy law

• Public disclosure of private facts
  • Revealing information that is not of public concern

Defamation/Privacy Law

FERPA

• Family Educational Rights and Privacy Act
  • The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records.
  • The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

• FERPA is not applicable to GME/OGME as it is not under the jurisdiction of the USDE.
• FERPA is applicable to medical students.

Summary

Terms and concepts to remember

- Duty to produce an outcome
- Duty to follow a procedural rule
- Duty to avoid causing unjustifiable risk or harm
- Error
- Drift
- Recklessness
- Vicarious liability
- Failure to supervise
- Educational malpractice
- Defamation/Privacy Law
Summary

Areas of concern

• The classroom delivery of formal education
• The delivery of education within the context of active patient care
• The proper supervision of trainees, especially while “on-call”
• The hallway, elevator, and dining room conversation

• Think about your risk if there is a negligent breach of duty to educate as prescribed by your standards

• Begin to make program changes that will limit risk and simultaneously enhance the quality of the educational experience
References


