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## The Adverse Witness Rule: A Cure for a Conspiracy

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## THE ADVERSE WITNESS RULE: A CURE FOR A CONSPIRACY

J. B. SPENCE\*

[R]egardless of the merits of the plaintiff's case, physicians who are members of medical societies flock to the defense of their fellow member charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul, who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance policy.<sup>1</sup>

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### I. THE CONSPIRACY OF SILENCE

We have come a great distance from 1543, when Andreas Vesalius of Brussels published the first comprehensive textbook on human anatomy.<sup>2</sup> Understandably, medical procedures of today tend to compel all of us to stand in awe at the techniques of our highly trained and, for the most part, highly competent contemporary healers. It is to be expected, therefore, that both the physicians and the general public sometimes place the medical profession upon a pedestal far above the human characteristic of error. While the public's psychological confidence is perhaps clinically beneficial, the refusal of the great majority<sup>3</sup> of doctors to recognize and point out an error of a colleague can be legally disastrous.

When a physician makes a mistake, it may result in a great amount

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1. *Huffman v. Lindquist*, 37 Cal. 2d 465, 484, 234 P.2d 34, 46 (1951).

2. A. VESALIUS, *DE HUMANI CORPORIS FABRICA* (1543).

3. A survey made by the Boston University Law-Medicine Research Institute revealed that out of 214 doctors, only 31% of the specialists and 27% of the general practitioners said they would be willing to testify for the plaintiff if a surgeon, operating on a diseased kidney removed the wrong one. W. PROSSER, *LAW OF TORTS* 167 n. 45 (3d ed. 1964). In *Agnew v. Parks*, 172 Cal. App. 2d 756, 343 P.2d 118 (1959), a suit was brought against a group of

of needless pain or prolonged recovery. Even more seriously, an oversight by a surgeon may lead to the loss of a limb or a life. When the damage done by the forgotten sponge,<sup>4</sup> gauze,<sup>5</sup> cloth sack,<sup>6</sup> drainage tube,<sup>7</sup> rubber tube,<sup>8</sup> or needle<sup>9</sup> can be translated into dollars and cents, the result frequently is a suit against a physician.<sup>10</sup> Then, in an adversary proceeding, the doctor must answer to one judge or perhaps six ordinary citizens for an act or omission which may be highly technical and highly sophisticated.

Fortunately, for our system of justice, the courts have provided for the use of expert testimony.<sup>11</sup> In a medical malpractice case, this testimony usually revolves around the question of whether the defendant met the applicable standard of care:<sup>12</sup> (1) the degree of ability or skill possessed by other physicians in the same or similar community, neighborhood, or locality;<sup>13</sup> (2) the degree of care, attention, diligence, or vigilance ordinarily exercised by those physicians in the application of their skill; and (3) the special or extraordinary skill of the specialist, if the physician involved has represented himself as possessing that knowledge.

Thus, the standard for judging a physician's performance is objective—the performance of other physicians similarly situated. This obviously requires the testimony of another physician to help the judge or jury to render a sound judgment on the defendant's performance.<sup>14</sup> Yet, in practice, counsel for the plaintiff will find it difficult to coax any physician into pointing out a colleague's errors. This "conspiracy of silence" is evident no matter how lacking in skill or how negligent the defendant's behavior.<sup>15</sup> Various causes can be attributed for this ethical weakness:

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doctors for "conspiracy to obstruct the ends of justice" by refusal to testify. *See also* Simon v. Friedrich, 163 Misc. 112, 296 N.Y.S. 367 (City Ct. of N.Y. 1937); Johnson v. Winston, 68 Neb. 425, 94 N.W. 607 (1903); Coleman v. McCarthy, 53 R.I. 266, 165 A. 900 (1933).

