
ARTICLE

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A Professional (Lack of) Courtesy: The Emergence of Expert Testimony in Legal and Medical Malpractice Cases

Abstract. This Article investigates the role of expert testimony in legal malpractice and medical malpractice cases; analyzing similarities and differences between the two and the evolution of case law in this context. The Article also examines numerous challenges potential expert witnesses face, including harsh backlash from their colleagues and repercussions from their professional organizations. Finally, the Article discusses the future of the legal malpractice and medical malpractice landscape as it pertains to expert testimony and what we should look for moving forward.

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I. INTRODUCTION

In 2003, a respected neuro-oncologist planned to testify on behalf of a young girl, the plaintiff in a pending medical malpractice lawsuit.¹ The girl had been left physically disabled after a neurosurgeon at New York’s Columbia Presbyterian Medical Center cut the main blood vessel that ran to her brain while performing optic artery surgery when she was three years old.² However, one month before trial, the neuro-oncologist suddenly withdrew from the case.³

Several months earlier, the neuro-oncologist had testified on behalf of an eleven-year-old boy who, after being thrown off his scooter, unexpectedly died in the subsequent emergency surgery.⁴ The neuro-oncologist had testified that the operating surgeon could have saved the young boy’s life by administering cortisone, “which would have reduced the swelling in his

1. See Stephanie Mencimer, *The White Wall*, LEGAL AFF. (Mar./Apr. 2004), available at http://legalaffairs.org/issues/March-April-2004/story_mencimer_marpar04.msp.

2. *Id.*

3. *Id.*

4. *Id.*

brain.”⁵ The defendant operating surgeon complained to the American Association of Neurological Surgeons (AANS) that the neuro-oncologist’s testimony was wrong and unjustified.⁶ The AANS agreed and suspended his membership in the organization for a full year.⁷ The AANS then sent him a letter threatening to revoke his membership altogether if he testified on behalf of a different plaintiff—a young girl who had been severely injured during optic artery surgery at Columbia Presbyterian.⁸

Because medicine is such a complex field, patients put a significant amount of faith in their physicians to properly care for them; similarly, clients rely on their attorneys to help them navigate the legal system—an otherwise arduous task for those without a law degree.⁹ As a result, when people hire doctors and lawyers, they trust that the job is being done correctly, since they do not have the training and experience to make this determination themselves. Patients and clients are vulnerable to unexpected outcomes in that they cannot ascertain whether a poor outcome was the result of bad luck, or a negligent doctor or lawyer.

Enter professional malpractice, a legal remedy for individuals who find themselves in the seemingly helpless position of being harmed by those they sought to help them. Legal malpractice and medical malpractice actions exist so that individuals may sue their lawyers and doctors to recover monetary compensation for the harm incurred. However, because of the intricate nature of law and medicine, they must enlist the help of another lawyer or doctor to testify as an expert witness on their behalf.

This Article investigates the evolution of expert testimony in legal malpractice and medical malpractice cases, and examines the real-life implications for those who bear witness against their colleagues. Although law and medicine share certain characteristics in this context, they also differ in significant ways. Most notably, medical malpractice experts are in greater demand than legal malpractice experts, but they also have more hurdles to clear before they can take the witness stand—the least of which may be the intimidation tactics of their peers.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 410 (2000) (“There is . . . a similarity between the relationship that litigation attorneys have with their clients and the one that doctors have with patients.”).

II. THERE IS A REASON IT IS CALLED THE “PRACTICE” OF LAW/MEDICINE

As any medical (or jurist) doctor will say, what they do is an art, not a science. Inevitably, the result is not always a pretty picture. When there is a bad outcome in law or medicine, the harmed individual may opt to file a complaint with the state bar or medical board in addition to (or instead of) pursuing legal action. People sometimes confuse disciplinary action by a state bar or medical association with professional malpractice, or assume that the former implies the latter. Disciplinary action occurs when a board punishes an attorney or a physician for improper conduct; malpractice occurs when an individual files a civil suit against an attorney or physician for monetary damages.¹⁰ One important difference between a disciplinary proceeding and a malpractice action is that a professional may be subject to discipline even if his wrongdoing did not cause harm.¹¹

In the law, for example, each state has Rules of Professional Conduct that are styled after the Model Rules of Professional Conduct, which the American Bar Association (ABA) adopted in 1983.¹² The Rules dictate that a lawyer should behave professionally and ethically, and they provide a set of guidelines for attorneys to follow accordingly.¹³ While a violation of the Rules of Professional Conduct often goes hand-in-hand with legal malpractice, it does not constitute negligence *per se*.¹⁴

There is a spectrum regarding the extent to which courts consider a violation of the Rules in a case for malpractice. Some courts believe that a breach constitutes “a rebuttable presumption that violations . . . constitute actionable [legal] malpractice.”¹⁵ Other courts have held that a violation

10. See *Hizey v. Carpenter*, 830 P.2d 646, 652 (Wash. 1992) (en banc) (noting the various forms of disciplinary proceedings involved with lawyer misconduct and comparing the differences between a malpractice proceeding and disciplinary hearing, specifically how a lawyer may still be subject to disciplinary action, even though his conduct did not cause any damage).

11. *Id.* at 652.

12. See generally JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 3 (2012–2013 ed.) (noting that the Model Code was substituted with the “Model Rules of Professional Conduct” in 1983).

13. See MODEL RULES OF PROF’L CONDUCT pmb. (2012) (describing that it is a lawyer’s obligation to maintain a high standard of ethical conduct).

14. See *id.* (“Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.” However, the final sentence of Section 20 states, “[n]evertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”).

15. *Beattie v. Firmschild*, 394 N.W.2d 107, 109 (Mich. Ct. App. 1986); accord *Lipton v. Boesky*, 313 N.W.2d 163, 167 (Mich. Ct. App. 1981) (“We hold that, as with statutes, a violation of the Code is rebuttable evidence of malpractice.”).

of the Rules constitutes rebuttable evidence of malpractice,¹⁶ while still others suggest that it merely constitutes some evidence of misconduct.¹⁷ The Rules of Professional Conduct lay out the “minimum level of conduct below which no lawyer can fall without being subject to disciplinary action,”¹⁸ but malpractice liability is judged according to what a “reasonable” lawyer would have done under the circumstances.¹⁹ Although judges in malpractice cases may admit expert testimony that an attorney has violated an ethical rule, they also note the inherent problems in doing so. For example, the standard of care outlined by the Rules may not be the exact duty the attorney owed to the client under the circumstances of the representation.²⁰

Moreover, litigation is a zero-sum game. Every case has a winner and a loser, but that does not mean the attorney of the losing party was automatically negligent. Even if the losing party can find another lawyer to testify as an expert and criticize how their attorney handled the original case, such testimony must conclude that the attorney’s actions amounted to a breach of the standard of care, not just that the expert would have handled the original case differently, in order to survive a motion for directed verdict.²¹ As one court articulated:

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court.²²

16. See *Woodruff v. Tomlin*, 616 F.2d 924, 936 (6th Cir. 1980) (stating that a violation of the Code serves as some evidence of civil liability, but does not in and of itself establish civil liability against the attorney); see also *Lipton*, 313 N.W.2d at 167 (holding that a violation of the Code of Professional Responsibility serves as rebuttable evidence of malpractice).

17. Cf. *Martinson Bros. v. Hjellum*, 359 N.W.2d 865, 875 (N.D. 1985) (holding that a violation of the Code of Professional Conduct is mere evidence of malpractice, but does not define what the standard is for civil liability).

18. MODEL RULES OF PROF'L CONDUCT, preliminary statement.

19. See *Kessler*, *supra* note 9, at 405 n.10 (noting that the representational standard in a malpractice action is that of a reasonable attorney).

20. See *Carlson v. Morton*, 745 P.2d 1133, 1136 (Mont. 1987) (discussing how the model rules are a “scheme” for judging attorney conduct in a variety of matters, “often at times where one ethical rule seems to contradict another”); see also *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, PC*, 813 S.W.2d 400, 405 (Tenn. 1991) (arguing that a particular duty owed to a client depends on the circumstances surrounding the representation, which may not necessarily align with the standard under the Code).

21. See *Carlson*, 745 P.2d at 1136 (holding that a plaintiff must provide testimony or other evidence that establishes a breach of the prevalent standard of care).

22. *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954).

Therefore, the client's burden is to show that the original attorney did not meet the level of care that would have been exercised by a reasonably prudent attorney under the same circumstances.²³ In order to prove this point, expert testimony is required.

Likewise, in medicine, just because a surgery does not go as planned, it does not necessarily mean that the physician was negligent. While medicine is not a zero-sum game like litigation, a key element of the practice is that an injury may not have been caused by the physician, but by the underlying illness. For physicians, the outcome is very rarely entirely within their full control. Even when they do exercise a great degree of control over the outcome, a zero percent rate of error is unrealistic. Though steps can be taken to improve the functionality of a hospital system or to better train health care providers, the best-case scenario is not the complete extinction of errors, but a significant decrease in the frequency with which errors occur. Either way, medical malpractice cases must have an expert testify whether the error was avoidable, and if so, whether the physician met the appropriate standard of care.

