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ROLL NUMBER

DESCRIPTION

1333

2007 HOUSE JUDICIARY

HB 1333

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1333

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/23/07

Recorder Job Number: 1657

Committee Clerk Signature D Renose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1333.

Rep. Klemin: This is the "I'm sorry" bill. I am a sponsor of this bill. Bruce Levi, ND Medical Association is going to explain the bill. It deals with admissions against interest and how that can affect communications. I am handing out a sheet regarding the ND Rules of Evidence, which relates to hearsay and what isn't hearsay.

Chairman DeKrey: Thank you. Further testimony in support.

Bruce Levi, Exec. Dir./General Counsel, ND Medical Association: (see attached testimony).

Rep. Kretschmar: As the statute is written, wouldn't this prevent unsympathetic gestures from becoming part of the record.

Bruce Levi: What is the definition of sympathetic vs. unsympathetic statement that would become the test as to admissibility. They are statements that suggest sympathy, benevolence, fault, any statement in that manner. This wouldn't address unsympathetic.

Rep. Kretschmar: As an example, what if a doctor told the patient, I'm very sorry this happened, this was all my fault. Would that be admissible.

Bruce Levi: Under the bill, with the amendment, it could not come in. That's probably the classic example, "I'm sorry, it's my fault". Do you split hairs and allow one part of that to come in and not the other part. Under the bill with the fault language, it would allow all of that statement to be inadmissible.

Rep. Kretschmar: I understand that there is a committee at Supreme Court that looks at rules and procedures, and I think also rules of evidence. Have you contacted them or requested their help in changing the rules to do the same thing that this bill would do.

Bruce Levi: No, we have not. I cited Rule 402 of the Rules of Evidence, there is a line of cases talking about the issue and the relationship between the legislature and the Supreme Court with respect to rules of evidence, particularly in admissibility and inadmissibility. I think the cite in my written testimony, Rule 402, is to clarify that piece. But there is a line of cases, and I can bring some of those to your attention.

Rep. Klemin: If a doctor said I'm sorry this happened, it was the fault of my anesthesiologist, would that be admissible.

Bruce Levi: As this is written, I would suggest that it would be inadmissible. The rule applies, as you look at the definition of a health care provider, includes not only the health professionals but the facilities as well, their agents and I would suspect that it would apply there as well.

Rep. Klemin: In a medical malpractice case, aren't these kinds of admissions, really aren't they sort of extraneous. They wouldn't hinge of this, they would have medical evidence that shows malpractice.

Bruce Levi: That would be my view as well. Certainly these are statements that can be used to support other evidence that might be admitted with respect to the actual clinical or medical care that was provided. Under our law as well, in terms of medical liability, experts have to be

brought forward to offer evidence with respect to whether or not what occurred was within reason with respect to medical practice.

Rep. Koppelman: I'm sympathetic to this bill. But I'm wondering about the word "fault". This has been introduced in 30 states, but only 2 have the fault provision, is that correct.

Bruce Levi: I'm aware of 3 or 4 that have specifically put that in. Some use the word "fault", other states include the word "error or mistake" as well. I haven't tallied up the number of states that have actually put any combination of those three words in their law. There are a number of states that include that language.

Rep. Koppelman: I think the idea that most reasonable people would support is if the patient dies, and the doctor feels that he/she cannot come to the family of the patient and say "I'm sorry" for fear that they will be sued, that they can't express sympathy, I think most people would say that's gone too far. I think these bills have gained a lot of popularity throughout the country because of that. Most people would say that it is appropriate for the doctor to say he's sorry that the person died. But if the doctor said, I really messed up I should have done this and I did that and they are dead as a result, I'm not a litigious person and don't favor taking people to court, but that should be admissible.

Bruce Levi: I think the fault language is very important. If the motivation here is to create a legal environment, practice environment that encourages open and frank communication, if we have to split hairs or if a physician or health professional still has to go back to their attorneys or risk managers and talk about what can be said, I think you have lost the opportunity to have that conversation at the time when it is most beneficial to the relationship between that health professional and their patient. I think from that context, you have seen other states that have realized that as well. It is difficult to split hairs on this issue. If you divide them out, really

haven't gained much in terms of changing that practice. I think it is critical to include that language.