4. Fredrickson v. Maw, 119 Utah 385, 227 P.2d 772 (1951).

5. Walker Hosp. v. Pulley, 74 Ind. App. 659, 127 N.E. 559 (1920), *reh. denied*, 74 Ind. App. 659, 128 N.E. 933 (1920).

6. Tiller v. Von Pohle, 72 Ariz. 11, 230 P.2d 213 (1951).

7. Null v. Stewart, 78 S.W.2d 75 (Mo. 1934).

8. Saucier v. Ross, 112 Misc. 306, 73 So. 49 (Miss. 1916).

9. Johnson v. Ely, 30 Tenn. App. 294, 205 S.W.2d 759 (1947).

10. Professional liability actions against practitioners date back to at least 1374. *See* Y. B. Hill, 48 Edw. III, F. 6, pl. 11 (1374).

11. Indeed, since juries composed of laymen are normally incompetent to pass judgment on questions of medical science or technique, "it has been held in the great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it." W. PROSSER, *LAW OF TORTS* 167 (3d ed. 1964).

12. D. LOUISELL & H. WILLIAMS, *TRIAL OF MEDICAL MALPRACTICE CASES*, ¶ 8.04, at 201 (1965).

13. The "locality rule" has come under very heavy and very convincing attack. *See, e.g.*, Comment, *Expert Testimony in Medical Malpractice Cases*, 17 U. MIAMI L. REV. 182 (1962). *See also* D. LOUISELL & H. WILLIAMS, *TRIAL OF MEDICAL MALPRACTICE CASES*, ¶ 8.06, at 210 (1965); Kolesar v. United States, 198 F. Supp. 517 (S.D. Fla. 1961) (Court held that the locality rule is obsolete).

14. *See* note 11 *supra*. Where the matter is of common knowledge, as where a surgeon saws off the wrong leg, or where there is a part of the body not within the operative field injured, it has been held that the jury may infer negligence without the aid of an expert. W. PROSSER, *LAW OF TORTS* 167 (3d ed. 1964).

15. Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 568, 317

prestige, the fear of insurance costs, social ostracism, and the like.<sup>16</sup> The fact of the matter is, however, that the court and the jury may not receive the benefit of the training and experience of the expert. On the other hand, counsel for the defendant will have at his disposal a small army of noted physicians, all anxious to make the fatal incision into the plaintiff's claim for relief.

In the light of all this, the "Adverse Witness Rule,"<sup>17</sup> construed to allow the plaintiff to elicit expert testimony from the defendant, may be the most direct and inexpensive cure for the conspiracy.<sup>18</sup>

## II. EARLY DEVELOPMENT OF THE ADVERSE WITNESS RULE

### A. *The Minority Rule*

At common law, a party could not compel his adversary to testify.<sup>19</sup> On the other hand, Chancery followed the rule of the ecclesiastical courts to compel each party to the suit to testify.<sup>20</sup> Statutes and rules in the United States have abolished the common law rule concerning adverse witnesses.<sup>21</sup>

Seizing upon the language of these statutes and rules, lawyers argued early that the defendant physician should be compelled to divulge his expertise for the benefit of the court, especially as to the applicable standard of care. The courts which first<sup>22</sup> discussed the problem objected on three major grounds. First, the courts announced that it was contrary to the purpose and intent of the statute to allow the plaintiff to make out his case in chief by expert evidence secured from the defendant. Secondly,

P.2d 170, 175 (1957). See also *Christie v. Callahan*, 124 F.2d 825, 828 (D.C. Cir. 1941); Cases cited note 3 *supra*; Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

16. Anyone familiar with cases of this character [malpractice] knows the so-called ethical practitioner will not testify on behalf of a plaintiff regardless of the merits of his case. This is largely due to the pressure exerted by medical societies and public insurance companies which issue policies of liability insurance covering malpractice claims . . . .

*Huffman v. Lindquist*, 37 Cal. 2d 465, 484, 234 P.2d 34, 46 (1951).

17. See, e.g., FLA. R. CIV. PRO. 1.450 (a).

18. See Friedenthal, *Discovery and Use of Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); King, *The Adverse Witness Statute and Expert Opinion*, 4 WAYNE L. REV. 228 (1958); Note, 70 DICK. L. REV. 394 (1966); Note, 33 FORDHAM L. REV. 732 (1965); Note, 51 IOWA L. REV. 731 (1966); Note, 11 N.Y.L.F. 160 (1965); Note, 17 W. RES. L. REV. 608 (1965); Note, 5 So. CALIF. L. REV. 448 (1931); Comment, *Malpractice Actions—Scope of Examination Under Adverse Witness Statute*, 34 U.M.K.C. L. REV. 416 (1966).

