



# PM101 Part 3

## Practice Management Institute: Legal News You Can Use

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# The Pathologist Within the Legal System

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# Disclosure

**I have no financial interests/relationships or non-FDA approved uses to disclose.**

**My sincere thanks to**

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and

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# Course Objectives

- Interpret the meaning of “tort reform” as it applies to your practice and medicine as a whole
- Describe the benefits of autopsies in their legal context, including their performance and role in reducing malpractice claims
- Conduct yourself properly when named in a lawsuit
- Act in an effective and ethical manner when engaged as an expert witness

# Agenda

The Pathologist Within the Legal System	Time
Opening/ Introductions	1:30 – 1:35 PM
C. Elliott Foucar, MD, FCAP	1:35 – 2:20 PM
Q & A	2:20 – 2:35 PM
Richard M. Conran, MD, PhD, JD, FCAP	2:35 – 3:20 PM
Q & A	3:20 – 3:35 PM
Break	3:35 – 4:00 PM
Gregory J. Davis, MD, FCAP	4:00 – 4:45 PM
Q & A with Summary and Closing	4:45 – 5:00 PM

# Medicine and Law – Similarities

- Require advanced training
- Divided into two great camps
- General practitioners and specialists
- Some cases easy, others difficult
- Good and bad practitioners of each profession
- Each practiced in a specialized setting

# Medicine and Law – Differences

## Medicine

- Common enemy – disease
- Scientific discipline
- More comfortable with disease than with patient

## Law

- May prosecute or defend
- Tend to dislike science
- Careful to remember people and faces; tend to be formal and polite

# Purpose of Court

- Purpose of court  $\neq$  Establish truth
- Purpose of court = Resolve Dispute



# Theory of American Legal System

- Resolution of disputes accomplished in America by **adversarial trial system**:
  - Each side in dispute presents evidence publicly
  - Evidence presented in presence of accused
  - Evidence subject to challenge

# Theory of American Legal System (2)

- Purpose of court is to settle a dispute in a civilized way, preventing vendetta.
- An attorney can work both sides of system because either way he is resolving a dispute.
- Challenge of evidence can make court unpleasant for the pathologist.

# American Legal System

- Judge
  - Sole authority in courtroom
  - Sets tone in courtroom
  - Settles disputes between attorneys
  - One to whom jury looks for guidance
- Jury
  - Hears evidence & decides verdict
  - Peers as citizens and human beings
  - Attorneys for both sides have input
  - Must have leader (foreman)
  - Dislike having time wasted

# American Legal System (2)

## Attorneys

- The “champion” of each side in the dispute
- Often know each other
- Enjoy their work
- Must abide by their client’s wishes

# American Legal System (3)

- Fact witness
  - Saw, heard, or otherwise directly involved in matter that is subject of trial
- Expert witness
  - Has special training or experience not common to all individuals that can clarify issues which are not obvious to the jury and judge
  - Opinion of an expert witness has legal worth

# American Legal System (4)

## Criminal disputes

- “People of the state” initiate lawsuit
- Defendant = party accused
- “People” bear burden of proof
  - Evidence must make clear “beyond reasonable doubt” that defendant committed crime

# American Legal System (5)

## Civil disputes

- One party seeks recompense for harm he believes other party caused him
- Plaintiff = party initiating civil lawsuit
- Defendant = party accused
- Plaintiff bears burden of proof
  - “Preponderance of evidence”

# Impact of Law on Pathology Practice

- Pathologist as Physician
- Anatomic Pathology
- Clinical Pathology
- Laboratory Director

# Pathologist as Physician

- Legal obligation to possess learning and skill similar to other physicians in specialty.
- Accepting patient carries duty of reasonable care and diligence in applying skills to task.
- Must use best judgment, continue to learn, and adhere to practice approved by others.
- No guarantee of good outcome, and not liable for mere error in judgment carefully made.

# Malpractice Suits

- Four legal pillars of malpractice
  - Duty
  - Dereliction
  - Damage
  - Cause

# Malpractice Suits (2)

- Why do patients sue?
  - Money
  - Misdiagnosis
  - Mistreatment
- Suit more likely with heightened emotion
  - Obstetrics
  - Neurosurgery
  - Hospitalization

# Malpractice Suits (3)

Notification of suit brings on crisis of conscience.