Rep. Onstad: Are we looking to protect the medical profession, the medical providers by not allowing those kinds of statements.

Bruce Levi: I think there is a lot of literature out there that talks about these kinds of bills and what they might do to the ultimate outcome in a lawsuit or civil action; whether it's brought in the first place, whether it's settled or whether folks are actively seeking more or less than they would have sought if there was an apology. I think the primary motivation, obviously it is a rule of admissibility or non-admissibility of evidence; but at the same time, I think going back to Rep. Klemin's comment, that there would still be a requirement of other testimony and proof that this was something that rises to medical liability. I think the answer to your question is yes, it does take evidence out from the deliberation of the jury with respect to these kinds of statements. Under the amendment, only for the purpose of an admission against interest or as proof of liability. From our perspective, it creates a different kind of practice environment, and that is our primary motivation in bringing this bill to you.

Rep. Onstad: In a statement between a medical provider and family, are you saying you are in judgment by making a statement to the contrary to the facts and therefore that's inadmissible, but if you did go to a hearing, it would still be inadmissible later on under oath.

Bruce Levi: It would be inadmissible for the purpose of proving that the individual was liable. It might be introduced for other purposes; to show the state of mind of both parties, or the state of mind of the physician at that time. But the jury couldn't use it to prove liability and I suspect they would be instructed in that manner by the judge in that case. It would exclude that evidence for purposes of proving fault.

Rep. Griffin: Do you not think that this might have a tendency to increase litigation if doctors felt more open to be able to say it was their fault. I would assume that patients, once they heard that, would be more likelier to sue.

Bruce Levi: I read literature on both sides of that issue. That's an open question as to whether or not it might increase lawsuits. There is literature on the other side that suggests that in the relationship between the health professionals and patients, all they want are answers to their questions. They want to understand what happened. Some who don't get their answers, then they'll bring a lawsuit to get the answers. I think that's what we are trying to avoid and this just creates a better practice environment for the relationship I can't say one way or the other whether it will increase litigation or not.

Rep. Griffin: Aren't doctors free right now to give answers as to what happened regarding that procedure.

Bruce Levi: Yes.

Rep. Griffin: Then it would be up to the court's determination.

Rep. Klemin: This bill recognizes that doctors are people, they have feelings and psychological needs to grieve and communicate with other grieving people and if there's an issue of medical malpractice, that's going to be shown by evidence.

Bruce Levi: Yes, I agree. I think that's all part of it. We work with physicians and their families when they go through medical liability suits as well. Obviously it takes its toll on anyone.

Chairman DeKrey: Thank you. Further testimony in support.

Tracy Vignaas Coleman: I'm a defense attorney in Bismarck, who does represent doctors and hospitals and nurses who have been sue for medical negligence. I am here today in that capacity and I support HB 1333. The bill is a form of the apology or "I'm sorry" laws that have

passed, or being considered in other states. It would create an evidentiary privilege for certain statements made by health care providers to patients, patient's family members or their representatives, usually in the immediate aftermath of a bad result. Professional malpractice lawsuits are often motivated by powerful emotions and perceptions, such as anger at a physician who is silent after a bad result, who appeared dismissive after a bad results or who did not say "I'm sorry this happened". It is often the absence of an apology that triggers a lawsuit, but it is the fear of a lawsuit that prompts the physician's silence. HB 1333 would allow health care providers to apologize to patients, with some assurance that the statements they say will not be used against them improperly or misconstrued if that patient decides later to bring a medical malpractice lawsuit. I'm sorry laws like HB 1333 are based on the concept that the fear of litigation should not interfere with the physician-patient relationship. It's the concept that should be supported as a matter of public policy because it would promote open and continuing communication between a physician and his/her patient. It is also part of the care and treatment that a physician provides to a patient or patient's family in the immediate aftermath of a bad result. Part of the healing and grieving process is the communication that's going on between the physician and that family. Words like I'm sorry this happened, are a natural and appropriate remark to be made by physicians. Unfortunately if a medical malpractice lawsuit is later brought, those very words later become subject of an evidentiary hearing in which those words try to be used improperly against the physician as evidence of liability or as an admission against interest; or words such as I wish I would have done this or that, and that might have prevented this outcome. Again, it can be used against the physician improperly and unfairly as an admission against interest when in that immediate aftermath, the physician was commiserating with that patient's family and appropriately expressing thoughts about hindsight. It's often a hindsight analysis when someone looks back in retrospect and