19. 8 J. WIGMORE, EVIDENCE §§ 2217, 2218 (McNaughton ed. 1961). In *R. v. Woburn*, 10 East 395, 403, 103 Eng. Rep. 825, 828 (1808), Ellenborough, L.C.J. said: "It is a long-established rule of evidence that a party to the suit cannot be called upon against his will by the opposite party to give evidence." See also *People ex rel. Kraushaar Bros. Co. v. Thorpe*, 296 N.Y. 223, 72 N.E.2d 165 (1947); *Mauran v. Lamb*, 7 Cow. 174 (N.Y. 1827).

20. *Storey v. Lord Lennox*, 1 Keen 341, 350, 48 Eng. Rep. 341, 343 (1836).

21. 7 J. WIGMORE, EVIDENCE § 2218 (McNaughton rev. ed. 1961).

22. *Osborn v. Carey*, 24 Idaho 158, 132 P. 967 (1913), *aff'd*, 28 Idaho 89, 152 P. 473 (1915); *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931), *overruled* by *Iverson v. Lancaster*, — N.D. —, 158 N.W.2d 507 (1968). See also *Hull v. Plume*, 131 N.J.L. 511, 516-17, 37 A.2d 53, 56 (1944).

to compel such testimony of the defendant would give the plaintiff an unfair advantage.<sup>23</sup> Finally, while the physician as an adverse witness could be compelled to testify to facts within his knowledge—that is, what he actually saw and did—he should not be required to testify whether his actions deviated from the accepted standard of medical practice in the community. The courts which had discussed the issue unanimously held that such examination would not be permitted. The now defunct majority position was based upon the construction of the Idaho adverse witness rule<sup>24</sup> by the court in *Osborn v. Carey*:<sup>25</sup> “The statute was not intended to enable an adverse party to call an opposing party as an expert and seek to establish his side of the case by such expert evidence.”<sup>26</sup>

### B. *The Development of the Majority Rule*

Beginning in 1941 with the case of *Anderson v. Stump*,<sup>27</sup> and later, *Lawless v. Calaway*,<sup>28</sup> the states began to question, and finally,<sup>29</sup> to repudiate the previous construction of the adverse witness statutes. The vanguard California courts, construing a statute similar in wording<sup>30</sup> to that of Idaho<sup>31</sup> and North Dakota,<sup>32</sup> replaced the question “Why?” with the more helpful quare, “Why not?”:

Neither the letter nor the spirit of the statute suggests any reason why the defendant in such action should not be examined with regard to the standard of skill and care ordinarily exercised by doctors in the community under like circumstances.<sup>33</sup>

The obvious purpose of the statute, the courts reasoned, was to permit the production in each case of all pertinent and relevant evidence available from the parties to the action.<sup>34</sup>

23. See, e.g., the analysis of *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931) in Note, 5 So. CALIF. L. REV. 448, 449-50 (1931):

[T]o compel the defendant to testify under the statute would give the plaintiff an unfair advantage in that he would be in a position to accept whatever favorable testimony he could bring out under the liberal rules of cross-examination, and yet, under what seems to be the reasonable interpretation of the statute, be able to impeach the defendant if the answer were unfavorable.

*Hunder* was recently overruled by *Iverson v. Lancaster*, — N.D. —, 158 N.W.2d 507 (1968).

24. IDAHO SESS. LAWS 1909 at 334, now IDAHO R. CIV. P. 43(b).

25. 24 Idaho 158, 132 P. 967 (1913).

26. *Id.* at 168, 132 P. at 970.

27. 42 Cal. App. 2d 761, 109 P.2d 1027 (1941). The court stated: “Having in mind the fact that Dr. Stump was a practicing physician and was engaged by Mrs. Anderson for the specific purposes of her confinement, it is obvious that he became a material witness to the case.”

28. 24 Cal. 2d 81, 147 P.2d 604 (1944).