- Was my diagnosis correct?
- Did I miss something?
- How can they do this to me?

# Malpractice Suits (4)

- A *summons* is the legal document that notifies an individual he has been named as a defendant in a law suit.
- Upon receiving a summons you should do three things.

# Malpractice Suits (5)

- Resist the urge to talk – a major danger.
- Contact risk management or your attorney per protocol.
- Work with your attorney and that of your organization.

# Malpractice Suits (6)

Signs that you may need another attorney to represent you in a malpractice case:

- Attorney says there is no need to meet because he has done this sort of case many times.
- Attorney uncooperative, will not meet with you.
- Attorney more concerned with interests of insurance company than with your interests.
- The two of you just do not get along.

# Malpractice Suits (7)

- May be dismissed
- May be settled out of court
- May be tried in court
- Counter-suit against patient and attorney
- Indefensible positions
  - Lack of record (or microscope slide)
  - Changing record
  - Leaving out information that does not support diagnosis
  - Rudeness or jokes at patient's expense

# Expert Witness Testimony

## Expert witness

- Has training and experience beyond ordinary human experience.
- May give his opinion in court.

*Any physician can be qualified as an expert witness by virtue of her medical degree and practice.*

# Expert Witness Testimony (2)

- Fact witnesses *must* go to court.
- Expert witness *chooses* whether to accept a case.
- Good expert witness always in demand.

# Expert Witness Testimony (3)

**Examine yourself honestly.**

Expert witness should be:

- Fully qualified
- Willing to devote time necessary to prepare
- Current on literature in field
- “Impressive”
- Able to maintain equanimity

# Expert Witness Testimony (4)

- Shy, retiring people will dislike being an expert witness.
- Those who do not wish a look into their affairs will dislike being an expert witness.

# Expert Witness Testimony (5)

Before accepting any case find out:

- What medical theory the attorney wants you to prove.
- What facts attorney has to support his theory.
- Who is involved, and decline the case if it involves a friend.

# Expert Witness Testimony (6)

Report of Expert Witness should contain:

- List of materials submitted for your review.
- List of questions to be answered.
- **Brief** restatement of circumstances surrounding matter in question.
- List of your conclusions in the matter.
- List of recommendations.

# Expert Witness Testimony (7)

Expert witnesses entitled to payment for their *time*.

- Time spent preparing for court.
- Time spent meeting with attorneys.
- Time spent testifying in court.

# Expert Witness Testimony (8)

- Fee should be agreed upon beforehand.
- Contract best unless you have worked with attorney before and both know the terms.
- Contract may be formal or informal.

# Expert Witness Testimony (9)

- Deposition – sworn statement (or videotape recording) of your testimony that may be read (or played) in court as a substitute for your personal appearance at the trial.
- No other witnesses, no judge, no jury present.
- Can be taken at any place agreeable to you and attorneys.
- May benefit you as a physician witness

# Expert Witness Testimony (10)

- Review your deposition before you testify in trial.
- You should say same thing in trial that you did in deposition.
- If you must change a statement you can
  - Expect to explain why you changed your mind.
  - Do not make a habit of changing.

# Trial

- Jury selection
- Opening statements by each side's attorney
- Presentation of evidence
- Closing statements by each side's attorney  
Jury deliberation and verdict
- Sentencing



# Trial (2)

- Seldom begins on date on first subpoena.
- Your portion as a witness will not begin at 9:00 AM on Monday as subpoena says.
  - Call office of attorney to schedule approximate date and time when you will testify.
  - Expect to spend at least a half day in court.
  - Know where the bathrooms are.
  - Take food, a beverage, and some reading material: you'll often “hurry up and wait”.

# Trial (3)

- Testifying is a performance.
- The truth is the truth, but how you tell it makes all the difference
- Performance begins as you enter room.
  - Look professional, neat, clean, conservative.
  - Jury should remember what you said, not what clothes you wore.
  - Bow ties



# Trial (4)

- Performance continues
  - as you walk to stand.
  - as you take the oath.
- A physician witness is in a strong position
  - No one in room knows as much medicine as physician.
  - Attorneys as afraid of you as you are of them.
  - Jury wants to like physician witness.

