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ARTICLE

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Abstract. Attorney-experts in legal malpractice litigation are like many other experts. Although easily distinguishable from experts offering science-based testimony, attorney expertise is similar to that of witnesses offering experience-based testimony, and very much like the expertise of a physician in a medical malpractice case. An attorney-expert is, however, somewhat unique among experts in terms of the type of expertise offered, the inherent risk that the expert's testimony will invade the province of the judge or jury, and, I believe, the risk of over-testifying. First, there is a problem of defining the attorney-expert's "expertise" to ensure that the expert is not testifying as an expert in "law" (which is prohibited, even though the attorney is an expert in law), but is instead a fact witness (with expertise in the "factual" standards of practice in the legal community). That problem gives rise to the perceived danger, unique to experts in law, of the expert invading the province of the judge and jury. How is the "factual" standard of practice not a "legal" standard? Third, I argue that there is a special risk of over-testifying and advocacy, on the part of attorney-experts in legal malpractice cases, when one or more of four defenses are raised by a defendant. Two of them, assumption of the risk and contributory negligence, tend to blame the client even when there is attorney negligence; and two of them, professional judgment and unsettled law, allow for "honest" mistakes. All of these defenses involve interpretive instability and subjective judgments, thereby encouraging confident testimony by contradictory attorney-experts. Some solutions have been offered, but I conclude that these risks may be endemic to the structure that allows attorney-experts to testify, and as such they are not subject to resolution by any particular regulatory scheme.

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I. INTRODUCTION

> Lawsuits against physicians, frivolous or not, would not be filed unless one doctor is willing to testify against another doctor, under oath, for *money* .... Doctors who, under oath, distort medical facts and medical records for the sole purpose of making money are the fuel that sparks the fire of the malpractice crisis .... Without physicians testifying against other physicians, greedy attorneys would have no cases, judges would hear no frivolous lawsuits[,] and juries would not have to make decisions regarding medical facts that they know little about. *Try to find a lawyer who will sue another lawyer. It's real tough. There is an unwritten law among lawyers that simply states that they will not rat on a fellow colleague.* No such unwritten law exists among fellow physicians. If the price is right, some unethical physicians will sell their soul and hence, their integrity to the devil.[1]

There is, of course, no "unwritten law" among lawyers that discourages them from suing each other; indeed, "the legal malpractice action [is now] a common and prominent feature of the legal landscape."[2] Lawyers sue lawyers, and just as physicians testify as experts against their fellow physicians, attorney-experts testify against other attorneys. There is, however, an explanation for the plastic surgeon's misapprehension, above, of this phenomenon: "Legal malpractice claims occasionally grab headlines, but are more often quietly asserted and resolved, sometimes without a lawsuit and often through negotiation ...."[3] And if public understanding of the legal malpractice lawsuit is not widespread, I suspect that the understanding of the attorney-expert's role in legal malpractice litigation is even less understood. At times, the explanation of an attorney-expert witness's "expertise" in a malpractice case must sound like Orwellian *doublethink*[4]—for example, (i) there is no need for "legal" expertise, so attorney experts offer "factual testimony" concerning the standard of care (which sounds a lot like a "legal" standard?), *and* (ii) the ultimate fact of negligence is left to the jury, thus attorney-experts should not "invade" the province of the jury, *but* attorney-experts for plaintiffs commonly testify

1. Francis J. Collini, *'Dirty Little Secret' of the Malpractice Crisis*, PHYSICIAN'S NEWS DIGEST (Feb. 1, 2003, 7:59 AM), http://www.physiciansnews.com/2003/02/01/dirty-little-secret-of-the-malpractice-crisis/ (emphasis added).

2. Paul Koning, *Foreword* to THE LAW OF LAWYERS' LIABILITY, at vii, vii (Merri A. Baldwin, Scott F. Bertschi & Dylan C. Black eds., 2012).

3. Merri A. Baldwin, Scott F. Bertschi & Dylan C. Black, *Introduction* to THE LAW OF LAWYERS' LIABILITY, *supra* note 2, at ix, ix.

4. *See* GEORGE ORWELL, 1984, at 214 (1950). "*Doublethink* means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them." *Id.*

that a breach of duty to clients has occurred![5]

In some respects, an attorney-expert is like many other experts. Although expertise in the practice of law is easily distinguishable from an expert offering science-based testimony, it is similar to the expertise of those witnesses offering experience-based testimony, and very much like the expertise of a physician in a medical malpractice case, who testifies as to the standard of care in medical practice.[6] An attorney-expert is, however, somewhat unique among experts in terms of the type of expertise offered, the inherent risk that the expert's testimony will invade the province of the judge or jury, and, I believe, the risk of over-testifying.

First, there is some jurisdictional diversity on the question of whether an attorney-expert is even required in a malpractice suit (although attorney-expert testimony is admissible in every state), and the appropriate scope of permissible testimony varies among the states—testimony as to the standard of care (local or national, depending on the jurisdiction) is allowed everywhere, but admissibility of testimony as to causation or damages is only allowed in some jurisdictions.[7] Second, however, in all jurisdictions there is a problem of defining the attorney-expert's "expertise" to ensure that the expert is not testifying as an expert in "law" (which is prohibited, even though the attorney *is* an expert in law), but is instead a fact witness (with expertise in the "factual" standards of practice in the

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5. *See generally* David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 136, 143–45 (2012) (describing the problematic overlap of questions of law and fact within the context of legal malpractice actions). Consider the following:

> As to the standard of care, generally speaking, expert testimony is required[, and a] jury will eventually determine the fact of whether the defendant deviated from the standard . . . [but] a duty is [determined] by the judge as a matter of law, plaintiff's expert witness will . . . offer testimony that the duty has been breached by the defendant. The jury will then determine if that "breach" . . . of the "duty" . . . was one which other attorneys in the community . . . would . . . have committed. The ultimate fact question of negligence is thus left to the jury.

DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE §§ 9.2–.3, at 151–52 (1980). The line between fact and law in the foregoing account is blurred, as the attorney is indeed testifying as to a standard (the judge's province?) and a breach (the jury's province?), which ambiguity can only be explained by recourse to "the notion of mixed questions of law and fact." *See generally* David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 136, 145–50 (2012).

6. *See* Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 23 N.E. 1075, 1075 (Ind. 1890) ("Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians and surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions.").

7. *See* MEISELMAN, *supra* note 5, §§ 9.3–.5, at 151–56 (explaining the variability of standards concerning expert testimony across jurisdictions).

legal community).[8] That problem gives rise to the perceived danger, unique to experts in *law*, of the expert invading the province of the judge and jury.[9] How is the "factual" standard of practice not a "legal" standard? Third, and finally, I will argue in this Article that there is a special risk of over-testifying, on the part of attorney-experts both for the plaintiff and for the defendant, in legal malpractice cases.

In part II, I explore the problem of over-testifying and its particular risk in legal malpractice cases. In part III, I highlight four defenses, raised by a defendant in malpractice litigation, where the risk of advocacy on the part of the attorney-experts in the case is high. Two of them, assumption of the risk and contributory negligence, tend to blame the client even when there is attorney negligence; and two of them, professional judgment and unsettled law, allow for "honest" mistakes. All of these defenses involve interpretive instability and subjective judgments, thereby encouraging confident testimony by contradictory attorney-experts. Part IV suggests some possible solutions, but in part V, I conclude that these risks may be endemic to the structure that allows attorney-experts to testify, and as such they are not subject to resolution by any particular regulatory scheme.

II. THE NATURE OF THE EXPERTISE OF AN ATTORNEY-EXPERT WITNESS

A. *Experience-Based Expertise*

What type of expertise is reflected in the testimony of an attorney-expert in a malpractice case? The attorney serving as a witness may be an expert in an area (or several areas) of law, or certain types of transactions or litigation, but the expertise called upon in malpractice litigation is the special knowledge (which the jury lacks) of how attorneys with reasonable skill and diligence behave, and impliedly how they would have behaved in the malpractice defendant's shoes.[10] That type of knowledge is generally not learned in academic study (although the required professional

8. *See id.* §§ 9.1–.3, at 149–53 (describing the tension between law and fact in the permissibility of expert testimony and the scope such testimony may encompass).

9. *See* David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 136, 149–50 (2012) (citing examples in which legal expert opinion was deemed to have exceeded the bounds of permissibility). That is, even though it would be possible for any expert in any field to "invade" the province of the judge by testifying as to the applicable law, or the jury as to the facts, the risk is greater that an expert in law will testify as to the law governing lawyers and the "fact" of negligence.

10. *See* MEISELMAN, *supra* note 5, § 9.3, at 151–52 (confirming that the attorney expert witness will testify about the duty owed and whether "other attorneys in the community using reasonable skill and diligence would . . . have committed [such a breach]").

responsibility course in law school does introduce ethical standards which are helpful, but not at all determinative, in proving a malpractice claim).[11] Consequently, attorney expertise in malpractice litigation is best characterized as observation- or experience-based. As to the admissibility of an attorney as an expert, an experienced attorney is likely easily qualified to testify, and the relevance of attorney expertise in malpractice litigation is rarely an issue (unless the malpractice is so obvious that a court can find a breach of duty as a matter of law).[12] The only remaining admissibility issue is whether the attorney-expert's testimony is reliable.[13] How does one assess the reliability of an attorney-expert's testimony?

