LEGAL ISSUES IN RESIDENCY TRAINING:
TOP TRENDS IN RECENT YEARS

Graduate Medical Education Program
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Today’s Topics

➢ Lawful interviews
➢ Disability accommodation and medical leaves
➢ Resident evaluation
➢ References
Careless Interviewing Can Lead to

➢ Discrimination claims
➢ Negligent hiring
Protected Characteristics

➢ Age
➢ Gender/Gender Identity
➢ Citizenship or citizenship status
➢ Race
➢ Disability (mental/physical)
➢ Marital status

➢ National origin
➢ Political beliefs
➢ Pregnancy
➢ Religion
➢ Sexual orientation
➢ Veteran status
Reducing Liability in the Hiring Process

Questions should not elicit information that can’t be considered in the hiring decision:

• Marital status, children, or family plans
• Ethnicity
• Religion or politics
• Age
• Disability
JOB-RELATED INTERVIEWING:
Define the skills and behaviors required for success in the job

Skills:
➢ Required skills
➢ Academic qualifications
➢ Relevant experience

Behaviors:
➢ Work environment
➢ Work team dynamics
➢ Work expectations

Outline your questions before you begin. Use a script. Keep your notes for a minimum of three years.
Exercise Due Diligence to Avoid Negligent Hiring Claims

➢ Look for red flags and follow-up:
  – Attendance at more than one medical school
  – Participation in more than one training program
  – Lack of references from particular school / program

➢ Ask about any prior discipline / probation / terminations
Disability Accommodation

➢ Must make modifications to the work environment or to the way the work is performed for qualified individuals with disabilities.
➢ Need not eliminate essential functions.
➢ Legally obligated to engage in the “interactive process.”
What Are You Expected to Do?

➢ Don’t ignore comments by residents about needing help, feeling overwhelmed, depressed, etc.
➢ Get GME Office involved promptly
➢ Document that assistance has been offered
➢ Tell only those who need to know about the accommodation
Lessons Learned

➢ Case involving fellow who alleged he was wrongfully terminated based on his disability

➢ Alleged he had disclosed that he had depression and anxiety and needed assistance when he hadn’t.

➢ In fact, when he voiced concerns, program director had recommended a program for smoking cessation and also referred him to OGME for support.

➢ Matter went through HRC, DFEH and (almost) arbitration

➢ *Lesson Learned* = no probation letter and no emails confirming offers of support
Medical Leaves

- Federal and state laws entitle eligible employees with up to 12 weeks of unpaid leave to address
  - Employee’s own serious health condition
  - Birth, adoption, foster care placement of a child
  - Serious health condition of immediate family member

- Additional leave for pregnancy disabilities

- Leave is protected
  - Job cannot be filled during leave
  - Employee cannot be penalized for taking leave
  - Training may be extended as necessary
Pregnancy Disability Leave

➢ GME Program provides 6 weeks’ paid time off as a benefit.

BUT

➢ Pregnancy Disability Leave Act provides up to four months’ leave for those periods that the woman is disabled from working due to pregnancy.
   – No minimum service requirement.
Fundamentals of Resident Evaluation

➢ Essential function of a faculty member is to evaluate the performance of residents in a fair and accurate manner.

➢ Evaluate based on overall experience, not just one event (unless appropriate).

➢ Do not inflate ratings … “satisfactory” does not mean “poor”.
When Residents Fail to Progress

➢ Provide prompt, specific feedback
➢ Identify unsatisfactory performance and what must be done to remediate it
➢ Memorialize performance communications in writing
➢ Consult with GME Office
➢ Keep process confidential
Key Challenges

➢ Issues involving professionalism versus quality of care
➢ Misuse of ratings in Medhub
➢ Addressing concerns promptly
➢ Achieving some level of consensus on performance
➢ Talking to each other about the resident’s performance, but not to the resident
➢ Reluctant faculty evaluators
Lesson Learned

➢ Resident was placed on probation twice for repeated episodes of unprofessional behavior
➢ Made negative and derogatory remarks about attendings, residents, nurses
➢ Alleged she was retaliated against for “passionately” raising patient care issues
➢ Health & Safety Code Section 1278.5

Lesson Learned = OK to acknowledge merits of substance (if true), but require professional manner.
Employment references receive broad protection under the law

Statements should be:
- True
- Based upon facts that are documented in the resident’s evaluations or file

Avoid statements that are:
- Incomplete / misleading
- Motivated by ill-will
➢ Disclose documented concerns, including probation
➢ Do not disclose information that might indicate the individual’s race, age, disability, or other protected characteristic
➢ If there are any unusual circumstances, seek advice before responding
Best Practices for Providing References

- Unless you are a program director, you are not obligated to provide reference.
- Discuss with the resident the substance of what you will say.
- Provide factual information based upon personal knowledge consistent with how you have evaluated the resident.
- Know that lunch discussions or “off the record” telephone conversations with prospective programs are “on the record.”
- Know that reference recipients won’t hesitate to disclose what you said and point fingers.
Hey Dr. Colleague, Hope all is well. Sorry to make this such a short email. I'm about to catch a flight.

Joe is the worst resident I've ever worked with. He's lazy, he dumps on other residents, he leaves call early, he shows up for call late, he forgets when he is pulled to other services, and he calls in sick when he isn't sick. I'm chief resident for another month and he has made my life a nightmare this year.

He originally was going to do KM fellowship here but the KM department told him to look elsewhere (but they weren't going to write him any letters of recommendation b/c it would embarrass them). He was trying to work something out with the psych department but word of his laziness got around there too. He is terrible. You do not want him in your program.

I'll forward you just a few emails from this year.

Please email or call me if you have any questions. You can pass any of this on to your program director. Its all true.
Parting Advice

Trust your gut when making hiring / ranking decisions

"Thanks for coming in. We'll get back to you as soon as we lower our expectations."