# Trial (5)

- After swearing in you are asked your name.
- Fact witness then begins direct examination.
- Expert witnesses qualify themselves next
  - Tell your training and experience that make you an expert in your area.
  - Attorney for other side may challenge your qualifications.

# Trial (6)

- Use experience in teaching small groups to help you teach this group of twelve laymen.
  - Review the case before the trial.
  - Determine with attorney points for jury to learn and remember.
  - Think of way to make important, complicated points clear to laymen (example, analogy, model).
- Assemble your ideas in effective order.
- Have in mind the points you want to make.
- String these points together for the jury as you are questioned.

# Trial (7)

- Rapport you establish with jury is critical to your success as a witness.
  - Address short answers to attorney who asked.
  - Address long answers to jury.
    - Use English rather than medical jargon.
    - Address jury as you address a favorite patient to whom you must explain a particular medical matter.

# Trial (8)

- Rapport you establish with jury is critical to your success as a witness.
  - Establishing good rapport protects you from a vicious attack by an attorney.
  - *Never* be rude, suspicious, curt, or condescending.
- Keep your answers as brief as possible.
  - Less is more. “The less you say, the less you have to take back”
  - Limits cross-examination.
  - “Short and sweet is hard to beat”

# Trial (9)

- If you do not understand the question posed by an attorney, then ask him to repeat it.
- If an objection and the discussion following it have caused you to forget the original question, then ask the attorney to repeat it.
- Cross-examination
  - Begins when direct examiner says, “No further questions.”
  - If your testimony is vital to one side, the cross-examination will be designed to take the teeth out of the argument you just made.

# Trial (10)

- Cross-examining attorney will not let you leave the witness stand without conceding at least one point in his favor.
- Consider what that point is when it comes, then fight or capitulate as is appropriate.
- If attorney cannot attack your evidence, he may attack you (*ad hominem*).

# Trial (11)

**Ploy:** Attorney rude to point of provoking you to anger.

**Solution:** Never lose your cool on the witness stand.

**Ploy:** Attorney compliments you on your medical knowledge, then begins to move questions into an area outside your area of expertise.

**Solution:** Say you cannot answer a question that concerns an area beyond your area of expertise.

# Trial (12)

**Ploy:** Attorney demands question be answered “Yes” or “No.”

**Solution:** Reply that the question concerns a complicated matter, and to answer “Yes” or “No” without explanation would mislead the jury.

**Ploy:** Attorney asks whether you consider a certain textbook authoritative.

**Solution:** Say “No.”

# Trial (13)

**Ploy:** Attorney asks you how much you have been paid for your testimony.

**Solution:** Say, “My testimony is not for hire. I have been paid for my *time*, my professional knowledge, my services in studying the medical facts in the case, and for my medical opinions based on those facts.”

**Ploy:** Attorney asks whether you have discussed this case with anyone.

**Solution:** Say “Yes” if you have. It is proper to discuss case with attorney who hired you, as the cross examining attorney knows perfectly well.

# Trial (14)

**Ploy:** Attorney demands you answer question without looking at your notes.

**Solution:** Say that you prefer to look at your notes to assure that you give the correct answer.

**Ploy:** Attorney asks you a two part question.

**Solution:** Answer each question in turn (first things first).

# Trial (15)

**Ploy:** Attorney says your opinion differs from that of Dr. X, and asks whether you are implying that Dr. X does not know what he is doing.

**Solution:** Say that this is a complicated medical matter open to interpretation. Dr. X has his opinion and you have stated your opinion. In this case the two of you happen to disagree.

# Trial (16)

- Always appropriate to answer “I don’t know”... it’s the one thing an expert can always say with 100% certainty
  - L.C. McCloud, MD, FCAP



# Trial (17)

- It is **not** your responsibility as an expert witness to win or lose a case.
- Your responsibility is to transmit to the jury your understanding of the case, to be a teacher.
- Equanimity.

# Summary

- Be aware of your legal responsibilities as a Pathologist and Laboratory Director
- Know the American Legal System and your potential role in it
- Recognize that as a Pathologist you have a unique teaching role in legal proceedings as well as in the medical profession

# References

- *The Pathologist in Court. Northfield, IL, 2003.*
- Davis, Gregory G. *Pathology and Law: A Practical Guide for the Pathologist.* Springer, New York, 2004.

# Questions?

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