wonder if there was something I could have differently, that would have affected this outcome differently. But those words get used against the physician in medical cases as an admission against interest and is an improper use evidence. Because hindsight, for example, is not the standard to be judging a physician's conduct or anyone's conduct for that matter. I would also like to address the issue about the word "fault". When physician's make the statement that suggests that they might have been at fault for a particular outcome, again in retrospect, where the doctor now has the benefit of everything that's happened, and to rethink what has occurred, and wonder if there was something they could have differently. But having said that, it is often the case when a physician does not know what happened. It may not be know what happened until later, if ever. Unfortunately, those types of words again get used improperly and unfairly against the physician. There is a walk-away syndrome sometimes, where physicians just walk away rather than address the question or concern of the patient, they simply remain silent and walk away for fear of litigation. As to the admissibility of these types of statements, Bruce Levi was answering the question, as I understand the bill, with the amendment, the evidence would be not admissible for improper purposes. In other words, they would not be allowed to be used as evidence of liability or as evidence of admission against interest. There may be other purposes for which they could be offered, and I'm certain that there would be plenty of attorneys who could find creative purposes to offer them. But the point is, they will not be used improperly.

Rep. Meyer: You stated in your statement just now, that just certain statements wouldn't be admissible, but the bill the way it is written, it would mean that absolutely everything is excluded. If there is a way to understand "I'm sorry", but if he were in the operating room and makes the statement, I cut off the wrong leg, I should have looked at the x-rays for example, that wouldn't be admissible either, even if it were uncovered in an investigation.

Tracy Vignaas Coleman: As a trial attorney, we represent doctors in lawsuits. I'm sure that there are going to be evidentiary arguments made about the meaning of those remarks. I agree that the way you are reading it, it could arguably cover something like that. However, the statement must be made to a patient, patient's family or patient's representative. So I don't know that it would necessarily cover a statement made to someone else, or that it was intended to actually cover that kind of situation. This is to address the communication and dialog between a physician and a patient, family or representative.

Rep. Meyer: Would this exempt statements made between a doctor and operating room staff, for example. Is what he states and says in the operating room included or is it only what is said between the doctor and the patient. Are those records going to be admissible.

Tracy Vignaas Coleman: Those types of statements are often admitted into evidence because it is part of the care and treatment that occurred. The plain language of the statute says that it only applies to statement made by a health care provider to the patient, their family or representative.

Rep. Onstad: On the family side, death is an unexpected consequence too. If the information you're asking about, isn't going to be admissible, is that not taking a level playing field and weighing it on one side, of the physician.

Tracy Vignaas Coleman: You mean taking away potential evidence by a plaintiff. In a way, but what it is doing is precluding them from offering it for an improper purpose. So is there another purpose for which they could try and offer it, again with the way the bill is amended, it would. I don't know what the purpose would be, but it could exist. It does not, as a matter of law, preclude this type of evidence at all. It simply says it's not admissible for the purpose of showing evidence of liability or as an admission against interest.

Rep. Onstad: But the fact that it's not admissible, all of a sudden that shifts the even playing field.

Tracy Vignaas Coleman: I don't think that that necessarily precludes it. There are lots of evidentiary privileges in the law that define certain types of statements or conduct, etc. that say you can't use this as evidence of liability, but you may use it for the purpose of showing something else; bias of a witness, etc. You have to look at what was going on at the time of the incident.