Following the revolutionary holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[14] which engendered both a new regime in admissibility standards for experts and a new role for judges as gatekeepers,[15] there was obvious concern and confusion about whether *Daubert*, including its guidelines for admissibility (the now-famous four factors: testability, peer review, error rate, and general acceptance),[16] applied only to scientific experts such as those who testified in the *Daubert* litigation. Six years later, that confusion was eliminated when the U.S. Supreme Court rejected the Eleventh Circuit's opinion in *Kumho Tire Co. v. Carmichael*,[17] which held that *Daubert* only governs the admissibility of experts who rely on the application of scientific principles.[18] In *Kumho*

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11. MODEL RULES OF PROF'L CONDUCT scope (2002) (making clear that under the Model Rules, where they were adopted in some form in every state except California, the "violation of a Rule should not itself give rise to a cause of action against a lawyer . . . .").

12. *See* MEISELMAN, *supra* note 5, § 9.3, at 153 (citing Lysick v. Walcom, 65 Cal. Rptr. 406 (Ct. App. 1968)).

13. *See* Smith v. Ford Motor Co., 215 F.3d 713, 717 (7th Cir. 2000) ("The admission of expert testimony is specifically governed by Federal Rule of Evidence 702 and the principles announced in *Daubert v. Merrell Dow Pharm., Inc.*").

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

15. *See id.* at 592–94 (confirming the judge's role as gatekeeper, and suggesting testability, peer review and publication, low error rate, and general acceptance as factors to help determine reliability). Although the *Daubert* regime governs federal courts, many states have adopted the *Daubert* standards. George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 113 (2011) ("As of 2011, thirty-one states have adopted some version of the *Daubert* standard . . . .").

16. *See, e.g.*, *Daubert*, 509 U.S. at 592–94 (referring to the factors established to determine whether a witness's testimony is reliable).

17. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

18. *Id.* at 151 (explaining that *Daubert* also governs admissibility of experts relying upon "skill- or experience-based observation" while rejecting the views expressed in *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435 (11th Cir. 1997)); *see also* FED. R. EVID. 702 advisory committee's note (the rule was amended in 2000 to integrate *Daubert*) ("Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or

Tire, the tire failure expert for the plaintiffs was not a scientist, thereby raising the question of how to assess the expert's reliability. For Justice Breyer, the scientific or non-scientific character of the expertise does not alter the judge's scrutiny, since

> the objective of [*Daubert*'s gatekeeping] requirement . . . is to ensure the reliability and relevance of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.[19]

Conceding that the four factors mentioned in *Daubert* seem to be oriented to scientific experts, Justice Breyer emphasized that Federal Rule of Evidence 702 "applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope."[20] The *Kumho Tire* trial judge's application of *Daubert* to an expert who relied on skill- or experience-based observation was therefore appropriate:

> [a]nd the court ultimately based its decision [excluding the opinion of tire failure expert Carlson] upon Carlson's failure to satisfy either *Daubert*'s factors *or any other* set of reasonable reliability criteria. In light of the record as developed by the parties, that conclusion was within the District Court's lawful discretion.[21]

That phrase, "any other set of reasonable reliability criteria,"[22] is both helpful and ambiguous in the judicial effort to identify admissible testimony. It is helpful as an affirmation that the key to admissibility is reliability, and not some feature of one type of expertise that is irrelevant to other types of expertise.[23] For example, an expert in plumbing repairs is not likely to have peer-reviewed publications or to have statistically established an error rate based on his past professional judgments while diagnosing plumbing problems. Thus, the Court in *Kumho Tire* agreed

> with the Solicitor General that "the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the

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education—may not provide a sufficient foundation for expert testimony.").

19. *Kuhmo Tire*, 526 U.S. at 152 (noting that the applicability of the four factors is an evaluation that must be left up to the trial judge).

20. *Id.* at 147 ("We concede that the Court in *Daubert* referred only to 'scientific' knowledge.").

21. *Id.* at 158. "We do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts." *Id.* at 151.

22. *Id.* at 158.

23. *See Daubert*, 509 U.S. at 594–95 (emphasizing the flexibility envisioned by Federal Rule of Evidence 702 with respect to assessing scientific validity and reliability).

> issue, the expert's particular expertise, and the subject of his testimony."
>
> Brief for United States as Amicus Curiae 18–19, and n. 5 []cit[es] cases involving experts in drug terms, handwriting analysis, criminal modus operandi, land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others[].[24]

The examples offered in the parenthetical highlight categories, or types, of expertise that may not involve the *Daubert* factors: (i) testable hypotheses, (ii) error rates, (iii) peer-reviewed publications, or even (iv) general acceptance (since a novel procedure based on unique experiences could potentially be reliable).[25]

The expertise of an attorney-witness in a malpractice case would fall into this category of non-scientific areas of specialized knowledge. Experts in illegal drug terminology or in criminal modus operandi, for example, would have experience-based knowledge from police work, and a handwriting analyst would have enough experience observing handwriting styles that he or she could compare them for similarities.[26] In terms of ensuring that an expert witness's testimony reflects the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field,"[27] there is little in the way of *methodology* in the practice of experts who simply translate a slang term used by drug dealers, know how criminals operate, or recognize a handwriting style. The same could be said for experts in agricultural practices or railroad procedures—the experts simply *know* things from experience.[28] On the other hand, land valuation and attorney fee valuation seem to involve a process or methodology, and an expert could be evaluated on the basis of whether he or she followed the usual (and presumably accurate) methods of calculating attorney's fees or appraising land. Such a "methodology" would involve subjective judgments based on experience and would therefore not be as complex or thoroughgoing as the procedures of a laboratory scientist; but there is at least a series of steps, such as gathering data and making some calculations, on the part of the land appraiser or attorney fee evaluator.[29]

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24. *Kuhmo Tire Co.*, 526 U.S. at 150 ("Our emphasis on the word 'may' thus reflects *Daubert's* description of the Rule 702 inquiry as 'a flexible one.'" (citing *Daubert*, 509 U.S. at 594)).

25. *E.g.*, *id.* at 150–51 (accepting the idea that the *Daubert* factors are not a definitive list).

26. *See id.* at 156 ("But no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

27. *Id.* at 152.

28. *See id.* at 151 (demonstrating how experts simply know things from experience, such as one who tests perfume and can distinguish at a sniff among 140 odors, just by his experience).

29. *See* Adams v. Lab. Corp. of Am., 760 F.3d 1322, 1337 (11th Cir. 2014) ("In Dr.

Even in the field of medical expertise, there are expert witnesses whose testimony does not reflect rigorous scientific methodology. In *Cooper v. Carl E. Nelson & Co.*,[30] for example, an injured worker's medical experts (in a suit against his employer) were challenged by the defendant for not having a scientific basis, and the trial judge, exemplifying an aggressive gatekeeper, agreed and found the testimony inadmissible; however, on appeal, the court reversed,

> because in clinical medicine, the methodology of physical examination and self-reported medical history . . . is generally appropriate. Although it disputes the acceptability of such an approach in the case of conditions whose etiologies are less specific, [the defendant] suggests no alternative that could be employed by the conscientious clinical physician in this situation.[31]

Sometimes medical expertise is based on the rigor of the laboratory tests, but other times there is reliance upon an interview with a patient. The court in *Cooper* noted that as long as an expert is employing a "standard investigating technique" in the field, we should not demand more.[32]

The expertise of an attorney serving as a witness in malpractice litigation seems to be based on observation and experience in the field, much like a translator of drug dealer lingo or a handwriting expert. There is no established methodology (other than listening or observing, and then concluding something), no way to test or reproduce the result of the expert's analysis, and no identifiable error rate—these experience-based practices turn out to be highly subjective fields of expertise. We do expect the expert who observes the standards of law practice to *be* an attorney, which implies that the expert's observations must be grounded in educational accomplishments (including knowledge of ethical rules and the elements of a malpractice claim—an attorney–client relationship, a breach of duty, and damages caused by the breach) as well as experience *in* the practice of law. However, there is no particular methodology to be employed in drafting an expert report; an attorney-expert looks at the facts (or makes some assumptions based on the evidence that will be presented

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Rosenthal's words, properly trained cytotechnologists will 'know what benign looks like' [when they decide whether or not to send a slide to a pathologist] . . . A cytotechnologist's task, then, involves not a 'methodology,' but judgment—refined and disciplined through training, practice, and knowledge . . . .").

30. Cooper v. Carl A. Nelson & Co., 211 F.3d 1008 (7th Cir. 2000).

31. *Id.* at 1020 (rejecting the defendant's attempt to suggest the evidence was inadmissible without providing an alternative).

32. *Id.* (citing United States v. Lundy, 809 F.2d 392, 395 (7th Cir. 1987)) (noting that arson experts regularly rely on interviews with witnesses).

at trial), namely the actions of the defendant-attorney, and then applies the standards of the legal community to make an assessment of whether the defendant's actions fell below those standards. Significantly, there is almost always a battle of the experts in malpractice litigation—the plaintiff's expert will testify that the defendant did not live up to the standards of the legal community, and the defendant's expert will testify that there was no breach of an identifiable duty. Such contradictory testimony is, of course, not unique to malpractice litigation; but a battle of the experts always raises the concern that since both experts cannot possibly be correct in their assessments, one of them must be lying, or at least exaggerating. However, even though exaggeration is always a risk and a possibility, both experts may be genuinely convinced of the accuracy of their respective evaluative "interpretations" of the defendant's actions. Indeed, even scientific experts disagree, and while some judges have an idealized view of the scientific enterprise (such that when scientists disagree, one must be a charlatan), the better view is to recognize the uncertainties of science.[33] For example, in *United States v. Finley*,[34] a criminal case involving psychological expertise, the court characterized science as based upon reasonable beliefs, not certainty, and acknowledged that it is subject to internal disagreements:

> It appears from the record before us that [the expert] based his diagnosis on proper psychological methodology and reasoning . . . . [He] did not base his conclusions solely on [the defendant's] statements; rather, he used his many years of experience . . . .
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> . . . .
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> . . . Based on his clinical experience . . . [the expert] concluded that [the defendant] was not faking or lying.
>
> A belief, supported by sound reasoning . . . is sufficient to support the reliability of a mental health diagnosis.
>
> . . . .
>
> . . . We have recognized that concepts of mental disorders are "constantly-evolving conceptions" about which "the psychological and psychiatric community is far from unanimous."[35]

Moreover, science often involves alternative explanatory models. In *Walker v. Soo Line Railroad Co.*,[36] a case involving an injury on a tower

33. *See* DAVID S. CAUDILL & LEWIS H. LARUE, NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN LAW 23–24 (2006) (stating that judges often fail to recognize the limitations of science, such as the uncertainties that accompany it, in their review of expert witness testimony).

