ADMISSIONS BY PHYSICIANS

*Ralph Slovenko**

O, what a tangled web we weave,
When first we practice to deceive!

—Sir Walter Scott

"Oops, I cut in the wrong place," was the evidence used against a surgeon in a medical malpractice action. The surgeon made the statement during an operation. By virtue of the admission, it was unnecessary to offer expert testimony to prove that the defendant physician violated the standard of care, the usual obligation of a plaintiff in malpractice cases. The doctor's admission was sufficient to carry the case to the jury.[1] A prima facie case, we know, pressures the insurer to settle as it does not want to be put to the peril of a jury.

Admissions, of course, play a role as proof in all types of cases but they have special importance in cases of malpractice (professional negligence). Unlike in ordinary negligence cases, expert testimony is required as a matter of law to prove a case of malpractice. An admission obviates that requirement.[2] Statements of a party, plaintiff or defend-

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1. Orozco v. Henry Ford Hospital, 408 Mich. 248, 290 N.W.2d 363 (1980).

2. Other illustrations may be noted of the physician's statement justifying the case going to the jury without the necessity of expert testimony. In Sheffield v. Runner, 163 Cal. App. 2d 48, 328 P.2d 828, 830 (1958), where the patient died in her home from pneumonia, the doctor said, "I should have put her in the hospital." In Wickoff v. James, 159 Cal. App. 2d 664, 324 P.2d 661, 663 (1958), where the patient's intestine was torn during a sigmoidoscopic examination, the doctor said, "Boy, I sure made a mess out of things. . . ." In Pappa v. Bonner, 268 Ala. 185, 105 So. 2d 87 (1958), involving damage to a young child's central nervous system, the doctor admitted the child was not given proper post-operative care. In Lashley v. Koerber, 26 Cal. 2d 83, 156 P.2d 441 (1945), the physician admitted he should have X-rayed and said that it was all his own fault. In Stickleman v. Synhorst, 243 Iowa 872, 52 N.W.2d 504, 506 (1952), involving a catastrophic hemorrhage, the doctor said, "I don't know whether I can perform that operation [on another person] after the mess I made out of you." In Wooten v. Curry, 50 Tenn. App. 549, 362 S.W.2d 820 (1961), noted in 28 NACCA L.J.

ant, are received against them as proof of the facts admitted.[3] A party is not in the position to complain that when making the statement, he was not under oath or subject to cross-examination. After all, it is that person's own statement. "Anything that you say may be used against you," according to the familiar phrase.[4]

When, if ever then, should a physician make an admission of wrongdoing, or of an error? Should the physician always send a bill, since failure to do so might indicate a sense of culpability? Should the

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163 (1961-62), a malpractice action for failure to make a post-operative examination to prevent the patient's vagina from closing following a hysterectomy, the doctor said he was sorry it happened and could probably have avoided it if he had made the proper post-operative examinations. *See* D.W. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE vol. I, § 11.28.90 (1969); Lambert, *Law in the Future*, TRIAL, Aug. 1983, 62, at 64.

3. The only requirement for the admissibility into evidence of a party admission is that the statement be made by the party himself, by one he has authorized to make a statement concerning the subject (e.g., his attorney), or by his agent or servant concerning a matter within the scope of his agency or employment during the existence of this relationship, and that it be a statement "of which he has manifested his adoption or belief in its truth." FED. R. EVID. 801(d)(2). The law identifies several kinds of party admissions. A "judicial admission" is one in which a party makes an intelligent, solemn and formal admission during the course of trial which serves to dispense with any further need of proof on the point admitted. A judicial admission is binding on the party who makes it. Ortega v. Lenderink, 382 Mich. 218, 169 N.W.2d 470 (1969); Michigan Health Care v. Flagg Industries, 67 Mich. App. 125, 240 N.W.2d 295 (1976). In contrast, any admission short of a judicial admission is evidence to be considered by the fact-finder and weighed against any explanation, repudiation or denial the party offers at trial. The meaning or the weight to be given this admission is generally a question for the jury. West v. Southern Ry. Co., 20 Tenn. App. 491, 100 S.W.2d 1004 (1937). An "adoptive admission" arises when a party expressly and unambiguously adopts a statement made by another to be his own. Durbin v. KKM Corp., 54 Mich. App. 38, 220 N.W.2d 110 (1974). A "silent admission" arises where statements are made in the presence of a party under circumstances calling for his reply and the party does not reply, thereby indicating his acquiescence and concurrence with the statement. Donker v. Powers, 230 Mich. 237, 202 N.W. 989 (1925). An "authorized admission" is a statement made by persons who are authorized by a party to speak for the party on the subject matter. Neal v. Novelty Leather Works, 198 Mich. 598, 165 N.W. 681 (1917) (statements made by the president of a corporation may be admitted in a suit against the corporation since the president is authorized to speak on behalf of the corporation). "Vicarious admissions" are statements made by an employee or agent of a party while acting within the scope of their employment or agency. Bauman v. Grand Trunk Western Ry., 18 Mich. App. 450, 171 N.W.2d 468 (1969). Statements contained in documents "kept in the course of a regularly conducted business activity" are admissible in evidence as an exception to the rule excluding hearsay. FED. R. EVID. 803 (6), (7). Medical records are considered a form of business records. Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941).