III. PRELIMINARY DIFFERENCES BETWEEN LEGAL MALPRACTICE AND MEDICAL MALPRACTICE

Neither attorneys nor physicians want to be at the defendant's table in a malpractice action, but it may be more undesirable to be a defendant in a medical malpractice case for a few reasons. First, medical malpractice verdicts are typically higher than legal malpractice verdicts because physicians treat patients with illnesses and injuries that are life-threatening, or at least, threaten the capacity to enjoy it fully.²⁴ A negligent physician may be on the hook for pain and suffering, loss of income, and future medical expenses or wrongful death, while usually all that an attorney can lose is whatever was at stake in the original claim.²⁵ Courts have held that in most cases, non-economic damages may not be awarded in legal malpractice suits. For example, in malpractice suits involving only

23. Cf. Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 748 (1994) (discussing how an attorney is not liable for a mere error in judgment, and to overcome this judgmental immunity, a plaintiff would need to show that the judgment made was not what a reasonably prudent attorney would have made under the same circumstances).

24. E.g., Kessler, *supra* note 9, at 422 (acknowledging that damages from a medical malpractice suit are typically high because medical mistreatment can gravely affect one's ability to enjoy life).

25. See *id.* at 423 (comparing the amount of damages in a medical malpractice suit versus a legal malpractice suit; specifically how damages for a legal malpractice suit are much more limited to the economic facts of a case, rather than damages for expenses like future medical expenses and pain and suffering).

economic losses (which is the majority), emotional distress damages may not be awarded unless the attorney's misconduct was egregious.²⁶ Cases that have allowed for the recovery of emotional distress damages involved conduct that caused personal harm to the client's reputation or marriage, not simply financial losses.²⁷

However, if emotional distress is a *foreseeable* result of the attorney's blatant misconduct, a plaintiff may be awarded non-economic damages, even if the loss was purely economic. In one case, a Michigan appellate court affirmed the jury's verdict that an attorney was liable for mental anguish damages for failing to file his client's medical malpractice suit within the statute of limitations.²⁸ In another case, an attorney had to pay non-economic damages for emotional harm he caused to the intended beneficiary of a negligently drafted will.²⁹ Still, only a handful of legal malpractice claims permit recovery for emotional damages, while the retrieval of noneconomic damages in medical malpractice claims is commonplace.

Attorneys are also better off than physicians in malpractice cases because in order for a plaintiff to prevail in a legal malpractice action, she must successfully prove the "case-within-a-case."³⁰ The jury in the malpractice claim must find that but for the defendant attorney's negligence in the underlying action, the plaintiff would have won—otherwise, the attorney's negligence did not actually deprive the plaintiff of anything.³¹

26. See *Garland v. Roy*, 976 A.2d 940, 948 (Me. 2009) (concluding that the loss was purely economic, and because the attorney's conduct was not egregious, the plaintiff could not recover damages for emotional distress).

27. See *Doe v. Roe*, 681 N.E.2d 640, 650–51 (Ill. App. Ct. 1997) (holding that emotional distress damages may be awarded against an attorney who used undue influence or confidential information to coerce a client into a sexual relationship); *Burton v. Merrill*, 612 A.2d 862, 865 (Me. 1992) (concluding that the attorney was liable for emotional distress damages arising from economic loss that resulted in harm to client's reputation, client's development of ulcers, and dissolution of his marriage); *Rhodes v. Batilla*, 848 S.W.2d 833, 844 (Tex. App.—Houston [14th Dist.] 1993, writ withdrawn) (holding that an award of emotional distress damages was appropriate based on attorney's gross negligence in handling his client's tax defense in a proceeding with the IRS that led to dissolution of her marriage, inability to deal with professional or personal relationships, weight loss, insomnia, ulcers, fear, and nervousness).

28. See *Gore v. Rains & Block*, 473 N.W.2d 813, 819 (Mich. Ct. App. 1991) (concluding that the plaintiff was entitled to mental anguish damages as a result of the attorney's failure to timely file the plaintiff's medical malpractice claim).

29. See *Mieras v. DeBona*, 516 N.W.2d 154, 154 (Mich. Ct. App. 1994), *rev'd*, 550 N.W.2d 202 (Mich. 1996) (holding that a plaintiff is entitled to recover damages for mental pain that resulted from the injury that was caused by the attorney's failure to properly draft the will).

30. Kessler, *supra* note 9, at 493 (discussing the "case-within-a-case" aspect of a malpractice suit).

31. *Cf. id.* (arguing that in a malpractice trial a jury should be able to determine what would

In medical malpractice, there is no “case-within-a-case.”³² When a doctor amputates the patient’s left leg instead of his right leg or leaves a sponge in a patient’s abdomen after surgery, it is a straightforward conclusion that the outcome would have been different but for the doctor’s negligence.³³ But most medical malpractice cases are not so simple; more often than not the key issue is determining whether the patient’s health would have been preserved had the physician not erred or if the patient’s underlying condition would have rendered the physician’s error moot.³⁴ In these instances, there is no way to know what would have happened to the patient but-for the doctor’s negligence. However, unlike plaintiffs in legal malpractice actions, plaintiffs in medical malpractice cases need not definitively prove what would have happened, only that the doctor’s actions caused them some harm. This is because a medical error can rarely be reversed, making it impossible to restore the patient’s health to its “prenegligence status to determine the progress of the disease without the negligence.”³⁵

IV. THE NEED FOR EXPERT TESTIMONY

While it has long been the rule in medical malpractice cases that expert testimony is mandatory, it has not always been required in every legal malpractice case. Historically, some courts viewed this as an anomaly and sought to change the rule. In 1976, *Olson v. North*³⁶ came before the Illinois Court of Appeals. The court asserted, “the rules of evidence governing the trial of a case of malpractice against a lawyer are the same as those against a doctor or dentist.”³⁷ The court went so far as to reverse a verdict for the plaintiff, reasoning that the plaintiff had to introduce expert testimony to show the defendant attorney failed to exercise the appropriate degree of care and skill.³⁸ *Olson* started the trend of necessitating expert testimony in legal malpractice cases. That same year, a Georgia appellate

have happened had the attorney not been negligent).

32. *Id.*

33. *See generally id.* (emphasizing the fundamental differences involved with determining what would have happened had there not been a negligent lawyer versus what would have happened had there not been a negligent doctor).

34. *Id.*

35. *Id.*

36. *Olson v. North*, 276 Ill. App. 457 (1934).

37. *Id.* at 475–77.

38. *Cf. id.* (comparing the requirement for expert testimony in a medical malpractice case to that of a legal malpractice case, and ultimately concluding that expert testimony is required to show negligence on the part of the attorney).

court held that “except in clear and palpable cases, expert testimony is necessary to establish the parameters of acceptable professional conduct Consistency demands a similar standard for attorneys and doctors.”³⁹

While these cases helped set the precedent for introducing expert testimony into many legal malpractice claims, there was simply no room for it in other situations. Around 1980, courts adopted the premise that if the facts were so straightforward that jurors could use their own common knowledge to conclude that a duty was breached, an expert did not need to take the stand.⁴⁰ Similarly, expert testimony is not a requirement for determining the standard of care in a matter that is unrelated to special legal knowledge or expertise. In other words, expert testimony is only required if the key issues are so esoteric that jurors would not be able to independently determine whether an attorney’s actions were reasonable.⁴¹

While there was no bright-line test to determine this, the courts established some general parameters on the topic. For example, in 1979, courts in both Hawaii and New Mexico held that expert testimony was not required in a legal malpractice suit alleging that the defendant attorney failed to comply with the statute of limitations.⁴² Courts across the country have echoed this belief repeatedly.⁴³ However as the law has grown more varied, so too has the case law. For example, in 2010, an appellate court in Wisconsin held that expert testimony was mandatory in a suit alleging that an attorney never filed a timely answer and failed to

39. *Berman v. Rubin*, 227 S.E.2d 802, 806 (Ga. Ct. App. 1976).

40. *See Klimko v. Rose*, 422 A.2d 418, 422 (N.J. 1980) (holding that juries are allowed to determine any deviation from a standard of care, without expert testimony, if the facts of the case are considered common knowledge).

41. *Cf. Butler v. Acme Mkts., Inc.*, 445 A.2d 1141, 1147 (N.J. 1982) (“Even in malpractice cases, the facts of a given case may be such that the common knowledge possessed by laymen may permit a finding that a duty of due care has been breached.”).

42. *See Collins v. Greenstein*, 595 P.2d 275, 283 (Haw. 1979) (“We agree with the reasoning of the majority of courts that in some situations proof of negligence may be sufficiently clear, as in the instant case, without the aid of experts.”); *George v. Caton*, 600 P.2d 822, 829 (N.M. Ct. App. 1979) (establishing the negligence of an attorney does not require expert testimony for breaches in diligence).

