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Note

Overcoming the "Conspiracy of Silence": Statutory and Common-Law Innovations

The existence of a "conspiracy of silence" among doctors who refuse to testify against other doctors in malpractice actions has been recognized by many courts and authors. The author of this Note summarizes the authorities which have demonstrated the existence of the "conspiracy." He then analyzes various statutes and common-law rules which enable a complaining party in a malpractice action to obtain the expert testimony essential to the effective presentation of his action by utilizing either written medical opinions or the testimony of out-of-state doctors. The author concludes that the Massachusetts and Nevada statutes provide the courts with the most equitable method by which to overcome the "conspiracy of silence" because they enable plaintiffs to obtain expert testimony, but permit the trial court discretion to admit or exclude medical treatises in accordance with its evaluation of the need for such evidence.

INTRODUCTION

In order to hold a doctor liable for breach of his professional duty in a malpractice action, the plaintiff must establish the standard of care required of the defendant and the defendant's violation of that standard. The obvious way to do this is to call a doctor to the witness stand whose testimony will establish the standard and the violation directly. Since such testimony is often adverse to the defendant doctor's interests, however, a plaintiff frequently is unable to obtain the best medical testimony. Indeed, a plaintiff may be unable to obtain *any* medical testimony. As a result, he is either handicapped by having to rely on the testimony of doctors who are less qualified than those available to the defendant, or he may be nonsuited because he has failed to produce *any* medical testimony and therefore has failed to establish the requisite standard of care.

This reluctance to testify on the part of the members of the med-

ical profession has been called the "conspiracy of silence"¹ and has been explained in the following ways: (1) Doctors believe that defendants in malpractice cases are found negligent when in fact no negligence has occurred;² (2) they believe that jurors are ill-equipped to cope with the technicalities of medicine;³ (3) they fear that lawyers, in cross examination, may make doctors appear ridiculous on the witness stand;⁴ (4) they sympathize with the defendant because they believe that any doctor, regardless of his medical competence, could be sued for malpractice;⁵ (5) doctors are discouraged from testifying by the medical profession;⁶ and (6) they are also discouraged from testifying by malpractice insurance companies.⁷

In apparent recognition of the difficulties facing a plaintiff in a malpractice case, a few legislatures and courts have developed methods by which the plaintiff can establish the standard of care required of the defendant without using the testimony of doctors. Statutes in Massachusetts and Nevada and judicial decisions in Alabama allow a plaintiff to use medical books as substitutes for medical testimony in malpractice cases. It is the purpose of this Note to consider some of the problems raised by these statutes and decisions. As an alternative to the use of written materials under the Massachusetts and Nevada statutes, the Wisconsin statute permitting out of state doctors to testify in Wisconsin will also be discussed. In addition, this Note will consider the common law use of medical brochures as some evidence of the proper manner in which to administer a drug.

Although other methods for assisting plaintiffs in malpractice cases may exist, they are beyond the scope of this Note.

1. Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250, 259 (1956).

2. Note, *The California Malpractice Controversy*, 9 STAN. L. REV. 731, 734 (1957).

3. *Ibid.*

4. *Ibid.*; Comment, *Torts—Malpractice—Medicolegal Relations—Expert Testimony*, 2 VILL. L. REV. 95, 102 (1956); Hall, *Malpractice And The A.M.A. . . . Let's Understand Each Other*, 42 ILL. B.J. 690, 692 (1954).

5. *Ibid.*

6. See *Agnew v. Parks*, 172 Cal. App. 2d 756, 343 P.2d 118 (Dist. Ct. App. 1959); *Bernstein v. Alameda-Contra Costa Medical Ass'n*, 139 Cal. App. 2d 241, 293 P.2d 862 (Dist. Ct. App. 1956).

7. 3 BELLI, *MODERN TRIALS*, 1964, 1966 (1953); see VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 579 (1949). The committee report from which the citation in Vanderbilt is taken asserts that insurance contracts sometimes contain a clause precluding a doctor from collecting on his policy if he testifies against another doctor. The courts also are aware of this pressure from the insurance companies. See *Huffman v. Lindquist*, 37 Cal. 2d 465, 484, 234 P.2d 34, 46 (1951) (dissenting opinion).

I. THE EXISTENCE OF THE CONSPIRACY

It is common knowledge that the medical profession, either through individual doctors or through local associations, discourages doctors from making any statements regarding the professional capabilities of other doctors. An example of this attitude can be found in *Boswell v. Board of Medical Examiners*.⁸ There a doctor was ordered to appear before the state board of medical examiners on charges of "unprofessional conduct."⁹ The conduct in question consisted of statements criticizing the professional competence of three other doctors in the community.¹⁰ The court, in issuing a writ of prohibition against the board, held that it could not revoke the doctor's license merely because he had made disparaging comments about other practitioners.

Although *Boswell* was not a malpractice case and did not involve a doctor's refusal to testify, it nevertheless illustrates an attitude on the part of some members of the medical profession that a doctor should not publicly criticize other members of his profession.

*Bernstein v. Alameda-Contra Costa County Medical Ass'n*¹¹ provides a further illustration of this same attitude; but there the medical association's activities not only affected the doctor involved, as in *Boswell*, but also the rights of a third party in a trial-type hearing. In *Bernstein* a local doctor was charged with violation of the Principles of Medical Ethics of the American Medical Association.¹² One of the seven charges brought against him alleged that the doctor had rendered a report containing unfavorable remarks about another doctor to a workmen's compensation com-

8. 72 Nev. 20, 293 P.2d 424 (1956); 9 S.C.L.Q. 487 (1957).

9. *Id.* at 21, 293 P.2d at 425.

10. In discussing these remarks, the court said:

The first doctor he referred to as the "city drunk." The second he designated "nothing but a lousy old midwife" who had "probably killed more patients in this valley than she ever helped"; who never performed operations but treated her patients who were suffering from appendicitis with a high, hot enema; who had left a large percentage of the women of the county with their "insides hanging out" due to the butchery to which they were exposed under her care

Reflecting generally upon medical standards were statements by Dr. Boswell to the effect that the standard of medical practice throughout the west was so low as to be a national disgrace

Id. at 21-22, 293 P.2d at 425.

11. 139 Cal. App. 2d 241, 293 P.2d 862 (Dist. Ct. App. 1956); 5 Utah L. Rev. 270 (1956).

12. The relevant provisions of the code of ethics may be found at 139 Cal. App. 2d 241, 243, 293 P.2d 862, 863 (Dist. Ct. App. 1956). For some opinions on how codes of ethics may affect the availability of medical testimony, see Comment, 2 VILL. L. REV. 95, 103 (1956); *Daly v. Lininger*, 87 Colo. 401, 288 Pac. 633 (1930); *Tadlock v. Lloyd*, 65 Colo. 40, 173 Pac. 200 (1918).

mission for use by the commission in a pending action. Despite the fact that the report was to be used in a judicial proceeding, and even though the court on appeal was careful to point out that the medical association had no intention of interfering with that proceeding, the fact remains that the association considered the making of the report to be sufficiently unprofessional in character to constitute one of the bases for the doctor's expulsion from the association. In holding that the doctor's report did *not* violate the Principles of Medical Ethics, the court reasoned that public policy required that the report be used as evidence notwithstanding the character of the statements contained in it.

Unlike the *Boswell* and *Bernstein* cases, *Agnew v. Parks*¹³ involved a claim for damages by the plaintiff on the ground that a local medical association had coerced doctors into refusing to testify in his behalf. Nine doctors in the Los Angeles Medical Association refused to testify. One refused because he feared cancellation of his malpractice insurance; another refused because testifying against other doctors was "frowned upon."¹⁴ The trial court sustained a demurrer to the plaintiff's claim, which was affirmed on appeal. Because the appeal was taken from the granting of a demurrer, and because of the language used by the court, the effect of the holding on appeal is that there was *no legal ground* upon which a plaintiff could attack the conspiracy of silence among doctors. The *Agnew* case is important, therefore, not only because it reveals the existence of the conspiracy which prevents a plaintiff from proving his case, but also because it illustrates judicial inability to deal with the conspiracy of silence.¹⁵

However commendable the efforts of local medical boards may be in maintaining high professional standards, these associations apparently do not limit the effect of their activities to doctors. As both the *Bernstein* and *Agnew* cases indicate, the associations can and do affect the rights of third persons who need the testimony of doctors. It would appear, therefore, that the attitude expressed in the *Boswell* case is the kind of attitude which prevents a plaintiff in a malpractice action from securing competent medical testimony.

Because it involved an overt attempt by an organized medical group to prevent a plaintiff from obtaining medical testimony, the *Agnew* case is exceptional. *Steiginga v. Thron*¹⁶ more typically represents the effect of a conspiracy of silence in a malpractice

13. 172 Cal. App. 2d 756, 343 P.2d 118 (Dist. Ct. App. 1959).

14. *Id.* at 770, 343 P.2d at 127.

15. It has been suggested that the conspiracy in *Agnew* could have been considered an unjustifiable interference with a business or profession and therefore tortious. See 58 MICH. L. REV. 802 (1960).