Chairman DeKrey: Thank you. Further testimony in support.

Shelly Peterson, President, ND Long Term Care Association: (see attached testimony).

Rep. Griffin: Are you aware of any cases that hinged on, where a statement of empathy, sympathy, was used.

Shelly Peterson: We have very few lawsuits in long term care, and they generally don't come under professional liability or malpractice. They come under our general liability. I really can't say. I'm not aware of any, but that doesn't mean they haven't had a case.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition to HB 1333.

Jeff Weikum: I am a plaintiff's attorney in Bismarck. We routinely handle medical malpractice cases in ND, SD, MT, MN. The concern that we have with respect to this bill, is that it combines feelings of sympathy and expressions of sympathy, with expressions of fault. Those are two very different items and those are items that have different impacts on the medical malpractice side of litigation. 1) ND juries are very adept at being able to determine if someone is expressing sympathy or condolence because of their feelings, the human side of what they're saying. Just as adept as juries are at that, they are also adept at looking at fault. When a physician or other medical provider comes in and says I'm sorry for your loss, I'm

sorry for what happened, I'm sorry about the result. That is one thing. When a physician comes in and says I messed up, I'm at fault. I needed to do this, and I didn't do it. Those are statements that hold great weight with the jury and those are statements that hold great weight with the insurance companies that are representing their clients. The insurance companies take those statements to heart and those cases are at fault. That's why we have this bill. That's why fault is in this bill, because there is a combination of playing between the sympathies which are important. I, as a plaintiff's attorney, have much less problem with the bill from the standpoint of the sympathy, the doctor expressing sympathy, than I do with fault. There was some commentary back and forth regarding whether or not a physician's statement of fault was extraneous or not really incident to medical malpractice actions. They are absolutely relevant to medical malpractice actions. What typically happens in medical malpractice claims, I get a phone call, someone explains to me what happened. The result was not as anticipated. So you go through the process to figure out whether or not it was outside the accepted standards of medical practice; where they did something they weren't supposed to do. The vast majority of cases are within those accepted standards and so it ends right there. But what happens after that, is especially in a situation where a patient calls me or client calls me and says that the nurse told me this, or the doctor told me this, and they provide me with an admission of fault. We then go and look up in ND law to get what is called a medical expert to give an opinion as to where exactly fault occurred. The doctors do the same thing. The insurance companies for the doctors hire an expert to do that. It becomes a war of experts. Very often, ND juries see experts fighting. Rep. Klemin is correct in that. That is where the central battle is. ND juries want to hear from the patient or the patient's family and they want to hear from the doctor. When there is a statement from the doctor at the time when it happened, coming in and not expressing I'm sorry, but saying I messed up, that carries

huge weight and to take that away from an injured patient or an injured patient's family, absolutely tips the scales and we have significant uneven playing field. It goes back to a situation of what we're trying to hide. I can sympathize realistically with the human emotions that happens in the practice of law that happens in every profession that would be in here. That's good and that's fine. Juries see through that, insurance companies see through that and see it for what it is. But to hide statements of fault is just wrong. There are provisions in the rules of evidence that talk about what is called "excited utterances". It is when there is an accident and somebody goes through a stop sign and hits a car and that person hops out of the car and says I'm sorry, I was playing with the CD player and as a result of that I didn't see you, and I hit you. This kind of excited utterance is given credibility with juries based on the fact that it is extemporaneous. Rules of evidence already handle this area and handle it well. If the committee wants to look at the sympathy aspect of it and address that, I have less issue with that. Fault is a big concern. I was handed the proposed amendments that Mr. Levi talked about, and I think they address some of the issues and if the committee decides to explore that amendment, I think it is a good idea. I think that removing fault from this proposed bill is an absolute to maintain the position that the patient has right now and make sure that the bill is close to that. There isn't a level playing field now. Just trying to find a medical expert is difficult, especially in ND. We have to find an expert outside the state. This would tip the scales too far in that direction.

