ORTHOPAEDIC OPINION AND TESTIMONY

OBJECTIVES:

After study and discussion of this module, the orthopaedic resident should:

- Be familiar with the concept and principles of orthopaedic opinion and testimony
- Know how to prepare if named as a defendant or called to testify as part of the treatment team
- Be aware of the AAOS Standards of Professionalism on Orthopaedic Expert Opinion and Testimony

Slide 3: Case 1

After the weekly resident’s conference, one of your colleagues tells you that he is working for an attorney as an expert witness. He is excited about the opportunity and the extra income that he can earn. The case involves a malrotated and healed tibia fracture.

Slides 4-7: Questions and recommended actions

In your opinion, is your colleague qualified?
Is the resident qualified as an Expert under the definition in the Federal Rules of Evidence?
Is it ethical for the resident to serve as an expert witness while in training?
Is moonlighting allowed by your program?
Will you say anything to the administrative chief resident?
Will you say anything to the program director or chairman?
Will you say anything to the resident who is involved?
Will you say anything to the other residents?

While the presented scenario may in fact never happen, the issue of medical expert opinion testimony is a significant issue related to health care and orthopaedic surgery. Professional liability is a major concern and problem for the resident and practicing physician. The purpose of this module is to introduce the concept of orthopaedic expert opinion and expert witness testimony and stimulate discussion on the topic.
A resident physician may not be qualified to offer opinions in orthopaedic surgery but could serve as a general medical expert after his/her internship is completed. In addition, he or she might be asked to serve as a fact witness – testifying only to what he or she saw or witnessed but not offering a medical or orthopaedic opinion. The sitting judge may have to rule on whether a resident physician may serve as an expert witness, and it is possible that the resident may be disqualified from serving as an orthopaedic expert. The Federal Rules of Evidence offer guidelines concerning the use of expert witness testimony. Combined with other legal precedents, an expert witness can be qualified and challenged in a court setting.

If a resident physician is asked to serve as an expert witness, the basis of the testimony will be limited due to the lack of formal education and experience. The issue may need to be discussed with the departmental leadership and an honest discussion of the ethics involved may be helpful both to the residents and the staff. The case which the resident has been asked to review should not be the focus of the discussion due to privacy issues. However, the resident physician’s interest, motivation, and the financial ramifications are germane and should be discussed. The qualifications of the individual may also be a topic of open discussion. Clear delineation of the role of the involved resident can be important as he/she may only be a fact witness and not an expert.

The resident should also consider contacting counsel through his or her training program to discuss the matter. An expert witness is retained to assist the triers of the facts with opinions based on education, knowledge, experience, and a reasonable degree of medical and surgical certainty. A resident may not be able to offer opinions based on an appropriate degree of medical and surgical certainty as he or she is not fully educated and doesn’t have the necessary experience or knowledge. After the resident has finished training and gained experience in practice, then he or she may be qualified to offer expert opinions.

**Slide 8: Case 2**

*Two months later you learn that you have been named as a part of a professional liability claim.*

**Slide 9: Questions**

*What do you do first?*
*Who should you notify?*
*How do you prepare for the trial?*
If a resident is named as part of a professional liability claim, he or she should notify the Orthopaedic Surgery Department and the hospital risk management team immediately. After discussion with the named parties, legal counsel will be obtained. The chart should be analyzed and radiographs and testing reviewed. The allegations will be distributed and analyzed. The facts and actions involved in the matter will be reviewed. A defense of the action will be prepared.

As a resident involved in a professional liability claim, the physician –in –training will probably have to set aside time for a deposition. Meeting with defense counsel is necessary for preparation. The resident must also set aside appropriate time for review and the actual deposition.

A discovery deposition will be done first. In that deposition, questions will range from the background of the defendant to facts involved in the case. The resident will be asked for an opinion about the case. A resident defendant can be an expert for him or herself as well. Training, knowledge, and experience enables the resident to offer opinions relevant to his or her level of experience, but, until fully trained, the resident may not be qualified to be a retained as an expert witness.

Preparation is essential. When preparing with counsel, the resident should listen to the question asked and answer that question politely. It is important to compose an answer. The resident can also state that he or she does not understand the question. During a deposition a resident can ask to take a break to discuss questions and answers with defense counsel. Preparation for both the deposition and testimony can minimize mistakes and maximize effectiveness.