43. *See Boyle v. Welsh*, 589 N.W.2d 118, 124 (Neb. 1999) (concluding that “in legal malpractice cases, where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons, no expert testimony is required”); *Estate of Hards v. Walton*, No. 93185, 2010 WL 3035995, at *3 (Ohio App. Aug. 5, 2010) (“Ordinarily, expert testimony is required to establish the relevant standard of care for an attorney, but an exception exists in actions where the breach or lack thereof is so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen.”).

oppose a motion for a default judgment.⁴⁴ In that case, the plaintiff argued that expert testimony should not be required since missing a deadline and failing to respond were clearly negligent, citing the long line of cases that supported this principle.⁴⁵ However, the Wisconsin court reasoned that the malpractice claim involved a factual question of when the plaintiff told his attorneys he had been served and whether the attorneys could have relied on their client's recollection.⁴⁶ The court held that expert testimony was essential to understanding "[w]hat an attorney exercising reasonable care would have done under the circumstances."⁴⁷ While such a holding is frustrating to plaintiffs, the key issue in a malpractice claim is not if the jury could conclude whether an attorney's advice was sound and conclusions were legally correct, but whether they were reasonable.⁴⁸

Additionally, some malpractice claims that are based on breach of the attorney's fiduciary duty to the client, rather than breach of the standard of care, do not necessitate expert testimony. For example, failing to keep clients apprised of new, relevant information does not require expert testimony.⁴⁹ However, there is a fine line as to whether an expert must be called, which courts tend to draw where causation is at issue.⁵⁰ Accordingly, even if it would be obvious to a jury of laypersons that an attorney's conduct was negligent, an expert must opine whether the plaintiff was likely to have prevailed in the underlying case, but for the attorney's negligence.⁵¹ In a recent case, a Texas appellate court required expert testimony when the plaintiff alleged that her attorney breached his fiduciary duty and violated the Texas Deceptive Trade Practices Act by

44. See *Brophy v. Mei*, No. 2009AP194, 2010 WL 94026, at *4 (Wis. App. Jan. 12, 2010) (concluding "that expert testimony is needed to establish what a reasonably prudent attorney would have done when faced with a motion for default judgment").

45. *Id.*

46. *Id.*

47. *Id.* at *5.

48. See *Franch v. Ankney*, 670 A.2d 951, 956 (Md. 1996) ("Expert testimony of attorneys is admissible in attorney malpractice cases, however, for the purpose of establishing the standard of care for a reasonable, prudent lawyer in a particular situation.").

49. Cf. *Lane v. Oustalet*, 873 So. 2d 92, 98 (Miss. 2004) (recognizing that an obvious breach of a standard of conduct qualified as an instance where a jury would not need to rely on expert testimony to determine an attorney's negligence).

50. See *Finger v. Ray*, 326 S.W.3d 285, 301 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that the causal link between defendant-attorney's misrepresentations and plaintiff's injuries were not beyond the common understanding of the jurors, therefore, plaintiff need not provide expert testimony).

51. See *id.* at 300 (noting that the jury must have some aid in understanding the causal link between the elements of causation and damages).

misrepresenting the services he offered to induce her to hire him.⁵²

Because expert testimony is “necessary to establish a breach of duty in the vast majority of legal malpractice cases,”⁵³ expert testimony is admissible in every state, though not always mandatory. As a general rule, because of the case-within-a-case requirement, if expert testimony is necessary for the client to establish a prima facie case in the underlying claim, then expert testimony is required in the subsequent legal malpractice case.⁵⁴ As discussed, cases that fall within the “common experience exception,” such as missing the statute of limitations or breaching a fiduciary duty, rarely require expert testimony on the relevant standard of care.⁵⁵

These exceptions do not exist in medical malpractice.⁵⁶ Medical malpractice actions require expert testimony from other doctors to give the jury a basis for making its determination.⁵⁷ Early on in the history of medical malpractice litigation, plaintiffs' verdicts were few and far between.⁵⁸ One reason for this was that a locality rule promoted what was referred to as a “conspiracy of silence” that made it difficult for plaintiffs to find physicians from the local community to testify against their colleagues whom they knew fairly well (this topic is discussed in greater detail later).⁵⁹ Another reason plaintiffs struggled was that judges were very

52. See *id.* at 294 (“Because the causal connection between the alleged wrongful conduct and any actual damages sustained in this case is not within the common understanding of jurors, the law requires expert testimony to establish proximate and producing cause.”).

53. Kathleen Howard Meredith & Stephan Y. Brennan, *Role of Expert Witnesses in Legal Malpractice Cases*, MD. B.J., Jan.–Feb. 2007, at 42, 44.

54. See *id.* at 48 (“If an attorney is sued for malpractice arising from representation in an underlying litigation, and expert testimony was necessary for the client to establish a *prima facie* case in the underlying lawsuit, then such expert testimony is also necessary in the client’s legal malpractice case.”).

55. Cf. Marvin Franklin, *Expert Testimony in Legal Malpractice Actions*, 6 J. LEGAL PROF. 293, 297 (1981) (explaining the trend of courts in not requiring expert testimony in legal malpractice cases to be the product of negligence inferable from common experience).

56. Cf. *id.* at 295 (“Perhaps this unique treatment of legal malpractice results from the fact that the judge is qualified to act as an expert witness and render opinions as to the customary legal conduct, whereas he or she lacks such expertise in medical malpractice actions.”).

57. See Karyn K. Ablin, Note, *Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*, 82 VA. L. REV. 325, 332 (1996) (accepting that juries in medical malpractice cases are rarely able to use common experience alone to determine if negligence has occurred).

58. See Kessler, *supra* note 9, at 415 (“In thirty years, the medical malpractice bar has gone from losing cases because of the ‘conspiracy of silence among doctors’ to winning a seemingly endless stream of million-dollar verdicts.”).

59. Cf. Ablin, Note, *supra* note 57, at 333 (“Because of the necessity of expert evidence in establishing negligence in most medical malpractice claims, the inability of a plaintiff to find a medical expert willing to testify on his or her behalf often proved fatal to the plaintiff’s claim.”).

strict in their jury instructions regarding causation.⁶⁰ In general, jurors are required to determine how each event links to another, and if one link in the chain is broken, there is no causation, and thus no negligence. Dealing with the complexities of medicine, juries were having an exceedingly difficult time connecting the dots, resulting in a significant majority of defense verdicts.⁶¹ However in 1993, the Second Circuit authorized medical malpractice plaintiffs to instruct the jury on “res ipsa loquitur,” which permitted jurors to infer negligence if they believed the expert’s testimony, providing them an easier way to overcome prior strict causation language.⁶² The court said the res ipsa loquitur instruction was important so the jury could “bridge the gap” between their common knowledge and the esoteric knowledge of experts.⁶³

Some viewed this as an unusual move by the court because a res ipsa loquitur instruction is typically given when jurors have a common basis of knowledge about an event that allows them to infer that the injury occurred because of negligence.⁶⁴ In other words, a situation where there is expert testimony is the exact instance when a res ipsa loquitur directive should not be given.⁶⁵ Historically, this was intuitive. Since injuries to a patient could either be the result of physician negligence or the underlying illness, res ipsa loquitur was never used.⁶⁶ Expert testimony was necessary not only to distinguish between an injury caused by the illness and one caused by the doctor, but also to assess whether the injury might have occurred in spite of the physician’s care, simply because the procedure was

60. See Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1353 (1988) (indicating that the reluctance of judges to allow expert testimony to establish causation was likely a result of a view that expert testimony is speculative or conjectural).

61. See Ablin, Note, *supra* note 57, at 333 (attributing the lack of plaintiff success in medical malpractice claims to the inability of the jurors to bridge the gap between common knowledge and specifically applicable knowledge).

62. See *Connors v. Univ. Assocs. in Obstetrics & Gynecology, Inc.*, 4 F.3d 123, 126–27 (2d Cir. 1993) (“[R]es ipsa loquitur is a form of circumstantial evidence that allows a jury to infer from the circumstances of an injury that the defendant has been negligent.”).

63. See *id.* at 128 (allowing the res ipsa loquitur instruction even though the experts agreed on the appropriate standard of care because they disagreed on whether plaintiff’s injury would have occurred even if the agreed upon standard of care were exercised).

64. See *id.* at 127 (“The basis for this contention [that res ipsa loquitur should not apply] is that res ipsa loquitur is a doctrine traditionally grounded on the theory that jurors share a common experience that allows them to make certain inferences of negligence.”).

65. Cf. Ablin, Note, *supra* note 57, at 326 (identifying the paradox that exists in allowing a res ipsa loquitur instruction along with expert testimony).

66. See *id.* at 332 (“The same reasons that describe why res ipsa loquitur was originally inapplicable to medical malpractice cases also explain why expert evidence is so often *required* in order for the medical malpractice plaintiff to establish a case of negligence.”).

risky.⁶⁷

Some suggest that the *res ipsa loquitur* instruction should be limited to cases where there is no circumstantial evidence of negligence except the injury itself, and where a jury could conclude using its own common knowledge that the injury, more likely than not, resulted from the defendant's negligence. As one scholar put it: "[R]es ipsa loquitur was designed as a shield from nonsuit, employed in order for a plaintiff's case at least to reach the jury, *res ipsa loquitur* is now also used as a sword . . . the jury will be invited to draw an inference of negligence in the plaintiff's favor."⁶⁸ The concern being that to allow the instruction where there is expert testimony—especially competing expert testimony—invites a jury to “prejudicial overkill,” increasing the risk of an arbitrarily decided verdict.⁶⁹

Yet even though *res ipsa loquitur* has made it easier for plaintiffs to “bridge the gap” on the causation element of their claims, they should not underestimate the importance of having qualified experts.⁷⁰ Fourteen states require that a physician verify that a lawsuit has merit before it can even be filed, and in nearly every other state, it is practically impossible for a case to survive to trial without at least one expert's affidavit.⁷¹ For example, Texas's policy, which seems to fairly represent those of many other states, commands that every plaintiff in a health care liability action submit at least one expert report, with attached curriculum vitae, not later than the 120th day after the date each defendant's original answer is filed.⁷² In this context, expert report is defined as “a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the

67. *Cf. id.* (acknowledging another reason why expert testimony is crucial in medical malpractice cases, which are inherently complex and detailed).