34. United States v. Finley, 301 F.3d 1000, 1009 (9th Cir. 2002).

35. *Id.* at 1008–12 (quoting United States v. Rahm, 993 F.2d 1405, 1411 (9th Cir. 1993)).

36. Walker v. Soo Line R.R. Co., 208 F.3d 581 (7th Cir. 2000).

during an electrical storm, the trial judge barred the testimony of an electrical safety expert, concerning the different ways that lightning could have penetrated the tower on which the plaintiff was stationed, as too speculative.[37] The appellate panel, however, found his testimony scientifically valid since experts "are allowed to posit alternate models to explain their conclusion."[38] Therefore, in the highly interpretive world of legal malpractice litigation, it is not a surprise to find a battle of credible attorney-experts.

Nevertheless, there is a persistent concern that experts have a hard time remaining objective and that lawyers inevitably choose expert witnesses who will take the side of the attorney's client in a trial. We all know that an expert is not supposed to be an advocate; for example, the *Code of Pretrial and Trial Conduct* provides that

> [i]n retaining an expert witness, a lawyer should respect the integrity, professional practices and procedures in the expert's field and must never ask or encourage the expert to compromise the integrity of those practices and procedures for purposes of the particular matter for which the expert has been retained.[39]

There is always a risk that an attorney will indirectly or impliedly ask an expert witness to compromise his or her integrity for a client's cause, and thereby become an advocate.[40] Likewise, there is always a risk, related to the problem of advocacy on the part of an expert, that an expert witness will exaggerate his or her certainty. There is no reason that an attorney-expert in a malpractice case is immune from these risks.

B. *Over-Testifying and the Problem of Advocacy*

> Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the

37. *Id.* at 589 (explaining the district courts reasoning for not allowing the entirety of the electrical safety expert's testimony to be admitted).

38. *See id.* (identifying the appellate panel's reasoning for finding the expert witness's testimony valid).

39. CODE OF PRETRIAL AND TRIAL CONDUCT 10 (Am. Coll. of Trial Lawyers 2009) (emphasizing that a lawyer must not interfere with the integrity of an expert witness's testimony).

40. *See* Andrew W. Jurs, *Expert Prevalence, Persuasion and Price: What Trial Participants Really Think About Experts*, 91 Ind. L.J. (forthcoming 2015) (recent survey of experts in state courts indicated that 59% "agreed that lawyers 'frequently urge experts to be less tentative in their testimony'").

person who employs them.[41]

Over a century after the foregoing warning, the Phil Spector murder trial raised similar concerns about the trustworthiness of expert witnesses. The prosecutor in the trial, Deputy District Attorney Alan Jackson,

> flatly dismissed the testimony of a series of experts for the defense, calling them "pay-to-say" witnesses who received more than $400,000 in return for doing just what was expected of them. "How does a homicide become a suicide? You write a big, fat check," Jackson told jurors. "If you can't change the science, you buy the scientist."[42]

One journalist reporting on the case cynically concluded that Jackson is right:

> Expert witnesses don't have much credibility. Generally they have been carefully selected by sophisticated lawyers who know exactly what they're looking for . . . . [and they are] prepped by the lawyers so that the bulk of their testimony is worked out even before the trial starts.
>
> We're not saying these witnesses are liars; most, no doubt, tell the truth as they believe it to be. But they are, by the very nature of the system, partisan. The more reasonable, measured or objective an expert is, the less desirable he is to those who do the hiring.[43]

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41. Lord Abinger v. Ashton, 17 L.R. Eq. 358, 374 (1873) (discussing the natural tendency of a paid expert to testify with bias).

42. *Spector—and Expert Witnesses—on Trial*, L.A. TIMES (Mar. 30, 2009), http://articles.latimes.com/2009/mar/30/opinion/ed-witness30 ("[Experts are] paid—in the Spector case, one witness received what Jackson called a 'horse-choking $181,000'—by the very lawyers who hope to get a particular answer out of them and who, in many cases, they hope to work for again in the future.").

43. *See id.* which points out that other countries have tried to alleviate the problem of expert partisanship:

> In Germany, for instance, only the judge may select expert witnesses. Australia is experimenting with a system known as "hot tubbing," in which the experts are chosen by the two sides but are then required to testify at the same time—so they can discuss the case and ask each other questions. The British have recently adopted a system in which both sides must agree on a single expert. If they can't come up with a mutually acceptable person, the judge decides for them.

Id.; *see also* Sander Greenland, *The Need for Critical Appraisal of Expert Witnesses in Epidemiology and Statistics*, 39 WAKE FOREST L. REV. 291, 292 (2004):

> A competent lawyer will shop for experts with views favorable to the lawyer's case, and will attempt to deny use of unfavorable experts by the opposing side (e.g., by attempted disqualification in pre-trial maneuvers; by attempted impeachment in cross-examination; or by retaining, but not naming or using, unfavorable experts, thus denying them to the opposing side).

See also Jurs, *supra* note 40 (providing a recent survey of lawyers in state courts indicated that "less than half of the lawyers" viewed impartiality as an important characteristic of an expert witness to

The notion that a typical expert witness's testimony is not "measured" or "reasonable" gives rise to the term "over-claiming." Indeed, the concern in recent years over the reliability of forensic science in criminal prosecutions is based in part on the perception that forensic experts exaggerate the results of their analyses. Forensic science identification techniques, other than DNA profiling, do not employ formal probability analysis; thus, for example:

> fingerprinting, ballistics, fiber and handwriting analysis [do not currently have] the necessary statistical foundation to establish accurate probabilities. Yet, instead of acknowledging their imperfect knowledge, fingerprint experts, for example, routinely testify that they can identify a specific person's prints to the exclusion of all other people in the world with 100% certainty.[44]

However, expert witnesses are under pressure to testify with certainty,[45] and one can imagine that an attorney-expert who was very measured in his testimony, acknowledging that he is not 100% certain about his conclusions, would not be hired in a malpractice case. Thus I think the risk of over-claiming on the part of attorney-experts in malpractice litigation is quite high.

C. *Attorneys Are Trained to Be Uncertain*

> **Rick**: How can you close me up? On what grounds?
> **Captain Renault**: I'm shocked, *shocked* to find that gambling is going on in here!
> [A croupier hands Renault a pile of money]
> **Croupier**: Your winnings, sir.
> **Captain Renault**: [sotto voce] Oh. Thank you very much. [aloud] Everybody out at once.[46]

I recognize that my suspicion that attorney-experts in malpractice cases frequently exaggerate the certainty of their evaluations (of the defendant's conduct) could be viewed as naïve—one should hardly be shocked that

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be retained; impartiality was one of the least important characteristics, well below qualifications and experience (98% of surveyed lawyers agreed) and credibility (91% agreed)).

44. Jennifer L. Mnookin, *Clueless 'Science,'* L.A. TIMES (Feb. 19, 2009), http://articles.latimes.com/2009/feb/19/opinion/oe-mnookin19 (identifying the lack of certainty with particular scientific identification techniques and noting that some experts testify as to flawless results).

45. *See* Jurs, *supra* note 40 (recent survey of experts in state courts indicated that 66% of them thought that "willingness to draw firm conclusions" was a factor that persuaded judges).

46. CASABLANCA (Warner Bros. 1942).

there is gambling going on in Rick's casino in Casablanca! Is my subtitle, "Are Attorney-Experts Being Asked to Be Advocates?," an unwittingly rhetorical question? Indeed, it is common for opposing attorney-experts to state, respectively, with a high level of confidence, that the defendant-attorney clearly committed malpractice or clearly did not. That is not the way that attorneys typically think; however, because we are trained to see good arguments on both sides of an issue, we can look at a situation involving a claim of legal malpractice, and see how it could be viewed or explained as either (i) negligence *or* (ii) the type of mistake in judgment (e.g., whether it would be good to have a jury, whether the case is strong enough to win, whether your client will appear sympathetic) that attorneys make all the time. Hence the ability of lawyers, and even upper level law students, to argue either side of a controversy, depending on which "side" engages the lawyer's services.

Because courts reach final decisions in litigation, there is often a perception that lawyers deal in certainties. For example, the fact that lawyers employ syllogistic reasoning—"taking a general rule and applying it logically to the facts"—leads some commentators to imagine that when law students "brief" a case in the classroom, they are encouraged to learn to find the *correct* application of the law:

> [Syllogistic reasoning] is best represented in law school training that prepares the student to *brief* cases. The student is taught to apply deductive syllogistic reasoning until one and only one conclusion is reached.[47]

It would be more accurate to say that law professors spend class time breaking students of the habit of seeing only one possible conclusion, so that they learn to create arguments on any side of an issue. Hence, the familiar variations of the Socratic method in the law school classroom to develop critical thinking by challenging a seemingly defensible position under current legal doctrine with another equally defensible position under the same doctrine.

