Material is for informational purposes only and not for the purpose of providing legal advice. If you need legal guidance in a particular matter, you should contact your attorney. Each scenario is independent and stands on its own.
Preparing for the Legal Aspects of a Challenging Resident

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Professionalism As A Core Value of GME

• Accreditation Council for Graduate Medical Education has long focused on the critical importance of professionalism in graduate medical education.

• Professionalism is 1 of the 6 core competencies.

• GME obligation is to prepare young doctors for the safe, independent practice of medicine on completion of residency or fellowship.

• Professionalism encompasses:
  – excellence,
  – humanism,
  – Accountability; and
  – altruism.
Professional Responsibilities

Include commitments to the following:
 • Professional competence;
 • Honesty with patients;
 • Patient confidentiality;
 • Maintaining appropriate relationships with patients;
 • Improving quality of care;
 • Improving access to care;
 • Just distribution of finite resources;
 • Scientific knowledge;
 • Maintaining trust by managing conflicts of interest;
 • Professional responsibilities.
Standard:

- Professionalism is indispensable qualification to being a qualified physician
Professional Behaviors

• Recognize: it is not possible to list all accounts and behaviors which constitute unprofessional conduct.

• Some common types of unprofessional (and unacceptable) behaviors; cheating on scholarly activities, plagiarism, falsification of data on personnel records, medical records or other official documents, fraud, forgery, altering medical records without approval, sexual harassment, and inappropriate relationships between administrators, faculty and other supervisory personnel and a resident, alcohol or substance abuse, etc.
Unprofessional/Challenging Qualities Can Be Nebulous

• **United States Supreme Court** Justice **Potter Stewart** in 1964 case *Jacobellis v. Ohio*.¹

• "I know it when I see it" used by him to categorize an observable fact or event, where the category is subjective or lacks clearly defined parameters.

• Standard is "realistic and gallant" and an example of candor.
Professional/Challenging Qualities Can Be Nebulous

• Inability to fully quantify or describe issue does not mean individual is professional nor does it mean that concerns are not properly the subject of correction.

• Consider overall impression developed over time based on separate interactions or events.
Challenging Individuals

• Possible Features:
  – loud, overbearing, uncooperative, whiner, complainer, know-it-all, passive-aggressive, moody, CAVE (citizen against virtually everything); dismissive; arrogant; gruff; insensitive; vulgar
Challenging Individuals

• Exhausting to you.
  – If they are exhausting to you (person of authority), think about how others may perceive them
  – Extended exposure tends to suck the life, fun or productivity out of the environment.

• Do they erode candor, free discussion, morale or productivity
Identify the Challenging Individual Early:

• Granting entrance to the wrong person - One of the most costly mistakes a program can make.

• Per one estimate (in employment setting) a poor hiring decision will cost an employer $75,000 (on avg.) in direct costs for the mis-hired individual and reduce everyone’s productivity by at least 25%.
Ways to Identify Challenging Individuals

Pay Attention to Red Flags
  a. What does individual’s record tell you
  b. What does individual tell you – don’t ignore statements by Individual indicating weaknesses
  c. Unreasonable demands/expectations early in process

Check and Pay Attention to References
  a. Listen to what they say;
  b. Listen to what they do not say.

Check Social Media searches (Google and Instagram)
Standard for Discharging Residents

Institution is Extended Considerable Latitude

- Need to be fair and reasonable, but deference is paid to academic decision
- Substitution of 3rd party opinion for that of training institution is disfavored
Sec. 160.010. IMMUNITY FROM CIVIL LIABILITY. (a) The following are immune from civil liability:

(1) a person who, in good faith, reports or furnishes information to a medical peer review committee or the board;

(2) a member, employee, or agent of the board, a medical peer review committee, or a medical organization committee, or a medical organization district or local intervenor, who takes an action or makes a recommendation within the scope of the functions of the board, committee, or intervenor program, if that member, employee, agent, or intervenor acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to that person; and

(3) a member or employee of the board or any person who assists the board in carrying out its duties or functions provided by law.

(b) A cause of action does not accrue against a member, agent, or employee of a medical peer review committee or against a health care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of medical peer review.

(c) A person, medical peer review committee, or health care entity that, without malice, participates in medical peer review or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from that act.