4. E.W. CLEARY (ED.), MCCORMICK ON EVIDENCE, at 774 (3d ed. 1984).

physician ever say to a patient, "I'm sorry"? Good manners are essential for social life, but given the risk of litigation, one must be wary. A Tokyo office worker, reminiscing about living for a while in New York, said that Japanese friends in New York had advised her not to apologize too readily to Americans when confrontations arose. In the United States, they warned, saying "sorry" could be taken as an admission of wrongdoing, inviting legal action. The Japanese are a people who apologize profusely.[5]

A Miami attorney, Samuel J. Powers Jr., had this to say in an address to a medical association:[6]

> Some things that happen in your practice have a severe emotional impact on you. It's only natural to sympathize with a patient. Some physicians, emotionally overwrought under such conditions, make statements to the effect that they're sorry this or that happened, as though they hoped to lessen its impact on the patient or on his relatives. But all they are really doing is digging their own graves. People nowadays are conscious of the fertility of this field of malpractice suits—and they remember those statements when you go to trial.

To be courteous is to let down one's guard and invite disaster. The word "sorry" in conjunction with other language or circumstances may constitute an admission, said the Nebraska Supreme Court.[7] In an Oklahoma case, the doctor diagnosed the patient's condition as a tumor, but when he operated, he found that she was pregnant. The doctor then told the woman and her husband, "I'm sorry, I should have done more tests on you." The only witnesses at the trial were the plaintiff and her husband, who testified as to this statement, and the doctor, the defendant, who was only asked his qualifications. The Oklahoma Supreme Court ruled that the remark was sufficient to make

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5. *See* Haberman, *The Apology in Japan: Mea Culpa Spoken Here*, N.Y. Times, Oct. 4, 1986, at 2, col. 1.

6. " *'Witless Pedantry' " Is Blamed in 90% of Malpractice Suits,"* MEDICAL TRIBUNE, Dec. 7, 1962, at 12.

7. Giangrasso v. Schimmel, 190 Neb. 228, 207 N.W.2d 517 (1973). In Peterson v. Richards, 73 Utah 459, 272 P. 229 (1928), the doctor said that he was sorry about the condition of the patient's hand. The patient's fingers were in some manner injured in the hospital. In a malpractice action, the doctor's statements were used against him as an admission. In Wojcik v. Hutzel Hospital, case no. 84-420-030 (Circuit Court of Wayne County, Michigan), the doctor said to the patient in the presence of several witnesses that "different doctors perform this surgery in different ways" and that he was "sorry."

a prima facie case of malpractice, and it remanded the case to be tried before a jury.[8]

Was the doctor's statement in this case an admission of negligence? Apart from this statement, and the harm done, there was no evidence to show that the defendant doctor's conduct was unskillful and not in accord with the work of physicians of good standing. Suppose an attorney loses a case and says to his client, "I'm sorry. I lost your case. I should have done more research." Will this statement alone be sufficient to take the case against the attorney to the jury even though the attorney may have in reality done much more than the average attorney in the community might have done?[9]

Out of caution for what might be said, lawyers advise doctors not to go to the funeral of a patient. Physicians at funerals are heard to say, "We did the best we could." But how good was that? Does it in fact measure up to the standard of care? "The statement, 'I'm sorry,' should not be sufficient," says one commentator in a law review article, "for this is what every decent human would say when the desired result was not accomplished even though he performed at his highest capability which might be far above that of his colleagues in his community . . . . On the other hand, one should not have to spell out everything which the law requires in order to hold the defendant doctor negligent."[10]

Two leading authorities on the law of evidence, Stephen Saltzburg and Kenneth Redden, are not very reassuring. They have a lengthy comment in their manual on the Federal Rules of Evidence:[11]

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8. Greenwood v. Harris, 362 P.2d 85 (Okla. 1961).

9. That query was posed in Note, *Professions and Occupations: Doctor's Extrajudicial Statements As A Basis of Liability in Malpractice Suit*, 15 OKLA. L. REV. 476, 478 (1962). Following a collision, a motorist says, "Thank God I've got insurance." Is it an admission of fault? It's debatable. *See* Wilbur v. Tourangeau, 116 Vt. 199, 71 A.2d 565 (1950); Travers, *An Essay on the Determination of Relevancy Under the Federal Rules of Evidence*, 1977 ARIZ. ST. L.J. 327, at 353. There are cases where the physician admits his error, says he will not and does not send a bill, and, indeed, announces that he will pay for the second or subsequent corrective surgery. Barrette v. Hight, 353 Mass. 268, 230 N.E.2d 808 (1967). Under Rule 409 of the Federal Rules of Evidence, evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. The rule is designed to encourage people to help others when a problem arises for which one party may feel some responsibility, even if not legal responsibility.

10. Note, *Professions and Occupations: Doctor's Extrajudicial Statements As A Basis of Liability in Malpractice Suit*, 15 OKLA. L. REV. 476, 476 n.3 (1962).

11. S. SALTZBURG & K. REDDEN, FED. RULES EVID. MANUAL, at 199 (3d ed. 1982).

> It should be noted that nothing in the Federal Rules of Evidence covers statements of remorse made by someone who is involved in an accident. For example, testimony that one driver in an automobile accident states to another injured driver, "I am terribly sorry that you are injured," is not barred by any specific Rule. It is not an offer of compromise; nor is it an offer to pay medical expenses. In most jurisdictions such a statement is deemed to be of very low relevance and is excluded as the kind of statement that a good Samaritan would make and one for which no one should be penalized. We would urge that the same policies that underlie Rule 409 [on payment of medical and similar expenses] would support exclusion of such a statement on the ground that, although it might be slightly probative of consciousness of guilt, the statement's probative value is substantially outweighed by the unfairness of using such evidence against a citizen who expresses the kind of concern that a society expects of its best citizens. We recognize that Rule 409 allows into evidence statements made in connection with payment of or offers to pay medical expenses. [Rule 409 excludes evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury but it does not exclude opinions or admissions of liability though made in connection with an offer to pay hospital or other expenses.] But we view the simple statement of remorse as having close to no probative value. Many courts have wanted to encourage kind or humane statements, and to them it seems unfair to use such evidence against a party who has responded in a generous or caring way. Arguably, such evidence is probative enough to be admitted, however. There is a good argument that the statement is not substantially more prejudicial than probative. Our position is that it is of such little probative value that the danger that the jury could misuse it justifies exclusion. But we recognize that our argument reflects a strong feeling of unfairness that has to do more with wanting to encourage expressions of sympathy and compassion than with concern about demonstrable prejudicial effect . . . . We think that it is highly unlikely that false statements of remorse will be made. And even if they are, false statements of remorse may do as much good for the injured person as true statements and may help to reduce tension following accidents and other disruptive events. We would not recommend blind adherence to precedent, but the policy of exclusion is so well founded that it seems like a waste of scarce judicial resources to persistently relitigate a well-founded rule.