A similar misconception is found in discussions of the difference between science and law, wherein science is characterized by both open-mindedness and uncertainty, while law is viewed as a sphere of finality where controversies are settled. For example, scientists may not be able to state with 100% certainty that a medical device caused a patient to become infected and develop a disease, because there might be other causes; but a

47. David S. Caudill, *Coming to Terms with Lacan: Legal Discourse as Analysand*, 6 INT'L J. SEMIOTICS L. 203, 215 (1993) (book review) (quoting DRAGAN MILOVANOVIC, POSTMODERN LAW AND DISORDER: PSYCHOANALYTIC SEMIOTICS, CHAOS AND JURIDIC EXEGESES (1992)).

court, at the end of a products liability trial, *can* find causation (perhaps as a matter of probability, e.g., more likely than not, but the verdict will construct the fact that there was, in reality, causation, such that damages will be paid). While that is true, it is not accurate to contrast law and science by stating, "For lawyers, of course, the whole point is to find cause,"[48] as if lawyers are the opposite of scientists—and as if scientists are advocates, who debate their findings, while lawyers trade in certainties. It would be more accurate to say that the whole point of litigation is to find cause (or not), but that products liability plaintiffs' lawyers are prepared to *argue*, with conviction, that causation is present, and defense attorneys are prepared to argue, with that same level of conviction, that causation has not been established. Scientists and lawyers are both advocates, respectively employing rhetoric to make claims that other scientists or lawyers might challenge.[49]

My point is that lawyers are trained to see both sides of an issue, and then, as advocates, they are trained to argue their client's cause with conviction and certainty. They know that they are not allowed, as advocates, to *lie*, but they are allowed to characterize facts in their client's favor. For example, while lawyers are not allowed to offer evidence *known* to be false, they are allowed to offer testimony that they reasonably believe to be false—they do not vouch for the evidence they submit, and they have an ethical obligation to present their client's case "with persuasive force."[50] Lon Fuller famously described the partisan role of a lawyer: "His task is not to decide but to persuade," and his viewpoint, far from being detached, is "from that corner of life into which fate has cast his client."[51] Another

48. Gina Kolata, *The Sad Legacy of the Dalkon Shield*, N.Y. TIMES (Dec. 6, 1987), http://www.nytimes.com/1987/12/06/magazine/the-sad-legacy-of-the-dalkon-shield.html.

49. *See* David Goodstein, *How Science Works*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 67, 74 (2d ed. 2000):

> [S]cience is, above all, an adversary process. It is an arena in which ideas do battle, with observations and data the tools of combat. The scientific debate is very different from what happens in a court of law, but just as in the law, it is crucial that every idea receive the most vigorous possible advocacy, just in case it might be right.

50. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmts. 2 & 8 (2002). The Rules are drafted somewhat indirectly—instead of stating that an attorney may offer testimony reasonably believed (but not *known*) to be false, the Rules state that an attorney may *refuse* to offer testimony reasonable believed to be false, which results in the same freedom, surprising to some, to introduce shaky evidence.

51. Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34, 35–36 (Harold J. Berman, ed., 1973); *see also* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 3 (2008) ("[A]dversary lawyers should not pursue a true account of the facts of a case and promote a dispassionate application of the law to these facts.

commentator formulated the attorney's task as follows:

> The adversary process assigns each participant a single function. The judge is to serve as a neutral and passive arbiter. Counsel are to act as zealous advocates. . . . Each knows what is expected of [them]. . . . Among the greatest dangers . . .[is] that the attorney will compromise his client's interests if compelled to serve as an officer of the court rather than as an advocate.[52]

Now, take this trained lawyer and put him or her in the role of an expert witness in a malpractice case, and two potential problems arise. If the lawyer becomes an advocate, perhaps by expressing 100% confidence in his or her assessment of the defendant's conduct, even as the lawyer-witness can easily see how the opposite conclusion *could* be correct, then the lawyer has failed in his duty to the court.[53] If, on the other hand, the lawyer gives a measured and careful analysis of the defendant's conduct, conceding that his or her interpretation is not the only way to characterize the situation, then the lawyer has seemingly failed to be any use in the litigation![54]

In some legal malpractice suits, the conduct of the defendant-lawyer may be so clearly negligent, or so clearly excusable, that testifying with 100% confidence might not be problematic. In the next section, however, I attempt to identify some controversial defenses to legal malpractice claims that are highly interpretative and may not lend themselves to high levels of confidence in expert testimony, even though high levels of confidence are the primary markers of useful attorney-expert testimony. By "controversial," I do not mean to suggest that these defenses are not doctrinally sound; I simply mean that the risk of advocacy on the part of attorney-experts, in cases where these defenses are raised, is extremely high.

III. CONTROVERSIAL DEFENSES

There are some defenses to legal malpractice that do not rely heavily on the testimony of a supporting attorney-expert, and a plaintiff's challenges

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Instead, they should try aggressively to manipulate both the facts and the law to suit their clients' purposes.").

52. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 35 (1988).

53. *See generally* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 37:26, at 1734 (2014) ("A lawyer retained as an expert witness does not thereby enter into an attorney[-]client relationship. The expert witness' role is not as an advocate but to render opinions, which, in theory, are neutral.").

54. *See* FED. R. EVID. 702 (permitting expert testimony to assist the trier of fact in determining which side in the litigation is correct on an issue of fact).

to such defenses likewise do not rely heavily on an opposing attorney-expert. For example, the (i) defense that the legal malpractice claim is premature, and the related (ii) defense that no damages have been suffered, both appear to rely on objective facts (i.e., the client still has a cause of action, and no injury can be proved).[55] Similarly, the (iii) defense that the statute of limitations has expired is a purely legal decision as to the applicable limitations period;[56] thus, attorney expertise would not be required.[57] The (iv) defense of no attorney–client relationship does not rely on expertise regarding the standard of care in the legal community because an attorney–client relationship is a precondition to a malpractice suit.[58] Also the (v) defense that the plaintiff in a malpractice suit did not establish the standard of care by use of expert testimony is not a defense that relies on the testimony of an attorney-expert.[59]

There are other defenses, however, that rely heavily on the expertise of an attorney who can establish or refute a claim of malpractice. The defenses I term controversial often arise in cases where there is clearly an attorney–client relationship, an unfortunate outcome of the representation that leaves the plaintiff with a financial loss, and even a clear indication that the advice given by the attorney was not good. One might think that the combination of those three phenomena would pave the way for a successful malpractice lawsuit, but there are four defenses, all of which rely on subjective judgments by attorney-expert witnesses when they are raised or challenged, that destabilize the claim of an injured client against an

55. *See, e.g.*, Colman v. Fisher-Price, Inc., 954 F. Supp. 835, 840 (D. N.J. 1996) ("[P]laintiffs have not suffered any legally cognizable injury as a result of the actions of plaintiffs' former counsel, and any malpractice claims by plaintiffs are premature at this time.").

56. *See* Erickson v. Croft, 760 P.2d 706, 710–11 (Mont. 1988) (stating legal malpractice statute of limitations, not contracts statute of limitation, govern a malpractice claim based on implied contract for legal services).

57. While testimony from a legal expert, and therefore legal expertise, is generally prohibited, there is a rare exception when courts are faced with complex legal issues, but the statute of limitations would not be considered complex for any court. *See* David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 136, 153–55 (2012) ("The conventional rule against expert legal testimony is difficult to sustain when the legal standard or term of art is complex and difficult to understand. . . . Many cases allow testimony to explain complex law to the jury.").

58. *See* Hashemi v. Shack, 609 F. Supp. 391, 393 (S.D.N.Y. 1984) (indicating in a malpractice action, "[f]ormality is not an essential element in the employment of an attorney, and since '[t]he initial arrangements for representation are often informal . . . it is necessary to look at the words and actions of the parties'" (citing People v. Ellis, 397 N.Y.S.2d 541, 545 (Sup. Ct. 1977))).

59. *See* Olson v. North, 276 Ill. App. 457, 473, 477 (1934) ("The defendant [argues that] there was no expert testimony to show that he did not exercise that degree of care and skill . . . as used by other [skillful] and reputable lawyers in such cases," and the court agreed that "the plaintiff did not make out a prima facie case.").

attorney who gave bad advice. The first two, assumption of the risk and contributory negligence, essentially blame the client for his or her own loss.[60] The second two, professional judgment and unsettled law, basically relieve the defendant-attorney from responsibility because any reasonable attorney could have made the same mistake as the defendant; hence, the mistake did not constitute negligence.[61]

A. *Assumption of the Risk*

> Assumption of risk is an extremely difficult defense for an attorney to rely upon in a legal malpractice case. It is a rare occasion when one can truly state that the client knew the risks involved. One such instance may be where the client himself is an attorney and plays an active role in the conduct of the case.[62]

Two types of assumption of the risk defense are identifiable in legal malpractice precedent. The first arises when the client is an attorney and therefore could make his or her own assessment of the quality of the erroneous advice given by the defendant attorney. The second is a related defense, insofar as a client who is experienced in legal matters, even if he or she is not an attorney, could likewise make his or her own assessment of the quality of the defendant's erroneous advice.[63]

1. "My Client Is a Lawyer!"

> If the [client] had not been himself a lawyer it would perhaps have never occurred to anyone that his acquiescence [to his attorney's strategy] affected the question [of his attorney's negligence]. But what difference does it make that the [client] is a lawyer? Is there any difference between the duty that a lawyer owes his client who is a layman and that which he owes his client

60. *See* SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 293 (2d ed. 2014) ("Contributory negligence refers to the plaintiff's unreasonable conduct that contributes to the production of the plaintiff's harm . . . . A small amount of plaintiff's carelessness [might be] enough to wholly save a negligent defendant from liability . . . .").

