Legal Issues in Clinical Education

Objectives
Present essential basic legal concepts regarding your role as a clinical faculty member and reduction of risks for all parties:

- To reduce risk by knowing how to perform the faculty role
- To reduce risk through familiarity with student policies and practices including when to make exceptions
- To reduce risk by understanding FERPA
- To reduce risk by understanding HIPAA
- To reduce risk through understanding of the allocation and management of risks

Faculty Status: Role and Risk; Risk and Role
- Teaching offers personal and professional satisfaction.

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<th>To teach is to learn twice.</th>
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<td>Joseph Joubert (1754-1824)</td>
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- Because of its value in our society, the law offers some protections to those who engage in teaching.
- Doctrine of Academic Abstention
  - Courts defer to educators who make sound professional judgments absent arbitrariness or unfairness. This is an important acknowledgement of the expertise of clinical educators and it’s important to exercise this judgment and not to be paralyzed by fear of litigation.
- Sovereign Immunity — Tort Claims KS/State Legal Defense Fund MO
  - One remnant of the origin of our legal system rooted in Great Britain is the continuing principle that the King can do no wrong and one cannot sue the sovereign without the permission of the sovereign. Both Kansas and Missouri have significant protection for state entities, including public universities who are fulfilling their obligations as a state entity. There are limits to this protection as well.

Understanding Risks: a Parade of Horribles…
- The job of legal counsel is to imagine all of the ways things can go wrong and try to prevent them or mitigate the potential loss.
  - Balancing Professional Expectations, Patient Welfare and Instructional Needs
    - We all understand the importance of balancing our time and energy. In the role of clinical faculty one has to balance each professional duty implicated above. The saving grace is that the duties are compatible and congruent.
Tort Law
- Torts are civil wrongs, rather than criminal wrongs, recognized by law as grounds for a lawsuit. These wrongs result in an injury or harm. The injured person may sue to be made whole. Among the types of damages the injured party may recover are: loss of earnings capacity, pain, and suffering, reasonable medical expenses, and damage to reputation. Torts fall into three general categories: intentional, negligent, and strict liability torts.
  - Duty and Breach \{Present Causation and Damages\} = Liability
    - If a duty can be established and an injured person who has suffered damages can prove that the duty was breached, and that the breach caused the injured person loss or damage then liability may be established.
  - Duty and Standard of Care
    - One common way of determining whether there was a duty is to introduce evidence of the standard of care among professionals in the area. Would a reasonably prudent charge nurse follow up on an irregular symptom when the patient has a particular diagnosis? The professional who fails to live up to that standard of care risks liability if damages result.

Frequently Asked Questions
- Am I responsible for what the student does?
- When I sign the chart where the student has entered the data, am I responsible?
- Do I need to have insurance?

Public institutions have Constitutional Duties (and private institutions often contract to protect these values).

The secret of education is respecting the pupil.
Ralph Waldo Emerson

Due Process
- The Fourteenth Amendment to the U.S. Constitution protects individual citizens from the exercise of government power (including public schools) by requiring due process prior to the taking of life, liberty, or property. Property includes more than real estate. For example, a contract of employment is a property interest. Liberty includes one’s reputation and ability to seek other educational opportunities or employment.
- Is there a property interest or a contractual obligation?
  - If there is no property interest, no process is due before deprivation.
• Is this an academic or a conduct based dismissal?
  ○ A dismissal for academic reasons, such as the student’s inability to establish rapport with patients, or interpret medication circulars, or recall verbal directions, does not require as much process as dismissal for misconduct. It is presumed that faculty has the professional expertise to assess a student who cannot successfully complete the program. Inability to meet curriculum expectations does not reflect on the student. The courts defer to the professional judgment of faculty. Nevertheless, providing notice of deficiencies will stand the institution/faculty in good stead.
  ○ Dismissal for misconduct requires procedures to assure that the student committed a violation and that the action taken was fair. Unlike an academic dismissal, courts are in the business of judging when procedures have been followed.