16. 30 N.J. Super. 423, 105 A.2d 10 (App. Div. 1954).

case. In that case, plaintiff's medical expert refused to testify two days before trial. Although the doctor himself believed that the defendant in the case was negligent in his treatment of the plaintiff, the doctor refused "on second thought" to testify against "a brother practitioner."¹⁷ In reversing the trial court's refusal to grant an adjournment of the case on these grounds, the court on appeal made the following statement:

The circumstances of the case must be looked at in the light of—the matter is of sufficient public concern to call for plain speaking—a shocking unethical reluctance on the part of the medical profession to accept its obligations to society and its profession in an action for malpractice. . . . A charge of malpractice is a serious and emburdening charge upon a professional man, but it is not answered by an attempt to throttle justice.¹⁸

Other cases, such as *Christie v. Callahan*,¹⁹ have similarly recognized the existence of the conspiracy.²⁰ There plaintiff brought a malpractice action against a doctor alleging that he had negligently given plaintiff an overdose of X-ray, thereby causing the plaintiff's injury. The court asserted that "physicians, like lawyers, are loath to testify a fellow craftsman has been negligent, especially when he is highly reputable in professional character"²¹ In *Butts v. Watts*²² the court said:

The rule that expert testimony is indispensable ought not to be too strictly applied [T]he notorious unwillingness of members of the medical profession to testify against one another may impose an insuperable handicap upon a plaintiff who cannot obtain professional proof.²³

In *Morrill v. Komasinski*,²⁴ plaintiff brought a malpractice action against a Wisconsin doctor and "consulted six or seven" Wisconsin doctors for the purpose of obtaining them as expert witnesses. Although all of the doctors believed that the defendant's treatment was "faulty," none would testify to this effect for the plaintiff.²⁵

17. *Id.* at 425–26, 105 A.2d at 11.

18. *Ibid.*

19. 124 F.2d 825 (D.C. Cir. 1941).

20. *E.g.*, *Salgo v. Leland Stanford Jr. Univ.*, 154 Cal. App. 2d 560, 568, 317 P.2d 170, 175 (Dist. Ct. App. 1957); *Gist v. French*, 136 Cal. App. 2d 247, 257–58, 288 P.2d 1003, 1010 (Dist. Ct. App. 1955); *McGulpin v. Bessmer*, 241 Iowa 1119, 1130, 43 N.W.2d 121, 127 (1950); *Bartholomew v. Butts*, 232 Iowa 776, 779, 5 N.W.2d 7, 9 (1942); *Stockham v. Hall*, 145 Kan. 291, 293–94, 65 P.2d 348, 349 (1937); *Carbone v. Warburton*, 22 N.J. Super. 5, 13, 91 A.2d 518, 522 (App. Div. 1952); *Huffman v. Lindquist*, 37 Cal. 2d 465, 483–84, 234 P.2d 34, 45–46 (1951) (dissenting opinion).

21. *Christie v. Callahan*, 124 F.2d 825, 828 (D.C. Cir. 1941).

22. 290 S.W.2d 777 (Ky. 1956).

23. *Id.* at 779.

24. 256 Wis. 417, 41 N.W.2d 620 (1950).

25. *Id.* at 422, 41 N.W.2d at 622.

Authors as well as courts have recognized the existence of the conspiracy.²⁶ One such author has made the following statement:

"We're not a profession: we're a conspiracy!"

So spake the eminent Dr. Ridgeon, of and for the medical profession in *The Doctor's Dilemma*.

This play by George Bernard Shaw was written half a century ago, and in another country. But you, as a present-day American victim of medical ignorance or ineptitude . . . may well echo Dr. Ridgeon's sentiments if you have to seek legal redress for your injuries.

What is this "conspiracy"? It's a rule of silence. . . . It is almost impossible today in our courts of justice to get a physician to testify against a fellow practitioner in a malpractice case!

Without medical testimony, it is just about impossible for you to win your malpractice suit! Does that amaze you?

Well I too was amazed when I first discovered the existence of this appalling conspiracy.²⁷

That there is a conspiracy of silence among doctors seems clear. Some of the problems raised by permitting plaintiffs to overcome the effect of the conspiracy by using written evidence in court must now be considered.

II. THE MASSACHUSETTS AND NEVADA STATUTES

In an effort to assist the plaintiff in a malpractice case, the legislatures of Massachusetts and Nevada have enacted statutes permitting him to use medical books as direct evidence of the standard of care required of the defendant doctor.²⁸ This legislation prob-

26. SHARTEL & PLANT, *THE LAW OF MEDICAL PRACTICE* 3-16 (1959); 22 NACCA L.J. 73, 74 (1958); 21 NACCA L.J. 71, 73-74 (1958); 18 NACCA L.J. 348, 350, 356-57 (1956); 16 NACCA L.J. 336, 337, 344-45 (1955); 11 NACCA L.J. 172, 176 (1953); 10 NACCA L.J. 256-57 (1952). See ASSOCIATION OF AMERICAN LAW SCHOOLS, *SELECTED WRITING ON EVIDENCE AND TRIAL, Recent Litigation Illustrates Difficulties Met in Prosecuting Malpractice Action* 534 (1957).

27. Belli, "Ready For The Plaintiff!", 30 TEMP. L.Q. 408, 409 (1957). Belli is probably the most outspoken critic of the medical profession on this subject. Some of his other articles include the following: Belli, *More on Being "Ready for the Plaintiff,"* 20 GA. B.J. 451 (1958); Belli, *Is Medicine Above the Law?*, 34 MED. ECONOMICS 120, 123 (1957); Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

28. MASS. ANN. LAWS ch. 233, § 79C (1956) provides:

A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitararia, as evidence tending to prove said fact or as opinion evidence; provided, however, that the party intending to offer as evidence any such statement shall,

ably was enacted to accomplish several objectives. First, the statutes avoid the effect of the conspiracy of silence by affording the plaintiff the opportunity to use the best medical opinions.²⁹ Second, they provide the plaintiff with inexpensive expert testimony. Third, they *may* be punitive in that they *could* be interpreted to permit only the plaintiff, and not the defendant, to use medical books at trial.³⁰ The effect of these statutes is to create an exception to the hearsay rule which is not generally recognized.³¹ Although medical books may be used in most jurisdictions to impeach a medical expert, they may not be used as direct evidence.³² Despite this rule, the use of medical books as direct evidence is not a new idea³³ even though its statutory codification is as yet uncommon.

A. THE PROVISIONS OF THE STATUTES

The Massachusetts statute differs from that of Nevada only in that the latter statute is applicable to more types of medical practitioners.³⁴ Both statutes, however, require the court to make two

not less than three days before the trial of the action, give the adverse party notice of such intention, stating the name of the writer of the statement and the title of the treatise, periodical, book or pamphlet in which it is contained.

NEV. REV. STAT. § 51.040 (1960) provides:

1. A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book, or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, chiropractors, chiropodist, naturopathic physicians, hospitals and sanitaría, as evidence tending to prove the fact or as opinion evidence.

2. The party intending to offer as evidence any such statement shall, not less than 3 days before the trial of the action, give the adverse party notice of such intention, stating the name of the writer of the statement and the title of the treatise, periodical, book or pamphlet in which it is contained.

29. See Goldman, *Malpractice Cases in Massachusetts*, Mass. L.Q., May 1955, pp. 34-35.

30. See text at note 42 *infra*.

31. See, e.g., *Gallagher v. Market St. Ry.*, 67 Cal. 13, 6 Pac. 869 (1885); *Scarano v. Schnoor*, 158 Cal. App. 2d 612, 323 P.2d 178 (Dist. Ct. App. 1958); *Osborn v. Cary*, 28 Idaho 89, 152 Pac. 473 (1915); *State v. Peterson*, 110 Iowa 647, 82 N.W. 329 (1900); *Zubryski v. Minneapolis St. Ry.*, 243 Minn. 450, 68 N.W.2d 489 (1955); *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897).

32. See 6 WIGMORE, EVIDENCE § 1700(b) nn.2, 3 & 4 (3d ed. 1940).

33. The American Law Institute proposed that medical treatises be used in evidence as early as 1942. MODEL CODE OF EVIDENCE rule 529 (1942). Wigmore has similarly urged the use of medical books as direct evidence. 6 WIGMORE, EVIDENCE §§ 1690, 1691 (3d ed. 1940).

34. See MASS. ANN. LAWS ch. 233, § 79C (1956) and NEV. REV. STAT. § 51.040 (1960), quoted at note 28 *supra*.

preliminary findings before allowing medical books to be used in evidence: (1) the statement from the book must be relevant; (2) the author of the book must be a recognized expert in his calling or profession.³⁵ In addition, the statutes require that a party notify the opposing party of his intention to use medical books in evidence not later than three days before trial.³⁶ A party satisfies this notice provision by informing the opposing party of the name of the author and title of the book.³⁷

The notice provision of the Massachusetts statute was interpreted specifically in *Murawski v. Laird*.³⁸ There plaintiff brought a malpractice action and notified the defendant, as required by the statute, of the plaintiff's intention to use certain medical books in evidence. The court excluded the books on the ground that the plaintiff had not complied with the statute because he failed to inform the defendant of the pages in the book which he intended to use at trial. The court on appeal reversed, holding that the plaintiff need only tell defendant the title of the book and the author's name.

This holding precluded the defendant from ascertaining specific portions of the plaintiff's books by means of the notice provisions of the statute. While the *Murawski* case was concerned with a foundational requirement under the statute and did not involve a consideration of the Massachusetts discovery rules, the defendant, as a practical matter, wanted to know what page of the medical book the plaintiff intended to use in order to meet this evidence more effectively at trial. Because the discovery rules in Massachusetts make no provision for discovering *portions* of books,³⁹ the

35. *Ibid.*

36. *Ibid.*

37. *Ibid.*

38. 330 Mass. 599, 116 N.E.2d 279 (1953).

39. There appears to be no discovery procedure in Massachusetts by which a defendant in a malpractice case could compel the plaintiff to disclose the page of a book from which he intends to read at trial. The closest provision of this kind is MASS. ANN. LAWS ch. 231, § 68 (1956), which provides for the inspection of documents. However, the language of this section does not permit the defendant to inquire about the pages from which the plaintiff will read. Rather the section allows a defendant to inspect the "document" as a whole.

