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**A**nyone who has watched the television series *Law & Order* knows that a jury trial is a complex interplay of facts, law, war games, and theater. These same items determine the outcome in the civil courts, where allegations of medical malpractice are tried.

Recently I served as an expert witness, defending a surgeon accused of negligence in performing an operation on the pancreas and in managing the pancreatitis that followed. There was a bad outcome for the patient (who survived), but I firmly believed and had testified in deposition that the surgeon's treatment had been well within the acceptable standards of care. After being duly sworn in, the defense attorney established my qualifications to offer an expert opinion in this case, based on both my clinical practice and writings, which I have focused on the pancreas for 35 years.<sup>1</sup> In cross-examination, the plaintiff's attorney asked whether I had read and verified "every word" of any publication bearing my name. The question seemed straightforward enough at the moment (even if a bit aggressive). He did not challenge my credentials, but the trap was set.

My testimony proceeded smoothly. It seemed to me that the jury was getting it, understanding that the unfortunate consequences of the operation were not the result of surgical error or medical mismanagement. Even the cross-examination failed to shake that position.

Then the plaintiff's attorney dropped the bomb. He turned to face me and accused me of disrespect for the jury system and the jurors. The defense attorney exploded with an objection, which was sustained by the judge. The plaintiff's attorney next inquired whether it was true that I chaired the surgeons' political action committee (PAC), which sought to deny patients their rights (objection: sustained). He then asked if it was true that I raised hun-



dreds of thousands of dollars to overturn the law (objection: sustained).

At that point, the judge allowed me to reply to the jury with more than a "yes" or "no," to defend my objectivity and to express that the prime purpose of my service for the American College of Surgeons Professional Association PAC (ACSPA SurgeonsPAC) was to assure the continued access of patients to surgical care. I explained that access to care has been threatened by the rising costs of liability insurance and falling reimbursement for surgical care, as these have contributed to early retirements, closing of trauma centers, and critical shortages of surgical specialists in many parts of the country, all leading to the concern that "a surgeon might not be there when you need one." I made it clear that our PAC is not about one issue but supports advocacy for graduate medical education, trauma programs, and readjustment of the formula for Medicare payment, among other concerns.

When he resumed, the plaintiff's attorney read an admittedly flamboyant sentence from an article that I had coauthored

## REPLY TO A TRIAL LAWYER

by Andrew L. Warshaw, MD, FACS,  
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on a public movement to fix a very broken medical liability environment in Mississippi: "Pound for pound and for sheer avaricious malevolence, your journeyman tort lawyer can twist, undermine, and misdirect more of the fundamental principles of a civilized society than the aggregate inhabitants of any state's maximum security institution."<sup>2</sup> Although this hyperbole was from the inspired pen of a coauthor, I accepted authorship responsibility for the published comment (as I had testified 90 minutes earlier during the qualifying questions). "Were you talking about me?" he asked. Amidst the resulting hubbub, I was excused from the witness stand.

I felt terrible. Had my PAC activity completely negated my credibility as an expert in the field to which I had devoted my professional career? Was the jury going to discount and dismiss my testimony as critically biased? The lawyer for the surgeon, however, did not seem distressed. He told me, while the jury was still out, that he advises his junior associates, "When you have the facts, pound on the facts. When you have the law, pound on the law. When you have neither, pound on the table." I guess the facts prevailed: it was a verdict for the defense.

Nonetheless, I have perseverated on this experience. What should I have replied to the personal attack on the veracity of my statements, not based on the facts but on the implication of such irresistible bias against malpractice plaintiffs and their lawyers that I could not or would not provide fair testimony? Will I be henceforth tainted as a medical witness because of my political views and activity? Could it happen that any of us who support the ACSPA SurgeonsPAC will be disqualified?

Here are my answers to the plaintiff's lawyer's questions: I more or less said these things in court but not quite so distinctly.

1. I respect and honor the jury system and the jurors who underpin it.

2. I have a problem with the tort system's misapplication: 97 percent of injuries to patients, some of which are the result of negligence, do not result in a tort action,<sup>3</sup> and 90 percent of the cases that reach a jury are dismissed as unjustified by that jury.<sup>4</sup>

3. Too much of the awards to plaintiffs never reach the injured patient.

4. The majority of the members of the House

and Senate believe that the tort system is in need of reform.

5. The ACSPA SurgeonsPAC advocates for a number of diverse goals, most in the end relating to access to quality care for patient.

I missed my big chance, however. Most of us have thought of the perfect comeback that we wish we had made but thought of too late, after the moment had passed. Following is what I should have said (courtesy of my wife when she heard the story):

*Trial lawyer:* "Did you write this characterization about the average journeyman tort lawyer?"

*Me:* "No, but I accept responsibility as a coauthor."

*Trial lawyer:* "When you wrote those lines, were you talking about me?"

*Me:* "Sir, if the shoe fits, wear it." □

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## References

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2. McGee GE, Warshaw AL, Harken AH. Mississippi medical liability reform experience. *Surgery.* 2006;139(4):462-465.
3. Localio AR, Lawthers AG, Brennan TA, et al. Relation between malpractice claims and adverse events due to negligence. Results of the Harvard Medical Practice Study III. *N Engl J Med.* 1991;325(4):245-251.
4. Personal communication with Marilyn McMahon, JD, Risk Manager, Office of the General Counsel, Massachusetts General Hospital, Boston, MA. July 5, 2006.

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