(d) A person or health care entity required to report to the board may not be found liable in a civil action for failure to report to the board unless the failure was committed knowingly or wilfully, except that the appropriate state licensing body may take action against a licensed person or entity for not reporting as required under this subtitle.

(e) A member of an expert panel under Section 154.056(e) and a person serving as a consultant to the board are immune from suit and judgment and may not be subjected to a suit for damages for any investigation, report, recommendation, statement, evaluation, finding, or other action taken without fraud or malice in the course of performing the person's duties in evaluating a medical competency case. The attorney general shall represent a member of an expert panel or consultant in any suit resulting from a duty provided by the person in good faith to the board.
Legal Obligation of Candor

• Maintain sight of obligation GME Programs and PDs to safeguard the public
• With latitude comes responsibility as gatekeeper
Legal Standards

• In the context of a graduate education setting, a certain degree of deference is owed to the judgment of an academic institution.

Legal Standard

• Courts are particularly ill-equipped to evaluate academic performance, for purposes of a disability discrimination claim against an academic institution; thus, considerable judicial deference is appropriate because experienced educational administrators and professionals are better able to determine an applicant's qualifications and whether he or she would meet reasonable standards for academic and professional achievement established by a university or a non-legal profession. Americans with Disabilities Act of 1990, § 3(4)(D), 42 U.S.C.A. § 12102(4)(D).

Form L

- **UNUSUAL CIRCUMSTANCES:**
  - Please attach an explanation for any “yes” response.
  - 1. Did this individual ever take a leave of absence or break from training? ☐ Yes ☐ No
  - 2. Did this individual resign from training? ☐ Yes ☐ No
  - 3. Were any limitations or special requirements placed upon this individual for professionalism or behavioral issues? ☐ Yes ☐ No
  - 4. Did this individual ever receive a written warning or documented counseling about his/her behavior? ☐ Yes ☐ No
  - 5. Was this individual ever placed on probation for any reason? ☐ Yes ☐ No
  - 6. Is this individual currently under investigation? ☐ Yes ☐ No
  - 7. Were this individual’s privileges or duties ever reduced, suspended, or revoked? ☐ Yes ☐ No
  - 8. Did this individual experience delayed promotion or delayed advancement to the next level? ☐ Yes ☐ No
  - 9. Was this individual informed his/her contract would not be renewed? ☐ Yes ☐ No
  - 10. Was this individual suspended, terminated, or dismissed from training? ☐ Yes ☐ No
• **VERIFICATION OF PROFESSIONAL HISTORY**

• 1. This evaluation is based on ☐ Personal Knowledge ☐ Review of Credential File
• 2. How long have you known the applicant? Years________ Months ________
• 3. Is the applicant related to you? ☐ Yes ☐ No
• 4. Do you know the applicant well? ☐ Yes ☐ No
• 5. Has your acquaintance with the applicant continued until recent date? ☐ Yes ☐ No
• 6. Do you consider the applicant: (a) Reliable? ☐ Yes ☐ No (b) Ethical? ☐ Yes ☐ No (c) Of good character? ☐ Yes ☐ No

7. Please rate the applicant:
• Excellent  Good  Average  Poor

• (a) Professional ability

• (b) Attention to duties

• (c) Breadth of education

• (d) Interpersonal skills
Documentation
Generally

Effective and thoughtful documentation of resident issues protects both institution and the resident by ensuring mutual understanding of:

– Institutional expectations
– Problematic behavior
– Consequences
– Corrective action plan
• Need not take any particular form when for challenging/remedial behavior
• Need not be lengthy
• Needs to be accurate – if details are wrong, then indication of lack of reliability
Key questions

• What is the threshold for documenting a behavior?

• What is the duration of the documentation?
Generally

• There must be a narrative of what occurred
• Documentation is a critical component of the narrative
• Narrative of events must show employer was:
  – Reasonable; and
  – More than fair
• Documentation must support the narrative
TIPS FOR DOCUMENTING CHALLENGING OR UNPROFESSIONAL BEHAVIOR
Do: Describe Expectations

• Clarity in what is expected

• Be clear about standards individual is not meeting, even if not specifically quantifiable, and expressly state how performance will be measured.
Do Say:

• Behavior was unprofessional – individual failed to conduct herself in a manner expected of the profession
• Individual had a hostile attitude
• Individual was uncooperative with supervisor and/or coworkers

Individual is consistently difficult to get along with
Do:

• State: “Individual is expected to refrain from additional behavior which results in complaints”
• Say (and record) that discussion was held with individual
• Give individual opportunity to acknowledge that s/he was made aware of issue
Things to Avoid in Documentation

• **Excuses:**
  Don’t include excuses for why the individual is engaging in the problem behavior or conduct.
  Heavy workload, stress, problems at home do not excuse sustained poor workplace behavior.

