A Guide for UTHSC Faculty, Residents and Medical Students

UTHSC Medical Students.
As medical students approach the clinical rotations during their third and fourth years, some angst about potential liability is normal. This fact sheet is designed to answer the questions students may have about their potential liability as they begin their education in the patient care setting.

Can Students Be Sued?
The potential for medical malpractice liability exists for almost everyone who works in a health care setting — including physicians, dentists, nurses, EMTs, pharmacists, physical therapists, and trainees such as medical students. Lawsuits involving medical students are fairly rare, but the potential exists. Students must be cognizant of the limits of their skills, and the rules on how to conduct themselves to avoid unnecessary exposure to liability.

Are Students Covered by Insurance?
Yes, UTHSC carries liability insurance for its medical students. If there is an adverse event that results in a lawsuit involving a medical student, the policy covers the student’s legal defense and damage award, if any, entered against the student. To come under the umbrella of this policy, however, the student must be engaged in clinical activities that are within the scope of the student’s education and training and that are performed while under the direction of UTHSC faculty and/or residents.

The insurance coverage also applies to clinical activities performed while a medical student participates in pre-approved visiting electives at outside institutions. Coverage includes pre-approved electives taken outside the United States, but only if the lawsuit is filed in the United States, its territories or possessions.

Coverage is limited by dollar amounts specified in the policy. If a student’s liability exceeds the policy limits, the student may be personally liable for the excess. Currently, the policy limit is $1,000,000 per medical incident, with a $3,000,000 annual aggregate.

Medical students are not covered for any clinical activities performed outside of these parameters. For example, if a medical student performs clinical activities in her mother’s medical practice while on a free block, UTHSC’s liability insurance does not cover the medical student under these circumstances.

How Much Responsibility Should Students Have in Clinical Settings?
Clinical activities that a medical student performs should be under the direction and supervision of a UT faculty member or resident (or an equivalent person for pre-approved visiting electives at outside institutions). Medical students should perform clinical activities that are educational in nature and that highlight the learning experience. Clinical activities that a student performs outside the scope of the student’s education and training may not be covered by UTHSC’s liability insurance, and the student risks personal liability. Therefore, it is important for students to know the scope of their duties in the clinical setting.

Identification. Medical students should always wear identification name tags when dealing with patients, and always identify themselves to a patient as a medical student. If a student makes any notations in a patient’s chart, the student should sign the notation identifying him or herself as a medical student.

Writing orders. Medical students often write orders on the patients that they have seen in the clinical setting. An order should be reviewed by a UT faculty
member or resident who discusses it with the student and countersigns it. If an order written by a medical student is executed before being countersigned by a UT faculty member or resident, the student risks personal liability for any adverse event that results from the execution of that order.

Usual and customary functions of a medical student. As part of their training, medical students are expected to learn and perform basic patient care functions, such as taking a medical history, conducting a physical examination, and performing certain procedures. In performing these functions, the student is covered under the liability policy as long as the student is functioning under the supervision and direction of a UT faculty member or resident.

Performing procedures. Medical students are expected to become proficient in basic procedures, such as starting IVs, inserting catheters, phlebotomy, minor surgical procedures, etc. Other activities that medical students usually conduct include administering skin tests, injecting nontoxic medications, applying dressings, splints, casts, etc. When conducting these procedures while gaining proficiency, the medical student should be closely and personally supervised by a UT faculty member or resident.

After the student has gained proficiency, the student should not perform any procedure unless it was ordered by the supervising physician. Students must inform their supervising physician when they are not proficient in a given procedure so that they may receive the necessary supervision. However, it remains the supervising physician’s responsibility to determine whether the student has the required level of skill to perform the procedure.

Medical students should avoid performing procedures that go beyond the usual and customary functions of a medical student, such as major surgery, reduction of fractures, invasive procedures, administration of toxic medications, etc. But, if such a procedure is performed by a medical student, it is absolutely essential that it is performed only under the close, personal, and direct supervision of a UT faculty member or resident.

