DISCLOSURE STATEMENT

UB Orthopedics and Sports Medicine receives an unrestricted education grant for the sports medicine fellowship from Arthrex.

I have attempted to uphold scientific rigor, and to be independent and objective in preparing this CME activity.

There are no off label uses of drugs or devices, or they will be clearly delineated.
There are relatively few judicial opinions concerning litigation between ATC and athlete.

Liability rests with the medical team and the institution, by extension the ATC as a member of that team.
THE ISSUE AT HAND

In our increasingly litigious society, whenever an unfortunate incident or injury occurs from participation in sport, the actions or inactions of the medical staff are likely to be scrutinized, second-guessed, or directly blamed.

How do we mitigate the risk?
Disclaimer

I am not an attorney
This lecture is not legal advise
This lecture is medical advise
Perspective of a physician working with ATC’s as an MD extender
Some comments only pertain to NYS
MEDICAL/LEGAL CONCERNS OF THE TEAM PHYSICIAN

Disclaimer: I am not an attorney!

MLMIC

Academic Insurance

Consultation with local attorneys
DEFINITION: NEGLIGENCE

1. *duty* of care is owed as a result of the relationship between the two parties
2. the defendant *breached* the duty owed to the injured party
3. proof that the breach of duty is the actual *cause* of the harm
4. there must be *actual harm*
DEFINITION: STANDARD OF CARE

There is a legal duty to provide health care services consistent with what other health care practitioners of the same training, education, and credentialing would provide under the same circumstances.
DEFINITION OF TEAM PHYSICIAN
“DUTY AND STANDARD OF CARE”

- Broad, up to date knowledge of musculoskeletal system
- Understand physical and emotional needs of the athlete in the context of the sport
- Familiarity with demands of specific sport(s)
- Common injuries of the sport
- Maintain an awareness of the sport specific regulations
  - Equipment
  - Screening test (wrestling)
  - Rules (spearing)

Seems easy, right?
TEAM PROVIDER CONFLICT

Need to reconcile secondary gain of being a team trainer with the primary responsibility of being a health care provider

1. desire to be team provider
2. pressure for athletes to play
3. economics of employment
1. Desire to be team provider
   - Part of the team
   - Visibility
   - Notoriety
TEAM PROVIDER CONFLICT

1. Desire to be team provider
   - Implicit endorsement of ATC, MD
   - Implicit validation of knowledge, skill
   - Practice development in the community
   - Source of patient referrals, especially if a business entity stands to gain
2. Pressure on athletes to play

- Coaches, management, fans, media
  - Extrinsic pressure to have players play
- Players
  - Want to play, intrinsic pressure
    - School status
    - College – scholarship, draft
    - Pros – want jobs, contract, $$
  - Players want their teammates to play, peer pressure
TEAM PROVIDER CONFLICT

Desire to win vs. individual health needs

- Player deliberately engages in conduct that is likely to produce injury
- Player/patient may be willing to accept extraordinary levels of risk, risks that might be unacceptable in a setting other than sports
- Definition of return to healthy activity may be different than in any other activity (i.e. NFL CBA, annual “reset” of health status)
TEAM PROVIDER CONFLICT

Pressures on medical staff to keep players playing

- Doctors’, trainers’ obligation to management is to keep players healthy, able to play
- Keep jobs by keeping players in the game; supervising a quick return from injury
TEAM PROVIDER CONFLICT

Do we get players ready to play, or make sure they are healed completely?

Do we consider the short term health concerns or the long term health concerns?

- Ex: recent shoulder dislocation @ training camp
TEAM PROVIDER CONFLICT

3. Economics of employment

- ATC hired by school, team
- ATC acts as an agent of the club
  - Risk losing the trust of the players
  - Players lack confidence in ATC/MD opinion
    - Erodes provider/patient relationship
    - Players seek other unbiased opinions
    - Disrupts continuity of care
    - Disrupts player/team relationship
RESOLUTION OF CONFLICT AND MITIGATION OF RISK ARE THE SAME

Well accepted methods of Mitigation:

- Preparation
- Evaluation
- Communication
- Education
- Documentation
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Preparation

- Concept of “foreseeability”
  - Ex. Gathers v Loyola Marymount University. Proper care was delayed and would have been avoided with the application of a well-prepared emergency plan

- Absence of an emergency plan frequently is the basis for a claim and suit based on negligence
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Preparation

- A well formulated, adequately written, and periodically rehearsed emergency response plan will fulfill both professional and legal duty
  - Ex. K.E. the toughest rescue: SCI and respiratory distress in a prone athlete
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Preparation

- Event coverage, have a plan
- Determine adequate equipment and transportation, ex. AED
- Know the venue
  - Hockey arena and bench area
  - Football field surface
- Identify emergency personnel
- Communication method
- Identify hospital facility
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Evaluation

- Private consultation
  - No management, no coaches, other
- ATC/patient relationship comes first
- ATC allegiance is to athlete first
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Evaluation

- Treat athletes like you treat all patients
- Keep a perspective, consider goals
- Be an agent of the athlete
- Sometimes the best approach may be the most *conservative* approach
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Education