29. See note 60 *infra* and accompanying text.

30. CAL. CIV. PROC. CODE § 2055.

31. IDAHO SESS. LAWS 1909 at 334, now IDAHO R. CIV. P. 43(b).

32. LAWS OF N.D. 1907, ch. 4, now N.D.R. CIV. P. 43(b).

33. *Lawless v. Calaway*, 24 Cal. 2d 81, 90, 147 P.2d 604, 609 (1944).

34. *Id.* See also the statement in the recent case of *Iverson v. Lancaster*, — N.D. —, 158 N.W.2d 507 (1968):

[B]y allowing the plaintiff to examine the defendant doctor with regard to the

At the same time, other courts allowed this type of examination based upon a comparison of the applicable statutes. The statutes assumed were of two forms. Statutes in the states which adopted a restrictive view usually provided that "a party to the record of any civil action or proceedings may be examined by the adverse party as if under cross-examination . . ."<sup>35</sup> Those states which adopted a contrary view were usually construing a statute which provided: "Any party may call as a witness any adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party."<sup>36</sup>

Based upon this difference in wording, some courts reached the conclusion of the court in *State v. Brainin*.<sup>37</sup> That court construed the latter of the above-mentioned forms of statutes<sup>38</sup> to be liberal in scope. Refusing to follow the then-majority rule on the ground that the majority<sup>39</sup> were construing statutes much narrower in scope than the Maryland statute in question, the court said: "Furthermore, it seems plain that the statute in this state is broad enough to encompass whatever expert knowledge the party called as an adverse witness may possess."<sup>40</sup>

However, it is interesting to note that not all of the states followed the rationale of the court in *Brainin*. For example, in a Minnesota case, *Ericksen v. Wilson*,<sup>41</sup> the court was faced with a rule similar in wording<sup>42</sup>

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standard of skill and care ordinarily exercised by physicians in the community under like circumstances and with regard to whether his conduct conformed thereto, even though such questions call for the expression of an expert opinion, the courts do no more than conform to the obvious purpose underlying the adverse-party-witness rule. That purpose, of course, 'is to permit the production in each case of all pertinent and relevant evidence that is available from the parties to the action.'

*Id.* at 158 N.W.2d at 521.

35. See, e.g., *Osborne v. Carey*, 24 Idaho 158, 168, 132 P. 967, 970 (1913), construing Idaho Sess. Laws 1909 at 334, now IDAHO R. CIV. P. 43(b):

Where a witness is called under the provisions of that act, he may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses, but it is contrary to the purpose and reason of that statute to allow the plaintiff to make out his case in chief by expert opinion evidence secured from defendant under cross-examination. If the plaintiff desires to make his case by expert evidence from defendant himself, he must call him as his own witness, but is not permitted to do so under the provisions of the statute.

36. MD. CODE ANN. art. 35, § 9 (1957); FLA. R. CIV. P. 1.450(a); FED. R. CIV. P. 43(b). See also N.Y. CIV. PRAC. LAW § 4512: "A person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party . . ."

37. 224 Md. 156, 167 A.2d 117 (1961).

38. MD. CODE ANN. art. 35, § 9 (1957).

39. *Osborn v. Carey*, 24 Idaho 158, 132 P. 967 (1913); *Hull v. Plume*, 131 N.J.L. 511, 37 A.2d 53 (1944); *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931), expressly overruled by *Iverson v. Lancaster*, — N.D. —, 158 N.W.2d 507 (1968); *Wiley v. Wharton*, 68 Ohio App. 345, 41 N.E.2d 255 (1941); *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

40. *State v. Brainin*, 224 Md. 156, 161, 167 A.2d 117, 119-20 (1961). See also *Iverson v. Lancaster*, — N.D. —, 158 N.W.2d 507 (1967).

41. 266 Minn. 401, 123 N.W.2d 687 (1963); see also *Hoffman v. Naslund*, 274 Minn. 521, 144 N.W.2d 580 (1960), which reiterated the position taken in *Ericksen*.

