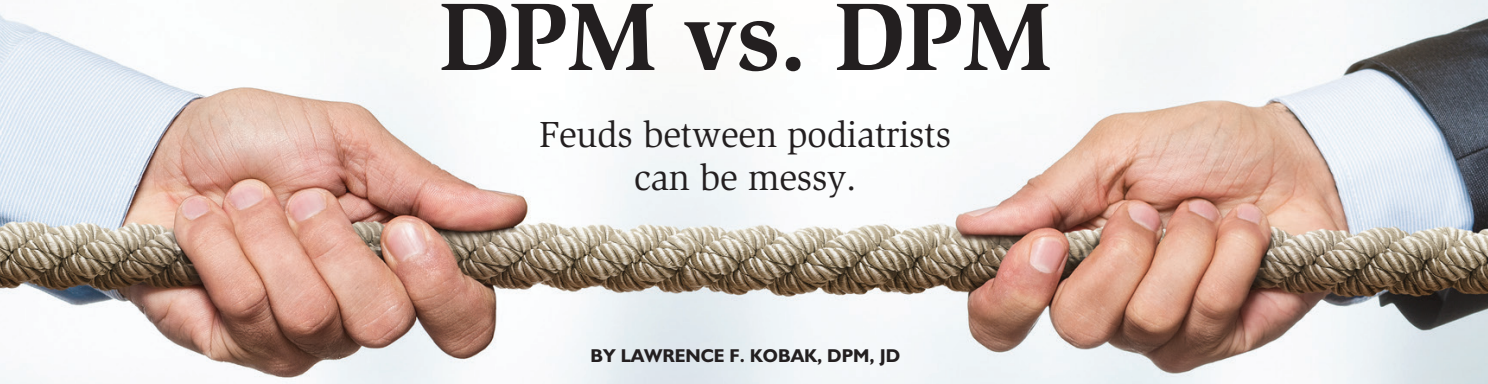
DPM vs. DPM



Feuds between podiatrists can be messy.

BY LAWRENCE F. KOBAK, DPM, JD

Over the years in my career as a healthcare attorney, certain cases stand out for their unique qualities. Others stand out due to their repetitive nature. Below is a selection of each.

Case One: Feuding Podiatrists—The Classic

We all know of feuding podiatrists. Frequently, they originally worked together. Something in the distant past happened and they went their own ways. Often, they both still practiced in proximity to each other. Often, over the years, there were multiple legal actions against each other. It gets personal. Many attorneys love this as the billable hours are plentiful. A "free" way of expressing the hostility involves generating malpractice cases from patients they obtain who are unhappy with the other podiatrist. Remember, we all see each other's dissatisfied patients. This goes both ways. Sometimes, the "other" podiatrist files a complaint with the state board for possible disciplinary action. Most states require an investigation into each complaint received.

The accused podiatrist practiced in a suburban area. A total of five patients complained to the state disciplinary board. All the patients, after treatment by the accused, subsequently saw the same podiatrist—a podiatrist who had been in a feud with the accused podiatrist for a couple of decades. Each practice was "guilty" of provoking malpractice suits against the other. There were harassment suits, breach of contract suits, insurance company complaints, HIPAA complaints, OSHA complaints; you name it. Sometimes staff of one practice was hired by the other. The other practice acted in any way it could with the information thus obtained. It was a truly toxic situation.

Despite this inter-practice history, the accused podiatrist had to be defended based upon the validity of the allegations, not the history between the two podiatrists. Once the accused podiatrist realized that reality, he and his lawyer proceeded to analyze the allegations and possible defense strategies. While each state board has their own investigative techniques and regimens, most involve an interview of the podiatrist early into the investigation.

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The letter we received from the board stated there were issues concerning advertising as well as patient care with five different patients. At that stage, the board refused to be more specific. His legal team set out to determine any commonality between the five patients other than the subsequent podiatrist. All were treated with a relatively new technology for heel pain. Podiatry, as a profession, was somewhat divided over the treatment mode, but no generally accepted paradigm for treating heel pain was accepted at that time. We sent over the last several years of podiatric literature on the subject. Any paradigm accepted after the treatment was disqualified. While the treatment mode used by our client was not universally accepted for heel pain, it had its proponents.

There was another aspect to the allegations/investigation—the advertising. In its local ads, the accused podiatrist claimed that his treatment for heel pain was "state-of-the-art". Additionally, the accused podiatrist stated he was board certified by a board not recognized by the APMA. No state allows a podiatrist to mislead or lie about their practice or credentials.

After some legal research, his legal team had to differentiate between what was misleading and was merely the podiatrist tooting his own horn. The treatment used for heel pain, at the time, was considered "state-of-the-art" by several leading podiatrists. That was their opinion. The term "state-of-the-art" is opinion by its very nature, not factual. His legal team set out to demonstrate that many professions have arguments re: whether or not various treatment

Continued on page 56

DPM vs. DPM *(from page 55)*

techniques are state-of-the-art. Robotic surgery was far from universally recognized as state-of-the-art for all types of procedures. Yet, dozens of advertisements asserting to its cutting-edge nature abound. It's the same with laser surgery.