- Disclose the injury
- “it’s ok, it’s just a bruise”
- Disclose the diagnosis, Differential Dx
- Review options for treatment
  - Pro and con
  - Risks
  - Possible complications
Aspirational: **AAOS Code of Medical Ethics and Professionalism for Orthopaedic Surgeons, I. F.:**

*When obtaining informed consent for treatment, the orthopaedic surgeon is obligated to present to the patient or to the person responsible for the patient, in understandable terms, pertinent medical facts and recommendations consistent with good medical practice. Such information should include alternative modes of treatment, the objectives, risks and possible complications of such treatment, and the complications and consequences of no treatment.*
The physician (&ATC) “has a responsibility to inform the patient about important health information or abnormalities discovered during the course of examination”

The physician (&ATC) “should ensure to the extent possible that the patient understands the problem or diagnosis”
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Communication

- Specifically review the risk of further play
  - Further injury
  - Permanent injury
- Ask for questions
- Do not exert excess influence over your patient/player’s decision
SOLUTIONS TO REDUCE CONFLICT/REDUCE RISK

Communication

- Offer to talk to spouse, parents, agent
- “know your personnel”, individualize care
- Enlist the athlete/patient in the ultimate decision
  - May free the care giver from liability
REDUCE CONFLICT/REDUCE RISK

Documentation

- Document the encounter
- DOCUMENT THE ENCOUNTER
GENERAL COMMENTS
REDUCE CONFLICT/REDUCE RISK

- Practice good medicine
- Keep current
GENERAL COMMENTS

REDUCE CONFLICT/REDUCE RISK

Keep current

Avoid holding yourself apart from or above the general practitioner community, using terms like “best” “most advanced”, etc.
Do not overstate abilities

Advertising and marketing

- “preferred provider”
- “official provider”

- Any claim to a higher standard of care will hold you to the claim
GENERAL COMMENTS
REDUCE CONFLICT/REDUCE RISK

- Be fully professional
- Build relationships, minor injuries provide an opportunity
- Do not socialize with players
GENERAL COMMENTS
REDUCE CONFLICT/REDUCE RISK

- Try to be insulated from wins/losses
- Separate yourself from the glamour of sport, do not “participate in the event”
EXAMPLES

- Butkus
  - Knee injections
  - 1st win suit $600,000

- Pappas
  - Team MD, Owner
  - Did not disclose ACL
  - Award: $1.7M
EXAMPLES

- Pavlatos Chic Bears
  - MD erased videotapes of surgery
  - Award: $5.3M

- Seabrooke
  - Shoulder RSD
  - Alleged rushed rehab
  - Award: $5.5M
EXAMPLES

- Others
- Easley
  - Adverse effect of NSAID
- Stringer
  - Sudden death
- Diaco
  - Hernia repair developed post op infection
  - Did not treat like a professional athlete
  - Jury award (on appeal)
- Miniacci
  - MRSA infection
  - Alleged unsanitary training room
EXAMPLES

1st round draft pick Miami in 1993, led NFL with 90 receptions in 1998

1993-2000 retired because of a nagging toe injury suffered in 1999, 10th game, played 2/6 remaining regular season, 2 playoff games, 9 games in 2000, 0 in 2001, cut in 2002 with 3 years left on contract
The lawsuit alleged Dr. X did not disclose the extent of the injury, and told McDuffie he was safe to continue playing football, despite MRI’s showing damage to the tendons in his toe.

11.5 million 5/2010 10 mill in lost earnings, 1.5 mill anguish

attorney: “shattered dreams and career of Mr Football”
EXAMPLES: FINE LINE

Buffalo case, forearm fracture
ORIF
Played in cast at 8 weeks after executing an exculpatory waiver
Raises questions, issues Liability, malpractice
EXAMPLES: FINE LINE

What is appropriate?

- Injections
  - 3 cases of pro athlete

- Medications
  - Analgesics
  - Narcotics
  - Toradol? (perceived as pre-emptive pain killing injection)
EXAMPLES SUMMARY

Most common allegation is that a player was returned to competition too early.

Another is “fraudulent concealment”

- Failure to disclose injury
- Failure to disclose extent of injury
- Failure to discuss risks of treatment
SEPARATE ISSUE: MD MEDICAL MALPRACTICE CRISIS

- Inadequate level of coverage
  - Judgments can exceed limits of policy
  - Especially for high level and elite athletes
- Risk to group as employer
- Team physicians leaving, forced to leave
- Unable to get consultations
RESOLUTION OF CONFLICT AND MITIGATION

Less well defined methods of Mitigation:

- Competence
- Reasonable care
- Accepted practice
- Moral reasoning
- Confidentiality
PRACTICE IN A COMPETENT MANNER

Keep up with medical guidelines developed by:

- your specialty
- AMA
- Am College of Sports Med
- Other organizations (NATA, NFL, NCAA)

- Legal presumption is that you know and follow organizations’ written guidelines
REDUCING RISK
PRACTICE IN A COMPETENT MANNER

Know when your level of competency has been exceeded

- Relinquish care of the athlete
- Utilize EMS, transport
- Refer (I would suggest liberally)
PRACTICE IN A COMPETENT MANNER

“reasonable care under the circumstances”

“good medical practice”

“accepted practice”

All are not well defined in legal terms
PRACTICE IN A COMPETENT MANNER

May be held to a standard of care determined in a court of law

- Use of practice guidelines
- Use of learned treatises
  - Medical textbooks
  - Published articles (ex. hamstring avulsion)- difference between 1998 and 2005
- Testimony of expert witnesses
PRACTICE IN A MORAL WAY

Kohlberg’s hierarchy

- The stage of moral reasoning of health care providers appears to be related to factors commonly associated with good clinical performance and lower rates of professional liability claims against.