• When there is a property interest or contractual obligation; what process is due?
  ○ The greater the value of the property and the more certain that one possesses it, the more process is due. Terminating the employment of a tenured professor requires a long involved procedure. Terminating an adjunct requires minimal procedure. A student accidentally admitted has a lesser protected interest than one who is one semester away from graduation.

  □ Procedural Due Process Basics
  • Notice
    ○ Before deprivation of life, liberty or property one must be given notice of the charges or deficiencies.
  • An opportunity to tell your side of the story and to have the decision reviewed at a meaningful time and in a meaningful manner.

  □ Substantive Due Process
  • Whether the decision was fundamentally fair even though the procedure was followed. Ask whether there were factors that influenced the outcome that should not have such as bias or the consideration of irrelevant factors. Was the student who failed clinical the one who refused to donate eggs to the stem cell researcher?

  □ Equal Protection of the Law
  • Under the Fourteenth Amendment of the U.S. Constitution all persons are entitled to equal protection of the law. It does not require that all persons be treated equally, but that persons who are not treated equally under the laws/regulations/procedures are treated differently for a valid reason that is not prohibited by discrimination law. Similarly situated, women with hearing disabilities must be treated the same.
  ○ All persons are protected from discrimination on the basis of race, sex, age, disability, color, national origin, religion, veteran’s status, and sometimes marital or family status or sexual orientation.
  ○ Harassment is a form of discrimination.
• The U.S. Supreme Court recently held that individuals who complain of harassment and suffer negative employment actions (even actions less significant than loss of salary or termination) can prevail in a lawsuit alleging retaliation. If you have any information or indication that a student has been harassed (because of the student’s gender, race, religion, disability or other protected status) by an employee of the clinical facility, the institution or another student, then this must be reported to the institutional representative for investigation. Failure to address these possible complaints may create huge liabilities for all parties. In addition, our students are entitled to instruction in how to work with others who are different from themselves.

Student Issues: Policies, Practices, and Exceptional Circumstances Policies
- Become familiar with the policies affecting the students and your responsibilities (know where to find them when needed).
- Family Educational Rights and Privacy Act of 1974; also known as FERPA and the Buckley Amendment found at 20 USC § 1232g, 34 CFR § 99.1 et seq.
  • Regulates disclosure of student records held by schools
  • Offers students the ability to review and challenge records; prevents schools from disclosing student educational records without the student’s consent
  • Covers records regularly maintained by a school that contain identifiable information about a student(s) in any form
  • Covered records include class schedules, grades, evaluations, financial or discipline records, photographs, and residence hall records
  • School records that are not protected by FERPA include:
    ○ Notes by faculty/administrators kept and not shared
    ○ Campus Police or Security records for law enforcement purposes
    ○ Employment records if student is also an employee
    ○ Medical and mental health treatment records
    ○ Records kept after student is no longer enrolled, e.g. alumni records
    ○ Other restrictions may apply to these records.
- Access can be granted to parents when student is tax dependent AND the school policy allows this (in general parents who pay the bills expect, but are not entitled to, access).
- Access can be granted when the student consents in writing:
  ○ Consent must identify the record
  ○ Provide the purpose for the disclosure
  ○ Identify the persons to be granted access
  ○ Have the student’s signature and the date
- Disclosure is appropriate in response to a valid subpoena.
- Disclosure to student must redact information identifying another student.
• Disclosure without consent is allowed in specific circumstances. Selected examples include:
  ○ To the student
  ○ To a school official with a legitimate educational interest
  ○ To other schools where the student wishes to enroll
  ○ To persons in an emergency to protect the health or safety of the student or other persons
  ○ To a parent of a student under 21 where the student has violated laws or rules related to the possession of alcohol or controlled substances, among others
• Disclosure is also permissible when information has been defined as “directory” by the school.
• Typical directory information includes name, address, class status, honors, and awards, weight and height if an athlete, major, telephone number, and e-mail address, degrees received; however students can annually request that their directory information not be shared and the school must honor that barring receipt of a subpoena. This is one reason release should be by school officials.