• **Diagnoses:**
  Don’t diagnose individual whose deficiencies clearly are or appear to be related to a medical or mental health condition.
Examples:

• Do Not Say: “Mood swings”
• Instead Say “You can be amiable and cooperative, but on [date] and [date] you suddenly argued with leaders and co-workers and loudly/angrily refused to complete tasks”

• Do Not Say: “Delusional”
• Instead Say: “individual accuses co-workers of targeting or conspiring against him and investigations of those accusations have consistently shown them to be false.”
Examples

• Do Not Say: “Addict”
• Do Say: Individual has recurring absences on Monday mornings and smells of alcohol in the workplace;
• Do Not Say: “Bipolar”
• Instead Say: Individual is inconsistent – highly energetic and works frenetically some of the time, but also frequently lacks engagement, will not communicate, and does not get tasks completed.
Examples

• Do Not Say: “Individual appears to have ADHD”
• Do Say: Individual becomes distracted and fails to complete required duties as expected.
  OR
On multiple occasions, individual has not followed instructions even after clear and detailed explanations were provided.
  OR
Despite additional coaching and support, Individual has not learned new processes and has not demonstrated required competencies within expected time frame.
Examples

• Do not say, individual must take seek prescription for Adderall and take medication as prescribed, which will be monitored.

• Can say, individual must be evaluated for causes of seeming extreme and ongoing lack of focus

• AS PD – YOU ARE NOT A TREATING PHYSICIAN
Examples:

• Do Not Say: “Unethical”
• Instead Say:
  Individual's behavior constituted a dramatic deviation from established rules
    OR
  Individual was aware of a clinical error but did not report it
    OR
  Individual took credit for the work without disclosing that he had actually left it for team members on the next shift to complete
• Don’t Say: “Individual bullied colleagues”
• Instead Say: “Spoke loudly;” “Yelled at;” “was mean;” “intimidating;” “aggressive”
Avoid Legal Conclusions (cont’d.)

• Do Not Say: “Individual’s actions were illegal”
• Instead Say:

• Do Not Say: Individual sexually harassed co-worker
• Instead Say: Individual repeatedly sent sexually explicit text messages (generally should quote language), made repeated requests that the two “hook up,” and recipient found this offensive.
Do Not Delay: Pull the Proverbial Trigger

• Where problem has gone on for a long time, don’t further delay write up because want to give Individual chance to fix problem.

• Proceed with documentation so individual has fair opportunity to know of issue and take corrective action.

• Communicating issue is a hallmark of a fairness.

• Being nice/avoiding conflict is not necessarily fair or nice
Do Not Delay: Pull the Proverbial Trigger (cont’d)

• Proceeding with write up provides *clarity*.
• Helps avoid circumstance in which individual makes complaint *because* s/he anticipates corrective action.
• If behavior is subsequently corrected or does not occur, then this can be noted.
Standard for Discharging Residents

Institution is Extended Considerable Latitude

- Need to be fair and reasonable, but deference is paid to academic decision
Common Mistakes
cont’d

What is Fair & Reasonable:

a. Notice/Warning: Did the individual know what was expected?

b. Did the Individual understand the consequences of non-compliance? Did they know that the conduct could result in separation.

c. When the Individual was failing to meet expectations (poor performer), were they given the opportunity (where appropriate) to improve. If you get to the point of discharging the individual should not be surprised when the time comes.
Standard for Discharging Residents

1. Not Knowing the Unwritten Standard by Which An Employment Termination May be Measured:

- Was the Individual treated *more* than fairly? (firing is perceived as a workplace death penalty)
- This is tempered by deference afforded to institutions of higher learning
3. Waiting too long to discharge individual

4. Not having proper documentation
   a. Need documentation of precipitating event;
   b. If ongoing /recurring issue, that must be reflected in documentation (e.g. performance evaluations).
Discussion and Questions
Thank you!