- The greater degree to which one measures the impact of his/her decisions in terms of “social justice” the higher stage of moral development one has achieved.
REDUCING RISK
KEEP ADEQUATE RECORDS

- Document, document, document
- Preferably at team facility
RETURN TO PLAY: EXCULPATORY WAIVER

Is a risk release

Of great value in dealing with disagreement with player, coach, parents

EXCULPATORY WAIVER

In order to make full and meaningful disclosure, I have informed x____________________________

Of the following diagnosis:

My best advise for treatment is to abstain from athletic activities.

The purpose of this treatment is:

Alternatives for treatment are:

The risks of returning to play are:

Ex. Recurrent fracture, displacement of the fracture, delay in fracture healing, nonunion of the fracture, malunion of the fracture, risk of injury to adjacent part(s), risk of injury to remote body part organ, or system

x______________________________ knows the risks,

understands the risks, and assumes the risks.

x______________________________ voluntarily chooses to return to play by oral agreement, and by so doing releases the medical staff and it’s agents from liability. The medical staff will provide reasonable measures, treatments, and supportive care in an effort to minimize the risks.
REDUCING RISK
MAINTAIN CONFIDENTIALITY

HIPAA

- Health care information is not party or dinner conversation
- Avoid releasing information to other parties without a consent
- Avoid statements to the press
MISCELLANEOUS ISSUES

Practice out of state
- Most states allow as long as the practitioner does not maintain an office, or hold out as a licensed practitioner within that state

Are team physicians considered “specialists”? ATC’s may be at some risk if the supervising physician does not have competence in a particular area
- Not well defined
- MD’s from a variety of backgrounds and specialties
- Some states require experts in court to be from the same specialty
  - Potential: primary vs ortho; generalist vs specialist
  - Which standard will be upheld??
REDUCING RISK
THE EMPLOYMENT CONTRACT

Be aware of, and discuss with your covering physician:

- Each state has its own statutes regarding contracts
- Worker’s Compensation Act
  - Co-employee doctrine: one employee can not sue another employee
  - Has been tested in courts (NY, Wash)

Exceptions

- Intent to injure
- Fraud
NY State Contract

SUMMARY OF RECOMMENDATIONS FOR CONTRACT:

- Delineate duties and responsibilities
- Clause: Employer/employee relationship “shall not supersede MD/patient relationship”

Make representation regarding:

- Licensure (separate address)
- MD DEA certificate (separate address)
- Substance abuse
- Disciplinary actions
THE EMPLOYMENT CONTRACT

Establishes the relationship between employer and employee

- Volunteer, independent contractor, employee (best)
- Delineation of duties
  - What patients to see
  - Hours and work place
  - Reports to management (coach, AD, GM, Owner)

Delineation of duties

- Pre-participation PE’s
- Injury management during practice, competition
- Coordination of care
- Return to play decisions
THE EMPLOYMENT CONTRACT

*most important aspect*: establish the degree of control an employer exercises over the worker (physician)

The more control the better, except over matters of professional discretion

- “The employee shall have complete control over the diagnosis and treatment of co-employee patients assigned to him/her, and neither the directors, officers, coaches, nor any other employee of the corporation shall exercise any supervision or control over the individual treatment of the co-employee patient”
THE EMPLOYMENT CONTRACT

Termination clause

- Demonstrates the ability of the employer to terminate the employee, and is strong evidence of control over the relationship
THE EMPLOYMENT CONTRACT

Term of employment

Compensation – per diem, fee for service, retainer, salary (best)

benefits – as many as possible – corporate health insurance, 401K

Malpractice insurance – carry by individual, school, organization, team

- Add as “additional insured”
THE EMPLOYMENT CONTRACT

- Indemnification clause (very difficult)
- "The employer agrees to hold harmless, defend, and indemnify the employee from and against all claims, lawsuits, liabilities, damages, costs and expenses which the employee may suffer or incur as a result of the performance of his duties to the employer"
MEDICAL RECORDS

Document, document, document
Send reports to employer, parents and/or patient (athlete)
UNDESIREABLE ASPECTS OF THE CONTRACT

- Do not pay to be the team physician
- Do not accept trade: marketing, advertising
- Be careful of arrangements where the hospital, group has financial arrangement to be the health care provider
  - NFL Sept 2004 policy prohibits such arrangements if they involve a commitment to provide medical services by team physicians
    - Pointed to by plaintiff’s attorneys
    - Increased requests for second opinions
PASS THE TEST!