68. *Id.* at 335.

69. *See id.* at 350–51 (“Allowing, and especially inviting, a jury to rule for the plaintiff based on *res ipsa loquitur* under these circumstances only exacerbates the risk of an erroneous verdict, and courts should therefore bar completely the use of *res ipsa loquitur* in cases involving conflicting expert evidence.”).

70. *See id.* at 326, 350 (reporting the increased odds of the jury returning a verdict for the plaintiff when uncontested expert evidence is presented).

71. *See* Mencimer, *supra* note 1 (“If doctors refuse to testify or are prevented from doing so for plaintiffs, lawsuits cannot go forward.”).

72. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2011) (requiring a plaintiff to produce a report indicating the requisite standard of care and the subsequent breach on that standard by the defendant-physician in order to avoid dismissal).

injury, harm, or damages claimed.”⁷³ In short, trying to litigate a legal malpractice claim without calling an expert is like trying to navigate downstream without an oar; it can be done, but with great difficulty. One who tries to litigate a medical malpractice claim without an expert is quite truthfully up the creek without a paddle.

V. YOU CALL YOURSELF AN EXPERT?

Once it has been established that expert testimony needs to be presented, what should it look like? First of all, though expert testimony is necessary in both types of malpractice cases, it serves a slightly different purpose in each context. When a health care provider is accused of negligence, much of the case involves testimony saturated with medical terminology and complex science. Legal malpractice cases are less technical in that sense, but without expert testimony, there is no discernible way for a jury of non-lawyers to figure out what comprises ordinary legal knowledge and skill for lawyers, and what a reasonably careful and diligent lawyer would have done under the particular circumstances.⁷⁴ Courts caution those attorneys who represent plaintiffs in legal malpractice actions not to omit the testimony of a legal expert because doing so would make the jury’s job nearly impossible and expose the plaintiff to the risk of having her case dismissed.⁷⁵

If a plaintiff’s claim against an attorney is based on the attorney deceptively holding himself out as an expert in a particular field of law, the plaintiff should call an expert who is knowledgeable in that specialty, as only that individual will be able to accurately define the applicable duty of care and indicate whether it was met.⁷⁶ Experts should draw from their own experiences and on what they know about how other lawyers should practice law and conduct themselves under certain circumstances.⁷⁷

73. *Id.*

74. *See* Dorf v. Relles, 355 F.2d 488, 492 (7th Cir. 1966) (“Without expert testimony, it was left to a jury of laymen to determine the reasonable care and diligence which lawyers usually exercise when confronted with the same or a similar situation.”).

75. *Cf.* Brizak v. Needle, 571 A.2d 975, 984 (N.J. Super. Ct. App. Div. 1990) (“Although expert opinion is not necessary to establish the negligence of a personal injury attorney who fails to conduct any investigation of his client’s claim, where the attorney has undertaken some investigation, a jury will rarely be able to evaluate its adequacy without the aid of expert legal opinion.”).

76. *See* Wright v. Williams, 121 Cal. Rptr. 194, 200 (Ct. App. 1975) (holding that the plaintiff needed the aid of an expert to establish that the defendant-attorney, holding himself out as an expert in admiralty law, did not act as a reasonably prudent specialist in admiralty law would).

77. *But cf.* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 121–22 (1995) (“It follows that much of the role now undertaken by malpractice experts could appropriately be replaced by more detailed instructions from the court.”).

Experts should also rely on their knowledge of the professional rules, case law, ethics opinions, and principles derived from those sources.⁷⁸

Likewise, an expert in a medical malpractice case should be knowledgeable about the specialty of the doctor being sued. However, this is not to say the physician must be a specialist in the same field; having knowledge of the subject and its standard of care is adequate, provided the knowledge is based on “education, experience, observation, or association with that specialty.”⁷⁹ For example, to qualify as an expert witness in Texas, the physician must (1) be practicing medicine when the claim arose or at the time of testifying; (2) have knowledge of the accepted standards of medical care for treatment of the condition; and (3) have the training or experience necessary to offer an expert opinion on those matters.⁸⁰

Of course, it is up to each individual judge to decide whether the proposed expert qualifies. There are several criteria for a judge to consider in reaching this conclusion. First, the judge may look at whether the witness is board certified or has “other substantial training or experience in an area of practice relevant to the claim and is actively practicing medicine in rendering medical care services relevant to the claim.”⁸¹ Since medicine has become more and more specialized, the key is that the testifying physician possess knowledge specific to the subject matter of the case. The mere fact that the physician is licensed is not enough to automatically qualify him or her as an expert on any medical question out there.⁸²

Since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁸³ judges are obligated to screen planned expert witnesses to verify that their testimony will be dependable.⁸⁴ While judges are appropriate for this task in legal

78. See *id.* at 120–21 (“Lawyers and courts have used expert witnesses to fill the gaps left by the court’s failure to define with sufficient specificity what duties a legal malpractice action enforces.”).

79. See *Evans v. Ohanesian*, 112 Cal. Rptr. 236, 241 (Cal. Ct. App. 1974) (“Nor is it critical whether a medical expert is a general practitioner or a specialist so long as he exhibits knowledge of the subject.”); see also *Roberts v. Williamson*, 111 S.W.3d 113, 121 (Tex. 2003) (establishing that the test is whether “the offering party [has] establish[ed] that the expert has ‘knowledge, skill, experience, training, or education’ regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject”).

80. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.401 (West 2011) (focusing on the condition involved in the claim in determining whether a witness will be qualified as an expert).

81. *Ehrlich v. Miles*, 144 S.W.3d 620, 625 (Tex. App.—Fort Worth 2004, pet. denied).

82. *Cf. id.* at 625 (allowing a neurosurgeon to provide expert testimony in a medical malpractice action against a plastic surgeon because the court felt the physicians specialization may be relevant to plaintiff’s claim).

83. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

84. See *Austin v. Am. Ass’n of Neurological Surgeons*, 253 F.3d 967, 973 (7th Cir. 2001) (“The *Daubert* rule . . . requires judges to screen proposed expert witnesses carefully to make sure that their testimony will be responsible . . .” (citing *Daubert*, 509 U.S. 579)).

malpractice cases, they do not have the background necessary to decide whether a proposed expert in a medical malpractice case is credible (as will be discussed, this is where professional organizations often come in to screen experts). Everyone in the courtroom should be aware that just because the judge decides to admit certain expert testimony does not mean it's conclusively dependable for the jury to rely on.⁸⁵

As mentioned earlier, an important criterion for experts in some jurisdictions is what is known as the "locality rule." This means that in legal malpractice claims, for example, to determine the appropriate standard of care, courts take into account the community in which the attorney practices law.⁸⁶ The idea behind this is that the level of skill and diligence of attorneys in one jurisdiction might not be typical of attorneys in a different jurisdiction; therefore, it would be unfair for an attorney to testify against another attorney unless he practiced law in the same geographic location.

One problem with the locality rule is that it makes it difficult for plaintiffs to find expert witnesses because attorneys are reluctant to testify against colleagues whom they regularly encounter (i.e. "conspiracy of silence").⁸⁷ However, for the past fifty years, courts have solved this problem by simply adopting a looser definition of the word "jurisdiction."⁸⁸ Interpreting "jurisdiction" to mean each state as a whole,

85. *See id.* at 973 ("Fair enough; a judge is not a surgical expert and his ruling on the admissibility of an expert's witness may be in error." (citing *Daubert*, 509 U.S. 579)).

86. *See Brewer*, *supra* note 23, at 757 ("In measuring the skill, diligence, and practice of an attorney, some courts have taken into consideration the locality or community in which the attorney practices as an element in determining the applicable standard of care.").

87. *Cf. id.* at 758 (reporting that the "conspiracy of silence" effect created by the locality rule is likely to immunize practitioners from liability in small locales).