Rep. Kretschmar: In the states where you practice, are there any rules or statutes like this.

Jeff Weikum: SD has one, MN has a version of it.

Rep. Kretschmar: Is it more difficult in those states.

Jeff Weikum: I haven't had a claim in those states where that has come up. I can't tell you dynamically how that would work in those states.

Rep. Meyer: How many medical malpractice suits are there going on in ND in an average year.

Jeff Weikum: I don't have that information in front of me. It is remarkably few. The vast majority of medical malpractice cases, especially through our office, is a small amount. They are typically in a discovery type process, where you are going through and determining whether or not there is medical negligence. Most of the claims are in that phase, where you are trying to sort out that information.

Rep. Meyer: Are there any awards in ND that went to plaintiffs that were astronomical, has there ever been a medical malpractice suit where the plaintiff was awarded over a million dollars.

Jeff Weikum: My understanding is that there have been claims where ND people have been awarded more than a million dollars in medical malpractice claims. The vast majority of the claims, however, that are significant and where liability is resolved are settled in settlement negotiations. Typically you don't see very bad cases, because those get resolved. Everybody is just trying to work for a mutually agreeable solution.

Chairman DeKrey: Thank you. Further testimony in opposition to HB 1333. Neutral.

Bill Neumann, State Bar Association of ND: (see attached testimony). We neither support or oppose HB 1333.

Chairman DeKrey: Thank you. Further testimony. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1333

House Judiciary Committee

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Hearing Date: 1/24/07

Recorder Job Number: 1779

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will look at HB 1333.

Rep. Koppelman: I would think that if we removed the word "fault", line 7, page 1.

Rep. Wolf: Seconded.

Chairman DeKrey: It has been moved by Rep. Koppelman and seconded by Rep. Wolf to remove the word "fault" on page 1, line 7.

Rep. Klemin: I heard testimony as to why we should take this out, but this is a very commonly used word when somebody says, "it's all my fault". They may not mean it in that context. I think Bruce Levi said we're kind of splitting hairs when we say that fault has some legal context and not a common usage. It's a commonly used word. I think it should stay in there. I am going to vote against the motion to amend.

Rep. Koppelman: On that point, my point is that when the word is removed, the law would be silenced on that point. Since we're talking about attorneys today, I think a good attorney, if the doctor did come in and say "gee I'm sorry, it's all my fault", they could still make a case to say that couldn't be admissible based on the other language in this statute that it would remove. It would just be silent on that word. I think if there's a case where a physician comes out of surgery and says, "I'm really sorry about what happened, I should have cut to the left

instead of to the right and I killed him". Should that be excluded. I think that is where we are going with us. I think the amended bill is still gets at the intent without going that far.

Rep. Klemin: Going back to Lev's written testimony, said not including the word fault, would continue to discourage a health professional from expressing any statement, apology whether it included a reference to fault or not. That's their position.

Rep. Koppelman: I heard the testimony, but you know what, also in his testimony it talks about the 30 states that have adopted this and I think there are only 2 that included that word. Certainly, if this becomes an issue, we can come back to it. I am very supportive of the bill, of the idea. I don't like our litigious society. I think if we get to the point where the doctor has to clear it, by telling the family he's sorry that the patient died, and has to appear for a malpractice suit, I think that's a bad statement there, so I do think we need to pass the bill. Most other states have not gone with this word.

Rep. Meyer: I guess I just have to go back to Kenton's statement during the hearing. You aren't on a level playing field. I don't think because a doctor comes out and says "I'm sorry" that you're going to have any basis at all for a lawsuit. Maybe it will pass in other states, but I just don't see it happening here. There have been 24 medical malpractice lawsuits in the last two years; 22 of them have ruled in favor of the doctor.

Rep. Koppelman: Are you talking about the amendment, now or just the bill in general.

Rep. Meyer: Well, especially if you leave the word "fault" in there. Even amending that out, I'm not real keen on this piece of legislation; but with it in, it's just blanket immunity.