61. *See* Town of N. Hempstead v. Winston & Strawn, LLP, 814 N.Y.S.2d 237, 240 (App. Div. 2006) ("[A]ttorneys . . . cannot be held liable for exercising their professional judgment on a question that was not elementary or conclusively settled by authority.").

62. MEISELMAN, *supra* note 5, § 7.3; *see id.* ("In a legal malpractice action, the plaintiff will not normally have adequate knowledge of the risk to be said to have incurred the risk, because few people without some type of legal training or experience have actual knowledge of most legal perils." (quoting Hacker v. Holland, 570 N.E.2d 951, 958–59 (Ind. Ct. App. 1991))).

63. *See, e.g.*, Behrens v. Wedmore, 698 N.W.2d 555, 572–73 (S.D. 2005) (holding that in some cases experience and learning on the part of the client can cause them to assume the risk of their attorney's decisions if they acquiesce to them).

who is a lawyer?[64]

Over a century ago, in *Carr's Executrix v. Glover*,[65] a malpractice lawsuit in St. Louis went from referee to trial judge to appellate panel while reflecting disagreements over the issue of whether an attorney's duty toward a client is reduced if the client is a lawyer.[66] James Carr, an attorney, initially represented attorney John M. Glover in a suit filed against Glover; and when Glover lost the case, Glover sued Carr alleging that Glover

> had a complete defense on the merits. That he advised Carr fully of this defense, but that Carr, by his negligence, failed to embrace this defense in his answer to the suit, although advised by [Glover] to do so.[67]

The malpractice case was referred to a referee, by consent of the parties, and the referee denied Glover's claim because he was a knowledgeable attorney and he acquiesced to Carr.[68] Glover then filed a motion to set aside the referee's report, which was sustained in part (on the issue of Carr's negligence) by the trial judge who wrote:

> A lawyer is not liable in damages to his client for a mere error in judgment concerning a legal proposition on which enlightened legal minds may fairly differ. But the same degree of diligence is required of a lawyer that is required of other men employed to render services . . . if the error is such as to evince negligence he is liable.[69]

In the view of the referee, Carr's failure to plead Glover's defense was not negligent, because Glover was a lawyer and the pleading "was fully discussed by James Carr and [Glover]"—Glover acquiesced and thereby assumed the risk of the adverse outcome.[70] For the trial judge, however, "Glover expressed apprehension" concerning the pleadings, and then acquiesced *to Carr's advice*, in reliance on that advice.[71] The trial court

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64. Carr's Ex'x v. Glover, 70 Mo. App. 242, 248–49 (1897) (quoting the trial judge's written opinion).

65. Carr's Ex'x v. Glover, 70 Mo. App. 242 (1897).

66. *See id.* at 249 (quoting the trial judge's written opinion) (examining the issue of whether negligence can be asserted by an attorney in a suit against another attorney).

67. *Id.* at 246.

68. *See id.* at 247–48 (quoting the trial judge's written opinion) (noting the referee found that Glover permitted his attorney to continue with his strategy after a full discussion).

69. *Id.* at 247 (quoting the trial judge's written opinion).

70. *See id.* (quoting the trial judge, quoting the referee) (providing the referee's reasoning for finding assumption of risk against an attorney-client in a malpractice case).

71. *See id.* at 248 (quoting the trial judge's written opinion) (noting that the defendant did not consent to his attorney's strategy without raising concern as to its effectiveness).

recognized that Glover was "a lawyer of unusual ability," unlike other lawyers "who ha[d] very little learning."[72]

> In . . . a case like this shall we undertake to inquire into the degree of skill and learning of the client? It seems to me that this is a wholly immaterial matter . . . . [R]egardless of his own learning and ability[, a lawyer-client is] entitled to the same skill and the same degree of diligence at the hands of his attorney that he should have if he were a layman.[73]

On appeal, however, the foregoing rule was found to have "no application to the facts in this case."[74] While the trial judge correctly said that "mere acquiescence is not sufficient to estop Glover from pleading [Carr's] negligence," this case was extraordinary because Glover criticized and suggested amendments to the pleadings drafted by Carr; Glover actually advised Carr in a letter that he did not want to make a defense to the merits.[75] Glover was, therefore, not acquiescing to the skill and ability of his attorney, as Carr's judgment had no influence on Glover's own, independent decision as to how to proceed.[76]

Because these facts are extreme, the general rule expressed by the trial judge in *Carr* remains—there is nothing about being an attorney that releases his or her attorney from the duty of care.[77] However, when the attorney-client takes some level of control of a matter, and begins to make strategic decisions, an exception to the rule develops.[78]

Another exception was suggested in *In re TCW/Camil Holding LLC*,[79] where the defendant-attorneys who, during arbitration, overlooked a clause in an agreement (and thereby caused a loss) were liable for malpractice, even though an in-house attorney had reviewed the documents.[80] The

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72. *Id.* at 249 (quoting the trial judge's written opinion).

73. *Id.* (quoting the trial judge's written opinion).

74. *Id.* at 250.

75. In the letter Glover wrote, "I beg you will file it as I prepared it, and I will take responsibility therefor." Carr's Ex'x v. Glover, 70 Mo. App. 242, 250–51 (1897).

76. *See id.* at 251–52 (finding a client-attorney waived his claim of negligence against his attorney by agreeing with his attorney over the course of action that caused him to lose the underlying case).

77. *See id.* at 249 (quoting the trial judge's written opinion) (declaring that attorney-clients do not get a lower standard of care simply because they are represented by another attorney in their case).

78. *See, e.g., id.* at 242, 250–52 ("Here the client was an able lawyer . . . . The acquiescence . . . of the client [was not due to] his confidence in the skill and ability of his attorney. [Rather his] assent . . . was produced . . . by reason of his individual knowledge and superior skill as a lawyer.").

79. TCW/Camil Holding LLC v. Fox Horan & Camerini LLP (*In re* TCW/Camil Holding LLC), 330 B.R. 117 (D. Del. 2005).

80. *See id.* at 125, 128 ("The court concludes that, by failing to identify plaintiff's limited obligation to cause Camil Holdings to repurchase the New Camil Units from IRHE, defendant's

court pointed out that the in-house attorney had sought the attorneys' advice because she had no experience in litigation or arbitration.[81] If she had possessed more experience in those areas, the opinion suggests the possibility of assumption of the risk as a defense.[82] Significantly, *In re TCW/Camil* also involved a second sophisticated employee of the client, a banker, who read all the documents,[83] thereby suggesting another type of "assumption-of-the-risk" defense, for legally experienced clients.

2. "My Client Is Experienced in Legal Matters!"

In *Behrens v. Wedmore*,[84] the sellers of a funeral home sued their attorney for malpractice after the buyer, who owed more money to the sellers than the value of the security for the loan, went bankrupt.[85] The client-sellers, who were "experienced business people," were deemed to have known about and assumed the "risk of nonpayment" under any loan.[86] Similarly, in *Berman v. Rubin*,[87] an attorney was sued for

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actions fell below the Standard of Care owed to plaintiff.").

81. *Id.* at 124.

82. *See id.* at 132 (finding that an attorney who lacks experience in an area of the law, and specifically seeks out assistance, should not be found to have caused her own harm).

83. *See id.* at 121, 132 (confirming that a sophisticated client who is actively involved in the case could be held to have caused some of his own harm).

> A client's knowledge and sophistication may create a defense to legal malpractice. . . .
>
> Christensen and Moody both have a high degree of knowledge and sophistication. Both Christensen and Moody reviewed several drafts of documents filed by defendant. However, Christensen is not a lawyer. Although Moody is a lawyer, she had no experience with litigation or arbitration and she had many other obligations, which prevented her from focusing on the Arbitration. Furthermore, when Moody read defendant's drafts, she did so to see if they were factually correct, not to assess defendant's arguments.

Id. at 132 (citations omitted).

84. Behrens v. Wedmore, 698 N.W.2d 555 (S.D. 2005).

85. *Id.* at 561 (informing readers the plaintiffs sought to hold their attorney negligent for failing to inform them of the risks of selling their business to the buyer).

86. *Id.* at 573.

> [W]e observe that [defendant] Wedmore's expert testimony indicated that experienced business people should know that when one makes a loan there is a risk of nonpayment. Here, by the terms of the Initial Agreement, [Plaintiffs, the] Behrens clearly agreed to assume the risk of a $2 million unsecured loan. Even after the security Wedmore obtained, Behrens remained saddled with an approximate $1.5 million note secured by a mortgage on property worth only $425,000. Consequently, according to one expert, Behrens "had to know that they weren't fully protected because they've got . . . a note secured by an asset worth" substantially less than the value of the note. Considering all of the evidence, Behrens must be charged with the knowledge that by negotiating a $2 million *unsecured* loan, they incurred a risk of not being repaid in full .... We, therefore, agree that *there was sufficient evidence to charge these businessmen with having voluntarily assumed the risk* of agreeing to a $2 million unsecured note.