The Nevada Rules of Civil Procedure similarly do not expressly permit the defendant to discover the page numbers of books, although the Nevada rules come closer to permitting this than do those in Massachusetts. See NEV. R. CIV. P. 26(b).

Neither Massachusetts nor Nevada has a rule similar to MINN. R. CIV. P. 26.02 under which the "conclusions of an expert" are expressly made undiscoverable. Therefore, one could argue that in Massachusetts and Nevada parties *may* discover the conclusions of live experts and should likewise be able to discover the *particular written* conclusion when a book is used instead of a live expert. Assuming that conclusions of medical experts

court in *Murawski* was probably correct in refusing to construe the malpractice statute to allow the defendant to discover this information. Moreover, since the malpractice statute was enacted for the benefit of the plaintiff, its terms should not be construed to put him at a procedural disadvantage by forcing him to reveal more of his case to the defendant than he would have revealed in the absence of such a statute. For this reason, even if the Massachusetts discovery rules specifically permitted a party to discover portions of books, the court in *Murawski* would nevertheless be justified in its result.

Although the plaintiff may establish that he gave the defendant proper notice of his intention to use a particular book at trial and that the book is relevant and authoritative under the statute, both the Massachusetts and the Nevada statutes provide that the book may nevertheless be excluded "in the discretion of the court."⁴⁰ There is, therefore, no guarantee that a plaintiff can use medical books at trial even if one assumes that the requisite findings and notice comply with the statute.

The question of who may use medical books under these statutes raises a difficult problem of interpretation. The statutory language to be interpreted is the following:

A statement of fact or opinion . . . contained in a published treatise . . . shall . . . be admissible in actions of contract or tort for malpractice . . . against physicians

The question to be answered is: Does this language mean that "published treatises" are "admissible against physicians," or does it mean that such treatises are admissible "in actions for malpractice against physicians"? Grammatically, the problem posed by this language is: Does the phrase, "against physicians," modify "actions" or "admissible"? If the phrase modifies "actions," the statute would permit *both* parties in a malpractice action to use medical books, since the language would merely assert that medical books "are admissible" whenever a plaintiff brings an action against a doctor for malpractice. On the other hand, if the phrase, "against physicians," modifies "admissible," then the statute in effect penalizes the defendant by providing that books are "admissible against physicians" thereby allowing only the plaintiff to use medical books—since only he is seeking to admit them *against* physicians.

may be discovered, written medical conclusions in books may nevertheless be *undiscoverable* since both the Massachusetts and the Nevada procedures for the discovery of written evidence provide for the discovery of the *whole book* and not for those portions of it upon which the opposing party may rely.

40. MASS. ANN. LAWS ch. 233, § 79C (1956); NEV. REV. STAT. § 51.040 (1960).

Because the phrase, "against physicians," probably modifies "actions" and *not* "admissible," the statute seems to place no prohibition upon the defendant's use of medical books except for discretionary exclusions of books by the court.⁴¹ However, at least one writer has asserted categorically that "*only* the plaintiff can use medical books."⁴² In addition, in none of the Massachusetts cases does it appear that the defendant attempted to use medical books at trial even though the statute *could* be interpreted to allow him to use them.

Perhaps one could argue that the statute should be interpreted to prevent the defendant from using medical books at trial because defendants are not confronted with a conspiracy and therefore do not need such evidence. Moreover, allowing defendants to use medical books could destroy any attempt by courts to "equalize" the opportunity of plaintiff and defendant to obtain medical evidence⁴³ since the defendant would have an advantage in that he could use testimony as well as writings, whereas plaintiff could only use writings. These arguments, however, break down in the case where the plaintiff *can* obtain competent medical testimony and could therefore use both written and oral evidence. In this instance, the defendant should be able to use both types of evidence so that his opportunity to defend his conduct will be equal to the plaintiff's opportunity to assail it.

As a result, the statute *should* be interpreted to place no prohibition upon either party in the use of medical books except in so far as the discretion of the court may be exercised to exclude

41. See text accompanying note 40 *supra*. This conclusion is substantiated further by the fact that the notice provisions of the statutes speak of "the party" who intends to use medical books at trial and thereby imply that *either party* could give notice of an intention to use medical books at trial. Had the legislatures intended the statutes to apply only to plaintiffs, they would probably have used the term, *plaintiff*, and not "party"; since only the plaintiff could give notice of an intention to use medical books under this interpretation of the statutes.

42. Goldman, *supra* note 29, at 39. (Emphasis added.)

43. See *Salgo v. Leland Stanford Jr. Univ.*, 154 Cal. App. 2d 560, 568, 317 P.2d 170, 175 (Dist. Ct. App. 1957). The court in *Salgo* asserted that the conspiracy of silence was one reason for using the doctrine of *res ipsa loquitur* in medical malpractice cases. Since doctors would not testify for the plaintiff, he was at a disadvantage and *res ipsa loquitur* was a procedural device "to equalize the situation" by placing the burden of proof upon the doctor to establish that his conduct was *not* negligent. *Ibid.*

Although *Salgo* dealt with *res ipsa loquitur* and not a statute like the ones in Massachusetts and Nevada, this fact should not affect the relevance of the equalization doctrine under a statutory scheme. This fact, however, may mean that the equalization doctrine would be limited to equalizing the opportunity of plaintiff and defendant *to get to the jury* and be inapplicable as a means of equalizing the opportunity of the parties *to persuade the finder of fact after having reached the jury*.

certain books. Not only would such a construction comport with the grammatical construction of the words of the statute, but it would also do justice to the respective interests of the parties. In cases in which both parties have an equal opportunity to obtain and use written and oral evidence, the trial court would *not* exercise its "discretion" because each side could present its case unaffected by the conspiracy or by the need for a statutory construction limiting the use of written evidence. However, where an effective conspiracy exists, the trial court could prevent the defendant from using books in an effort to equalize the opportunities of the parties in presenting their cases.⁴⁴ In this latter case, such an approach to the statute would not prevent the defendant from defending his conduct by means of expert testimony, but it would refuse him the benefits of the conspiracy of silence.

The statute would, therefore, penalize the defendant by preventing him from using books *only* when an effective conspiracy of silence exists. Such a penalty would not be unjust for two reasons: first, since the doctors have forced plaintiffs to use written evidence, they should not be heard to complain when they are not allowed to use the same kind of evidence; second, the penalty would operate *only* when the plaintiff was unable to obtain competent medical testimony thereby equalizing the opportunities of the parties to present their cases.

B. QUALIFYING THE AUTHOR OF THE BOOK UNDER THE STATUTES

*Reddington v. Clayman*⁴⁵ illustrates the difficulty a plaintiff may encounter in attempting to show that the author of a medical book qualifies under the statute as a recognized authority in his profession. In that case plaintiff brought a malpractice action against a surgeon. To establish the author's standing in his profession, the plaintiff referred to the biographical data in the book itself. The lower court found that this data was not admissible to establish the author's professional standing under section 79C of the Massachusetts statute—the statute which allows medical texts to be used as evidence in a malpractice case. Similarly, the lower court found that the *Directory of Medical Specialists* and an English edition of *Who's Who* were inadmissible for this purpose. The court on appeal affirmed these findings and held that these sources were not a "statement of fact or opinion on a subject of

44. Because the suggested use of the court's discretion excludes *available* evidence, courts may be unwilling to exercise their discretion in this manner. This may be especially true since the *Salgo* case itself, in which the equalization doctrine was applied, involved a situation in which the plaintiff had *no available* evidence of defendant's negligence. The equalization doctrine could be limited to such cases as a result.

45. 334 Mass. 244, 134 N.E.2d 920 (1956).

science or art"⁴⁶ within the meaning of section 79C. The court suggested, however, that these sources might have been admissible under section 79B⁴⁷—a statute of more general application than section 79C—if the requisite "preliminary findings" had been made.⁴⁸ The "preliminary findings" which the court must make under this provision consist of the following: (1) the statements must be published for use by "persons engaged in an occupation"; and (2) these persons must rely upon the statements in question.⁴⁹ In an attempt to define how one satisfies these requirements, the court in *Reddington* made the following statement:

Such compilations conceivably might by their own statements show that they are issued to the public for a stated use, but it would appear necessary, at least in the usual case, that there be some *independent evidence* that they are commonly used and relied on to permit such a finding to be made.⁵⁰

To the extent that the books themselves, without other evidence, could satisfy section 79B, and thereby qualify an author of a medical book under the malpractice statute, a plaintiff might be well advised to use this section. However, the reference by the court in *Reddington* to the need for "independent evidence," in addition to the book itself, raises an interesting problem. If the plaintiff in *Reddington*, for example, had asked a doctor to testify to the fact that the *Directory of Medical Specialists* was used and relied upon by members of the medical profession, it is likely that the doctor would be reluctant to testify. His testimony would be used to qualify an author whose book would be used against a fellow practitioner. Since section 79B requires that the book, to be admissible, must be relied upon by "persons engaged in an occupation," doctors would probably be the only ones who could supply the "independent evidence" that the *Directory of Medical Specialists* was used and relied upon by doctors. Written evidence for this purpose would probably not be available as an alternative to testimony since section 79B would again have to be satisfied.

46. *Id.* at 247, 134 N.E.2d at 922.

47. MASS. ANN. LAWS ch. 233, § 79B (1956) provides:

Statements of fact of general interest to persons engaged in an occupation contained in a list, register, periodical, book or other compilation, issued to the public, shall, in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them, be admissible in civil cases as evidence of the truth of any fact so stated.

48. *Reddington v. Clayman*, 334 Mass. 244, 248, 134 N.E.2d 920, 923 (1956).