Now, as to the possible problem with the podiatrist's use of his board certification credentials, the board was indeed recognized at the time by a large board certifying umbrella other than the APMA. In fact, after obtaining a few years of advertising and other documents from the accused podiatrist's local colleagues, his legal team were somewhat surprised to see that his long-time rival had also used those same credentials on his stationery and ads. His legal team obtained the stationary from various unfriendly and threatening pieces of correspondence between the two podiatrists over the years.

His lawyer did not have to prove a successful outcome for any of the patients, only that the treatment was at or above the standard of care at the time the treatment was rendered. The lawyer assembled dozens of peer-reviewed articles concerning the treatment/procedure involved for all five of the patients.

The podiatrist was carefully prepared for his board interview. Mock interviews were held. It was very important for the accused podiatrist not to get personal or vindictive. All he had to do was to define, explain, and defend the treatment and advertising. Past history and vindictiveness were not only irrelevant, but they were also potentially hurtful.

The interview went quite well. An extensively written document, with exhibits of other local advertisements, proof of the legitimacy of the board, and copies of the treatment studies were given to the board. The case was closed soon after.

In truth, none of this should have been necessary. This was simply the latest chapter of foolishly spent time, emotion, and money, in perpetuating a useless feud between practitioners who should be colleagues, not enemies.

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Case Two: Family Feud

Here is one with a twist. Two podiatrists, Dr. A and Dr. B, were best friends. They remained that way. The feud was between Dr. A and Dr. B's soon to be ex-spouse. Dr. B's spouse was seeing his best friend, Dr. A as a patient. The spouse felt that the best way to hurt the soon-to-be "ex" was by hurting his best friend.

The spouse went to Dr. A for foot care. While the conversation started professionally, the spouse soon started bad-mouthing Dr. B. Dr. A replied in a professional way. There was a podiatric assistant in the room. Soon after, the podiatrist got a letter from the state podiatry board investigating his alleged inappropriate behavior and verbiage with the patient during their recent encounter.

Upon an investigation, it was ascertained that there were no locks on the treatment room doors in the podiatrist's office. His lawyers were able to speak with the podiatric assistant who was in the room during the recent encounter with this patient. The podiatric assistant was able to draft a cogent affidavit with her memory of the visit. Photographs were taken of the treatment room layout and its position within the office. The front desk was a few feet away from the treatment room. The office manager was at the front desk at the time and remembered nothing untoward coming from the treatment area. There were no patient complaints after the treatment. In fact, the re-appointment software showed that the patient re = appointed for a follow-up visit! A screen shot was taken of the appointment calendar.

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Additionally, the lawyers obtained sworn testimony of the soon-to-be ex-spouse that stated she "would get" the soon-to-be ex-spouse "by any means necessary". After all this documentary evidence was presented, it was reasonable to infer that the podiatrist was the victim, not the perpetrator of unprofessional conduct. The investigation was ended soon after the podiatrist had his interview with the podiatry board.

Case Three: Podiatrist vs. Podiatrist vs. Patient

This is another true story about colleagues who morphed into enemies. While still in practice together, multiple podiatric surgeries were performed on a patient. The patient sued both podiatrists.

The two podiatrists at first practiced well together. They had each other's back. One thing led to another. They split up. They were both served with a summons and complaint. This was a straight-up malpractice suit. Each podiatrist had his own attorney. Just prior to the start of testimony at trial, it became very apparent that if each had to sit at the same defense table with the other, there could be physical violence between them. The other defense attorney had real fears that the case was going to be need-

Continued on page 58

DPM vs. DPM (from page 56)

lessly lost by both "colleagues" pointing a finger at the other. When that occurs, both sides have lost. The jury smells a rat and divides up liability between the two defendants. This was an untenable situation.

The lawyers sat down with both podiatrists and explained the possible consequences of a big loss in the case. It could impact on their licenses in this jurisdiction. It could negatively influence their participation in insurance panels. After demonstrating how their continued fighting could hurt their bottom line and worse, a temporary truce was called. A verdict came back, quite deservedly, finding no negligence by either of the defendants.

While these two practitioners never became best friends again, they soon realized the increased benefits of peace and quiet.

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Conclusion

The common denominator in these three matters was the consequences of allowing emotions to get the best of you. There is so much wasted time, money, and energy spent with no true satisfaction. Yes, mediation or arbitration is sometimes necessary to solve certain problems; in some situations it is necessary to go to court. However, oftentimes it is best to take the advice of the great psychologists, Lennon and McCartney: "Speaking words of wisdom, let it be, let it be." **PM**

Dr. Kobak is Senior Counsel in Frier Levitt's Healthcare Department in the Uniondale, New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Health Care Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.