Id. (emphasis added). Note that the clients had negotiated a sale agreement, calling for a $2 million

misrepresenting the effect of a document and failing to advise the client of its terms.[88] However, the court on appeal held that there was no negligence because

> [t]he agreement in this case is not ambiguous, nor is it technical or laced with "legal jargon." [Plaintiff] Berman admits that an initial draft of the agreement was unsatisfactory to him, that the draft was changed, that he read the changes, that he initialed each and every page, and that he placed his signature on the final page. There are few rules of law more fundamental than that which requires a party to read what he signs and to be bound thereby . . . . This rule has particular force when the party is well educated and laboring under no disabilities. To hold otherwise is to create the potential for malpractice litigation in every contract dispute.
>
> . . . [Our] holding is simply that when the document's meaning is plain, obvious, and requires no legal explanation, and the client is well educated, laboring under no disability, and has had the opportunity to read what he signed, no action for professional malpractice based on counsel's alleged misrepresentation of the document will lie.[89]

A variation of the experienced-client defense is the rule that an attorney is not liable for following the client's instructions. For example, a coin investor who was warned that a proposed transaction was ill-advised was held to have assumed the risk,[90] and an attorney who followed his clients' instructions after advising the clients of their options, clearly had a viable defense to a malpractice claim.[91]

It is not always easy to distinguish assumption of the risk from the next

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unsecured note, *before* hiring counsel. *Id.* at 562–63.

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

88. *See id.* at 804 (indicating that after the trial court gave an unfavorable reading to the property settlement agreement, Berman sued his attorney for not preventing the harm and not warning him it could occur).

89. *Id.* at 806.

90. *See* Stedman v. Hoogendoorn, Talbot, Davids, Godfrey & Milligan, 843 F. Supp. 1512, 1516, 1519 (N.D. Ill. 1994), *vacated*, 61 F.3d 906 (7th Cir. 1995) (holding that the client "elected to ignore the warnings that he had been given [by counsel] . . . and to proceed with the investment"; his "decision to proceed anyway must be considered as his own deliberate assumption of those risks.").

91. *See* Boyd v. Brett-Major, 449 So. 2d 952, 954 (Fla. Dist. Ct. App. 1984).

> Plaintiffs argue that to permit [the defendant attorney's] defense such as that presented here, which is without legal precedence, would establish an untenable situation by which attorneys could avoid liability for their professional omissions simply by pleading that they followed a course of action desired by the client. We are not convinced that the door is opened to a parade of horribles unless we disapprove of, as a defense to a malpractice claim, [the claim] that the course of action taken by counsel was at the direction of an otherwise well-advised client.

Id.

defense discussed below, contributory negligence. Indeed, "[s]ome jurisdictions have abolished the doctrine of implied assumption of the risk in favor of comparative negligence."[92]

B. *Contributory Negligence*

Numerous cases involve an attorney's claim that the client should have paid more attention to documents, and therefore, contributed to the damages the plaintiff suffered; but those claims are rarely successful. In *Helmbrecht v. St. Paul Insurance Co.*,[93] a negligent attorney failed to obtain a fair settlement for the wife in a divorce action; the attorney's defense to the malpractice suit was that the client had been careless in failing:

> [T]o advise him of [her husband's] safety deposit box, gun collection, and coin collection. . . . If [the plaintiff] was careless, it was in her misplaced reliance upon [her attorney's] negligent representation of her. We will not limit recovery in this case merely because [she] trusted [her attorney] to properly perform the services for which he was employed.[94]

Similarly, in *Speedee Oil Change No. 2, Inc. v. National Union Fire Insurance Co.*,[95] a corporate vice president relied upon an attorney's advice that a lease option could be exercised after a lease expired. Although the attorney's erroneous advice was clear on the face of the lease, the court ruled the client's inattentiveness did not constitute contributory negligence.[96]

> One may agree that the corporation's vice-president was, at the least, inattentive to his own contractual obligations to the corporation in relying on that advice. . . . One may agree that the vice-president should not have accepted the attorney's advice because so obviously mistaken.
>
> Yet the attorney's gross inattentiveness to his obligation to give correct legal advice, to give a correct interpretation of a simple contractual provision, was also a legal cause of the corporation's loss, for had the attorney not given that mistaken advice the vice-president could not have

92. 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 22:3, at 117 (2011) (citing Harrell v. Crystal, 611 N.E.2d 908 (Ohio Ct. App. 1992)).

93. Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis. 1985).

94. *Id.* at 132–33; *see also* Alper v. Altheimer & Gray, No. 97 C 1200, 2002 WL 31133287, at *1 (N.D. Ill. Sept. 26, 2002) (holding that the clients' failure to read clear contract language was not a defense when attorney was hired to "shape transaction documents on their behalf").

95. Speedee Oil Change No. 2, Inc. v. Nat'l Union Fire Ins. Co., 444 So. 2d 1304 (La. Ct. App. 1984).

96. *See id.* at 1308 (explaining that even a sophisticated client may not necessarily be held contributorily negligent).

> thoughtlessly relied on it and presumably would not have allowed termination of the lease to occur without exercising the option to extend.[97]

Finally, in *KBF Associates LP v. Saul Ewing Remick & Saul*,[98] the defense of contributory negligence was not available despite the client's "capability and expertise" to have seen the defendant-attorney's error.[99] On the other hand, a client who is a skilled attorney, is fully advised, and decides on a course of conduct that turns out badly can be contributorily negligent, and even a non-attorney who understands legal formalities and obligations can be contributorily negligent notwithstanding erroneous legal advice![100] Similarly, if a client fails to appeal a dismissal of a suit against a securities company that she likely would have won, she cannot bring a malpractice claim against the attorney who represented her in the litigation.[101] Finally, if a client chooses not to follow an attorney's advice, the defense of contributory negligence is available.[102]

In all of the foregoing cases, it is easy to understand both (i) how a lawyer who has been careless should be held responsible, and (ii) how a

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97. *Id.*

98. KBF Assocs. LP v. Saul Ewing Remick & Saul, 35 Pa. D. & C.4th 1 (Pa. Com. Pl. 1998).

99. *See id.* at *3:

> Defendants ask this court to rule that a client may be barred from suing his attorney for malpractice with respect to errors within the scope of the attorney's engagement where it can be demonstrated that the client had the capability and expertise to have independently determined the error. The court finds no support in Pennsylvania law for this proposition and accordingly rules that contributory negligence is no defense under the specific factual situation presented herein.

100. *See* TCW/Camil Holding LLC v. Fox Horan & Camerini LLP (*In re* TCW/Camil Holding LLC), 330 B.R. 117, 132 (D. Del. 2005):

> A client who is a skilled lawyer, who is fully advised of issues involved, and decides what course of action to take may . . . be found to be contributorily negligent. A non-attorney client may be contributorily negligent when it is reasonable to expect the client to understand the legal obligations or formalities notwithstanding erroneous advice from an attorney.

101. *See* Bradley v. Davis, 777 So. 2d 1189, 1190 (Fla. Dist. Ct. App. 2001), *dismissed*, 805 So. 2d 804 (finding that the client was not able to sue for legal malpractice when he neglected to preserve the error on appeal).

102. Ott v. Smith, 413 So. 2d 1129, 1135 (Ala. 1982).

> In actions against doctors and dentists for medical malpractice, courts have held the doctrine of contributory negligence to be a proper defense. . . . A patient will thus be barred from recovery for medical malpractice where the patient has disobeyed medical instructions given by a doctor or dentist or has administered home remedies to an injury without the aid of medical advice. There would seem to be no reason whatever why the same rule should not be applicable in a legal malpractice action where there is evidence that a client chose to disregard the legal advice of his attorney. In our opinion, any other rule would be grossly unfair.

Theobald v. Byers, 13 Cal. Rptr. 864, 866 (Dist. Ct. App. 1961).

client who is capable of understanding his lawyer's mistake, but is simply not paying attention, should be held accountable. It *seems* unfair to blame the client who relies on an attorney for help, but from a different perspective, it seems unfair to blame an attorney for an error that his legally experienced client was perfectly capable of recognizing. This interpretive instability is what allows attorney-experts on each side of the controversy to testify with confidence either (i) that any reasonable attorney would expect a sophisticated client to pay careful attention, or (ii) that any reasonable attorney would *never* rely on a client to catch an error. The doctrinal rationale for legal malpractice liability has this inherent instability:

> The rule is well established that an attorney is liable to his client for negligence in rendering professional services. The courts have consistently held that liability will be imposed for want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. The lawyer can thus properly be classified with members of various other professions who are considered to possess knowledge, skill or even intelligence superior to that of an ordinary man and are, as a consequence, held to a higher minimum standard of conduct.[103]

If one's client is sophisticated and knowledgeable in legal matters, and capable of determining his or her attorney's error and avoiding the adverse consequences that follow, then, one could testify with confidence that there is no malpractice, or that there is, because the duty of an attorney remains.

A similar interpretive instability can be found in those defenses that, in contrast to blaming the client for its losses, are based on the notion that the attorney's mistake was understandable and could have been made by anyone.

C. *Professional Judgment*

> Attorneys are free to select among reasonable courses of action . . . without thereby exposing themselves to liability for malpractice."[104]

In *Hatfield v. Herz*,[105] an attorney was sued for malpractice on the basis of a litany of alleged failures—to prepare for trial, to call good defense witnesses, to introduce documents into evidence to support the defense, to consult with his lawyer-client concerning tactics, to bring proper motions

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103. *Theobald*, 13 Cal. Rptr. at 865–66 (citations omitted).