49. MASS. ANN. LAWS ch. 233, § 79B (1956).

50. *Reddington v. Clayman*, 334 Mass. 244, 248, 134 N.E.2d 920, 923 (1956). (Emphasis added.)

Thus, a conspiracy of silence could preclude a plaintiff from obtaining medical testimony on the question whether a particular book is used and relied upon by doctors.

If *doctors* are reluctant to qualify the plaintiff's medical books either directly under 79C or indirectly by means of 79B, the plaintiff could pursue one of several methods to qualify them. He could obtain a court order compelling a doctor to appear and answer questions concerning the books; but because of a doctor's lack of sympathy for the plaintiff's case, compulsory medical testimony could be detrimental to his cause. The inquiry, however, would be limited to the authoritative status of the books; and because it would not elicit the doctor's medical opinion on the merits of the case, this type of compulsory testimony would probably not harm the plaintiff's case. Also, the plaintiff might call the defendant himself to the stand to qualify the books. The problem of qualifying medical authors under the malpractice statute could be avoided by using a nonmedical book such as *Who's Who*. This is so because nonmedical works may be qualified under section 79B by a nonmedical witness. This approach was followed in *Ramsland v. Shaw*,⁵¹ where a librarian was called to qualify *Who's Who*.⁵² On appeal, the Massachusetts Supreme Court did not pass on the validity of this procedure, but affirmed the decision on other grounds.⁵³

C. EFFECT OF THE STATUTES ON THE SUBSTANTIVE LAW OF MALPRACTICE

Only two cases have suggested the effect of the Massachusetts statute on the substantive law of malpractice. One of these cases was *Ramsland v. Shaw*.⁵⁴ There a malpractice action was brought against three doctors for alleged negligence in administering a spinal anesthetic which resulted in brain damage to the plaintiff. At the trial plaintiff sought to introduce an excerpt from a medical book written by an English doctor. The lower court denied the plaintiff opportunity to establish the author's professional standing and refused to receive the medical book into evidence. The court on appeal adhered to the locality rule,⁵⁵ and held that because the

51. 166 N.E.2d 894 (Mass. 1960).

52. *Id.* at 900. The librarian was asked whether *Who's Who* is used and relied upon by librarians as an authoritative reference book.

53. The use of statutory provisions like those of § 79B to introduce books which will in turn qualify medical books under a malpractice statute like the one in Massachusetts is not a problem endemic to Massachusetts. Several states have statutes similar to § 79B. See note 96 *infra*.

54. *Ramsland v. Shaw*, 166 N.E.2d 894 (Mass. 1960).

55. See McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 569 (1959).

author of the medical book was an English doctor, the book could not be used against a doctor who practiced in Massachusetts.

The *Ramsland* case is significant because it rebuts the suggestion, made by one writer, that a statute like that in Massachusetts changes the substantive law of malpractice.⁵⁶ This writer argues that in a malpractice action against a general practitioner, the defendant's conduct must be judged by standards existing in his community or in similar communities.⁵⁷ Therefore, doctors who testify in behalf of the plaintiff must either be local doctors or doctors practicing in similar communities. Under the Massachusetts statute, however, he asserts that there is no assurance that the author of the book used at trial will have practiced medicine in a community similar to that in which the defendant has practiced.⁵⁸ In addition, this writer argues that there is no assurance under the statute that the defendant will be judged according to the school of medicine by which he has practiced.⁵⁹ Since general practitioners, under existing law, need not meet the standard of care required of specialists,⁶⁰ this author concludes that the statute also ignores this substantive law in so far as it permits books written by specialists to be used at trial against general practitioners.⁶¹

In *Ramsland*, however, the court held that because the author of the medical book was an Englishman, and because procedures for anesthetizing patients in England might differ from those in Massachusetts, the lower court correctly excluded the book. In so holding the court expressly approved the lower court's use of the locality rule. Because the trial court in *Ramsland*, by exercising its "discretion" under section 79C, applied the substantive law of locality which existed prior to the enactment of the statute, there appears to be some possibility that the same "discretion" might also be used to exclude books written by specialists in actions against general practitioners. As a result, the statute may have substituted judicial discretion for a comparatively inflexible rule of

56. Goldman, *supra* note 29, at 31.

57. *Ibid.*; Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363 (1880).

58. See Goldman, *supra* note 29, at 31. The Massachusetts statute makes no reference to the locality in which the author of the book has practiced. See statute quoted at note 28 *supra*.

59. See Goldman, *supra* note 29, at 31. The statute is silent concerning the status of a book's author as a specialist or a general practitioner. See statute quoted at note 28 *supra*.

Although specialists have been allowed to testify in actions against a general practitioner, the specialist must establish the standard required of general practitioners, *not* that required of specialists. McCoid, *supra* note 55, at 568; Wilson v. Corbin, 241 Iowa 593, 41 N.W.2d 702 (1950).

60. See McCoid, *supra* note 55, at 566, 568.

61. See Goldman, *supra* note 29, at 31. See statute quoted at note 28 *supra*.

law. If this substitution has occurred, the effect may be to make lower court determinations less subject to reversal on appeal since an appellate court is generally less likely to reverse a trial court's discretionary rulings than it is to reverse a lower court's rulings on the application of law. However, the courts have *not* yet decided whether the language, "in the discretion of the court," in section 79C means that a court could allow a general practitioner to be judged by the written opinions of a specialist whose book was introduced into evidence. Nor have they decided whether it would be an abuse of discretion for a judge to admit a book in evidence in violation of the locality rule. Until such questions have been answered by the courts, one cannot say with certainty that statutes like the one in Massachusetts have or have not changed the substantive law of medical malpractice.

It must be recognized, however, that any strict application of *either* the locality rule or the specialist rule to cases in which written medical opinions are offered in evidence may seriously hamper a plaintiff's opportunity to present his case against a general practitioner. Not only might there be few medical authors whose experiences have been limited to localities which were the same as, or similar to, those of the defendant; but also the chance that a particular book would *not* have been written by a specialist would probably be remote. Consequently, *some* change in traditional malpractice law may be required to make the statutes useful to a plaintiff in an action against a general practitioner.⁶² A change in the locality rule would probably work no hardship upon a general practitioner because the need for the rule is probably not as strong as it once was,⁶³ but a change in the specialist rule *could* put a general practitioner at a serious disadvantage. Since his training has not been as extensive in any particular area of medicine as that of the specialist, the general practitioner should not be held to the same degree of proficiency in that area as that required of the specialist. Yet the use of books written by specialists might effect this very result. Courts, therefore, may have to weigh the plaintiff's need to use medical books written by specialists against the potential harm to the general practitioner; they must recognize that if the plaintiff's need preponderates a basic change in malpractice law will have been effected at the expense of the general practitioner.

Another case indicating the effect of the Massachusetts statute

62. Books written by doctors who have practiced outside of a given geographical locality might nevertheless be used as evidence against local doctors, without violating the purpose of the locality rule if it could be shown that these books were read and followed by other doctors in the same, or a similar, locality.

63. See generally McCoid, *supra* note 55, at 571-75.

on the law of malpractice is *Thomas v. Ellis*.⁶⁴ In that case plaintiff brought an action against an obstetrician for alleged negligent prenatal care resulting in the death of the plaintiff's child. At the trial plaintiff, over defendant's objection,⁶⁵ introduced excerpts from two medical books. In passing upon the objection, the appellate court made the following statement:

Nor is the admission of the excerpts a departure from the established standard that the defendant owed the plaintiff the duty to have and use the care and skill commonly possessed and used by similar specialists in like circumstances.⁶⁶

By this statement the court in *Thomas* appears to be saying that the use of medical books at trial did not depart from the established law of medical malpractice. Yet one of the medical books used at trial was written by a doctor who practiced in a different locality from that of the defendant.⁶⁷ In Massachusetts, this fact has been held to be a proper ground for precluding a doctor from testifying in a malpractice case.⁶⁸ Because of this apparent inconsistency between the language of the court and the facts of the case, *Thomas* is not determinative of the question whether the law of malpractice has been changed by the statute.

D. SOME ARGUMENTS AGAINST USING MEDICAL BOOKS

Various arguments have been advanced against the use of medical books as direct evidence. They include the following: (1) medical books are hearsay evidence,⁶⁹ (2) the lay jury will not un-

64. 329 Mass. 93, 106 N.E.2d 687 (1952).

65. The defendant objected on the ground that the book was too old. *Id.* at 99, 106 N.E.2d at 690.

66. *Id.* at 100, 106 N.E.2d at 691. The court cited *Gabrunas v. Minitier*, 289 Mass. 20, 21, 193 N.E. 551, 552 (1935), as authority for this statement. The *Gabrunas* case, however, did not involve the question whether a particular doctor could testify against the defendant doctor, because there was no medical expert testimony at the trial. The statement by the court in *Gabrunas*, therefore, that defendant "owed the plaintiff the duty to have and use in the operation the care and skill commonly possessed and exercised by similar specialists in like circumstances" was dictum. The court in *Thomas* must have felt that because of the defendant's "wide experience" in obstetrics, the locality rule either had little application or was a factor calling for an expansion of the locality rule. This kind of expansion has occurred in other cases. See *McCoid*, *supra* note 55, at 570 n.110. *Sinz v. Owens*, 33 Cal. 2d 749, 205 P.2d 3 (1949). See also *Gist v. French*, 136 Cal. App. 2d 247, 288 P.2d 1003 (Dist. Ct. App. 1955). While the locality rule has been expanded, courts are apparently unwilling as yet to disregard it entirely. *Lockart v. Maclean*, 361 P.2d 670 (Nev. 1961).