Are physicians between a rock and a whirlpool? On the one hand, admissions or even an apology may be used against the physician as

evidence in a malpractice suit while, on the other hand, the physician is told that the physician-patient relationship is improved by leveling with the patient, and thereby lessens the risk of a malpractice suit. Time beyond count, we hear doctors or others advising doctors:

"People sue when they are angry, so say you are sorry."[12]

"Never lie."[13]

"Many, if not most, of those who file malpractice suits might not have done so if the physician (and his or her staff) had created and maintained good rapport."[14]

"The major documented reason for malpractice actions is not poor outcome, but the patient or his family's sense that the physician did not care about them due to his lack of communication. When an unexpected result occurs rather than the physician addressing it directly with the family, he may decide to avoid them, to pretend it didn't happen. This type of behavior leads to malpractice lawsuits."[15]

"[T]here is only one thing that can prevent litigation by a patient. Only the genuine love of the physician for the patient expressed both in word and deed can offer the physician some immunity against litigation. Patients don't sue physicians whose love they feel . . . . Patients who are loved forgive the errors of their beloved physician."[16]

"A warm relationship with a patient is the best defense against malpractice. You don't have a warm relationship when you regard the patient as an adversary."[17]

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12. Communication by Dr. Bruno Bettelheim to Ralph Slovenko (July 26, 1983).

13. S. BOK, MORAL CHOICES IN PUBLIC AND PRIVATE LIFE (1979).

14. Hall, *Doctor-Patient Rapport: Key to Avoiding a Malpractice Suit*, 23 PHYSICIAN'S MGMT. 120 (1983).

15. Talk presented by attorney Barbara A. Weiner upon receipt of the Manfred Guttmacher Award at annual meeting of American Psychiatric Association on May 10, 1987, in Chicago.

16. Orvin, *Malpractice*, PSYCHIATRIC NEWS, Nov. 7, 1986, at 2.

17. Comment by Dr. Gene L. Usdin in 1986 Distinguished Lectureship, "The Stress and Gratification of a Physician," at Tulane University School of Medicine.

"Confession is good for the soul."[18]

In yet another suggestion, Joan Vogel and Richard Delgado in a law review article urge the enactment in law of an affirmative duty on the physician to disclose medical mistakes or malpractice. They say that if the primary physician and other members of the treatment team conceal malpractice, the patient may believe that his or her pain, debilitation, or loss of function are merely unfortunate results of the operation or procedure. A duty to disclose malpractice is necessary, they say, because the medical profession does not regulate itself effectively, discourages the reporting of malpractice to patients, and erects formal and informal barriers to patients' access to information. This proposed duty to disclose malpractice is consistent, they say, with current trends in tort law, such as the development of the doctrines of informed consent, collective responsibility, duty to warn, and duty to supervise. It would remedy a serious imbalance in the physician- patient relationship, as well as enable some victims of malpractice to obtain relief who would otherwise be unable to do so. It would give tangible expression, they say, to the moral imperative that professionals who injure their clients must inform them of the injury.[19]

Of course, physicians who misrepresent the nature, outcome or prognosis of a completed procedure, or who either by silence or reassurance willfully conceal the state of the patient's condition, may be liable for fraud.[20] Physicians have an obligation to tell the truth about a patient's condition, even if that would reveal one's own or a prior physician's negligence.[21] In such cases, unless disclosure is made, the statute of limitations will be tolled as to fraud, and if other physicians are involved, conspiracy as well. Therefore, writes Dr. Robert M. Wettstein, a patient with Tardive Dyskinesia (TD) who comes to the physician for diagnosis or treatment should be told he has TD, regardless of whether he inquires specifically about it or whether it is a consequence of present or past negligence. Dr. Wettstein says, "The physician

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18. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987).

19. Vogel & Delgado, *To Tell The Truth: Physicians' Duty to Disclose Medical Mistakes*, 28 UCLA L. REV. 52 (1980).

20. Baum v. Turel, 206 F. Supp. 490 (S.D.N.Y. 1962); Garlock v. Cole, 199 Cal. App. 2d 11, 18 Cal. Rptr. 393 (1962); Simcuski v. Saeli, 441 N.Y.2d 442, 406 N.Y.S.2d 259, 377 N.E.2d 713 (N.Y. 1978); Birnbaum v. Seigler, 273 A.D. 817, 76 N.Y.S.2d 173 (N.Y. 1948); Haskins v. Howard, 159 Tenn. 86, 16 S.W.2d 20 (1929).