Rep. Griffin: I just want to make a point on fault. If a doctor admits fault, rules of evidence and in all circumstances in life where you admit you were at fault, the reason the court lets it in, is because they believe it a trustworthy enough form of evidence. For a doctor not to be able to understand the difference between I'm sorry or be at fault. I don't think you can find a case

where the case hinges on a doctor saying "I'm sorry". I don't think we need the bill is at all necessary.

Rep. Delmore: Question.

Chairman DeKrey: The question has been called on the proposed amendment and removing the word "fault". Voice vote, motion carried.

Rep. Kretschmar: I would move the Medical Association's amendments; pg 1, line 8, replace "into evidence or subject to" with "as evidence of liability or as an admission against interest", pg 1, line 9, remove "discovery".

Rep. Delmore: Seconded.

Rep. Klemin: The first one, says not subject to discovery, which means that you couldn't even ask about it during the course of litigation. So they're taking that out, which means it is subject to discovery. Then the other one, at the end of line 9.

Rep. Delmore: That is what the Medical Association people wanted it done, because at the end you added, as evidence of liability or as an admission against interest. That's the one that he asked to do.

Rep. Klemin: That means that those would be the circumstances under which it might not be admissible but there might be other circumstances under which it could be admissible, to show something else. This is a restriction on this paragraph, it's only not admissible as evidence of liability or as an admission against interest. It may then leave the door open for the admissibility of some other evidence. The way it is written right now, it's not admissible at all, so I think they are loosening it by adding that language.

Rep. Delmore: Why then would he ask for that to be put on there, if you think it's opening the door, why would he ask for that to be put on there.

Rep. Klemin: So it's less restrictive, I assume.

Rep. Koppelman: How would this kind of thing be admitted.

Rep. Klemin: The doctor was there and said it.

Chairman DeKrey: We will take a voice vote. Motion carried. We now have the bill before as amended.

Rep. Delmore: I move a Do Pass as amended.

Rep. Koppelman: Seconded.

Rep. Onstad: I am going to vote against the bill because I don't think it is needed. I don't think their testimony was compelling enough for me.

10YES 4 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. Koppelman

Adopted by the Judiciary Committee
January 24, 2007

House Amendments to HB 1333 (78266.0101) - Judiciary Committee 01/25/2007

Page 1, line 7, remove "fault,"

Page 1, line 8, replace "into evidence or subject to" with "as evidence of liability or as an admission against interest"

Page 1, line 9, remove "discovery"

Renumber accordingly

Date: 1-24-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1333

House JUDICIARY Committee

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Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin		✓
Rep. Boehning	✓		Rep. Meyer		✓
Rep. Charging		✓	Rep. Onstad		✓
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 10 No 4

Absent 0

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1333: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1333 was placed on the Sixth order on the calendar.

Page 1, line 7, remove "fault,"

Page 1, line 8, replace "into evidence or subject to" with "as evidence of liability or as an admission against interest"

Page 1, line 9, remove "discovery"

Renumber accordingly

2007 SENATE JUDICIARY

HB 1333

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1333**

Senate **Judiciary Committee**

☐ Check here for Conference Committee

Hearing Date: February 12, 2007

Recorder Job Number: 3361 & 3363

Committee Clerk Signature Mara L Solberg

Minutes: An Act to provide that expressions of empathy by health care providers are inadmissible in civil actions.

Relating to **Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Recorder Job Number: 3361

Testimony in Favor of the Bill:

Rep. Larry Klemin, Dist. 47 Introduced the bill and calling it the "I'm sorry Bill". This is about admissions made prior or during the course of civil actions. He referred to rule of evidence 8-01 Definition of Statements. These are the things a party can say that can be admissible in court.

Sen. Nelson asked (meter 1:42) spoke of a scenario of a patients death and a Dr.'s condolences as being human and having feelings of compassion. They discussed the difference between an "I'm sorry" and an "I screwed-up", concerns of the degradation of apology verses admission of guilt (bill does not cover this).