- Evaluation and Grading
  • Due process and developmental instruction favor frequent evaluation and feedback.
  • A failing grade should not be a surprise to the student. --Siminoe

Learning is not compulsory... neither is survival.  
W. Edwards Deming

- Syllabi
  • Evidence of our contract with our students
- Academic Assessment Issues:
  • Measurement of performance
  • Ability to perform
- Misconduct
  • Academic integrity (cheating)
  • Ethics

Practices

Assumptions are the termites of relationships.  
Henry Winkler, actor

- Be familiar with customs, expectations, and actual practices regarding confidentiality, fair (or due process) procedures, and professional and academic integrity.
Exceptional Circumstances

Ignorance more frequently begets confidence than does knowledge.
Charles Darwin, naturalist and author (1809-1882)

- Americans with Disabilities Act
  - In the area of disability law we are required to think in a manner opposite of our usual means of avoiding discrimination. Normally, we cannot take the different status into account in interacting with a person to avoid discrimination. When we are working in the area of persons with disabilities, we must take their abilities and limitations into account to try to place them on a level playing field.
    - Accommodations are intended to provide equal opportunity (but not guaranteed outcomes) to otherwise qualified students who meet the technical standards. Institutions may articulate essential skills and requirements for admission. The national Council of State Boards of Nursing no longer supports a list of essential skills or functional abilities as a requirement of admission. Individual state boards of nursing will determine whether essential skills/abilities will be included in their minimum standards for approved nursing programs.
    - Faculty members are not to make accommodation decisions without consultation.
    - The schools have individuals who are trained to evaluate documentation of disabilities and identify appropriate aids and accommodations to assist students. These accessibility coordinators often have to interact with faculty to make the best decisions, but the institution has charged the accessibility administrator with the decision based upon his or her expertise, rather than the faculty member.
    - Accommodations cannot fundamentally alter the nature of the program, lower standards or cause an undue burden.
  - The courts have identified limits to the types of accommodations and modifications that can be made in an academic program.

- Health Insurance Portability and Accountability Act (HIPAA)
  - Protects private health information from release without consent and provides one’s ability to challenge one’s records for accuracy.
  - Sets standard of care: each covered entity that electronically transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards to ensure integrity, confidentiality, and to protect against threats to security and unauthorized use or disclosure.
  - There are civil and criminal penalties for violations. Criminal penalties are imposed via 42 USC § 1320d-6 Knowing Disclosure: one year in prison or a fine of $50,000; Disclosure under false pretenses: five years
or $100,000; Disclosure with malice, for commercial advantage or personal gain: ten years or $250,000. Civil penalties are $100 for each transaction to an annual limit of $25,000.

- Students should not share PHI with other students or faculty not engaged in treatment. There is no HIPAA exception for educational purposes.

**Allocation and Reduction of Risks**

- The educational institutions and clinical facilities negotiate a written agreement intended to allocate the risks of various behaviors. Both parties are trying to reduce the risks they assume and both are trying not to accept the risks of student behaviors.

**Affiliation Agreements: Define Duty and Allocate Risk**

- Specify which party is responsible for activities and who makes decisions.
  - Role distinction (by duty and expertise)
  - Indemnification language
  - Realistic commitments, i.e. training and criminal clearance versus promise to perform
  - Responsibility for student conduct

- Insurance
  - Different types of insurance include professional liability, general liability, and medical/health.

- Manage risk through:
  - Using good communication
  - Maintaining appropriate documentation
  - Protecting sovereign immunity
  - Protecting academic abstention by exercising professional judgment
  - Understanding the tort formula
    - Don’t breach a duty
    - Follow the standard of care
  - Understanding the appropriate orchestration of roles
  - Maintaining applicable insurance

**Conclusions and Your Questions**

Teaching people skills without giving them a vision for a better future a vision based on common values — is only training.  

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