42. MINN. R. CIV. P. 43:02:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party . . . and interrogate him by leading questions and

to the statute<sup>43</sup> in *Brainin*. Despite this fact, the court held that the plaintiff could not compel expert testimony from the defendant "under the guise of cross-examination."<sup>44</sup>

Furthermore, inconsistency of judicial construction is seen in the recent Ohio case of *Oleksiw v. Weidener*.<sup>45</sup> There, although construing a statute of the more "narrow" class,<sup>46</sup> the court nevertheless held that "the cases which permit the plaintiff to call the defendant physician and examine him as an expert represents the more enlightened view."<sup>47</sup>

In light of these observations, it seems clear that the basis upon which the courts align themselves with one camp or another is not the wording of the statutes. Rather, it is obvious that the courts are weighing what they consider to be the contrasting public policy considerations.

As mentioned above,<sup>48</sup> the older view of this area of the law was influenced by three arguments, two of which were, (1) that the statute was not intended to permit this type of examination, and (2) that such an examination would be basically unfair. However, these considerations are not separate. On the contrary, the fact that it may be viewed as unfair undoubtedly influences the court's view of the intent of the statute. Clearly, this indulgence into judicial sportsmanship is the guiding light of the present minority rule. It is to be expected, therefore, that the courts which have repudiated the old-line view, have directed an attack on the moral sense of the older decisions.<sup>49</sup> For example, in *Oleksiw v. Weidener*,<sup>50</sup> the court refused to follow two previous Ohio decisions<sup>51</sup> and the minority's preoccupation with fairness; the court said the following:

No question of fairness should be involved in this matter. A person has no right to remain silent if he has information which is needed in a judicial proceeding. Since the withholding of relevant testimony obstructs the administration of justice, the duty to testify is owed to society not to the individual parties. The question is not whether it is fair for a party to require the adverse party to testify, but whether it is fair for society to

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contradict and impeach him on material matters in all respects as if he had been called by the adverse party.

43. MD. CODE ANN. art. 35, § 9 (1957).

44. *Erickson v. Wilson*, 266 Minn. 401, 123 N.W.2d 687 (1963).

45. 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

46. OHIO REV. CODE ANN. § 2317.07 (Page 1954):

At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition, like any other witness. . . . The party calling for such examination shall not thereby be concluded but rebut it by evidence.

47. *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 150, 207 N.E.2d 375, 377 (1965).

48. See note 23 *supra* and accompanying text.

49. See King, *The Adverse Witness Statute and Expert Opinion*, 4 WAYNE L. REV. 228 (1958).

50. 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

51. *Wiley v. Wharton*, 68 Ohio App. 345, 41 N.E.2d 255 (1941); *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

require a party to testify where his testimony will aid his opponent.<sup>52</sup>

Furthermore, the court rejected any analogy between a defendant in a malpractice action and a defendant in a criminal prosecution. A civil defendant has no protection against subjecting himself to liability. If his testimony will provide facts which will aid the court at arriving at a just decision, he has a duty to testify. "Any loss to the sporting aspect of adversary proceedings would be outweighed by the benefit to the judicial system."<sup>53</sup>

The New York decision in *McDermott v. Manhattan Eye, Ear and Throat Hospital*<sup>54</sup> was based on reasoning similar to that in *Oleksiw*. On the intermediate appeal, the court had followed the older view in reversing the trial court's decision to allow the plaintiff to elicit expert testimony from the defendant physician. The court reasoned that in requiring the testimony of the defendant, relating to the standard by which the jury was to judge the conduct of the defendant, the "plaintiff invites the jury to be guided by a standard furnished by a source condemned by her."<sup>55</sup> The New York Court of Appeals, reversing the supreme court, observed that courts are intent upon arriving at just decisions and upon employing properly expedient means to attain that end. If a defendant in a malpractice action can truthfully testify that his conduct conformed to the standard required, his case would be substantially strengthened. If, on the other hand, he cannot so testify, the plaintiff's chances of recovery are unquestionably increased. "In either case, the objective of the court in doing justice is achieved."<sup>56</sup>

Finally, as stated before, the minority's third argument was that while the defendant physician could testify as to facts, *i.e.*, what he did and what he saw, he was not required to give an opinion on whether he deviated from standard procedure. This argument was attacked in the recent case of *Iverson v. Lancaster*<sup>57</sup> which expressly overruled the stronghold minority case of *Hunder v. Rindlaub*.<sup>58</sup>

52. *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 149, 207 N.E.2d 375, 377 (1965).