88. *See generally* *Ramp v. St. Paul Fire & Marine Ins. Co.*, 254 So. 2d 79, 83 (La. Ct. App. 1971) ("Forced heirship is one of the most basic concepts of the legal system of this state, and an attorney should possess such reasonable knowledge of this concept as will enable him to perform the duties he undertakes."); *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954) (determining that an attorney will not be held liable "for a mistake in a point of law which has not been settled by the court of last resort in his State"); *Feil v. Wishek*, 193 N.W.2d 218, 225 (N.D. 1971) (deciding the "attorney in the instant case, failed to exercise that degree of care commonly possessed and exercised by other reasonable, careful and prudent lawyers of this State in not advising his client that the agreement should be filed in the appropriate office"); *Childers v. Spindor*, 733 P.2d 1388, 1390 (Or. Ct. App. 1987) ("The jury could find from plaintiff's evidence that the appropriate standard of care in this case was the same for the entire state."); *Russo v. Griffin*, 510 A.2d 436, 438 (Vt. 1986) ("The relevant geographic area then is not the community in which the attorney's office is located or the nation as a whole, but the jurisdiction in which the attorney is licensed to practice."); *Cook, Flanagan & Berst v. Clausing*, 438 P.2d 865, 866 (Wash. 1968) ("The standards of practice for lawyers in this jurisdiction as a qualification for the practice of law are the same throughout the state, and do not differ in its various communities.").

rather than localities with the state, prevents “an inefficient and inequitable morass of professional standards of care.”⁸⁹ Furthermore, this is consistent with how courts use “jurisdiction” in other contexts, not to mention its dictionary definition: “[a] geographic area within which political or judicial authority may be exercised.”⁹⁰

There has been a great deal of support for eliminating the locality rule altogether.⁹¹ Those who advocate abolishing the rule argue that it is without merit and already out of date and it has significantly disappeared from medical malpractice cases.⁹² They also contend that “the rule is an inappropriate anachronism considering modern educational standards and communication,” and its only purpose is “to protect pockets of incompetence.”⁹³ They cite the dreaded “conspiracy of silence,” which deprived plaintiffs of a legitimate opportunity to find a qualified expert in their community to testify on their behalf.⁹⁴

Unsurprisingly perhaps, the locality rule has lost its importance in recent years, especially in medical malpractice cases, as courts have attempted to clarify what meets the requirements for being an expert witness. In Texas, for example, in addition to being qualified under the Texas Rules of Evidence, the physician must be licensed to practice medicine in at least one state within the country⁹⁵ and experts may not be disqualified for the sole reason that they are licensed outside the State of Texas.⁹⁶ Additionally, a defendant physician may support a motion for summary judgment with his own affidavit,⁹⁷ or “testify as an expert in his own case.”⁹⁸ A graduate of medical school who has not yet completed residency or become a licensed physician may not offer expert testimony in a medical malpractice case.⁹⁹

89. *Chapman v. Bearfield*, 207 S.W.3d 736, 740 (Tenn. 2006).

90. *Id.* at 739.

91. *See Brewer*, *supra* note 23, at 757 (claiming that the locality rule has mostly disappeared in medical malpractice case and should no longer be used in legal malpractice cases).

92. *Cf. id.* (recognizing the arguments against using the locality rule).

93. *Id.*

94. *Id.* at 758.

95. *See Springer v. Johnson*, 280 S.W.3d 322, 327 (Tex. App.—Amarillo 2008, no pet.) (“[A] physician . . . is qualified as an expert witness if he is a physician licensed to practice in one or more states in the United States and is otherwise qualified under the Texas Rules of Evidence.”).

96. *See Kelly v. Rendon*, 255 S.W.3d 665, 675 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (refusing to disqualify physician experts because the experts were not licensed in Texas).

97. *See Rodriguez v. Pacificare of Tex., Inc.*, 980 F.2d 1014, 1019 (5th Cir. 1993) (affirming the district court’s decision to allow a defendant physician to support his motion with his own affidavit).

98. *Id.*

99. *See Andrade Garcia v. Columbia Med. Ctr. of Sherman*, 996 F. Supp. 617, 624 (E.D. Tex.

More important than having knowledge in the defendant's specialty, the expert should be well versed in the condition involved in the claim.¹⁰⁰ For example, a Texas appellate court recently held that a board-certified neurologist was competent to offer expert testimony in a malpractice case against an emergency room physician where the relevant medical issue was the standard of care for a patient with brain trauma who had suffered a stroke.¹⁰¹ For medicine (and law now too) the key element is that the expert knows the applicable standard of care and can assess the defendant's actions against that standard.¹⁰²

Bringing a malpractice action thus appears rather straightforward: a plaintiff must simply find a willing expert who is knowledgeable on the relevant issues and can logically conclude that the professional breached the applicable standard of care. However, as easy as it may be to find an expert who *meets* these requirements, the difficult part is finding one who is *willing* to testify.

VI. "BROTHER AGAINST BROTHER"

Although the law is an adversarial profession, there exists a mutual respect and courtesy between all members of the bar. Similarly, although doctors compete with one another for prestigious positions, as well as patients, they admire each other for being members of a profession dedicated to healing. These wonderful feelings of civility and admiration go out the window when lawyers and doctors are called upon in malpractice actions to testify against their colleagues.

For the most part, professionals have a natural reluctance to testify

1998) (determining that medical students cannot offer expert testimony in a case).

100. *Dingler v. Tucker*, 301 S.W.3d 761, 769 (Tex. App.—Fort Worth 2009, no pet.); *see also* *Baylor Coll. of Med. v. Pokluda*, 283 S.W.3d 110, 118–19 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (“In order to qualify as an expert in a particular case, a physician need not be a practitioner in the same specialty as the defendant physician. . . . The test is whether the report and curriculum vitae establish the witness’s knowledge, skill, experience, training, or education regarding the specific issue before the court that would qualify the expert to give an opinion on that particular subject.”); *Pediatrix Med. Grp., Inc. v. Robinson*, 352 S.W.3d 879, 883–84 (Tex. App.—Dallas 2011, no pet.) (“[T]he proper inquiry concerning whether a physician is qualified to testify [as a medical expert in a medical malpractice action] is not the physician’s area of practice but the stated familiarity with the issues involved in the claim before the court.”).

101. *Rittger v. Danos*, 332 S.W.3d 550, 559 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

102. *Cf. Young v. Rutkin*, 830 A.2d 340, 344 (Conn. App. Ct. 2003) (“Rather, [an attorney] must possess special knowledge, that, as properly applied, would be helpful in the determination of the question of whether the defendant’s actions were in accordance with the standard of care applicable to attorneys *under comparable circumstances*.”); *see also* *Evans v. Ohanesian*, 112 Cal. Rptr. 236, 240 (Ct. App. 1974) (stating the requirements to qualify a witness as a medical expert).

against one another.¹⁰³ “Respect for fellow specialists, understanding of the complexities of the specialty and the margin for error, and fear of retaliation are motivations which could lead any professional to refuse to take the stand against a colleague.”¹⁰⁴ Doctors in particular try to avoid testifying against one another because “[t]hey rely on each other for professional guidance and patient referrals.”¹⁰⁵ Many physicians refrain from serving as an expert witness for plaintiffs in a malpractice action because it is just bad business; although, for some physicians, testifying as an expert witness provides a much-needed source of supplemental income.¹⁰⁶

In the medical malpractice context, a physician who has knowledge of the defendant physician’s specialty is permitted to testify against that physician even if she does not specialize in that particular field herself.¹⁰⁷ One possible reason for this is because physicians are hesitant to bear witness against their immediate colleagues.¹⁰⁸ If plaintiffs were required to hire a physician in the identical specialty as the doctor they’re suing, plaintiffs would have an exceedingly difficult time finding a suitable, willing expert, and might never get their day in court.¹⁰⁹ Indeed, one of the biggest problems with the expert requirement in both legal and medical malpractice actions is that plaintiffs can be prevented from having their cases heard due to their inability to procure expert testimony.

Of course, if the facts of a case are egregious and it is clear that the defendant lawyer fell below the standard of care, attorneys are more inclined to put themselves out there and provide expert testimony.¹¹⁰ One possible reason for this is that if the lawyer’s mistake was blatant, it is inevitable that he has it coming to him and someone might as well testify against him. It is when the subject of the action exists in a gray area that

103. See *Jeffer, Mangels & Butler v. Glickman*, 286 Cal. Rptr. 243, 246 (Ct. App. 1991) (“[P]hysicians are reluctant to testify against each other.”).

104. *Id.*

105. *Mencimer*, *supra* note 1.

106. See Maureen Glabman, *Scared Silent: The Clash Between Malpractice Lawsuits & Expert Testimony*, NATIONAL MEDICAL CONSULTANTS P.C. (2003), <http://www.nationalmedicalconsultants.com/scaredsilent.aspx> (describing the case of a physician who earns a substantial supplemental income testifying as an expert witness).

107. See *Evans*, 112 Cal. Rptr. at 240–41 (explaining that a physician need only have knowledge of the subject about which he is testifying; he need not be a specialist in the area).

108. See *id.* at 241 (“Physicians are reluctant to testify against each other.”).

109. See *id.* (recognizing the difficulties of finding a specialist to be an expert witness against a defendant specialist).

110. See Elaine McArdle, *Lawyers Suing Lawyers Is Quite a Business*, LEGAL REFORM NOW! (May 29, 2006), <http://www.legalreform-now.org/archive/anmviewer.asp?a=264> (“Some lawyers will testify if they feel the facts are egregious enough . . .”).

attorneys hesitate to take the stand, refusing to judge their colleagues for a difficult decision that they themselves may have made under the circumstances.¹¹¹

Thus, the problem is two-fold for plaintiffs in legal malpractice actions: not only do they have to find an attorney to testify against their negligent former lawyer, but they also must find an attorney who will try the case against their former lawyer.¹¹² As one such attorney noted, “If you promote yourself as a lawyer who sues lawyers, you’re not endearing yourself to your colleagues.”¹¹³ Yet even though it is a detested job, it is a profitable practice field.¹¹⁴ When a case is lost or a deal goes awry, the losing party likely considers suing its lawyer.¹¹⁵ Still, a significant number of attorneys refuse to testify against their colleagues, making it exceedingly difficult for plaintiffs to make their case.¹¹⁶ Although this is a serious obstacle that plaintiffs face, fortunately for them, it has not gone unnoticed by attorneys and judges alike.