21. LeBlang, *Disclosure of Injury and Illness: Responsibilities in the Physician-Patient Relationship*, 9 LAW, MEDICINE & HEALTH CARE 4 (1981).

should not deny, if the patient asks, and arguably should volunteer if the patient does not ask, that the TD is a result of negligence, if the clinician believes this to be the case."[22]

C.G. Schoenfeld, book editor of the *Journal of Psychiatry & Law*, says that he filed a negligence suit against a hospital "only because it wouldn't say it was sorry." His mother was dropped by nurses in transferring her from a stretcher to a bed and fractured her hip. The jury awarded $176,000. Schoenfeld said,

> If they had just faced up to what they did and sat down with me and said "We're sorry," I would never have sued. They did the one thing that you never do to a man who has suffered the terrible loss of a loved one—they insulted my intelligence with tortured explanations.[23]

That viewpoint is often heard. A television documentary, "Diagnosis: Malpractice," began with a patient saying: "I was forced to sue. No one came to me and said, 'we're sorry, we made a mistake.' "[24]

History is replete with illustrations. Armenians strike out against the Turks, we understand, because Turkey never said it was sorry about its genocide of Armenians. One Armenian writes:

> So long as the Turkish nation denies what happened to the Armenians 70 years ago, terrorists will strike. I regret this, but as a first-generation descendant of survivors of the massacres, I can under-

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22. Wettstein, *Tardive Dyskinesia and Malpractice*, I BEHAVIORAL SCIENCES & LAW 85, at 92 (1983). In a subsequent communication, Dr. Wettstein says, "I don't think I definitely have formed my opinion at this point about a doctor telling a patient he was negligent in prescribing medication and can see good arguments for either side." Communication from Dr. Robert M. Wettstein to Ralph Slovenko (July 15, 1987).

23. After the verdict was announced, the jurors called Schoenfeld into the deliberation room to talk about how they reached the decision. A juror suggested to Schoenfeld that he finance a hospital fund in his mother's memory for patients who cannot afford private nurses. Schoenfeld seized on the idea and said he would organize the fund with a substantial portion of the $176,000. Lachman, *He Wins 176G Suit—& Will Give It Away*, New York Post, Nov. 25, 1981, at 9. One lady wrote to Schoenfeld: "I read in the newspaper about how your mother died. I feel sorry for all these things that happened. I know how you feel today to lose the best loved one in the world. The paper I read said you won the case suing the hospital, and that you want to give away $176,000. I feel that because you are going to give away all this money, could you possibly give me $5,000. I need this money badly for fixing my teeth that cost $2,000, and to go see my mother who is a very old lady. I will pray for you and your mother all my life." Communication from Hermenia Rodriguez to C.G. Schoenfeld (Dec. 1, 1981). I am grateful to Mr. Schoenfeld for sharing this communication with me.

24. *Diagnosis: Malpractice*, (ABC, television broadcast, Dec. 27, 1986).

> stand the bitterness Armenians worldwide feel toward the blatant denial of history. If the Turks displayed a modicum of intellectual honesty and laid the cards on the table, Armenians could become reconciled to the events of World War I, and the terrorism would stop.[25]

On May 4, 1970, four Kent State students were killed and nine others wounded by Ohio National Guardsmen who were on campus to quell violent antiwar demonstrations. For years, at Kent State, the situation was not defused. Yearly, on the May 4 anniversary, people on campus become tense and wary. Prage Golding, who became president of Kent State in 1977, says that the May 4 preoccupation at the university can be attributed partly to the fact that no one accepted the blame or apologized for the killings. "Without admitting liability, the state of Ohio should have told the families of the dead and wounded that it was sorry about what happened," says President Golding. "Politically, there are times when you have to say something the lawyers might not want you to."[26]

The expression of genuine sympathy could indeed lead to some form of utterance which, in the hands of a skillful lawyer, might be turned into an "admission" of wrongdoing. Is it possible to express sympathy and concern without it being turned into an admission of liability? Is it like walking a tightrope?

Should one attempt it, or should one like a motorist adopt bludgeoning tactics and blame the other party? Are good manners incompatible with the law, or with insurance coverage? Insurers are often blamed for much of the lack of courtesy because, as a rule, insurance policies will have a provision saying that after an accident one must not make any admission of liability. In theory, if it is one's own fault, one cannot apologize to the other party, for that may be an admission. Premiums, if not coverage, will be affected.

Liability insurance companies consider an admission by the insured to the injured party that he has done something wrong as a failure of cooperation, voiding insurance coverage. Therefore, before a physician should ever state to a patient that he did something wrong, he needs to be aware of what effect such a statement might have on his insur-

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25. Odian, *A Turkish Admission Would Halt Terrorism*, N.Y. Times, June 11, 1987, at 26, col. 3.

26. Quoted in Alsop, *Kent State: Symbol or Footnote?*, Wall St. J., April 28, 1978, at 16, col. 4.

ance coverage.[27] Thus, in a pragmatic sense, there are definite reasons why a physician should refrain from stating that something is or is not his "fault" unless he has cleared it with his insurance company.[28]

Consider what others do. When a street criminal commits a crime he remains silent or says, "I didn't do it." When Jim Bakker of the PTL ministry got caught with his pants down, he said, "God loves you, He really does."[29] When large companies are charged with violating the law, its spokesmen turn to gobbledygook, or they have no comment: "The charges are so ridiculous that they are unworthy of comment." Or they pass the buck: "Under normal conditions our product is accident-proof, but we can't guarantee it when the consumer doesn't follow the instructions."[30] In an article titled "Denial Has Become America's First Line of Self-Defense," Detroit columnist Laura Berman

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27. Throughout, for "he," read "she" in equal measure.

28. Insurance carriers caution the physician against making any statement that might be misconstrued as an admission. Orally and in policy sales literature they caution and admonish: "Admit nothing, deny everything." And they urge doctors not to brag or comment to patients about professional liability coverage. *First Aid for Malpractice Cases*, MEDICAL WORLD NEWS, June 7, 1963, at 117. Insurance carriers are known to insist on meticulous enforcement of cooperation clauses or to defend only on the basis of reservation of rights. Such enforcement dare not offend public policy, however, by chilling or choking off discovery of facts, and apparently may not be operative at all until a claim is filed against the insured. Many of the damaging admissions have occurred before the physician-patient relationship has been terminated, prior to the filing of a claim.