53. *Id.* at 150, 207 N.E.2d at 377.

54. 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E.2d 469 (1964) *rev'g* 16 App. Div. 2d 374, 228 N.Y.S.2d 143 (Sup. Ct. 1962).

55. *McDermott v. Manhattan Eye, Ear and Throat Hosp.*, 16 App. Div. 2d 374, 379, 228 N.Y.S.2d 143, 149 (Sup. Ct. 1962).

56. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 72, 203 N.E.2d 469, 474 (1964). The court also said:

[T]he very inability of a plaintiff in a malpractice action to *compel* the attendance and testimony of a 'disinterested' medical witness underscores the need and importance of allowing such a plaintiff the opportunity of questioning his adversary as an expert.

*Id.* at 29, 255 N.Y.S.2d at 73, 203 N.E.2d at 475.

57. — N.D. —, 158 N.W.2d 507 (1968).

58. 61 N.D. 389, 237 N.W. 915 (1931).



That the defendant is an 'expert' and that the particular questions asked of him are those which only an expert can answer, seem beside the point. It is at least arguable that the doctor's knowledge of the proper medical practice and his awareness of his deviation from that standard in the particular case are, in a real sense, as much matters of 'fact' as are the diagnosis and examination he made or the treatment upon which he settled.<sup>59</sup>

### III. THE PRESENT POSITION

#### A. *Other Jurisdictions*

Regardless of what form the adverse witness statute takes, the majority rule in this country is that in a malpractice action, expert testimony may be elicited from a defendant physician called by the plaintiff.<sup>60</sup> California,<sup>61</sup> Connecticut,<sup>62</sup> Maryland,<sup>63</sup> Michigan,<sup>64</sup> New Jersey,<sup>65</sup> New York,<sup>66</sup> North Dakota,<sup>67</sup> and Ohio<sup>68</sup> provide direct support for the rule. Massachusetts,<sup>69</sup> West Virginia,<sup>70</sup> and Wisconsin<sup>71</sup> provide collateral support. The majority rule is also buttressed by the federal courts construing Federal Rule of Civil Procedure 43(b) to allow this kind of examination.<sup>72</sup>

On the other hand, the only jurisdiction which has recently reaffirmed

59. — N.D. —, 158 N.W.2d at 521.

60. See cases collected in Annot., 88 A.L.R.2d 1186 (1963).

61. *Libby v. Conway*, 13 Cal. Rptr. 830, 192 P.2d 865 (Dist. Ct. App. 1961); *Sheffield v. Runner*, 163 Cal. App. 2d 48, 328 P.2d 828 (1958); *McCurdy v. Hatfield*, 30 Cal. 2d 492, 183 P.2d 269 (1947); *Lashley v. Koerber*, 26 Cal. 2d 83, 156 P.2d 441 (1945); *Lawless v. Calaway*, 24 Cal. 2d 81, 147 P.2d 604 (1944); *Anderson v. Stump*, 42 Cal. App. 2d 761, 109 P.2d 1027 (1941).

62. *Snyder v. Pantaleo*, 143 Conn. 290, 122 A.2d 21 (1956).

63. *State v. Brainin*, 224 Md. 156, 167 A.2d 117 (1961).

64. *Dark v. Fetzer*, 6 Mich. App. 308, 149 N.W.2d 222 (1967).

65. *Rogotzki v. Schept*, 91 N.J. Super. 135, 219 A.2d 426 (1966).

66. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 255 N.Y.S.2d 65, 203 N.E.2d 469 (1964).

67. *Iverson v. Lancaster*, — N.D. —, 158 N.W.2d 507 (1968). The court, in overruling *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931) said:

As our analysis of the trend of the law may have indicated, we are now convinced that it is timely and proper, in light of the adoption of N.D.R. Civ. P. 43(b) that our decision in *Hunder v. Rindlaub* be overruled.