67. *Goldman*, *supra* note 29, at 38. The author of the book used in evidence was a professor at the University of Pennsylvania. The defendant in the case was a doctor practicing in Massachusetts.

68. *Coburn v. Moore*, 320 Mass. 116, 68 N.E.2d 5 (1946).

69. 6 WIGMORE, EVIDENCE § 1690 (3d ed. 1940); see *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 354, 91 N.E.2d 690, 693 (1950);

derstand the terminology in the books;⁷⁰ (3) the opinions of medical writers are too uncertain to be useful in court;⁷¹ (4) the excerpts from the books may not be used in proper context;⁷² (5) medical opinion is based upon experience, not books, and therefore an author's written opinion is not the equivalent of medical testimony.⁷³

1. *The Hearsay Objection*

The fact that medical books are hearsay evidence is probably the most obvious legal objection to the use of such books at trial. Consequently, almost all jurisdictions hold that such books may not be used as direct evidence.⁷⁴ However, this objection could be overcome by showing that there is a *need* for the evidence and that there are adequate *safeguards* for its reliability as in the case of other exceptions to the hearsay rule.⁷⁵ The very existence of a conspiracy which precludes the plaintiff from obtaining *any* medical testimony, or which precludes him from obtaining reasonably well qualified medical testimony, establishes the plaintiff's need to use medical books. In addition, there are safeguards which tend to insure that the medical books will be reliable. Since an author of a medical work is writing primarily for other doctors, he knows that his ideas will be subjected to criticism and that his reputation will be affected accordingly. As a result, the author will probably consider his ideas very carefully before publishing them.⁷⁶ Also, an author of a medical book, unlike a doctor who has been called

Gluckstein v. Lipsett, 93 Cal. App. 2d 391, 209 P.2d 98 (Dist. Ct. App. 1949); Bailey v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904).

70. WIGMORE, *op. cit. supra* note 69; Bixby v. Omaha & C.B. Ry., 105 Iowa 293, 298, 75 N.W. 182, 184 (1898).

71. See authorities cited note 70 *supra*; Union Pac. Ry. v. Yates, 79 Fed. 584, 587 (8th Cir. 1897).

72. WIGMORE, *op. cit. supra* note 69.

73. *Ibid.*

74. See cases cited at note 31 *supra*.

75. Many of the exceptions to the hearsay rule have arisen because of *need* for evidence and because of *safeguards* for its reliability. An example of such an exception is the former testimony rule. The *need* for such evidence is supplied by the unavailability of the witness. MCCORMICK, EVIDENCE § 234 (1954). Other exceptions requiring this same *need* are the following: declarations against interest, business records, dying declarations, and declarations concerning family history. *Id.* at 492 n.3.

The *safeguard* for the reliability of former testimony is supplied by the opportunity to cross-examine the declarant at the original hearing. See *id.* § 231. Safeguards of reliability in the other exceptions mentioned above are supplied by the following factors respectively: the fact that the declaration is against one's pecuniary or proprietary interest, *id.* § 253; the need to be accurate in business affairs, *id.* § 283; the fact that the declarant was aware of death when he spoke, *id.* § 259; the declarant was a member of the family, or associated with it intimately, and made the statement without litigation in mind or reason to falsify, *id.* § 297.

76. See 6 WIGMORE, EVIDENCE § 1692(b) (3d ed. 1940).

as an expert witness, expresses his opinions without litigation in mind and therefore does not run the risk of becoming an advocate for one side in a lawsuit.⁷⁷

Of course it must be recognized that there is no absolute safeguard which will assure that a particular medical book is reliable; the author of the book may be completely wrong. However, given the *need* for the books and *some* assurance that the books are relevant and reliable, the hearsay objection can be minimized.

2. *Some Practical Problems in Using Medical Books in Court*

The jury's failure to understand the terminology used by an author may be an important barrier to successful use of medical books in court, and the court in *Bixby v. Omaha & C. B. Ry.*⁷⁸ took care to point this out. In this case the plaintiff, in order to establish the extent of his injuries, introduced excerpts from relevant medical texts. The court on appeal, in holding that the admission of these excerpts was error, said:

If those learned in medicine are often unable to determine from books the nature and extent of injuries and diseases, how shall the layman be better informed by an examination of the books. . . . We think the safer practice is to rely upon the testimony of living witnesses of the medical profession, who may bring the learning and research of the books within the comprehension of the jurors⁷⁹

The court cited with approval the language of a Michigan case⁸⁰ which reiterated the problems which confront jurors in understanding technical, medical terminology.⁸¹

If the plaintiff uses medical books only when he is unable to obtain any medical testimony, there will be no expert to explain to the jury what the terms in a particular medical book mean, and for

77. See *id.* § 1692(c).

78. 105 Iowa 293, 75 N.W. 182 (1898).

79. *Id.* at 297, 75 N.W. at 183-84.

80. *People v. Hall*, 48 Mich. 482, 12 N.W. 665 (1882).

81.

Scientific or expert testimony must be given by living witnesses who . . . can explain *in language open to general comprehension* what is necessary for the jury to know. . . . *Medical books are not addressed to common readers, but require particular knowledge to understand them.* Every one knows the inability of ordinary persons to understand or discriminate between symptoms or groups of symptoms, which cannot always be described to those who have not seen them, and which, with slight changes and combinations, mean something very different from what they mean in other cases. *The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. If jurors could be safely trusted with the interpretation of such books, it is hard to see on what principles witnesses would be required.*

105 Iowa at 297-98, 75 N.W. at 184. (Emphasis added.)

this reason the books might be of little value. The defendant would certainly be unwilling to assist the jury in understanding a book which would be used against him, and it is unlikely that the defendant's expert witnesses would be any more willing to assist the plaintiff than would the defendant. On the other hand, if the plaintiff is able to obtain an expert to explain medical terms for the jury, it could be argued that he does not *need* to use medical literature because no effective conspiracy exists. If the courts were to adopt this kind of reasoning, a plaintiff in Massachusetts or Nevada probably would be in no better position than a plaintiff in a state where medical texts are inadmissible as direct evidence. Thus, a plaintiff might be disqualified from using medical books by virtue of the fact that he was able to obtain a doctor's testimony, even though this testimony had been secured on condition that the doctor be asked only to define words in medical books and not to give his opinion on the merits of the case. However, no such disqualification seems likely. The unfairness of that result to a plaintiff who has not benefited from the substantive testimony of the physician is obvious. Furthermore, both the Massachusetts and the Nevada statutes seem to permit a plaintiff to use *both* written and oral evidence.⁸² As a result, a plaintiff would be able to call doctors to the stand to define terms in medical books without waiving his right under the statute to use them.

Apart from the difficulty which a jury may encounter in understanding medical terms, the fact that writings as such may have more impact upon the jury than oral statements is another problem posed by the use of medical books at trial. Because medical books received in evidence may, in the discretion of the court, be taken by the jury into the jury room and consulted during its deliberations,⁸³ writings may have more persuasive force than similar spoken words. However, if the jury cannot understand the medical terms, the books will probably have little effect despite their availability. On the other hand, the jury might believe that the ideas expressed in the books, as interpreted by the plaintiff's lawyer, are infallible merely because they are in print; thus, written evidence might have a greater impact upon the jury than the oral testimony of a doctor even though his testimony was carefully geared for a lay jury. Such an impact is important if the statutes are interpreted to permit *only* the plaintiff to introduce medical books into evidence; if *both* parties may use books, both may have the benefit of whatever advantages there are in using written, as opposed to oral, evidence.

82. See statutes quoted at note 28 *supra*.

83. See McCORMICK, EVIDENCE § 184, at 394 (1954). Since medical books are substitutes for testimony, however, it is arguable that they should not be used by the jury during its deliberations. *Id.* at 393.

An interesting aspect of the statute presents itself at this point. Suppose that plaintiff introduces an excerpt from page 100 of some medical text into evidence. The court finds that the author is a recognized authority in the field and that the excerpt is relevant. Since all of the statutory requirements have been met, the court receives the book into evidence. Suppose further that the language on page 101 resembles that on page 100, but that the relevance to the instant case could *not* be established under the statute. If the jury is permitted to take the book to the jury room during its deliberation, what prevents the jury from considering the excerpts on page 101 as well as the excerpt on page 100, thereby using as evidence material which could not initially have been received into evidence under the statute? This question suggests that *only* copies of the relevant excerpts of the particular medical book should be received in evidence and submitted to the jury for its consideration.

3. *Uncertainty of Written Medical Opinions*

It has been asserted that medical books should not be used at trial because the opinions expressed in them are too uncertain and indefinite to be reliable.⁸⁴ However, some medical opinions by their nature are uncertain whether *oral* or *written*; and since courts nevertheless rely upon *oral* expert testimony when required to do so by the nature of the case, there would appear to be no reason why *written* opinions might not be of equal value. Of course, if oral testimony is used, the defendant has an opportunity to cross examine plaintiff's witness; whereas if plaintiff uses a book the defendant has no such opportunity. However, it is doubtful whether cross-examination on matters of *opinion*, rather than *fact*, is effective assuming that the doctor, or author of the book, is qualified as an expert.

4. *The Use of Excerpts Out of Context*

Although an excerpt from a medical book must, under the statutes, be relevant to the case, a plaintiff might nevertheless be able to select quotations which, when read out of context, support his case but which, when read in context, are of much less importance. If the plaintiff quotes from the book in this manner, however, the defendant may be able to limit the effectiveness of such evidence by informing the jury of the context from which the excerpt was taken. This procedure would seem to be the only way

84. 6 WIGMORE, EVIDENCE § 1690 n.2 (3d ed. 1940). The suggestion that medical works are uncertain was made in *Bixby v. Omaha & C.B. Ry.*, 105 Iowa 293, 297-98, 75 N.W. 182, 184 (1898). However the court appeared to qualify this remark by saying that the books were useable only if doctors could assist the jury in understanding them. *Ibid.*

to mitigate, if not to erase, the effect of the plaintiff's misstatement from a medical book.

