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Avoidable Phraseology for Medicolegal Writing

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Is the glass half empty or half full? In how many situations does this metaphor become relevant? It occurred to me as I sat down to write this column on some "dos and don'ts" of writing, that as powerful and persuasive as expository or scientific writing can be when done well, it can also be some powerfully bad medicine when poorly executed. Successful physicians who are engaged in matters forensic - independent or qualified medical examiners, or those treating workers' compensation or personal injury cases - take the time to hone their writing skills and carefully craft their written documents. The learning curve is never-ending.

Expertly crafted and soundly reasoned letters, reports or rebuttals can ooze suasion. They command attention, change minds and induce action. Settlement offers can double; opposing experts can be pulled from a case simply as a result of a written document from a physician. But poorly written documents can, and very often do, unwittingly steal a patient's chance for recovery or impeach the doctor's credibility for years to come, becoming grist for opposing counsel's cross-examination strategy. Medicolegal circles are quite small, even in big cities like San Diego, and the grapevine is always alert to success or blunder. If a thing is worth doing, why not do it better than anyone else?

Sometimes it is more helpful to provide exhortations against poor technique than encouragement for good technique; so, in this article, we'll look at just a few of the many phrases that are best *avoided* in written documents that are destined for the medicolegal providing grounds.

Records Reviewed

When describing the source of materials reviewed in coming to conclusions (a requirement of Federal Rules of Civil Procedure 26), the physician should list all materials reviewed in "bullet" format. Two examples are "Hospital emergency room records from Harbor View Hospital, dated April 23, 2001," and "Deposition of Mark Watterman, PhD, dated March 30, 2002."

Using phraseology such as "records including," "briefly reviewed," "significant portions of," or "miscellaneous portions of," is poor form for a number of reasons. Readers of the report will not be able to determine from these vague descriptions what parts of the medical record or selected documents were reviewed. If there is any likelihood that the opinion was made without the benefit of seeing all the evidence, this can detract from the weight of the doctor's conclusions, especially if only selected portions of the medical record that the hirer deigned to be relevant were reviewed. In medicolegal proceedings, opposing counsel will generally jump on this with claws extended. At the very least, on cross-examination, the doctor will then have to go through this material and declare which records or their portions were reviewed. This can be rather tedious on the witness stand. If this had been more precisely documented in the original report, it would be a simple matter of reading from the report.

More egregiously, it is not at all uncommon for attorneys or insurance companies to provide only partial records or summaries of records to their experts in an attempt to influence the expert's opinion. Records that are not complimentary to the hiring agency's opinions are often tactically omitted from the documents provided to the expert. This is done ostensibly to lighten the expert's load, but, in addition to twisting the appearance of the facts, has the additional benefit of reducing costs to the expert's patron by reducing review time charges and simplifying the collection of records from numerous sources. This way, one need not ask the witness to lie.

An expert risks impeachment and damage to reputation and professional integrity when this occurs. The most common cross-examination setup is getting a doctor to admit that whatever he had not been privy to in the documents provided (e.g., a history of musculoskeletal pain, neurological condition, or another injury) might have some bearing on his opinion in this case, then pull the legal trap door and provide the doctor with information he hasn't seen, which necessitates a change in opinion. Obviously, it is always important to see *all* the records up front. I won't work with "executive summaries" or partial record sets. I consider my professional reputation more valuable than any single case.

Reference to the Law or to What Is "Legal"

Physicians and other nonlegal experts often make casual reference to the law or to whether a thing is "legal," but when the law is outside their area of expertise, they should avoid this phraseology. For example, one doctor may describe another doctor's actions as "grossly negligent." If he is cross-examined he might be asked what the legal definitions of *negligence* and *gross negligence* are. For the former, the four elements

are duty, breach, causation, and damages. In the case of gross negligence, there is the additional implication of actual or constructive intent to injure. A cross-examination might go like this:

Attorney: "Doctor, you noted in your report that Dr. Stewart's actions were 'grossly negligent,' correct?"

Doctor: "Yes, that's my opinion."

Attorney: "Doctor, do you know the legal definition of 'negligence'?"

Doctor: "Well, no."