After completing the deposition, the resident should “reserve his or her signature.” Later, once a copy of the deposition is received, the resident should review and correct it before signing. The signed document will be the basis of later testimony. This document should be reviewed before any evidence deposition or trial testimony as one cannot change opinions at an evidence deposition or trial. A witness can be impeached if the testimony changes from what was stated at a discovery deposition.

**Slide 10: Case continued**

*It is the day before the trial. You have prepared as recommended but understandably are somewhat tired and anxious.*
Slide 11: Questions

*Is there anything you can do at this stage?*
*What should you do while testifying?*
*What should you do after your testimony?*

Trials can be difficult. The resident needs to be well rested and prepared by counsel for what can be a long and trying experience. During the trial the resident should remain calm and be polite remembering that the judge requires respect and deference as it is his or her court room. The resident should listen carefully to the questions and think about the question asked before answering. He or she should provide succinct, honest answers. If one does not have an answer, then it is acceptable to state that one does not know or does not have an opinion on the matter. Answer a question only if one is able to understand the question. It is acceptable to say that one does not understand a question. The question will then be asked again. The resident should also look for cues from the defense counsel and only answer the question asked. A testifying physician should not be rude, flippant or argumentative. One should not speculate about an answer. The testimony should end on a positive note.

Confidentiality in the halls of justice should be observed as one does not know the identities of those who may be listening. The resident should leave the court in a timely manner and discuss his or her thoughts after the experience in a private setting.

Slide 12: Case 3

*Six months later a fellow resident and good friend of yours is called as a fact witness in a suit against an attending surgeon at your hospital. Knowing that you were part of a professional liability claim, your friend comes to you for advice.*

Slide 13: Questions

*What should you tell your friend to do first?*
*What is the difference between a fact witness and being a party to a liability claim?*
*What is the difference between a fact witness and an expert witness?*

A resident can be called as a fact witness to provide testimony about the care of a patient - testifying only to what he or she saw or witnessed and not offering a medical or orthopaedic opinion. Anytime a resident physician is
involved in a legal proceeding, he or she should first notify the department and the hospital. The resident could be exposed to liability on the matter and advice and support from an attorney representing the resident can be critical for both deposition preparation and testimony at trial. When one is named a fact witness (and potentially a defendant), a clear appraisal of the matter and the facts is essential. A prepared witness is an effective witness. Remember the oath that will be taken at the time of deposition and trial. You will swear to tell the truth and nothing but the truth.

**AAOS Standards of Professionalism and Affirmation Statement**

The American Academy of Orthopaedic Surgeons has adopted Standards of Professionalism (SOPs) on Orthopaedic Expert Opinion and Testimony. They establish the minimum acceptable standards for members of the AAOS to follow when offering any expert opinion ranging from legal testimony to peer review. Fellows of the AAOS, Candidate Members, and other AAOS Members should familiarize themselves with these standards as they offer exacting requirements for orthopaedic testimony. Failure to observe the mandatory standards can lead to a formal complaint to and action by the AAOS. These standards are available on the AAOS website and are published. A resident should read these standards prior to engaging in any form of orthopaedic testimony. Familiarity with these standards can be of assistance in rendering effective and appropriate testimony.

In addition to the Standard of Professionalism (SOP) on Orthopedic Expert Opinion and Testimony, the AAOS has adopted an Expert Witness Affirmation Statement. Resident physicians are encouraged to read the statement and sign it. It should be submitted to the AAOS and may serve as a guide when considering opinion and testimony.

**Summary**

Orthopaedic Expert Opinion and Expert Witness Testimony is an important issue in contemporary orthopaedics. As an attending or practicing physician, one may be called upon to offer testimony as a treating physician or retained expert. Good experts are completely trained, knowledgeable and have practical experience. Peer review work and independent medical exams also constitute expert witness testimony.

Training programs and universities often have rules regarding outside activities beyond the scope of residency training. One should also be aware of the AAOS Standards of Professionalism on this topic. Read and consider executing the AAOS‘Expert Witness Affirmation Statement. Most importantly, remember to
tell the truth, the whole truth and nothing but the truth. That is the ethical way to participate in the legal process.

References

   http://www.aaos.org/about/papers/ethics/code.asp
   http://www3.aaos.org/member/expwit/statement.cfm
7. Frye v. United States, 293F. 1013 (D.C. Cir. 1923)