104. Iocovello v. Weingrad & Weingrad, LLP, 772 N.Y.S.2d 53, 53 (App. Div. 2004).

105. Hatfield v. Herz, 109 F. Supp. 2d 174 (S.D.N.Y. 2000).

before trial, and to demand a jury trial.[106] While the court acknowledged the duty of attorneys "to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community,"[107] the court nevertheless recognized that "[a]ttorneys are entitled to significant discretion in determining which positions to advance on the behalf of their clients, and in determining how best to advance those positions."[108] Because attorneys are not infallible, there is no liability for "honest mistake[s] of judgment where the proper course of action is open to reasonable doubt."[109] Neglect and ignorance can be the basis for liability, but not mere "dissatisfaction with strategic choices." Accordingly, the *Hatfield* court found no malpractice liability.[110]

Likewise, in *Healy v. Finz & Finz*,[111] an attorney in a medical malpractice case presented an expert who could not testify to when a newborn infant was injured, and thereby could not establish a defendant-doctor's actions during delivery as having proximately caused the injury.[112] The attorney was sued by his client for malpractice for choosing the wrong expert, but the court found that claim "insufficient to sustain" a legal malpractice suit.[113] Note, however, that the professional judgment defense (exemplified in *Hatfield* and *Healy*) applies only to tactical decisions "between courses of action in an adversarial situation [the viability of which] turned on many factors beyond [a lawyer's] control such as the actions of an opposing counsel or the unknown views of a judge or jury."[114] Thus in *Bush v. Goren*,[115] the failure to advise a client that the statute of limitations on a products liability claim was different from that of a medical malpractice claim was *not* viewed as a tactical

106. *See id.* at 178, 180–81 ("To succeed on his claim of legal malpractice, therefore, plaintiffs must establish that defendant breached this duty, and that said breach was the proximate cause of some injury to him.").

107. *Id.* at 180 (quoting 675 Chelsea Corp. v. Lebensfeld, No. 95 Civ. 6239, 1997 WL 576089, at *2 (S.D.N.Y. Sept. 17, 1997) (Sotomayor, J.)).

108. *Id.* (quoting 675 Chelsea Corp. v. Lebensfeld, No. 95 Civ. 6239, 1997 WL 576089, at *5 (S.D.N.Y. Sept. 17, 1997) (Sotomayor, J.)).

109. *Id.* (quoting Estate of Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907, 921 (S.D.N.Y 1997)).

110. *Id.* (quoting Bernstein v. Oppenheim & Co., 554 N.Y.S.2d 487, 489–90 (App. Div. 1990)).

111. Healy v. Finz & Finz, PC, 918 N.Y.S.2d 500 (App. Div. 2011).

112. *Id.* at 501–02 (reasoning that the plaintiff had not met their burden of proof that "but for" the doctor's negligence, the victim would still be alive).

113. *Id.* at 503.

114. Bush v. Goren, No. 294779, 2011 WL 321637, at *4 (Mich. Ct. App. Feb. 1, 2011) (per curiam).

115. *Id.*

decision.[116]

Another example of an error that is *not* an honest "mistake in judgment or discretion" is the failure to even know about a viable position or argument available that could help one's client.[117] Moreover, while "an 'informed judgment,' does not constitute malpractice," an "attorney may not shield himself from liability in failing to exercise the requisite degree of professional skill in settling [a] case by asserting that he was merely following a certain strategy or exercising professional judgment."[118] In *Rizzo v. Haines*,[119] an attorney failed "to communicate all settlement offers to his client," and such failure supported a malpractice claim.[120]

Closely related to the "honest mistake" aspect of the professional judgment defense—i.e., any attorney could have made such a discretionary error (without committing malpractice)—is the defense that in the representation, the applicable law was unsettled, thereby making the error excusable (since any attorney would have trouble discerning the law).

D. *Unsettled Law*

> The attorney judgment defense, also known as the judgmental immunity doctrine, provides that an attorney is not liable for errors in judgment regarding an unsettled point of law provided the attorney acted in good faith and exercised reasonable care, skill, and diligence. Courts, however, distinguish between "negligence" and "mere error in judgment."[121]

In *L.D.G., Inc. v. Robinson*,[122] an attorney, representing an estate, who did not join potentially liable defendants in a wrongful death action, against a tavern owner, argued that two relevant judicial opinions had different results on the issue of liability, thus rendering the law unsettled.[123] The court, however, noted that it is not always appropriate:

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116. *See id.* at *4 (emphasis added) (acknowledging that the court did not decide whether the failure constituted malpractice).

117. *See* TCW/Camil Holding LLC v. Fox Horan & Camerini LLP (*In re* TCW/Camil Holding LLC), 330 B.R. 117, 128 (D. Del. 2005) (finding that the "law firm breached [the] standard of care owed to [the] debtor when it did not adequately research and investigate [the] debtor's obligation under contract").

118. Rizzo v. Haines, 555 A.2d 58, 65 (Pa. 1989) (emphasis added).

119. *Id.*

120. *Id.* at 66.

121. Angela Foster, *Attorney's Failure to Join Essential Party May Be Malpractice*, ABA LITIGATION NEWS (Feb. 27, 2013), https://apps.americanbar.org/litigation/litigationnews/top_stories/022713-essential-party-malpractice.html.

122. L.D.G., Inc. v. Robinson, 290 P.3d 215 (Alaska 2012).

123. *Id.* at 219, 221–22.

> to grant immunity to lawyers committing an error in judgment with regard to unsettled law.
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> . . . [W]here the law is unsettled—as it was here—there is at least a viable claim that the standard of care requires the attorney to advise a client to follow the reasonably prudent cause of action in light of the uncertainty.[124]

The court referred to an earlier case where there was doubt whether a particular law (the Indian Child Welfare Act, or ICWA) applied in an adoption matter. Instead of complying with the law just to be safe, the attorneys "chose not to pursue [compliance] because of the added cost to the adoptive parents," and "informed the parents that if ICWA applied it would be necessary to comply to prevent a future challenge."[125] Even though the attorney's decision involved "a point of law upon which reasonable lawyers could differ," the court in the earlier case concluded:

> [A]ny uncertainty there might have been about the applicability of [the ICWA] made [the firm's] failure to obtain compliance with the Act *more, rather than less, blameworthy.* The cost of compliance with the [A]ct would be by all measures slight when compared to the potential cost of not complying with the Act. The decision to ignore the additional steps required for a "valid" consent was anything but the act of a reasonably prudent lawyer.[126]

Applying this precedent to the attorney's failure to add a potentially liable defendant to the client's wrongful death claim in *L.D.G., Inc.* led the court to reject the claim that the error in judgment could not constitute legal malpractice.[127]

Likewise, in *Wood v. McGrath, North, Mullin & Kratz*,[128] a malpractice suit following an unfavorable divorce settlement and the unsettled status of the law concerning whether unvested stock options are divisible marital property in Nebraska did not immunize the defendant from a claim that he failed to advise his client of the possible outcomes under the law:

> The attorney's research efforts may not resolve doubts or may lead to the conclusion that only hindsight or future judicial decisions will provide accurate answers. The attorney's responsibilities to the client may not be satisfied concerning a material issue simply by determining that a

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124. *Id.* at 221–22.

125. *Id.* at 219–20 (citing Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 838 P.2d 804, 805 (Alaska 1992)).

126. *Id.* at 221 (quoting Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 838 P.2d 804, 807 n.7 (Alaska 1992)).

127. *Id.* at 222.

128. Wood v. McGrath, North, Mullin & Kratz, PC, 589 N.W.2d 103 (Neb. 1999).

> proposition is doubtful or by unilaterally deciding the issue. Where there are reasonable alternatives, the attorney should inform the client that the issue is uncertain, unsettled or debatable and allow the client to make the decision.[129]

The court concluded that to apply the "judgmental immunity rule" in this case would allow attorneys to "forgo conducting research or providing a client with information on a relevant legal issue once he or she determined that the legal issue at hand was unsettled in this state." This result would not promote "the settlement of disputes in a client's best interests."[130]

By contrast, in *Biomet Inc. v. Finnegan Henderson LLP*,[131] a client brought a malpractice claim for failure to challenge an award of punitive damages in a patent infringement action, and the court found that the "decision not to challenge the punitive damage award . . . was a protected exercise of legal judgment and not a basis for legal malpractice."[132] Because the law was unsettled, the court was satisfied that the decision was not negligent:

> Essentially, the judgmental immunity doctrine provides that an informed professional judgment made with reasonable care and skill cannot be the basis of a legal malpractice claim. Central to the doctrine is the understanding that an attorney's judgmental immunity and an attorney's obligation to exercise reasonable care coexist such that an attorney's non-liability for strategic decisions "is conditioned upon the attorney acting in good faith and upon an informed judgment after undertaking reasonable research of the relevant legal principals and facts of the given case."[133]

Unlike the judicial assessments in *L.D.G Inc.* and *Wood*, the court did not focus its attention on how much conversation or counseling the defendant-attorney had with the client before making a decision based on unsettled law.

The inevitable ambiguity in the evaluation of whether an attorney's erroneous decision was "informed," and made with *reasonable* care after undertaking *reasonable* research, creates the opportunity for attorney-experts on either side of a legal malpractice suit to testify with a high level of confidence, respectively, that the defendant's mistaken judgment did, or

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129. *Id.* at 106 (citation omitted).

130. *Id.* at 108.

131. Biomet Inc. v. Finnegan Henderson LLP, 967 A.2d 662 (D.C. 2009).

132. *Id.* at 665.

133. *Id.* at 666, 669 (quoting Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker, 981 P.2d 236, 240 (Idaho 1999)); *cf.* Gelsomino v. Gorov, 502 N.E.2d 264, 267 (Ill. App. Ct. 1986) ("Liability attaches only when that attorney fails to exercise a reasonable degree of care and professional skill.").

did not, constitute negligence. The defendant's expert can take the perspective that attorneys can never predict an outcome at law: "A lawyer would need a crystal ball, along with his library, to be able to guarantee that no judge, anytime, anywhere, would disagree with his judgment or evaluation of a situation."[134] On the other hand, the plaintiff's expert can see how a strategic judgment when the law is unsettled does not immunize that judgment, but rather places a burden on the attorney to explain the risks of unsettled law. "Because the client bears the risk, it is the client who should assess whether the risk is acceptable. . . ."[135] Both positions can be asserted with confidence, and the defendant's actions can be interpreted according to one perspective or the other. That sort of expert testimony has exactly the same structure as the argument of an advocate.