In preparation for trial, discovery may be made by a request for admissions, or by depositions or interrogatories. A party may serve on another party a written request for the admission of the truth of any matter, not privileged, which is relevant to the subject matter involved in the pending action, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. Mich. Court R. 2.302. A default judgment may be entered against a defendant who fails to answer interrogatories. Wood v. Detroit Automobile Inter-Insurance Exchange, 413 Mich. 573, 321 N.W.2d 653 (1982). The court may refuse to allow the disobedient party to support or oppose designated claims or defenses. Mich. Court R. 2.313(B)(2)(b). Reasonable expenses including attorney fees may be assessed against an opponent who improperly denies a request. Mich. Court R. 2.313(B)(2). In responding to a request for admissions, the party is not permitted to say he does not know but he may say that following inquiry he is unable to make a statement. Quite often, by the time a compliance order is obtained, it is time for trial and nothing happens.

29. *Nightline*, (ABC television broadcast, May 27, 1987). The initials "PTL" stand for Praise The Lord or People That Love, though mockers suggest other variations, such as Pass The Loot or Pay The Lady.

30. Buchwald (syndicated column), *Modern Business English*, Detroit Free Press, Sept. 24, 1978, at C3.

writes: "A man with political ambitions and a varied love life once told me how he combatted his girlfriend's accusations of betrayal. 'Deny, deny, deny—and then deny some more,' he said. Never, ever, allow her to glean even the suggestion that her suspicions might be true."[31]

Lawyers and negotiators do not make admissions but they do not lie; they dissemble. A law professor says, "In representing a client, lawyers can be dishonest—they can twist and bend— because everyone knows that's what they do."[32] "Just remember that lying can get you into a lot of trouble if not done properly," advises a lawyer. That was in a cartoon, but many would say it is true to life.[33]

Lawyers understand the importance of never admitting to anything—it's the lawyer's commandment. It's most important, at least from a legal perspective, to say nothing; particularly, to admit no guilt or responsibility whatsoever. When civil rights activist Julian Bond was asked by reporters about the allegations of cocaine use, he said his lawyer advised him not to comment.[34] In a discussion on automobile accidents, a commentator on national television advised: "Don't apologize. Don't say anything about it."[35] That's typical lawyer advice. "If you start explaining or apologizing to the victim," says a lawyer specializing in insurance cases, "you will be giving him crucial evidence for a suit against you."[36]

There is a classical parable (about the *M'raglim*) which describes the process of becoming lost. One doesn't suddenly find himself in the depths of a dark, trackless forest, but instead, one deviates from the familiar, broad roadway a step at a time. Gradually and imperceptibly, one strays farther and farther from the road until one ends up lost in the forest.

A woman, whose husband was negligently killed by a third party,

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31. Detroit News, June 5, 1987, at C1.

32. Comment by Prof. James J. White, "Effective Negotiation Techniques for Lawyers," Institute of Continuing Legal Education, Southfield, MI., June 10, 1987.

33. *Pepper and Salt*, Wall St. J., Sept. 4, 1986, at 27, col. 2. In the congressional hearings on the Iran-Contra affair, Secretary of State Schultz testified without a lawyer at his side, prompting cartoonist Ohman of the Oregonian to say, "I guess that means he's telling the truth." On fabrication and withholding of data, *see* Slovenko, *The Lawyer and the Forensic Expert: Boundaries of Ethical Practice*, 5 BEHAVIORAL SCIENCES & L. 119, at 131 (1987).

34. Upshur (Associated Press), *Julian Bond mocks press in speech*, Detroit News, June 14, 1987, at 8.

35. *Money Matters*, (NBC television broadcast, Oct. 15, 1982).

36. Comment by Alan. J. Schnurman of New York, quoted in Johnson, *You Can Get Sued, Even at Home*, N.Y. Times, Jan. 10, 1982, at F15, col. 1.

confessed her feelings to a friend, "The freedom is wonderful. I'm enjoying life now as never before. I'm glad he's dead." Being completely honest about one's feelings may be healthy, but in a wrongful death action, the value of the case is jeopardized by introduction of this evidence.[37]

The compulsion to confess—or brag, if you will—has resulted in crucial evidence in criminal as well as in civil cases. "People love to spill their guts, and they hang themselves."[38] Ernesto Miranda, whose name is given to the warning that police must give a suspect before questioning, was in the end convicted on the basis of statements he made to a girlfriend about the crime.[39] James Earl Ray boasted while imprisoned in London of participating in a conspiracy to kill civil rights leader Martin Luther King Jr. A London policeman, Alexander Eist, who overheard Ray make the comments after his arrest, was the lead-off witness in the hearings.[40] Detroit police officer Herman Williams, who killed himself after FBI agents questioned him about accepting bribes, bragged about having "highly placed political contacts throughout the state."[41]

Many times a physician ends up with a result that is not satisfactory and there is always a question as to what caused the detrimental outcome. While it is important for the physician to be open and honest with the patient about the patient's problem or condition, it is not necessary for the physician to tell a patient what might constitute legal fault for any adverse development. Apart from other considerations, there is a very real risk that such an opinion will later be proven to be wrong. In many cases, a physician thinks he is responsible for a problem (or, probably more often, he feels some other physician or entity is respon-

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37. Detroit Free Press, April 26, 1978, at C3. San Francisco attorney Richard Brown says that families don't realize when they pour out their souls to an insurance adjuster or company employee that their words might later be used against them. Brown handled a Delta-crash case in which a distraught family member remarked to a sympathetic adjuster that the victim, a married man, had been having an extramarital affair. "They threw it back at us in settlement talks and really took us by surprise," says Brown. (Quoted in Bean, *Damage Control*, Wall St. J., Nov. 7, 1986, at 1, col. 6).