The procedure for correcting a misstatement may present certain difficulties. If, as one writer has suggested, the defendant may *not* use the medical books which the plaintiff has introduced in evidence,⁸⁵ then the defendant would be unable to show the context out of which the statement came and therefore could not alter the misleading impression which the statement may have had upon the jury. On the other hand, if the book, like other evidence received at trial, may be used by the defendant during the course of the trial,⁸⁶ the context from which the excerpt was taken may be brought to the attention of the jury. Depending upon how the statute is construed, the defendant *may* be unable to use the book in this manner. Since the plaintiff would probably introduce only a portion of the entire book into evidence,⁸⁷ the defendant would have to introduce other parts of it to clarify the context. Because the statute could be read to prevent the defendant's use of a medical book,⁸⁸ however, he might be prohibited from using it even for the limited purpose of correcting the plaintiff's misstatements. As a result, the mechanics of introducing a medical book into evidence should permit the defendant to use it to insure that plaintiff's quotations are not misleading. This procedure could be adopted even though the defendant could not use medical books as substantive evidence to establish his theory of the case.⁸⁹ The language of the statute, however, probably allows the defendant to use books in the same way a plaintiff could, and therefore would present no barrier to the defendant's use of medical books already introduced in evidence by the plaintiff.⁹⁰

5. *The Basis for Medical Opinion*

Although it was once thought that a doctor's opinion was based upon his experience and not upon his reading of books, this view has not prevailed.⁹¹ The fact that doctors rely upon medical books, and the fact that their opinions are perhaps determined more by reading than by personal observation are good reasons for using medical books to establish the standard of care required of the defendant.⁹² One could argue that by allowing a party to use

85. See Goldman, *supra* note 29, at 39.

86. *Cf.* Harlow v. Leclair, 82 N.H. 506, 136 Atl. 128 (1927).

87. See text at p. 26 *supra*.

88. See note 41 *supra* and accompanying text.

89. The medical book could be used to *impeach* the reliability of the plaintiff's quotations even though it could not be used as substantive evidence. See MCCORMICK, EVIDENCE § 39 (1954).

90. See note 41 *supra* and accompanying text.

91. See 6 WIGMORE, EVIDENCE § 1690 (3d ed. 1940).

92. *Ibid.*

books for this purpose, the court in essence is permitting a *direct* use of evidence which is now presented *indirectly* by means of the doctor's opinion. This view ignores the distinction, which is critical under existing law, between the testimony of a doctor who gives *his own* opinion *based upon* his reading of medical works and the testimony of a doctor who merely reiterates the opinions of *other* doctors whose books he has read.⁹³ The significance of this distinction is that in the first case, the doctor's opinion is subject to cross-examination; whereas in the second case it is not.⁹⁴ The direct use of medical books may be preferred or not, therefore, depending upon the effectiveness of, and the need for, cross-examination of *opinion*, as distinguished from *factual*, evidence.

III. THE ALABAMA AND WISCONSIN METHODS FOR OVERCOMING THE CONSPIRACY

A. THE ALABAMA RULE

As a result of the holding in *Stoudenmeier v. Williamson*,⁹⁵ medical books may be used as direct evidence of medical fact or opinion in Alabama. Consequently, the Alabama approach has been a product of judicial, rather than legislative, action. As such, this approach may be more subject to change by courts than similar statutory approaches, depending upon the courts' willingness to depart from the rule of stare decisis. Although Alabama has a statute which permits "books of science or art" to be used as evidence under certain circumstances,⁹⁶ the cases do not rely up-

93. See *People v. Hooper*, 10 Cal. App. 2d 332, 335, 51 P.2d 1131, 1133 (Dist. Ct. App. 1935); *Village of Ponca v. Crawford*, 18 Neb. 551, 26 N.W. 365 (1886); *Commonwealth v. Blacik*, 172 Pa. Super 196, 92 A.2d 703 (1952).

94. See authorities cited note 93 *supra*.

95. 29 Ala. 558 (1861).

96. ALA. CODE tit. 7, § 413 (1960) provides: "Historical works, books of science or art and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."

Seven other states have statutes similar to that of Alabama: CAL. CIV. PROC. CODE § 1936; IOWA CODE ANN. § 622.23 (1950); MONT. REV. CODES ANN. § 93-1101-8 (1947); NEB. REV. STAT. § 25-1218 (1956); ORE. REV. STAT. § 41.670 (1959); UTAH CODE ANN. § 78-25-6 (1953); IDAHO CODE ANN. § 9-402 (1948). The Nebraska and California statutes have been specifically construed to preclude the use of medical books as direct evidence. See *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897); *Gallagher v. Market St. Ry.*, 67 Cal. 13, 6 Pac. 869 (1885). Although the cases do not refer to the statute, the law in Iowa appears to exclude medical books as direct evidence also. See, e.g., *Wilcox v. Crumpton*, 219 Iowa 389, 258 N.W. 704 (1935); *State v. Blackburn*, 136 Iowa 743, 114 N.W. 531 (1908). The Iowa court expressly refused to consider the question in *Brodhead v. Wiltse*, 35 Iowa 429 (1872).

Other types of statutory provisions have been enacted to provide for

on this statute as the basis for using medical books in court.⁹⁷

In *Stoudenmeier*, plaintiff brought an action for breach of warranty against the defendant, claiming that defendant had sold him a slave who was in poor health. To substantiate this fact plaintiff was permitted, over the defendant's objection, to read an excerpt from a medical book to the jury. The court on appeal found no error below. In so holding the court said:

We think that medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence. . . . If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself discovered or demonstrated the correctness of what he testifies to, we certainly restrict the inquiry to very narrow limits. . . . Professional knowledge is, in a great degree, derived from the books of the particular profession. In every step the practitioner takes, he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and moulded by the experience and learning of others. Indeed, much of the knowledge we have upon all subjects, except objects of sense, is derived from books and our associations with men.

It is the boast of this age of advancing civilization, that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the court-room? We think not.⁹⁸

The application of the rule layed down in *Stoudenmeier*, is, of course, restricted by the same two requirements found in the Massachusetts and Nevada statutes—namely, the medical books must be relevant to the issues in the case, and they must be reliable and authoritative.⁹⁹

various kinds of evidence. In South Carolina a medical book may be used in evidence as direct evidence in a case involving insanity. S.C. CODE § 26-142 (1952). See *Edwards v. Union Buffalo Mills Co.*, 162 S.C. 17, 159 S.E. 818 (1931); *Baker v. Southern Cotton Oil Co.*, 161 S.C. 479, 159 S.E. 822 (1931).

In Rhode Island a statute provides that a moving party may compel an expert to appear in his behalf. R.I. GEN. LAWS ANN. § 9-17-19 (1956). See *Coleman v. McCarthy*, 53 R.I. 266, 165 Atl. 900 (1933). A similar statute exists in Indiana. IND. ANN. STAT. § 2-1722 (1946).

Connecticut, by judicial decision, permits medical books to be used as direct evidence in insanity cases. *State v. Wade*, 96 Conn. 238, 113 Atl. 458 (1921); *Richmond's Appeal*, 59 Conn. 226 (1890); *State v. Hoyt*, 46 Conn. 330 (1878).

97. See cases cited at note 99 *infra*.

98. *Stoudenmeier v. Williamson*, 29 Ala. 558, 567 (1861).

99. See *Smarr v. State*, 260 Ala. 30, 36, 68 So. 2d 6, 12 (1953); *Watkins v. Potts*, 219 Ala. 427, 430, 122 So. 416, 418 (1929); *Birmingham Ry. Light & Power Co. v. Moore*, 148 Ala. 115, 125, 42 So. 1024, 1028 (1906); *Merkle v. State*, 37 Ala. 139, 141 (1861); *Franklin v. State*, 29 Ala. App. 306, 308, 197 So. 55, 57 (1940). Although the Alabama cases do not involve medical malpractice, there is no reason to believe that medical books would not be subject to the same requirements there, as in the cases cited.

Although the rule in Alabama may be similar to the statutory rule with respect to the preliminary findings which a court must make before receiving a medical book into evidence, there seem to be at least two basic differences. First, under the statutes a court has "discretion" to exclude even those books which fulfil the requirements of relevancy and authoritativeness.¹⁰⁰ However, it appears that in Alabama, since the rule in *Stoudenmeier* makes no allowance for the discretion of the court, it would be error for a court to exclude books which satisfied these preliminary requirements.¹⁰¹ Second, the Alabama approach, unlike that of the statutes, *undoubtedly* allows the defendant as well as the plaintiff to use medical books.

The weakness of the Alabama approach is that in failing to provide for discretionary exclusion of writings by the court, the rule allows a plaintiff in a malpractice case to use medical books even though he can obtain competent medical testimony. Thus, the Alabama approach appears to ignore the fact that the use of medical books at trial should be justified by a preliminary finding of an effective conspiracy of silence. Although this same result could be reached in Massachusetts and Nevada, at least in those states the trial court has the power to exclude medical books in its discretion when an effective conspiracy of silence does not exist. Under the Alabama rule, the court could not exercise comparable power without violating *stare decisis*.