Attorney: "How about the legal definitions of 'gross negligence'?"

Doctor: "No."

At this point, the attorney explains the two terms and then asks:

Attorney: "So, would you still say Dr. Stewart's actions were grossly negligent?"

Doctor: "No."

In addition to making the doctor appear ignorant of the law he is citing, the attorney also makes the doctor appear somewhat biased through the use of his exuberant language. What he should have commented on, as a physician, was whether Dr. Stewart's care was within the standard of care in the community, which is a determination that doctors, rather than lawyers, make.

Claims of Expertise

Doctors who make claims of expertise should do so only if they can provide support for those claims, otherwise, their words appear self-serving and grandiose. It's not uncommon, for example, for doctors to list themselves as experts in various areas of health care management or trauma in advertisements, on letterhead, business cards, or *curriculum vitae*. Consider this cross-examination:

Attorney: "Doctor, you are an expert in low back injuries occurring on the job, correct?"

Doctor: "That's correct."

Attorney: "How did you become an expert, doctor? Do you have any advanced degrees or special certification in this area? Have you done any fellowships, teaching, research, or have you published any textbooks or professional papers on the subject?"

Doctor: "No, but I have been involved in many cases."

Attorney: "And you promote yourself as an expert for hire, don't you doctor?"

Doctor: "I'm not sure I understand."

Attorney: "Well, your *CV* distinguishes you as an 'expert witness in work-related musculoskeletal injury.' You make money testifying in court, right?"

Doctor: "I'm paid for my opinions, yes."

Attorney: "Exactly my point, doctor."

Grandiloquent Language

I often read reports in which doctors describe their analyses as "thorough," "comprehensive", "exhaustive" or "meticulous," and their opinions as "considered" or "expert." This kind of exalted verbiage generally will appear self-serving, and will be the source of easy pot-shots during cross-examination. For example, if the doctor misses any little detail, he may be asked whether the review was still comprehensive. The doctor may be asked just what a thorough or exhaustive examination entails. These can be rather challenging questions. "Exhaustive" implies that nothing was omitted. It is not likely that a physical examination left no test or procedure out. Again, it is preferable to simply describe what procedures were conducted, what tests were performed, or what data was reviewed. Other examples include words which imply absolutes of anything: all; never; always; impossible; doubtless; certain; compete absence; none; etc. Any exception to the rule - and there usually are a few-can stand as an abnegation of the doctor's statement and can make the doctor appear reckless, dishonest, or biased.

Ambiguous and Vague Terminology

Although it is difficult to avoid some degree of ambiguity when using the English language, medical reports that allow for more than one interpretation of facts or critical information hold much less weight and in some cases no weight, compared to those that are clear and unambiguous. It is common, for example, for a

final medical report written in June to give a diagnosis of "acute, cervical strain/sprain (whiplash) injury, secondary to motor vehicle crash, February 3, 2002." This is subject to a couple of interpretations:

1. The patient did have an acute injury in January, but has since recovered, or;
2. The patient did have an acute injury in January and is still symptomatic, and doctor's terminology is probably just imprecise (i.e., one would not correctly describe a four-month-old condition as "acute").

Without asking the doctor what he meant, we can't be certain of the patient's final condition. Most importantly, if there is another medical report in the file that is not ambiguous or confusing, it will almost certainly hold sway over the ambiguous one. And that might be a report that is not complimentary to your theories, opinions, or management strategies!

There are also words that are subject to broad interpretation and should not be used unless they are qualified or quantified in the report. To write that "substantial" areas were involved, or that the patient's discomfort was "considerable" does not convey precise meaning. Words such as "significant," "major," "remarkable," and others that are subject to interpretation should be used cautiously. To some people, any pain, for example, might be considered significant, remarkable or substantial. Conversely, others might interpret this as lying on the high side of the visual analog pain scale.

There are hundreds of other dos and don'ts to medicolegal writing, and I've only mentioned a few dealing with phraseology here. A good general piece of advice, though - and one I always give my students - is to say (write) what you mean and mean what you say (write). Proofread your reports, looking for areas of potential ambiguity or lack of clarity. And never send out a report with typos, grammar errors or punctuation errors! They too detract from your credibility and professionalism.

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