Seton Hall Law faculty members Michael Ambrosio and Denis McLaughlin are outraged that attorneys would refuse to accept a legal malpractice case or appear as expert witness out of a professional courtesy or desire to maintain the dignity of the profession.¹¹⁷ They argue that a “sense of professional responsibility should motivate lawyers to accept legal malpractice cases or to provide testimony as legal experts.”¹¹⁸ But as another leading scholar explains, preventing professional failures is largely the task of “internalized standards of professional conduct that are written in the hearts and minds of each lawyer and are reinforced by the monitoring and criticism of other lawyers.”¹¹⁹ Lawyers should be willing

111. *Cf. id.* (recognizing the difficulty in placing lawyers against fellow lawyers because the legal community can be a “tightly-knit professional group”).

112. *See* Ambrosio & McLaughlin, *supra* note 60, at 1404 (arguing that it is difficult for clients to bring legal malpractice cases because attorneys are reluctant to accept those cases or testify in them as experts).

113. McArdle, *supra* note 110.

114. *Id.*

115. *See generally id.* (observing the increase in legal malpractice claims over the last few decades because the standard of proof has become easier to meet).

116. *See* Ambrosio & McLaughlin, *supra* note 60, at 1404 (recognizing the reluctance of attorneys to appear as expert witnesses against attorney defendants in legal malpractice cases).

117. *See id.* at 1405 (“But refusal to accept legal malpractice cases or to appear as an expert witness cannot be justified on the ground of upholding the honor of the legal profession or professional courtesy.”).

118. *Id.*

119. GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 19–20 (3d ed. 1999).

to participate in malpractice cases because they have a duty to do so.¹²⁰ Law professors as a whole are more willing to testify than practicing lawyers because it is less likely they'll encounter the defendant in the future,¹²¹ but all members of the bar should embrace their responsibility to make sure the profession remains honest and respectable. All attorneys have an obligation to uphold the integrity of the profession, which frequently requires assuming the unenviable task of reporting their colleagues' misconduct.¹²²

When lawyers and doctors need an extra push to get them into the witness chair, courts have no problem stepping in and forcing them to testify against their friends.¹²³ In a prominent case out of the Second Circuit, the Court held that an expert who was being reasonably compensated and did not have to do any extra preparatory work to formulate his opinion could be compelled to testify.¹²⁴ The Court reasoned that although the expert witness's opinion was his private property over which he had exclusive control, at times, that privilege had to yield to the realities of modern litigation.¹²⁵ The defendants argued that it was improper to require an expert to take the stand unless plaintiffs could demonstrate that there were no other equally qualified voluntary experts available, but the court disagreed, stressing the impracticality of such a task.¹²⁶

However, states vary on whether courts have the power to subpoena physicians like any other witness. One side of this argument stems from *Ex parte Dement*,¹²⁷ a case decided by the Alabama Supreme Court in 1875. There, the lower court fined a physician for contempt of court when he refused to offer his professional opinion because he had not been compensated for it.¹²⁸ The Supreme Court upheld the decision, stating that a physician could be called to testify as an expert witness in a judicial

120. See Ambrosio & McLaughlin, *supra* note 60, at 1406 (arguing that attorneys have an obligation to participate in legal malpractice cases).

121. Cf. McArdle, *supra* note 110 (describing the difficulty of obtaining expert witnesses in legal malpractice cases).

122. See Ambrosio & McLaughlin, *supra* note 60, at 1405–06 (stating that attorneys need maintain the integrity of the legal profession).

123. Cf. Kaufman v. Edelstein, 539 F.2d 811, 817 (2d Cir. 1976) (recognizing a court's power to compel testimony of an expert witness).

124. See *id.* at 820–22 (discussing the issue of whether an expert witness can be compelled to testify).

125. *Id.* at 821.

126. *Id.*

127. *Ex parte Dement*, 53 Ala. 389 (1875).

128. *Id.* at 389.

investigation (civil or criminal) without being paid for his testimony, and, if he refused to testify, could be held in contempt of court.¹²⁹ The court explained that payment was not necessary because the physician was not *exercising* his skill and education, stating, “in so testifying he would not be practicing the healing art; he would . . . be deposing only to things which he had learned in the course of his occupation or profession . . . [h]is testimony would concern the administration of justice.”¹³⁰ “And of him, as of the other witnesses, it could be justly ‘claimed by the public, as a tax paid by him to that system of laws which protects his rights as well as others.’”¹³¹

Though numerous courts across the country cite to *Ex parte Dement* when confronted with this dilemma, others have adopted a contrary position. In 1934, a case came before the New Jersey Supreme Court in which a physician was asked to testify whether his female patient had been physically abused at home.¹³² The physician stated that because he worked in a hospital and “his time was not his own,” he would only testify if the family compensated him in an amount equivalent to what he would receive for an operation.¹³³ The family agreed, but after the physician testified at trial, the family refused to pay him.¹³⁴ The trial court ruled that the family had to pay the physician, and the New Jersey Supreme Court affirmed.¹³⁵ The high court reasoned:

[W]hen the experience, training, and skill acquired by years of study and practice in a given profession exists, such knowledge and skill are not the property of litigants. . . . It would be unjust and without legal justification to withhold payment . . . [a]n expert witness cannot be compelled to give testimony . . . and it is the right of such person to . . . receive proper and adequate compensation.¹³⁶

Some courts compromise and state that physicians may not be compelled to testify as experts, but can be called as fact witnesses. In one such case, a radiologist at a community hospital noticed suspicious-looking calcifications in a set of mammograms he had received from a satellite office.¹³⁷ When he met with the patient, he discovered that she was forty-

129. *Id.* at 397–98.

130. *Id.* at 397.

131. *Id.*

132. *Stanton v. Rushmore*, 169 A. 721, 721 (N.J. 1934).

133. *Id.*

134. *Id.*

135. *Id.* at 721–22.

136. *Id.*

137. See generally Leonard Berlin, *Can a Radiologist Be Compelled to Testify as an Expert*

five years old and had a family history of breast cancer, but had never been told by her family physician that she should have a mammogram (until she pressed the issue several weeks earlier).¹³⁸ The radiologist informed her that the consensus amongst radiologists and physicians is that routine mammograms should begin at the age of forty, particularly when there is a family history of breast cancer.¹³⁹ The patient underwent a mastectomy, and several months later, sued her family physician.¹⁴⁰ After receiving a letter from the patient's attorney requesting him to testify, the radiologist responded that he did not want to get involved in the case and would not offer an opinion on the family physician's conduct.¹⁴¹ The patient subpoenaed the radiologist, and the radiologist (who had by now hired his own counsel), complied with the subpoena so as not to be held in contempt of court.¹⁴² However, his attorney told him to only answer questions related to his own interpretations of the mammograms and his conversations with the patient; he was to say nothing regarding his professional opinions on the medical aspects of the case.¹⁴³ In turn, the patient's attorney asked the judge to hold the radiologist in contempt of court.¹⁴⁴ The judge refused to do so, ruling that he did not have to answer questions regarding his professional opinions, and that he had "fulfilled his duty as a fact witness and did not have to act as an expert witness if he did not wish."¹⁴⁵

A California appellate court clarified the distinction between testifying as an ordinary witness and as an expert witness in a case in 1959. In *Agnew v. Parks*,¹⁴⁶ all nine physicians whom the plaintiff had asked to testify on her behalf refused, claiming that if they did, their malpractice insurance would be canceled and their membership in the Los Angeles County Medical Association would be jeopardized.¹⁴⁷ The court found that since there was no physician-patient relationship, there was no duty

Witness?, 185 A.J.R. 36, 36 (2005), available at <http://www.ajronline.org/doi/abs/10.2214/ajr.185.1.01850036> (describing a medical malpractice case in which a physician was sued by a woman with breast cancer and the radiologist who treated her once was compelled to testify in the case).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 37.

144. *Id.*

145. *Id.*

146. *Agnew v. Parks*, 343 P.2d 118 (Cal. Dist. Ct. App. 1959).