Informed consent. Informed consent is an essential element in patient care where the proposed treatment or procedure poses a material risk to the patient. Although an attending physician may delegate the task of obtaining informed consent, it remains the responsibility of the attending physician. Learning how to obtain informed consent is an important part of a medical student’s training, and students should be involved in the process to learn how it is done. However, the critical task of obtaining a patient’s informed consent should not be delegated to a medical student without the presence and direct supervision of a UT faculty member or resident.

Confidentiality. Medical students must respect a patient’s right to confidentiality. Failure to do so has potentially serious consequences, including dismissal from school, fines, and imprisonment. Under the Health Information Portability and Accountability Act (HIPAA), a patient’s private health information (PHI) may not be disclosed without the patient’s authorization except for treatment and training purposes (among others not relevant to medical students).

As a rule of thumb, do not discuss identifiable patients with anyone outside the treatment team, including spouses, friends, or other students unless the students are on the patient’s treatment team or the discussion is part of the training program. Students must never access the electronic patient database unless it is directly related to their training responsibilities.

For example, accessing the database to look up the results of a spouse’s test results, even at the spouse’s request, is a violation of HIPAA because it does not fall within the student’s work or training responsibilities. Accessing the database leaves electronic fingerprints, so administration knows who accessed a patient’s records. In this example, the medical student’s spouse should obtain the test results through his or her physician, not through an unauthorized channel.

Medical errors. Medical students may observe or commit a medical error during the course of their clinical rotations. A student should never take it upon himself— or herself to disclose the error to the patient or patient’s family. Many reasons support this guideline. First, what seems to be an error may not be an error at all. Bad outcomes do not equal malpractice, and it may take a thorough investigation before determining whether a specific course of action was a medical error.

Second, the physician making the medical error is the appropriate person to disclose this information to the family after discussing the issue with risk management. If the student has made the error, the supervising physician should be the one to disclose it, but only after discussing it with risk management. Medical students should be included in these discussions because learning how to disclose medical errors should be part of the educational process. Research shows that an honest and full disclosure of a medical error, accompanied by an apology, may effectively avoid a lawsuit.
Finally, UTHSC’s liability policy contains a “cooperation” clause that excludes coverage if the insured does not cooperate in the defense of the claim. Admitting to liability may be interpreted as a violation of this clause. Therefore it is essential to consult risk management before any statements are made that could be interpreted as an admission of liability. Also, under the cooperation clause, the insurer may deny coverage if the insured fails to report a medical incident, alters a medical record, misrepresents or conceals a material fact, or otherwise fails to cooperate with the insurer.

**Avoiding Liability.**

Following the above guidelines will help ensure that a medical student is covered under UTHSC’s liability policy if an adverse event results in litigation. While insurance coverage provides a measure of security, avoiding liability in the first instance is preferable. One of the most effective tools in a medical student’s arsenal for avoiding liability is the simple phrase, “I don’t know how to do this.” Students should never be reluctant to admit to their supervising physician that they are not proficient in performing a procedure. Failure to do so, not only robs the medical student of a learning opportunity, but it puts the patient at an unnecessary risk.

In addition, medical students must strive to obtain the highest professionalism at all times. Respect for the patient, as well as for all members of the health care team, is essential. Respect, dedication, compassion, good communication skills, prudence, good documentation, and acknowledging the limits of one’s abilities are the ingredients for successfully navigating through the clinical rotations and avoiding legal liability.

**UTHSC Residents**

Residents at UTHSC, and at any other state-owned institution, are state employees. As such, they are immune from personal liability, with some exceptions. This immunity means that no court may enter a judgment against the personal assets of the state employee on claims arising out of Tennessee law for the acts or omissions of the employee, unless the acts or omissions were outside the scope of the employee’s employment, or the acts or omissions were willful, malicious, criminal, or done for personal gain. The immunity does not apply to claims arising under federal law. Claims alleging professional malpractice by a state employee are within the jurisdiction of the Claims Commission, and the amount of damages that can be recovered by an injured party is statutorily capped at $300,000.

Immunity for UTHSC residents applies to medical incidents that occur within the borders of Tennessee and that are within the scope of the resident’s training responsibilities. If a resident moonlights at other institutions that are not part of the UTHSC training program, the resident should obtain medical malpractice insurance for those activities. (Note: Some residencies permit moonlighting, but only with the permission of the program director.)