38. Comment by attorney William E. Wisner, *Handling the Personal Injury Case*, Institute of Continuing Legal Education on June 18, 1987 in Southfield, MI.

39. Miranda v. Arizona, 384 U.S. 436 (1966).

40. Wall St. J., Nov. 10, 1978, at 1, col. 3.

41. Flanigan & Ray, *Officer allegedly bragged about ties*, Detroit Free Press, June 17, 1987, at 1. In a story headlined, *Bank Robber Opens His Trap—Which Turns Out to Be Just That*, an unemployed cook sitting in a bar bragged about how he had robbed a bank. Somebody believed him and called the police. Searching him, the police found money in an envelope from the bank. UPI news release, Aug. 5, 1980.

sible for the problem) when later, after all the evidence has been gathered, it becomes clear that someone else was responsible. During or immediately following treatment it is usually premature for physicians to attribute fault in indicating to a patient what has happened. For example, if a sponge has been left in during surgery, the patient should be told about this problem (the patient will likely find out about it anyway) but the doctor need not make a determination as to who is to blame for it. It might have been a nurse's fault, or a doctor's fault, or both.

As a result, physicians ought not to admit fault, regardless of what may have occurred. This may not comport with the ideal of physician-patient rapport, but it is appropriate given the complexities of the legal ramifications of the relationships. While a physician has a duty to say, for example, the ureter was injured during surgery, he does not have an obligation to tell the patient whether that injury was or was not the result of his negligence.

As a matter of practice, the physician usually does not say, "Sorry, I gave you the wrong medicine," but rather, "I'm going to change your prescription." Because the physician seldom admits either a mistake or malpractice, it makes it more precious for the lawyer to latch on to any statement, where in front of third persons, in court, or in his own hospital records, the doctor confesses he goofed. The situation is a *tabula in naufragio*. Hospital or other medical records as well as depositions are an important source of admissions. That is why the plaintiff's attorney goes over the records or deposition with a fine tooth comb, and why doctors and other personnel must be careful what is noted. Nowadays many law firms have nurses or other medical personnel on their full-time staff just to study and advise on material in medical records.

The altering of records—or other conduct of that ilk—is commonly regarded as an admission. The courts often speak of a "presumption" against the spoliator. By resorting to wrongful devices the individual is said to give ground for believing that he thinks his case is weak and not to be won by fair means.[42] Accordingly, a party's false statement about the matter in litigation, whether before suit or on the stand, his fabrication of false documents, his destruction or concealment of relevant documents or objects, his undue pressure, by bribery or intimidation or other means, to influence a witness to testify for him or to avoid testifying, his attempt to corrupt the jury, his hiding or

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42. In the *Rubaiyat* of Omar Khayyam, it is said: "The Moving Finger writes; and, having writ, Moves on: nor all thy Piety nor Wit Shall lure it back to cancel half a line Nor all thy Tears wash out of a Word of it."

transferring property in anticipation of judgment— all these are instances of admission by conduct.[43]

Statements made by the physician to his attorney are protected by the attorney-client privilege but what about statements made by the physician to an investigator of his own insurer? Are these communications privileged? In law, there is no insurer-insured privilege like that of the attorney-client privilege. Is the insurer's investigator to be considered an agent of the attorney, though the investigator is not in the employ of the attorney, thus entitling communications to be the work product of the attorney? By and large, the courts say that the statements are in preparation for trial within the meaning of the work product rule and therefore the plaintiff must show prejudice, hardship, or injustice, and good cause in order to obtain a production order. As this can usually be shown, cases show that these statements are subject to discovery.[44]

Some physicians, when sued, call the suing party or attorney, telling them it is all a misunderstanding and asking to drop the lawsuit. Caught up in the emotional side of litigation, they fail to see how the legal system works, and they make statements often to their detriment.[45]

Some lawyers representing a complainant will, as part of the investigation of the case, consult with the treating doctor to get his side of the story. Doctors often decry the abuse of the legal process, including the filing of a suit without interviewing him, but when that is done, it

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43. E.W. CLEARY (ED.), MCCORMICK ON EVID., at 808 (3d ed. 1984).

44. Chadbourne v. Superior Court, 60 Cal. 2d 878, 36 Cal. Rptr. 468, 388 P.2d 700 (Cal. 1964); Newton v. Yates, 170 Ind. App. 486, 353 N.E.2d 485 (1976); LaCroix v. Grand Trunk W.R. Co., 368 Mich. 321, 118 N.W.2d 302 (1962); Taylor Construction Co. v. Saginaw Circuit Judge, 372 Mich. 376, 126 N.W.2d 701 (1964); Wilson v. Saginaw Circuit Judge, 370 Mich. 404, 122 N.W.2d 57 (1963); Powers v. City of Troy, 28 Mich. App. 24, 184 N.W.2d 340 (1970). Peters v. Gaggos, 72 Mich. App. 138, 249 N.W.2d 327 (1976); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942); Note, *"Agents" Reports and the Attorney-Client Privilege*, 21 U. CHI. L. REV. 752 (1954); Annotation, *Insured—Insurer Communications as Privileged*, 55 A.L.R. 4TH 336 (1987). In May Department Stores Co. v. Ryan, 699 S.W.2d 134, 136 (Mo. 1985), the court held a report by the insured to the insurer as falling under "the insurer-insured/attorney-client privilege." The court said: "An existing insured-insurer relationship, whereby an insured is contractually obligated to report promptly covered incidents to the insurer who in turn is obligated to defend and indemnify the insured, is similar to an attorney-client relationship insofar as discovery is concerned."