147. *Id.* at 121.

to render expert services, and thus the plaintiff could not compel their testimony.¹⁴⁸ Similarly, other jurisdictions permit a trial judge to quash taking the depositions of non-treating doctors whom plaintiffs seek to subpoena as involuntary witnesses.¹⁴⁹

A few years later, a similar case arose in Texas.¹⁵⁰ The family of a forty-seven year old man, who died a few days after a failed cardiac surgery, sued the surgeon, alleging that he had failed to obtain their informed consent to implant an experimental artificial heart during the operation.¹⁵¹ The plaintiffs' medical expert refused to testify and the federal judge ruled that he did not have to.¹⁵² In concurring with its West Coast counterparts, the court laid out several criteria to determine whether a physician expert could be compelled to testify.¹⁵³ These factors included: the nature of the action, the subject of the testimony, and the situation of the party against whom the testimony is sought (e.g., a physician may be compelled to testify in criminal prosecutions but not civil disputes).¹⁵⁴

The latest interpretation of the balancing test is that before a court can compel an expert to testify based on their expertise alone without any connection to the litigation, the compelling party must affirmatively demonstrate three things: a compelling necessity for the testimony that overcomes the expert's desire to remain silent, an adequate compensation plan, and that the expert will "not be required to engage in any out-of-court preparation."¹⁵⁵

This line of cases helps explain why, in recent years, physicians have altered their stance on giving expert testimony. Thirty years ago, doctors believed that the problems encountered by medical practitioners could not be accurately judged by anyone who lacked medical knowledge.¹⁵⁶

148. *Id.* at 123.

149. *Young v. Metro. Dade County*, 201 So. 2d 594, 596 (Fla. Dist. Ct. App. 1967).

150. *See generally Karp v. Cooley*, 493 F.2d 408 (5th Cir. 1974) (involving a medical malpractice action brought against a chief surgeon).

151. *Id.* at 411.

152. *See id.* at 424–25 (detailing Dr. Michael DeBakey's refusal to testify and Judge Bell's allowance of the physician's refusal to testify).

153. *Cf. Agnew*, 343 P.2d at 123 (expressing the need to specifically address the serious ethical problem resulting from doctors' refusal to testify in medical malpractice litigation).

154. *See id.* at 122–23 (providing factors for the court to consider when deciding whether a medical expert can refuse to testify).

155. *See Mason v. Robinson*, 340 N.W.2d 236, 242–43 (Iowa 1983) (listing the three requirements a compelling party should show to determine whether a medical expert should be compelled to testify); *see also Glenn v. Plante*, 676 N.W.2d 413, 421 (Wis. 2004) (approving of the *Mason* court's approach as to when testimony will be required).

156. *Cf. Lawrence W. Kessler, The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 473 (2002) (proclaiming the

However, doctors were also reluctant to take the stand because they believed that actual medical malpractice was rare.¹⁵⁷ A Harvard study from 1988 revealed that a majority of physicians did not view substandard care as negligent and did not believe that a patient who had received inferior care deserved compensation.¹⁵⁸ This philosophy has largely disappeared and the one reason why: money.

The influx of cash into this field has increased the supply of expert testimony in malpractice actions.¹⁵⁹ Nowadays, a medical professional can enjoy a nice lifestyle as a “professional expert.”¹⁶⁰ While this has had the beneficial effect of ensuring that meritorious lawsuits see the light of day, the flip side is that frivolous cases and “junk science” have arisen.¹⁶¹ Defendants maintain that this has caused their insurance premiums to rise, and their attorneys claim that one in ten cases they receive is either fraudulent or based on junk science.¹⁶²

VII. HOW FAR IS TOO FAR: THE NEW “CONSPIRACY OF SILENCE”

This flood of frivolous cases has sparked so much fear amongst doctors that now the medical community is overcompensating by penalizing physicians who help plaintiffs.¹⁶³ In 1998, the American Medical Association concluded that giving expert testimony was the equivalent of practicing medicine, and therefore, “could be regulated by state medical boards.”¹⁶⁴ Three years later, the Seventh Circuit addressed this issue head on in *Austin v. American Ass’n of Neurological Surgeons*.¹⁶⁵ A neurosurgeon sued a voluntary association of neurosurgeons for damages that arose out of a six-month suspension he received for testifying in a

conspiracy of silence prevented physicians from giving testimony).

157. See Mencimer, *supra* note 1 (“Many doctors believe that genuine malpractice is rare.”).

158. See *generally id.* (detailing the results of the 1988 Harvard poll regarding physicians’ beliefs on medical malpractice).

159. See Kessler, *supra* note 9, at 417 (providing that the “flow of cash into the malpractice bar” increased the number of physicians testifying).

160. See *id.* (stating the abundance of medical malpractice cases provides a decent income for medical doctors serving as experts).

161. Cf. *id.* (indicating petty cases have escalated with the increased supply of expert testimony).

162. See Glabman, *supra* note 106 (stating defendants’ premiums have risen and attorneys estimate “at least ten percent of expert testimony” involves fraud or fringe science).

163. Cf. Mencimer, *supra* note 1 (reporting that professional medical organizations all but recommended that physicians not testify for plaintiffs).

164. See *id.* (stating the American Medical Association allows state medical boards to regulate physicians giving expert testimony).

165. *Austin v. Am. Ass’n of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001).

medical malpractice suit against another association member.¹⁶⁶ In the case, the neurosurgeon argued that if a professional association could punish its members for appearing as an expert witness in another case it would discourage physicians from testifying in malpractice cases, and therefore, was a public policy violation.¹⁶⁷ The court disagreed, inferring that if a physician could use an organization's credibility to enhance his own integrity, then the organization had an interest in preventing him from using his membership to potentially confuse jurors with erroneous facts and uninformed opinions.¹⁶⁸ Indeed, plaintiffs face a serious problem if professional organizations can sanction doctors for testifying. If the doctors are too afraid to testify, then deserving victims may not get their day in court.

As if this were not bad enough, some medical groups are going a step further by pressuring doctors not to advocate on behalf of plaintiffs, period.¹⁶⁹ The AMA urges its members to turn in doctors who give testimony that appears fraudulent, so it can then punish with suspensions or membership cancellation.¹⁷⁰ The AMA, AANS, and other like-minded groups have extended the holding of *Austin* more than the Seventh Circuit intended.¹⁷¹ The court was simply pointing out that identifying and sanctioning inferior physicians was advantageous insofar as it would ultimately improve health care quality;¹⁷² the court did not expect that its holding would be used to shield doctors from the meritorious claims of patients who could no longer find a willing physician to take the stand.

Medical groups assert that they regulate expert witnesses for the betterment of medicine.¹⁷³ Curiously though, the betterment of medicine never seems to necessitate that they regulate expert witnesses on the defense side. In *Austin*, the plaintiff's attorneys pointed out that AANS had never sanctioned a defendant's expert.¹⁷⁴ In 2002, the American

166. *Id.* at 968.

167. *Id.* at 972.

168. *Id.*

169. *See generally* Mencimer, *supra* note 1 (stating medical societies are pressuring doctors into not testifying for plaintiffs' attorneys).

170. *See id.* (recommending members of medical societies report potentially fraudulent testimony to their respective organization).

171. *See id.* (finding several medical organizations have been empowered by the Seventh Circuit's opinion in *Austin*).

172. *Cf. Austin*, 253 F.3d at 974 (noting a national interest in correcting low-grade doctors to further increase health care quality).

173. *See* Mencimer, *supra* note 1 ("Medical groups insist that their regulation of expert witnesses is motivated by science, but some of their actions suggest otherwise.").

174. *See generally id.* (providing the American Association of Neurological Surgeons has never

Society of Anesthesiologists went so far as to publish a brochure that said, "As a rule, defense work is good, and plaintiffs' work is bad."¹⁷⁵ To frighten physicians from testifying on behalf of patients, the Florida Medical Association has threatened to post the names of its members who serve as expert witnesses for plaintiffs in malpractice cases.¹⁷⁶ The Florida College of Emergency Physicians Director constructed a website that lists doctors who serve as experts for plaintiffs.¹⁷⁷ In North Carolina, doctors who are not licensed in the state may not give expert testimony,¹⁷⁸ and in February 2004, Tampa General Hospital announced a plan to modify its employee "Code of Conduct" to prohibit "staff from testifying on behalf of plaintiffs" (though they may still testify on behalf of defendants).¹⁷⁹

In spite of the scare tactics some organizations—mostly within the medical community—employ numerous lawyers, and doctors are not backing down. In order to assist plaintiffs in what they believe are valid claims, these professionals have stepped up and accepted the challenge—and the consequences.

First, let us not forget about our neuro-oncologist friend from the introduction who encountered problems with the AANS in 2003. That same year, the Florida state board revoked the license of a neurosurgeon who had given what the board labeled "'inappropriate' testimony on behalf of a patient's family."¹⁸⁰ Good Shepherd Medical Center in Longview, Texas, fired one of its nurses in the summer of 2003 because her husband's law firm practiced medical malpractice litigation, though he did not.¹⁸¹ The hospital justified its actions, stating it had an "unwritten practice" not to hire spouses of medical malpractice attorneys because of the likelihood that a conflict of interest might arise.¹⁸² The hospital declared that it feared a nurse in that position would have an incentive to pass along

sanctioned a defense's expert witness).

175. *Id.*

176. *See id.* ("The Florida Medical Association openly discourages doctors testifying on behalf of patients injured by doctors, telling members that their names will be posted in area hospitals if they appear as witnesses in malpractice cases.").

177. *Id.*

178. *See id.* ("North Carolina will allow only doctors licensed in the state to give expert testimony.").

179. *See generally* Laura Parker, *Medical-Malpractice Battle Gets Personal*, USA TODAY (June 13, 2004), http://usatoday30.usatoday.com/news/nation/2004-06-13-med-malpractice_x.htm (stating the prohibition of expert testimony for plaintiffs codified in an employee's Code of Conduct at a Florida hospital).