When the "controversial" defenses discussed above are raised in a legal malpractice case, what is it that distinguishes the attorney-expert's testimony from the trial lawyer's closing jury arguments? Ideally, the difference is that an advocate evaluates the facts in the best light possible for his or her client's cause, while the expert makes a neutral evaluation and looks at the facts as objectively as possible. From a more cynical perspective, should the attorney-expert see compelling arguments on both sides of the litigation, and find that he or she cannot testify with certainty whether the client is liable for malpractice, the expert would most likely be fired.

IV. WHAT CAN BE DONE?

> [L]itigants select and retain expert witnesses in ways that create the appearance of biased hired guns on both sides of every case, thereby depriving fact finders of a clear view of the facts.[136]

I am not simply repeating the observation that experts seem to be biased toward those who hire them. My argument is that attorney-experts in legal malpractice cases have a somewhat unique role in constructing the standard by which they make their evaluation. They testify as to the required degree of skill and care of a lawyer in the community—but not in the abstract, as if one could state what that means; rather, it is described in terms of the facts of the case in which the attorney-expert is providing testimony. With respect to whether the client assumed the risk or

134. Denzer v. Rouse, 180 N.W.2d 521, 525 (Wis. 1970), *overruled by* Hansen v. A.H. Robins, Inc., 113 N.W.2d 550 (Wis. 1983).

135. *Wood*, 589 N.W.2d at 107.

136. Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 174 (2010).

contributed to his or her loss, the attorney made an honest mistake, or the law was unsettled, the expert-attorneys on either side of the lawsuit will undoubtedly state, respectively, with a high degree of certainty whether or not a careful attorney would be responsible for the client's loss. In this respect, the attorney-expert is different from the toxicologist who testifies that a chemical was present, and can show the results of a laboratory test; the attorney-expert is even different from the much more interpretive fingerprint examiner, who at least can show a fingerprint or part of one; and the attorney-expert is different from the highly interpretive social scientist for there is at least some collected data to interpret. The only observations, that the attorney-expert makes, are his or her historical observations of attorneys in practice. Because these are not systematically recorded, the abstract evaluation of the defendant is made by comparing the current observation of the assumed facts of the case, which are then compared to historical observations of careful attorneys. This narrative evaluation cannot be presented in any form other than recollections from the expert's memory together with a subjective judgment about propriety. Hence the potential for complete disagreement concerning whether there was negligence.

How does one ensure honesty, objectivity, and neutrality in this circumstance? Attorneys are subject to *Rules of Professional Conduct*[137] that require honesty. Otherwise, there is no expert code of conduct that governs attorney-experts. Professional associations often have a code of ethics for its members who testify as experts; forensic expert witnesses, for example, are reminded never to "permit themselves to be compromised by conflicts of interest with clients or allow the influence of others to override their objectivity."[138] Such codes seem to reflect awareness that bias is a problem among courtroom experts, but the degree of their effectiveness cannot be established.

Due to concerns about bias in expert testimony, Australian courts[139]

137. *See* MODEL RULES PROF. CONDUCT R. 8.4 (2014) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . .").

138. *Code of Ethics*, FORENSIC EXPERT WITNESS ASS'N, *available at* http://www.forensic.org/code-of-ethics.php; *see also* Opinion 9.07—Medical Testimony, AM. MED. ASS'N, *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page.

139. *See* Justice H.D. Sperling, *Expert Evidence: The Problem of Bias and Other Things*, 4 JUD. REV. 429, 431 (2000), *available at* http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/sperling_speeches.pdf (reporting on a survey of judges that found a large percentage believed partisanship among expert witnesses significantly impacted the quality of their court's fact-finding and arguing for development of a professional expert code of conduct).

have recognized the need for expert codes of conduct. In a recent Australian case, one party's lawyers and their experts were found to be misleading and deceptive, primarily because the expert issued several different (and contradictory) versions of his report without advising the court and opposing counsel.[140] The relevant Civil Procedure Act provided that attorneys and experts in a civil proceeding have an "overarching obligation not to mislead or deceive,"[141] and the court noted an applicable Expert Code of Conduct,[142] which provided in part:

> 1. A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.
> 2. An expert witness is not an advocate for a party.

The question arises whether such a code of conduct, which must be acknowledged and signed by an expert as a condition to testifying, would be effective to stop partisan advocacy or over-claiming if implemented by U.S. attorneys hired as experts.

More radical proposals, which have little support because attorneys in an adversarial system do not want to relinquish control, include the notion of "blind expertise."

> The idea is to use an intermediary to select qualified experts who will render litigation opinions without knowledge of which party is asking. The result will be greater accuracy of both expert opinions and litigation outcomes compared to both the status quo and litigation with court-appointed experts.[143]

The latter concept, court-appointed experts, reflects another potential solution. The use of court-appointed experts is already available to most

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140. *Hudspeth v. Scholastic Cleaning and Consultancy Servs. Pty. Ltd. & Ors (No. 8)* (2014) VSC 567 ¶¶ 3, 15–17 (Supreme Court of Victoria) (Austl.), *available at* http://www.austlii.edu.au/au/cases/vic/VSC/2014/567.html.

141. *See Civil Procedure Act 2010* (Vic.) s 21 (Austl.) ("A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—(a) misleading or deceptive; or (b) likely to mislead or deceive"); *see also Civil Procedure Act 2010* (Vic.) s 10 (Austl.) ("The overarching obligations apply—(a) any person who is a party; (b) any legal practitioner or other representative acting for or on behalf of a party; (c) any law practice acting for or on behalf of a party; (d) any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to—(i) an insurer; (ii) a provider of funding or financial support, including any litigation funder.").

142. *Hudspeth (No. 8)* (2014) VSC at ¶ 38, *available at* http://www.austlii.edu.au/au/cases/vic/VSC/2014/567.html. For a list of the expert codes of conduct in various Australian states, including Victoria, New South Wales, Western Australia, ACT, and Queensland, see *Expert Codes of Conduct and Court Guidelines*, UNISEARCH, *available at* https://www.unisearch.com.au/resources/expert-code.

143. Robertson, *supra* note 136, at 174.

judges, but for practical reasons the option is rarely used.[144] The presumption with both "blind" experts and court-appointed experts is that these experts are not biased; but upon hearing the facts of the case, they may have implicit biases that color their assessment of the facts in the lawsuit.[145] More importantly, these proposals seem to suggest that there is one, unbiased view that would prevail if experts hired by lawyers were eliminated from the courtroom. There is an idealization at work in that presumption: if two scientific experts disagree, we tend to think that one of them is obviously right and the other is a liar, because of our faith in science as a collection of truths about nature.[146] Scientists, however, have theoretical debates concerning proper procedures, and interpretive disagreements over what the data shows. Non-scientific testimony is even more susceptible to interpretive variation, so any perceived problem with attorney-experts may not be due to dishonesty or curable bias, but rather arise from the facts (i) that attorney-experts have genuine, honest disagreements about whether the defendant was negligent, and (ii) that biases are inevitable.

V. CONCLUSION

If there is a problem with the fact that attorney-experts confidently express contradictory conclusions in their courtroom testimony, that problem may not be solvable—not only are they trained as advocates to take the positions required by their client's situation, but the structure of their analysis when they are called as an expert in legal malpractice is the same structure as their analysis as an advocate. The evaluative standard—"such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake"[147]—is interpretively unstable and subjective. How much skill,

144. *See generally* Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59 (1998) (noting that federal judges have broad powers to appoint neutral experts to assist the court under both Rule 706 of the Federal Rules of Evidence and their inherent power, but for a number of reasons, judges often decline to appoint these neutral experts).

145. *See* CAUDILL & LARUE, *supra* note 33, at 73 (describing an assumption by many that there exists one scientific "truth," implying that when experts disagree, one is "right" and one is "wrong," ignoring the fact that many scientific controversies involve legitimate theoretical and methodological differences within the scientific community).

146. *See id.* at 18–28 (describing a series of cases in which appeals courts overruled trial judges who excluded evidence based on the trial judges' belief that scientific evidence is either objectively right or completely wrong).

147. Millwright v. Romer, 322 N.W.2d 30, 32 (Iowa 1982) (quoting Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 422–23 (Cal. 1971)).

prudence or diligence is possessed by the ordinary lawyer? Who knows? One cannot identify that phenomenon by research. But that standard will be constructed by each of the attorney-experts in a legal malpractice case.

Some instances of legal malpractice, nevertheless, are so easy to identify that expert testimony is not even required—clearly defrauding a client, ignoring a client's requests, and failing to do minimal discovery[148]—but cases involving the defenses described in this article complicate the identification of negligence. From one perspective, the defendant is clearly negligent; from another perspective, not so much. Ideally, an objective expert would concede that there is no clear negligence or no clear lack thereof; that it is a close case and not susceptible to a confident assessment. Unfortunately, that expert will never appear in court, so we are left with confident attorney-experts who contradict each other and cannot help sounding like advocates. Should we be shocked? Or should we relax and be unsurprised that there is gambling in a casino? I believe it is worth thinking about, and if my analysis is compelling, then for no other reason than to identify a false alarm and silence the critics who worry that something is wrong.

148. *See* David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 136, 160 & nn.166–67 (2012) (citing examples of obvious malpractice).