45. "Don't get emotional about lawsuits," advises psychiatrist Emanuel Tanay. Tanay, *Sit back, Relax, and Don't Worry About Being Sued*, Health Care News (Detroit), April 20, 1983, at 3.

may inure to the disadvantage of the doctor. What he says (except in the course of a settlement negotiation) can be used against him.[46] Many lawyers, it must be noted, consider it unethical to "get the doctor's side of the story" without the doctor having legal assistance, for that would be an underhanded way of getting admissions.[47]

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46. FED. R. EVID. 408.

47. The American Bar Association Code of Professional Responsibility and Code of Judicial Conduct provides in Disciplinary Rule 7-104 on communicating with one of adverse interest:

> During the course of his representation of a client a lawyer shall not: (I) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1980). Informal Opinion No. 908 of the Standing Committee on Professional Ethics of the American Bar Association (Feb. 24, 1966) provides that it is not unethical behavior for a potential plaintiff's attorney to interview a potential defendant so long as the latter knows that the statement is being taken by the lawyer in his status as attorney for the plaintiff. Once a complaint has been filed, a lawyer is prohibited from giving the other party any advice other than the advice to secure a lawyer. W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976).

Professor Harry Cohen of the University of Alabama School of Law, founder and editor of the J. LEGAL PROF., says:

> I believe that if there is any doubt that a person could be a defendant, the lawyer who interviews him or her, without more, could be guilty of a breach of the new ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 dealing with a lawyer contacting another who is not represented by counsel. The rules and cases are not explicit about a situation where there is no "adverse party." However, I believe that where it is reasonable to assume that a doctor (or other person) could be a defendant, the lawyer must be very careful when implying that the lawyer is disinterested in the matter. The cases generally say that the lawyer must not approach one whom the lawyer believes will be an adverse party without telling that person that he or she should hire a lawyer and cautioning them that they should not say anything against their own interests. This is especially true where the person is ignorant or unaware of their involvement in the situation. *See* Lyons v. Paul, 321 S.W.2d 944 (Tex. Ct. App. 1959). It is true that the cases deal with parties to suits, but as I read them and the ethics opinions, they seem to deal with all adverse parties. In the doctor case, I believe that a caution to the doctor before the lawyer talks to him or her would cause the doctor to call his lawyer. The lawyer who would talk to the doctor to get his side of the story without a strong cautionary statement could well be in breach of Rule 4.3.

One hospital's risk management program advises its physicians:

> There is an old plaintiff attorney ruse which is worthy of mention. Euphemistically called a "fishing trip," the plaintiff attorney will contact a physician under the guise of seeking to avoid litigation or to dismiss the physician in a possible lawsuit. The attorney will tell the physician that s/he has reviewed a patient's case and sees no malpractice on the part of the physician. To clarify that review, the attorney will indicate the need to "set the record straight." Using the physician's gullibility and the promise of no litigation as bait, the attorney often obtains needed information to form the basis of a lawsuit. The attorney then proceeds to get detailed information about others involved in the care of the patient. Even if the plaintiff does not sue this physician, this communication may be used as testimony against the physician's colleagues via deposition. The Office of Medical Legal Affairs is responsible for handling inquiries from attorneys and others. Refer all calls and letters to that office for assistance. Do not fall for the 'fishing trip' trick which most certainly will embarrass you later.[48]

One lawyer who defends the practice of consulting with the treating doctor, but telling him that he may wish to have his lawyer present, says:

> Invariably there are two sides to every story. Should I wait until filing a complaint to find out just what are the basic facts? I say to the doctor, "We want to have your version. We want to truly find out what happened." If the doctor replies, "I'm not going to talk to you," the lawyer at trial (if put in evidence) may argue to the jury, "We tried to talk with the doctor, we asked for an explanation, but he wouldn't talk to us."[49]

What about utterances not intended for the outside world, as in an internal report, or where one makes entries in a secret diary, or where one is overheard talking to oneself? Are they admissible in evidence?

Organizations of every type, be it a hospital or a television company, have to be able to take a look back at their own work when questions arise so that they can correct mistakes, but members of the

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Communication from Professor Harry Cohen to Ralph Slovenko (July 6, 1987).

48. *Risk Management*, Office of Medical Legal Affairs, Henry Ford Hospital, Detroit, MI.

49. Texas Attorney Wayne Fisher in 1986 ABA Program on Medical Malpractice for Attorneys, Physicians, and Risk Managers.

organization will likely not be candid about their failures if they know those reports might later be used against them or the organization. Legally, however, internal investigative reports are generally not shielded from discovery.[50] Most jurisdictions do not recognize a "self-critical analysis" privilege. Thus, the evaluation and recommendation portion of a report prepared by a chemical company's employees, concerning a tank car derailment which gave rise to a lawsuit, was not exempt from discovery.[51]

Notes in a diary may be used notwithstanding the ordinary expectation of privacy. A seizure of the diary does not violate the fourth amendment's prohibition of "unreasonable searches and seizures." John W. Hinckley Jr.'s diary was used as evidence against him.[52] In a child custody case, a diary in which the father recorded his feelings about the child was used against him.[53]

What about talking in one's sleep? Apparently, physicians or others who talk in their sleep can rest easy. The courts will likely not hold what they say against them. The evidence is generally ruled un-

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50. Friendly, *Decision in CBS Case Raises New Press Concerns*, N.Y. Times, April 30, 1983, at 48, col. 1. Here are interrogatories put to defendant(s) which they are obliged to answer: Please state whether or not any committees or hearings were held by Defendant Hospital with respect to the care and treatment of Plaintiff during confinement to said Hospital, and, if so, please state with particularity what action, if any, was taken by Defendant Hospital and the names and address of all parties conducting said investigation or hearings. Was any meeting held by Defendant Hospital at which any occurrence complained of in this action was discussed? Was an investigation made by Defendant Hospital, or on its behalf, in the regular course of business or in preparation for litigation, concerning any matters relating to the occurrence complained of in this action? Were any statements obtained by Defendant Hospital or on its behalf from any person concerning any matter relating to the occurrence complained of herein? Were any statements obtained by Defendant Hospital or on its behalf from any person concerning any matter relating to Plaintiff's condition? Were any statements obtained by Defendant Hospital or on its behalf from any person concerning any matter relating to Plaintiff's decedent's condition?