If a resident practices outside of Tennessee, such as in Arkansas or Mississippi (assuming he or she is licensed to do so), the resident may lose immunity and may be held personally liable for medical malpractice. While it is possible that another state may honor the immunity granted to Tennessee state employees under Tennessee law, UT residents who choose to work in another state during their residency should assume that they need to obtain insurance coverage from another source.

**Medicare and Medicaid Services.**

When residents are involved in the care of Medicare or Medicaid patients, certain requirements must be met before the institution may submit a bill for physician fees. Both attending physicians and residents should be aware of these rules that are summarized below.

**Physician Services in Teaching Settings.** Generally, to bill Medicare or Medicaid for a physician’s fees, the services must be personally performed by the physician (who is not a resident), except when the following requirements are met.

- The services are furnished by a resident in the presence of a teaching physician, and the teaching physician is present during the key portion of the service or procedure;
- In the case of surgical, high-risk, or other complex procedures, the teaching physician is present during all critical portions of the procedure and immediately available to furnish services during the entire service or procedure;
- In the case of surgery, the teaching physician’s presence is not required during opening and closing of the surgical field;
- In the case of procedures performed through an endoscope, the teaching physician is present during the entire viewing;
- In the case of evaluation and management services, the teaching physician is present during the portion of the service that determines the level of service billed, except in the circumstances noted below.
Documentation. Except for services furnished under the exceptions noted below, the medical records must document the teaching physician was present at the time the service is furnished. The presence of the teaching physician during procedures may be demonstrated by the notes in the medical records made by a physician, resident, or nurse. In the case of evaluation and management procedures, the teaching physician must personally document his or her participation in the service in the medical records.

Exceptions — When Teaching Physician’s Presence Is Not Required.
For certain evaluation and management billing codes of lower and mid-level complexity (as specified by CMS in program instructions), services may be furnished by a resident without the presence of a teaching physician. For the exception to apply, all of the following conditions must be met:

- The services must be furnished in a center that is located in an outpatient department of a hospital or another ambulatory care entity in which the time spent by residents in patient care activities is included in determining GME payments.
- Any resident furnishing the service without the presence of a teaching physician must have completed more than 6 months of an approved residency program.
- The teaching physician must not direct the care of more than four residents at any given time and must direct the care from such proximity as to constitute immediate availability.
- The teaching physician must—(i) Have no other responsibilities at the time; (ii) Assume management responsibility for those patients seen by the residents; (iii) Ensure that the services furnished are appropriate; (iv) Review with each resident during or immediately after each visit, the patient’s medical history, physical examination, diagnosis, and record of tests and therapies; and (v) Document the extent of the teaching physician’s participation in the review and direction of the services furnished to each patient.
- The range of services furnished by residents in the center includes all of the following: (i) Acute care for undifferentiated problems or chronic care for ongoing conditions. (ii) Coordination of care furnished by other physicians and providers. (iii) Comprehensive care not limited by organ system, or diagnosis.
- The patients seen must be an identifiable group of individuals who consider the center to be the continuing source of their health care and in which services are furnished by residents under the medical direction of teaching physicians.

Renal dialysis services. In the case of renal dialysis services, physicians who are not paid under the physician monthly capitation payment method must meet the above requirements.

Psychiatric services. When a resident furnishes psychiatric services, the requirement that a teaching physician be present is met by observation of the service by use of a one-way mirror, video equipment, or similar device.

Resources:
UTHSC Student Handbook, page 121

Protections Against Liability, UT Board of Trustees, General Counsel
http://bot.tennessee.edu/counsel-liability.html

Tennessee Code Ann., §§ 9-8-307(h) and 63-6-207(d)(2)

US Code of Federal Regulations

For more information about the legal issues of health care, visit the web site http://www.utmem.edu/Medicine/legaledu/

Prepared by:
Carol A. Schwab, J.D., LL.M., Director of Medical/Legal Education, Office of Academic, Faculty and Student Affairs, University of Tennessee Health Science Center, Memphis, TN

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