This weakness in the Alabama rule, however, may be offset by the fact that the defendant as well as the plaintiff may use medical books at trial. Consequently, the potentially punitive aspect of the Massachusetts and Nevada statutes is not present under the Alabama rule. As a practical matter this may mean that plaintiff will use books because he cannot obtain experts, and defendant will use experts and books thereby gaining an advantage in the type and amount of evidence produced. Therefore the question whether a rule permitting the use of writings should "equalize" the evidence or merely assure the plaintiff that he will not be nonsuited, is raised once again. The effect of the Alabama rule in this regard is to help the plaintiff avoid a nonsuit, rather than to preclude the defendant from using books in an effort to equalize the opportunities of the parties to obtain evidence. This resolution of the problem has some merit in that it affords the defendant the maximum opportunity to rebut the charge of malpractice while at the same time it insures that a plaintiff will not be nonsuited as a result of the conspiracy of silence. Whether this type of procedural assistance is sufficient to overcome all of the effects of the con-

100. See statute quoted at note 28 *supra*.

101. See *Stoudenmeier v. Williamson*, 29 Ala. 558 (1861).

spiracy, and therefore adequately protects the rights of a plaintiff in a malpractice action, is debatable.¹⁰²

B. THE WISCONSIN APPROACH

By statute, Wisconsin permits doctors who practice out of state to testify, in certain circumstances, in actions involving Wisconsin residents.¹⁰³ Basically the statute provides that an out-of-state doctor may be called as an expert witness and may testify "as the attending or examining physician or surgeon to the care, treatment, examination or condition" of persons whom he has treated in the course of his practice.¹⁰⁴ Although the statute does *not* specifically refer to malpractice actions, its language appears to be broad enough to cover this type of case. Since the statute specifically permits "examining" doctors to testify, a plaintiff could probably consult an out-of-state doctor for the express purpose of qualifying him to testify in a Wisconsin malpractice action. Consequently, the statute could afford a Wisconsin plaintiff an opportunity to overcome a local conspiracy of silence by obtaining the testimony of out-of-state doctors.

Such a situation arose in *Paulsen v. Gundersen*.¹⁰⁵ There plaintiff brought an action against the defendant doctor for assault and battery and for negligent treatment of an ear ailment. Under the Wisconsin statute which was then applicable, plaintiff was permitted to call an Iowa doctor as an expert witness. The court on appeal held that the lower court was correct in permitting the doctor to testify. The court pointed out that since the plaintiff had made an effort to obtain expert testimony in Wisconsin and had failed in this effort, the statute permitted the plaintiff to obtain doctors from outside the state.¹⁰⁶

In a similar case, *Morrill v. Komasinski*,¹⁰⁷ plaintiff brought a

102. Since the conspiracy may not only prevent the plaintiff from *reaching* the jury, but may also make his case *appear* weaker owing to his lack of *any* expert testimony, the Alabama approach may be deficient in failing to meet this latter effect of the conspiracy.

While the Massachusetts and Nevada statutes provide no guarantee that this latter effect of the conspiracy will be remedied, they nevertheless, through the provisions granting the trial court discretion to admit or exclude books, afford an *opportunity* for such a remedy.

103. WIS. STAT. § 147.14(2) (a) (1959) provides:

[A] medical or osteopathic physician, licensed to practice in another state, may testify as the attending or examining physician or surgeon to the care, treatment, examination or condition of sick or injured persons whom he has treated in the ordinary course of his professional practice for the sickness or injury which is the subject of the judicial inquiry in any action or proceeding in which he is called as a witness.

104. WIS. STAT. § 147.14(2) (a) (1959). (Emphasis added.)

105. 218 Wis. 578, 260 N.W. 448 (1935).

106. *Id.* at 585, 260 N.W. at 451.

107. 256 Wis. 417, 41 N.W.2d 620 (1950).

malpractice action against a doctor, alleging that the defendant had not properly treated and reduced a fractured humerus. As in *Paulsen*, the plaintiff encountered difficulty in obtaining local doctors to testify in his behalf. At trial plaintiff was permitted to call a Michigan osteopath as an expert witness under the Wisconsin statute. The court on appeal held that the lower court had not committed error in permitting the osteopath to testify.¹⁰⁸

These cases illustrate the value of out-of-state experts in malpractice actions. Both *Morrill* and *Paulsen* arose under a Wisconsin statute which has subsequently been amended,¹⁰⁹ and as a result these cases did not involve an interpretation of the terms of the present statute. However, the language of the amended statute need not alter or in any way conflict with the results reached in the *Morrill* and *Paulsen* cases.¹¹⁰

However, the last case to be decided under the Wisconsin statute prior to its amendment, *McGaw v. Wassmann*,¹¹¹ raised the important question of how much discretion Wisconsin trial courts have under the statute to allow or disallow out-of-state expert testimony. In that case the plaintiff, a passenger in the defendant's car, brought a personal injury action against the defendant driver. At trial the plaintiff attempted to call an Illinois doctor as an expert witness to establish the extent of his injuries. The lower court refused to permit him to testify, and the court on appeal affirmed this ruling. On petition for rehearing the court clarified this result somewhat by saying that although the Illinois doctor was properly precluded from testifying, a lower court, in a proper case, could allow out-of-state doctors to testify in Wisconsin,¹¹² but the court did *not* delimit the scope of the trial court's discre-

108. *Ibid.*

109. Section 147.14(2) was amended in 1953. When *Paulsen* and *Morrill* were decided, the relevant statutory language read as follows:

Practitioners in medicine, surgery or osteopathy licensed in other states may testify as experts in the state when such testimony is necessary to establish the rights of citizens or residents of this state in a judicial proceeding and expert testimony of licensed practitioners of this state sufficient for the purpose is not available.

110. It must be recognized that the statutory language, "in the ordinary course of his professional practice," could be given a restrictive meaning thereby preventing a party from calling a doctor who had been consulted *only* for purposes of qualifying him as an expert. Such a restrictive reading of the present statutory language seems possible since the former Wisconsin statute did *not* contain the phrase quoted above. Compare Wis. STAT. § 147.14(2)(a) (1959) with Wis. STAT. § 147.14(2) (1952). However, in view of the fact that the legislature could have imposed more specific prohibitions upon testimony of doctors consulted only for the purpose of qualifying them as experts, the general language quoted above need not be construed to prevent plaintiffs from introducing such testimony.

111. 263 Wis. 486, 57 N.W.2d 920 (1953).

112. *McGaw v. Wassmann*, 263 Wis. 486, 497a, 58 N.W.2d 663, 664 (1953).

tion to exclude medical testimony. The opinion failed to mention the grounds upon which the lower court refused to allow the Illinois doctor to testify. Nor was this matter clarified in the second appeal. Rather, the court asserted that the question of who is a proper out of state expert "is left open for determination by the trial court upon the circumstances then appearing."¹¹³ Although this statement is vague, it probably does *not* mean that a Wisconsin court, under the amended statute, could refuse to allow an out-of-state doctor to testify "as the attending or examining physician" because the statute specifically provides that such a doctor "may testify."¹¹⁴ As a result, although the Wisconsin statute provides a plaintiff with a way of overcoming the conspiracy, the statute lacks the flexibility of the Massachusetts and Nevada statutes because it fails to provide explicitly that the trial court, in its discretion, may exclude evidence which has met the statutory requirements for admissibility.

Like the other statutes, however, the statute in Wisconsin raises the question whether the substantive law of malpractice has been changed. The court in *Morrill v. Komasinski* suggested that the locality rule had not been changed by holding expressly that the out of state osteopath could testify in Wisconsin because he was familiar with medical practice in communities similar to that in which the defendant practiced.¹¹⁵ Moreover, the court's treatment of the question whether the expert was of the same school of medicine as the defendant *suggests* that no change in substantive law has occurred.¹¹⁶ In considering this question, the court found that under the licensing laws of Wisconsin the osteopath and the defendant were both surgeons and were consequently of the same school of medicine.¹¹⁷ Despite the court's language, however, it is doubtful that the osteopath and the defendant were in fact of the same school of medicine. Rather, the court appears to have used the licensing statute to effect a desirable result—permitting the osteopath to testify without at the same time *formally* discarding traditional malpractice law.

IV. THE USE OF MEDICAL BROCHURES

Like medical books, medical brochures, which provide instructions for the use of drugs, are hearsay evidence and are not

113. *Ibid.*

114. WIS. STAT. § 147.14(2) (a) (1959).

115. *Morrill v. Komasinski*, 256 Wis. 417, 422-23, 41 N.W.2d 620, 623 (1950); see McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 569 (1959).

116. *Morrill v. Komasinski*, 256 Wis. 417, 421-22, 41 N.W.2d 620, 622 (1950); see McCoid, *supra* note 115.

117. *Morrill v. Komasinski*, 256 Wis. 417, 421, 41 N.W.2d 620, 622 (1950).

admissible under any of the recognized exceptions to the hearsay rule.¹¹⁸ The courts of California and Idaho, however, permit a party to use a manufacturer's brochure at trial as evidence of a proper way to administer a drug.¹¹⁹ This development parallels the use of medical books at trial since the brochures may be both necessary to a plaintiff's case and reliable as evidence. As such, the use of medical brochures may become an important and widely recognized exception to the hearsay rule.