180. Glabman, *supra* note 106.

181. *See* Parker, *supra* note 179 (detailing the termination of a nurse from a Longview, Texas, hospital).

182. *Id.*

confidential information to help her spouse solicit clients and win cases.¹⁸³

Some members of the medical community have taken their loyalty to the profession a step further. There are reported instances of a handful of doctors who refuse to give medical treatment to medical malpractice plaintiff's attorneys—except in cases of emergency.¹⁸⁴ Their justification is that such action is necessary to take a stand against their rising malpractice insurance premiums, which, they argue, are fueled by exorbitant jury awards.¹⁸⁵ Such practices push the limits of the Hippocratic Oath, and thus belie their alleged motive of protecting the sanctity of the medical practice.¹⁸⁶

VIII. A PICTURE WITHIN A PICTURE WITHIN A PICTURE WITHIN . . .

Finally, as if the fear of being branded a traitor within their own profession is not enough, experts in malpractice cases have one more thing to worry about—malpractice. Just as attorneys and physicians may be liable to their clients and patients, expert witnesses can be sued as well.¹⁸⁷ Although the majority of literature on this topic addresses the liability of expert witnesses in fields such as accounting,¹⁸⁸ engineering,¹⁸⁹ and psychiatry,¹⁹⁰ which is the source of underlying litigation, the principles behind this idea are just as applicable to lawyers and doctors as expert witnesses, and deserve mention.

Certainly, experts who blatantly lie about their qualifications on the witness stand subject themselves to perjury.¹⁹¹ However, even those who

183. *See id.* (stating the terminated nurse was in a position to communicate confidential information because of her husband's association with his law firm).

184. *See generally id.* ("Some doctors are refusing medical treatment to lawyers, their families and their employees except in emergencies . . .").

185. *Cf. id.* (describing the disagreement between attorneys and physicians regarding medical malpractice litigation).

186. *See id.* ("While sharing their peers' anger over malpractice lawsuits, some doctors see such tactics—particularly the refusal of treatment—as contrary to the Hippocratic Oath, in which new doctors acknowledge 'special obligations to all my fellow human beings.'").

187. *See* Mencimer, *supra* note 1 (indicating organizations have attacked expert witnesses through lawsuits).

188. *See* Levine v. Wiss & Co., 478 A.2d 397, 398 (N.J. 1984) (detailing the lack of liability for an expert witness in the accounting industry).

189. *See* Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 776 P.2d 666, 666–67 (Wash. 1989) (refusing to impose liability on the engineering industry expert witness).

190. *See* Clark v. Grigson, 579 S.W.2d 263, 264 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (providing no liability for the psychiatry industry expert witness).

191. *E.g.*, Carol Henderson Garcia, *Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness*, 12 MISS. C. L. REV. 39, 51 (1991) (providing that an expert witness

simply hold themselves out as an expert on a topic, permitting others to infer that they possess the requisite skill and knowledge normally possessed by members of the profession, can be held liable for such misrepresentations.¹⁹² Scholars disagree on whether expert liability is beneficial or detrimental for the malpractice setting.¹⁹³

Advocates of punishing expert witnesses point to the weight their testimony bears.¹⁹⁴ Everyone in the courtroom looks to experts as a reliable, trustworthy source of information; if they are to yield such great power, they must accordingly assume great responsibility.¹⁹⁵ Moreover, an expert witness who misrepresents himself can cause real and substantial injuries to individuals; the law should provide these individuals a remedy.¹⁹⁶ These advocates believe that the threat of liability serves as a type of “quality control” over expert testimony and they argue that this will motivate experts to be more careful with the views they express under oath.¹⁹⁷

Those on the other side of the argument contend that allowing this brand of liability might cause an expert witness to alter his testimony if he knows that he may face subsequent liability based on the outcome of the case.¹⁹⁸ Even worse, “imposing civil liability on expert witnesses would discourage” them from testifying unless they were professional expert witnesses, as only those individuals would be inclined to carry insurance to guard against that possibility.¹⁹⁹ Courts also believe that between “the oath, the hazard of cross-examination and the threat of prosecution for perjury,” there are enough safeguards to ensure reliable expert testimony.²⁰⁰

Fortunately for experts, many courts shelter them from civil liability, finding that negligent mistakes and inaccuracies are not perjury and that

testified falsely and was convicted of perjury).

192. See generally *Levine*, 478 A.2d at 399 (finding liability can be attached to persons holding out as an expert for any misrepresentations).

193. See *Garcia*, *supra* note 191, at 42 (“People are beginning to question whether experts are merely ‘hired guns’ rather than truth tellers.”).

194. See *id.* at 70 (providing that “expert testimony is accorded great weight by jurors”).

195. Cf. *SPIDER-MAN* (Columbia Pictures 2002) (“With great power comes great responsibility.”).

196. See *Garcia*, *supra* note 191, at 63 (providing a remedy should be given to individuals affected by an expert witness’s malpractice).

197. See *id.* (asserting that the imposition of liability motivates expert witnesses to be conscious of opinions stated on the record).

198. See *Bruce v. Byrne-Stevens & Assocs. Eng’rs, Inc.*, 776 P.2d 666, 672–73 (Wash. 1989) (stating an expert witness may alter testimony if subsequent liability is possible).

199. *Garcia*, *supra* note 191, at 66–67.

200. *Id.* at 64.

erroneous testimony is privileged.²⁰¹ Additionally, often it is the attorney who should have made available the time to authenticate an expert's credentials, and not accepted the information at face value without obtaining independent verification.²⁰² Of course, if plaintiffs were allowed to sue experts in malpractice claims, they could then sue the experts in the malpractice case against their expert from the original malpractice claim or original litigation. The litigation could carry on *ad infinitum*, which would be a huge burden on the legal system, not to mention completely illogical. If the underlying litigation is a medical malpractice case, plaintiffs should get one shot at the allegedly negligent doctor. If the plaintiffs lose that case, they can sue their attorney for legal malpractice. However, if the plaintiffs lose that case as well, perhaps it is time to call it a day.

IX. CONCLUSION

Legal and medical malpractice cases necessitate expert testimony, regardless of whether the law allows a case to proceed without it. Both fields are so sophisticated that a lawyer or doctor must translate the complexities of the profession to jurors. While the Rules of Professional Conduct may play anywhere from a small to a substantial role in the action, what is more central to the case is that the testifying experts have the knowledge and experience to offer an intelligent opinion on whether the standard of care was met.²⁰³

While attorneys are not immune to malpractice actions, apprehension about being sued has not affected attorneys to the extent it has affected physicians.²⁰⁴ Malpractice is not at the forefront of attorneys' minds like it is for many physicians, and the costs of malpractice insurance do not plague attorneys to the same extent they do physicians. Indeed, medical groups have conducted extensive lobbying efforts to generate various types of tort reform with the hope that such measures will lower their premiums.

Frequently, attorneys and physicians are hesitant, or refuse altogether, to

201. *See id.* at 67 (preventing liability in civil suits for experts whose testimony includes inaccuracies or errors).

202. *See id.* at 49 (stating the attorney should verify an expert's qualifications instead of accepting the information without verification).

203. *Cf.* Kessler, *supra* note 9, at 404–05 (declaring the correlation between a great expert witness and the plaintiff meeting the burden of proof).

204. *See id.* at 413–14 (“Although lawyers are not indifferent to the possibility of malpractice actions, there is no indication that anxiety about legal malpractice litigation has caused a lawyer to abandon his practice. The same cannot be said about doctors.”).

testify against their peers, colleagues, and friends.²⁰⁵ Most attorneys try to avoid having to testify against their contemporaries and very few make a living out of trying legal malpractice cases. While there are a number of experienced physicians who make a career out of taking the stand against other doctors, physicians usually do not want to be an expert witness in a malpractice case.²⁰⁶ Fortunately for plaintiffs, courts have been quick to insert themselves into the conflict and, under certain conditions, compel these potential experts to take the stand.

That said, the “conspiracy of silence,” where there was an unspoken agreement between attorneys and physicians not to testify against one another, has largely disappeared. Members of the legal or medical profession are now more inclined to view it as their personal responsibility to ensure that those who are sully their profession be held responsible for their negligent acts. However, there is also a growing concern that some, particularly in the medical community, are providing exaggerated or fraudulent testimony to capitalize on the growing trend of frivolous claims.

In response to these concerns, medical organizations have warned their members that they risk suspension or expulsion if they are caught testifying in a medical malpractice case—but only if they testify for the plaintiff. There are numerous stories of physicians who have been bullied out of serving as the plaintiff’s expert by their hospital or professional association. When this happens, deserving plaintiffs do not get their day in court and the ends of justice are not served. This needs to end. Such groups need to take responsibility for the missteps of their members and right their wrongs. Holding hostage those who advocate for plaintiffs’ rights is not a sustainable solution. Physicians and attorneys need to continue to be held to the high standards for which their services were initially sought, and they should not be surprised—or offended—if they see their colleague in the courtroom testifying against them.

205. See Mencimer, *supra* note 1 (indicating a reluctance among professionals to testify against other members of their respective profession).

206. See *id.* (arguing physicians hesitate to testify against other physicians).