51. Peterson v. Chesapeake & Ohio Ry. Co., 112 F.R.D. 360 (W.D. Mich. 1986).

52. Taylor, *Hinckley Lawyers Seek to Bar Data*, N.Y. Times, Oct. 28, 1981, at 25, col. 1. Hinckley wrote daily at the Butner Correctional Institute, where he was held for psychiatric examinations, in a diary labeled "The Diary of a Person We All Know." The guards regularly read the diary and other papers, except for correspondence with lawyers, while Hinckley was out of his cell. Hinckley's lawyers sought to suppress the material because it "contained 'Mr. Hinckley's most private (if not secret) thoughts about his legal situation.' " They argued that under the fourth amendment "Hinckley 'had a reasonable expectation that his handwritten papers would not be read by prison guards.' " Taylor, *Paper by Hinckley Seized by Guards*, N.Y. Times, Oct. 20, 1981, at 19, col. 1.

53. Unreported decision.

trustworthy. Hence, the New York State Supreme Court's Appellate Division granted a new trial to a man convicted of manslaughter and arson because the conviction was based on a girlfriend's testimony about statements he made in his sleep. She said that the accused, in his sleep, screamed and talked about blood spurting and how he cleaned a knife.[54]

What about talking to God? Statements made in prayer may be used as evidence. A case that went to the British Columbia Court of Appeal involved an accused who, in his cell, slid off his chair, fell to his knees, raised his hands and prayed, "Oh, God, let me get away with it just this once." The room was equipped with a video camera and concealed microphone. The supplication was offered as evidence. Though he was speaking with God, the appellate court allowed the introduction of the evidence as an admission. A dissent would have excluded the statement on the ground that it was made in complete privacy.[55]

Given the negative consequences in law of an apology or admission, the crucial question becomes: Does the apology or admission so enhance the physician-patient relationship that litigation is put out of mind? Is it really helpful to therapy to be apologetic or to admit mistakes? Or does it just get the doctor into more difficulty? And what does it do to the magic in the art of healing?

And do we say "I'm sorry" because we truly feel remorse for a wrongdoing we have done, or is it merely a way to ease our conscience between now and the next time we hurt someone? Some neurotics, whether they cause harm or not, are always saying they are sorry. Psychiatrists recognize it as masochism.[56] On the other hand, some people are so ill-mannered that they do not apologize or admit wrongdoing whatever the circumstances. They instead turn to the consequences in law as a rationalization.

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54. *Dream is An Issue in Retrial Decision*, N.Y. Times, June 17, 1980, at B20, col. 1. In a civil action for injury from a dog bite, testimony from the father of the plaintiff that the boy had cried out "Take him off" during his sleep was ruled inadmissible. The court said: "Words spoken while in sleep are not evidence of a fact or condition of mind. They proceed from an unconscious and irresponsible condition; they have little or no meaning; they are as likely to refer to unreal facts or conditions as to things real; they are wholly unreliable. . . ." Plummer v. Ricker, 71 Vt. 114, 41 A. 1045, 1046 (1898). *See* Annotation, *Admissibility of Evidence Concerning Words Spoken While Declarant Was Asleep or Unconscious*, 14 A.L.R. 4TH 802 (1982).

55. UPI news report, New Orleans Times-Picayune, Sept. 11, 1980, at 3.

56. L.H. Farber, *I'm Sorry, Dear*, in L.H. FARBER, THE WAYS OF THE WILL: ESSAYS TOWARD A PSYCHOLOGY AND PSYCHOPATHOLOGY OF WILL (1966); *reprinted in* L.H. FARBER, LYING, DESPAIR, JEALOUSY, ENVY, SEX, SUICIDE, DRUGS, AND THE GOOD LIFE, at 123 (1976).

Like a lawyer, Gertrude Stein urged: "Never apologize, never explain." Many agree: neither explanation nor apology is a workable form of social behavior for dealing with serious mishaps. Nine chances out of ten, it doesn't do any good to say you're sorry. Often when a mistake has hurt somebody, apology seems to heighten the injured person's anger. "Sorry? What is sorry going to do for my broken leg, you nitwit?" It's better to say, "Just lie quietly until the ambulance comes."[57]

One might suggest that if there is a positive transference, the patient will recognize that the physician is only human, and makes mistakes, but if there is a negative transference, the admission or apology will just fuel the discord. In Erich Segal's "Love Story," love means not having to say you're sorry.[58] But what a thin line separates love from hate. People will slap you on the back one day and feel like slapping your face the next. A taxi driver says, "Lovers come in my cab and leave as enemies."[59] But be that as it may, patients know that the real defendant in a malpractice suit, the one who will be paying the judgment, is not the doctor, beloved or not, but the insurance company.

At a recent annual meeting of the Association of American Trial Lawyers, an organization of lawyers representing plaintiffs, word got around that physicians were urging their colleagues to confess errors to their patients. They exclaimed, "That's wonderful!"

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57. Russell Baker writes amusingly about apologies in *Never Say Sorry*, N.Y. Times Mag., Jan. 10, 1982, at 19.

58. The book was made into a film but it did not earn tenure for Segal at Yale. Perhaps love means saying you're sorry.

59. Rose, *Taxi Passengers Are No Bargain*, N.Y. Times, June 26, 1987, at 35, col. 2.