*Salgo v. Leland Stanford Jr. Univ.*¹²⁰ is illustrative of the type of case in which medical brochures can be used. Plaintiff brought a malpractice action against the defendant doctor alleging that he had negligently performed a translumbar aortography and had caused the plaintiff to become a permanent paraplegic. At the trial plaintiff was permitted to introduce a manufacturer's brochure in which directions were given concerning the use of Urokon in translumbar aortography.¹²¹ The court on appeal held that using the brochure as evidence was not error, but that the lower court's instruction should have limited the jury's use of the brochure by prescribing that it be considered only as *some* evidence of the defendant's negligence.¹²²

The court in *Salgo* based its holding regarding the use of medical brochures upon *Julien v. Barker*.¹²³ In that case a trial court refused to receive an instruction sheet in evidence which the manufacturer of sodium pentathol had prepared and packaged with the anesthetic. There the decedent's representative brought a wrongful death action against the defendant doctors alleging that they had negligently administered sodium pentathol to the decedent and had thereby caused his death. On appeal the court held that the instruction sheet should have been received in evidence and that it was error to have excluded it. In so holding the court was careful to point out that the instruction sheet was "prima facie proof of a proper method of use" of sodium pentathol and was

118. The medical brochure is an out of court statement introduced into evidence for the truth of the matters contained in the brochure. As such, it conforms to the definition of hearsay. See MCCORMICK, EVIDENCE § 225 (1954). The brochures are not admissible under any recognized exception to the hearsay rule. See *id.* §§ 230-98.

119. *Salgo v. Leland Stanford Jr. Univ.*, 154 Cal. App. 2d 560, 317 P.2d 170 (Dist. Ct. App. 1957); *Julien v. Barker*, 75 Idaho 413, 272 P.2d 718 (1954).

120. 154 Cal. App. 2d 560, 317 P.2d 170 (Dist. Ct. App. 1957).

121. A translumbar aortography consists of injecting a radio-opaque substance, urokon in this case, into the aorta, or large artery, located immediately in front of the spinal column, in order to facilitate the taking of X-rays to determine the nature and extent of a block located in the aorta. *Id.* at 565, 317 P.2d at 173.

122. *Id.* at 577, 317 P.2d at 180.

123. 75 Idaho 413, 272 P.2d 718 (1954).

"not conclusive evidence of standard or accepted practice in the use of the drug."¹²⁴

The plaintiff's *need* to use medical brochures in cases like *Salgo* and *Julien* is clear. Doctors are reluctant to testify that the defendant failed to administer properly a particular drug or medicine. As a result, the plaintiff's use of a medical brochure could make the difference between getting to the jury and being non-suited.

In addition, the financial interest which drug manufacturers have in protecting themselves from potential liability to ultimate users of their product will insure that the instructions which accompany the drug prescribe at least one proper way to use it.¹²⁵ However, it has been argued that medical brochures should not be admitted as evidence because a manufacturer's instructions are always "conservative," and because doctors, after using a drug, develop safe standards for administering it which may vary from those prescribed by the manufacturer.¹²⁶ Arguably, therefore, the fact that a doctor administers a drug in a manner contrary to the manufacturer's instructions, is not necessarily evidence of his negligence.

This argument may be valid or invalid depending upon the circumstances in which brochures are used. If the plaintiff can establish the proper use of a drug without using brochures, then probably they should not be admissible as evidence. The potential harm to the defendant which may result from a jury's failure to understand that the manufacturer's instructions are not the only proper way to use a drug ought to outweigh the plaintiff's need to use the brochures. Conversely, however, if the plaintiff cannot establish a *prima facie* case without using this kind of evidence, then his interests probably outweigh the potential harm to the defendant, and the brochures should be admitted. Consequently, medical brochures should not be used in evidence as an exception to the hearsay rule unless the plaintiff *needs* such evidence and its reliability is reasonably assured by the potential liability of the manufacturer of the drug.

In both *Salgo* and *Julien* the brochures were used by the jury as "some evidence" of the defendant's negligence. In *Reed v. Church*,¹²⁷ however, the Virginia court was unwilling to permit the jury to use a brochure for that purpose. In that case, plaintiff brought a malpractice action against the defendant doctor claiming that he had negligently given the plaintiff injections of tryparsamide, a drug used in the treatment of cerebrospinal syphilis, there-

124. *Id.* at 423, 272 P.2d at 724. (Emphasis added.)

125. *Ibid.*

126. *Salgo v. Leland Stanford Jr. Univ.*, 154 Cal. App. 2d 560, 576, 317 P.2d 170, 180 (Dist. Ct. App. 1957).

127. 175 Va. 284, 8 S.E.2d 285 (1940).

by causing him to become almost blind. At the trial plaintiff, over the defendant's objection that the writing was hearsay, introduced a medical brochure, written by the manufacturer, which gave instructions in the use of the drug. The court on appeal held that since the defendant admitted knowing the contents of the brochure and had testified that he had followed the directions given in it, the use of the brochure below was not prejudicial to the defendant.¹²⁸ By treating the use of medical brochures as it did, the court suggested that the use of such evidence would have been reversible error had not the lower court limited the jury's use of the brochure to the question of the extent of the doctor's knowledge about the drug and expressly forbade the jury to use it as evidence of negligence.¹²⁹ The *Reed* case, therefore, is not authority for the proposition that the jury may use medical brochures as "some evidence" of a doctor's negligence, and the case is distinguishable from the *Salgo* and *Julien* cases on this ground.

It is interesting to note that while the court in *Salgo* permitted a medical brochure to be used as direct evidence of negligence, the court in the same opinion expressly reaffirmed its adherence to the holding in *Gluckstein v. Lipsett*¹³⁰ that medical books are inadmissible as direct evidence. Both the books and the brochures are hearsay, and yet the court admitted the brochures and excluded the books. One reason for this result may be the fact that the court considered the medical brochures to be more reliable than medical books because the threat of liability, which the manufacturer of the product may incur, is a more effective safeguard than the threat of professional criticism which may be accorded medical books. The fact that a court, as in *Salgo*, may retain the old rule regarding the use of medical books and still permit medical brochures to be used as direct evidence may mean that other jurisdictions which follow *Gluckstein*, can nevertheless afford the plaintiff *some* assistance in avoiding a nonsuit by permitting him to use medical brochures as some evidence of the defendant's negligence. The admission of medical brochures, therefore, could even be a first step in admitting medical books as direct evidence of negligence in those jurisdictions which presently do not permit this procedure.

CONCLUSION

The Massachusetts and Nevada statutes are probably the best way to overcome the conspiracy of silence among doctors. The main reason for this is that the statutes, by placing discretion in the trial court to exclude even those medical books which satisfy the

128. *Id.* at 297, 8 S.E.2d at 290.

129. *Ibid.*

130. 93 Cal. App. 2d 391, 209 P.2d 98 (Dist. Ct. App. 1949).

preliminary requirements of the statutes, retain some flexibility in the procedure for receiving medical books into evidence. This flexibility permits the trial court to "equalize" the opportunities of the parties to prove their cases by allowing or disallowing the defendant's use of medical books depending upon whether an effective conspiracy of silence exists. Although this discretion could allow the court to base its decision to receive or reject medical books on considerations unrelated to a conspiracy of silence, in some cases, especially where the plaintiff cannot afford expert testimony, this result may be desirable because of the detrimental effect which the plaintiff's poverty may have on his rights.

Where the plaintiff *can* obtain competent medical testimony one of two conclusions could be reached. Either *no* written evidence should be used; or both the plaintiff and the defendant should be able to use *all* relevant and admissible evidence. The arguments in favor of the first conclusion would be that since no conspiracy exists, plaintiff does not need to use books and since the plaintiff is not using books the defendant has no need to show that authors support his theory of the case. In addition, since expert testimony is available, there is *no need* to raise all the difficulties inherent in using medical books at trial. The argument in favor of the latter conclusion, would be that *all* relevant evidence should be used; and since the books can be brought within the understanding of the jury by the supplementary testimony of the experts, the major difficulties in using books at trial can be minimized if not eliminated. Because of the discretionary power in the trial court, either of these arguments may be used to exclude or admit medical books depending upon how useful such evidence would be in a particular case.

Where the plaintiff *cannot* obtain competent medical testimony, the court may exercise its discretion to prevent the defendant from using medical books thereby equalizing the opportunities of the parties in presenting their cases and preventing the defendant from benefiting from the conspiracy of silence.

Because each malpractice case is unique in so far as it presents these and other similar considerations in varying proportions, placing discretion in the trial court is probably the only effective way to balance *all* of these considerations in determining whether to admit medical books.

The Alabama approach appears to be too broad. The rule, as laid down by the *Stoudenmeier* case, makes no provision for discretionary exclusion of medical books by the court. As a result, plaintiff could use medical books in evidence even though there is no effective conspiracy, and therefore no *need* to use them. This result can be explained, perhaps, because the Alabama rule did

not arise from a malpractice case; and the result may be somewhat offset by the fact that under the Alabama rule defendants may use medical books to rebut the plaintiff's written evidence. However, the fact that the rule fails to provide the court with any discretionary power of exclusion will probably mean that the plaintiff, in the usual malpractice case, will use books, and the defendant will use *both* books and experts. The plaintiff's opportunity to prove his case is therefore *not* equal to that of the defendant under the Alabama approach.

While a Wisconsin trial court may possess some discretion in the admission or exclusion of the testimony of out-of-state experts, it is more probable that it does not; rather, once the preliminary requisites of the statute have been satisfied, a plaintiff could probably use the testimony of out-of-state experts even though no conspiracy exists. Also, *unlike* Alabama, the Wisconsin approach applies only to plaintiffs and not to defendants. This fact, however, raises no equalization problem since the Wisconsin statute pertains to the use of testimony only and not to writings; the defendant can always obtain experts from within the state to testify in his behalf.

The use of medical brochures to establish, *prima facie*, the proper way to administer a drug could be an important method of overcoming the effect of the conspiracy of silence in a limited area. Since the safeguards for reliability in the use of brochures are probably higher than they are in the use of medical treatises because of the manufacturer's potential liability, courts which are reluctant to overturn the old rules concerning medical books may, nevertheless, assist plaintiffs in some malpractice actions by admitting medical brochures into evidence. Having done this, the courts which now adhere to the old rules concerning medical books may be more willing in the future to consider new rules for using medical books at trial.