158 N.W.2d at 522.

68. *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

69. *Manzoni v. Hamlin*, 348 Mass. 770, 202 N.E.2d 264 (Sup. Jud. Ct. 1964) (recognizing principle).

70. *Duling v. Bluefield Sanitarium, Inc.*, 149 W. Va. 567, 142 S.E.2d 754 (1965) (Not a malpractice case. Plaintiff may call as a witness a physician who is a member of the hospital staff and director of defendant hospital corporation, may interrogate him by questions in hypothetical or other form and may require answers of him, including expressions of expert opinions of witnesses, in all respects as if he had been called as a witness by and in behalf of defendant).

71. *Shurpit v. Brah*, 30 Wis. 2d 388, 141 N.W.2d 266 (1966).

72. *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (D. Pa. 1947).

the minority position is Minnesota.<sup>73</sup> Idaho<sup>74</sup> apparently has not repudiated the minority rule although the issue has not been discussed in that state since 1913.

### B. *Florida*

The language of Rule 1.450 of the Florida Rules of Civil Procedure<sup>75</sup> can be described as falling into the class of "liberal" adverse witness statutes.<sup>76</sup> Although the Florida courts have never been faced with the problem discussed herein,<sup>77</sup> the author submits that under any reasonable construction of the purpose and effect of the rule, the majority position would be adopted in this state.

The physicians in Florida have not declared a truce in the "conspiracy of silence" noted above. Courts in this state, as those in other jurisdictions, would benefit by having the defendant's expertise at their disposal. If the physician must admit that his practice deviated from the norm, both the court and the public could save time, energy, and expense. In liberalizing procedural standards, the Supreme Court of Florida has indicated that our rules are more concerned with the ideal of justice rather than the competition of the sport. Therefore, if the Florida Rules of Civil Procedure are "to be construed to secure the just, speedy and inexpensive determination of every action,"<sup>78</sup> the plaintiff should be allowed to elicit expert testimony from the defendant physician. Such a construction of Florida's adverse witness rule at least will allow a plaintiff in a malpractice action an equal opportunity to obtain the legal

73. *Hoffman v. Naslund*, 274 Minn. 521, 144 N.W.2d 580 (1966); *Ericksen v. Wilson*, 123 N.W.2d 687 (Minn. 1963).

74. *Osborn v. Carey*, 24 Idaho 158, 132 P. 967 (1913). See also *Langford v. Issenhuth*, 28 S.D. 451, 134 N.W. 889 (1912).

75. FLA. R. CIV. P. 1.450(a) provides:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or any officer, director or managing agent of a public or private corporation or of a partnership or association which is an adverse party and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

76. See note 36 *supra* and accompanying text.

77. See Wigginton, *New Florida Common Law Rules*, 3 U. FLA. L. REV. 1, 26-27 (1950): The rule permitting the calling of an adverse party, which in Florida is new, hastens considerably the possibilities of looking straight to the bottom of a weak case, and forestalls in many instances the familiar muddying of the waters that all too often is carefully planned . . . an adverse party may be called, interrogated by leading questions, contradicted, and impeached, just as if he had previously been called by his own counsel. The method of the examination, in other words, is that of cross, but its scope is that of direct.

78. FLA. R. CIV. P. 1.010. See also Wigginton, *New Florida Common Law Rules*, 3 U. FLA. L. REV. 1, 3 (1950):

The chief objectives sought by the promulgation of these rules may be said to be three-fold: to insure as nearly as possible that the side of the controversy that ought to prevail will prevail; to permit speed, as distinct from haste, in the final disposition of the cause; and to reduce the procedural cost to litigants.

remedy to which he is entitled. Once the defendant has testified as an expert to the applicable standard of care, plaintiff's counsel can then move into a discussion of the literature, perhaps challenging the defendant's testimony. This will normally present at least a jury question, preventing the directed verdict which usually results from the absence of expert testimony. Moreover, the potential for the presentation of a jury question will motivate insurance companies to more readily negotiate a settlement. In the final analysis, the proper construction of the adverse witness rule will perhaps provide a legal cure for the medical conspiracy of silence.