



Docs Who Badmouth Each Other Court Trouble

Call it collegial criticism, jousting or backbiting. By any name, when you criticize another physician or facility, you're treading in dangerous territory — and in many cases, you're triggering a lawsuit. Jousting takes many forms, from saying outright to a patient "You should see a lawyer," to more subtle statements like "Well, that's not the way I would do it." The result is often that the patient loses faith in his physician and goes to a lawyer; in my experience, this is behind about half the lawsuits I defend. Here are three cases where loose lips led to lawsuits.



"My way or the highway"

• **The problem:** Patients and, in some cases, physicians have difficulty appreciating the complexity of medicine and the myriad ways to approach it. Too many times, I've taken the deposition of a physician who comments negatively on another's care simply because he used a different approach. Habits are formed during physician training; if you learned a particular technique in your residency, you will probably always think of that as the proper approach. This attitude can persist even though equally effective approaches become accepted or innovations render the approach antiquated — and that can be dangerous.

• **The example:** In a recent case, I took the statement of a treating oculoplastic surgeon — whose comments, I suspected, were at the root of the lawsuit. This surgeon had seen the patient after the defendant had. Although he ostensibly supported the defendant's care, several times he

offhandedly criticized the defendant's techniques. At one point, he criticized the use of Mercilene sutures, which had caused infections after abdominal surgeries. In the 1970s. But that's not the case now. In fact, most current textbooks and medical articles that describe the surgery in this case mention that Mercilene sutures were used. The case was ultimately

dropped, in part because this was not sufficient evidence and the surgeon was in the minority regarding his opinion of these sutures.

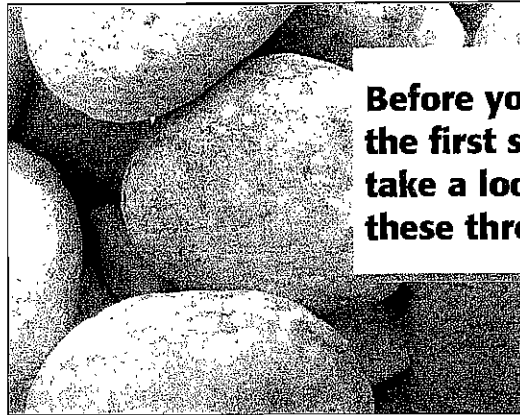
• **The rule:** Exercising humility — and understanding that other medical professionals might have techniques that work as well as yours — can go a long way toward keeping you and your colleagues out of the courtroom. This is not to say that you should support or tolerate clearly inappropriate care. Just make sure, perhaps through a literature search or conversations with colleagues, that your opinion is valid and not simply personal bias.



"No one told me that"

• **The problem:** Every physician who has discussed with a patient the risks and benefits of, and alternatives to, a surgical procedure knows patients forget much of what they are told within hours. Research shows this to be true — and that patients will deny that a subject was addressed if they don't remember it.¹ Despite this, physicians seeing a patient with post-op complications are sometimes too willing to comment on another surgeon's skill based solely on what they see and what the patient tells them.

• **The example:** In a recent trial, the subse-



Before you cast the first stone, take a look at these three cases.

quent treating physician testified on behalf of the plaintiff. His testimony was based on a flawed understanding of the diagnostic technology used in the pre-op work-up (Orbscan for a LASIK case). This doctor had examined the plaintiff and told him directly that he should hire a lawyer and sue the original LASIK surgeon. He testified that this surgeon was negligent because the pre-op testing clearly excluded the patient as a candidate for surgery. During cross-examination, it was demonstrated he had mistaken inferior corneal flattening for steepening and was misinterpreting the corneal thickness map. He then admitted to the jury that he had himself misdiagnosed the plaintiff's condition.

- **The rule:** If you don't know the facts or aren't confident you have a complete understanding of the medical issues, exercise discretion and refrain from rash remarks about the care of your colleagues. Having your investigative shortcomings exposed in open court isn't something you'd enjoy.



"This could improve my market share"

- **The problem:** Some physicians believe that criticism of colleagues will improve their practice. In this part of the country, LASIK is very popular, and competition for patients can be fierce. As a result, I often see local physicians testifying on a plaintiff's behalf, either as an expert or because he was the last physician the patient saw before heading to a lawyer. It's often far more difficult to find a local doctor to testify in support of my client. The idea is that undercutting the competition will increase patient volumes.

- **The example:** In one instance, a physician and client of mine discovered through one of his patients that another LASIK surgeon was disparaging his practice. We sent a private investiga-

tor to one of the free LASIK seminars sponsored by the offending physician. The PI taped the defamatory statements, which were grounds for a lawsuit. Rather than filing, though, we informally told the doctor the facts — and that future transgressions would be prosecuted. He apologized, and the statements stopped. Ironically, the patient who told my client of the defamation had been planning to have her LASIK done by the offending physician — until he started disparaging my client. This raised a red flag for her, and she decided to go elsewhere.

- **The rule:** As tempting as it may be, don't use defamation and collegial criticism as marketing tools. Word gets around and, as you can see from this example, it won't help your standing with colleagues or patients.

Think before speaking

I'm not advocating that doctors turn a blind eye to inappropriate care by their colleagues. But before you comment on someone else's care, make sure you have the facts, that you understand the medical issues fully and that you're acting solely in the patient's best interest. It does a patient no good to start an ill-conceived lawsuit based on bad advice from a treating doctor. One more case-in-point: The trial I mentioned in the second example ended in a defense verdict, so the plaintiff now owes the defendant nearly \$30,000 in trial costs. The jury didn't appreciate the ill-informed doctor's advice to the plaintiff to file a lawsuit, either. Once the trial was over, their first question to the judge was whether the plaintiff could sue the doctor who started the case with his misdiagnosis. **OSM**

Mr. Tiemeier (gtiemeier@thlaw.net) is a healthcare lawyer and partner in Denver-based Tiemeier and Hensen PC.

Reference

1. Priluck, Robertson, Buettner. "What Patients Recall of the Preoperative Discussion After Retinal Detachment Surgery." *Am. J. Ophthalmol.*;87:620(1979).