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THE UNWRITTEN RULES OF SPORTS AND MEDICAL MALPRACTICE

MICHAEL FLYNN*

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I. INTRODUCTION

In every sport, there are unwritten rules players live by. In soccer, players are expected to return the ball to a team courteous enough to kick the ball out of bounds when an injured player needs medical attention.¹ In basketball, the team with an insurmountable lead is expected to wind the

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1. Steve Wulf, *Goes Without Saying . . .*, ESPN THE MAGAZINE (Dec. 15, 2010, 2:53 PM), <http://sports.espn.go.com/espn/news/story?id=5920306>.

clock down in the final seconds of the game rather than taking a last second shot to bolster individual statistics.² Baseball—with its storied and long history—is full of unwritten rules, so much so that journalists and sportswriters have begun tracking and blogging about “baseball’s unwritten codes.”³ Even seemingly ruthless sports such as football and boxing have their own unwritten codes their athletes follow, with boxers being expected to salute each other before the final round by touching gloves as a sign of respect⁴ while football players are expected to take a knee in the final minute of a game with a big lead rather than trying to run up the score.⁵ These unwritten rules are as much a part of the culture of the game as the real, written rules and all share a common purpose: To instill a code of honor, respect, and fair play among the players of the game.⁶

2. Just dribble out the clock. If you have a big lead in the closing seconds, don’t pad your stats. This is especially appropriate the more important the game is. In 2008, in the Western Conference Finals, the Lakers led 97–92 with the clock ticking down on the series clincher when Sasha Vujacic put up a 3-pointer and sunk it at the buzzer. The Spurs had put on a full-court press but once the ball swung to Vujacic, no defender jumped out at him. It was a classless act and just about every fan of the NBA chided Vujacic for taking the shot. *Top 10 Unwritten Rules of Sport*, REAL CLEAR SPORTS (May 17, 2013), http://www.realclearsports.com/lists/unwritten_rules/.

3. See generally JASON TURBOW, *THE BASEBALL CODES: BEANBALLS, SIGN STEALING, AND BENCH-CLEARING BRAWLS: THE UNWRITTEN RULES OF AMERICA’S PASTIME* (2010) (stating, as one rule, that it is an accepted practice to steal the opposing teams signs but once a player gets caught doing so, he must stop. As another rule, it is not okay for a player to steal second or third base in the top of the ninth inning with a big lead. Also, a player should not “show another player up” by flicking his bat for instance after hitting a home run); see also Cam Martin, *Baseball, and Its Many Unwritten Rules*, ESPN (March 15, 2010), <http://espn.go.com/espn/page2/story?page=martin/100315> (describing that one unwritten code is the expectation of the batter to rush the mound and confront the pitcher if that pitcher keeps throwing at the batter’s teammates. This is demanded even if the batter does not want to confront the pitcher, as was the case with Robin Ventura’s half-hearted, but necessary attack of pitcher Nolan Ryan in 1993); see generally Tim Kurjian, *The Unwritten Canon, Revealed*, ESPN (May 21, 2014, 12:22 PM), http://espn.go.com/mlb/story/_/id/10964445/mlb-baseball-confusing-contradictory-unwritten-rules.

4. Wulf, *supra* note 1.

5. See *Top Ten Unwritten Rules of Sport*, *supra* note 2.

6. See Martin, *supra* note 3 (“At base, [the code is] about ‘three simple things. Respect your teammates, respect your opponents, and respect the game.’”); Wulf, *supra* note 1 (“[Y]ou’ll see that a code of fair play has been passed on to our modern knights, even if most athletes can’t explain the chivalrous origins of their sports’ time-honored mores.”).

Other sports with unwritten codes include cycling, which dictates that when a fellow rider falls or suffers a mechanical mishap, the lead rider should wait until the fallen rider gets back up before proceeding. In hockey, players drop gloves to fight only when both players want to fight. Those who go after an unwilling opponent earn a bad rep or future retaliation from other players. In NASCAR, there is a general rule that drivers are allowed to “spy on the sly” but should not get caught doing so. In golf, players are not to walk through another player’s putting line under any circumstance. For a list of these examples and unwritten rules from other sports see generally Wulf, *supra* note 1 and *Top 10 Unwritten Rules of Sport*, *supra* note 2.

In the game of medicine, where doctors are the players, an unwritten code also guides the conduct of medical professionals: Do not testify in court against one of your fellow doctors.⁷ This article will first describe and explain this unwritten rule and its origins. Next, this article will observe the effect this unwritten rule is having on expert witnesses, victims of medical malpractice, and the medical profession as a whole. This article will then examine the steps professional medical associations and state medical boards have taken to reinforce the unwritten Do Not Testify Rule. Next, this article will detail the latest state laws that seek to legitimize and further entrench this unwritten rule into the fabric of any medical malpractice case. Finally, this article will conclude by suggesting that the time has come to repeal this unwritten rule from the practice of medicine.

II. THE ORIGINAL CODE OF SPORTSMANSHIP IN MEDICAL MALPRACTICE

The unwritten codes in sports and medical malpractice share similar origins dating back to ancient times.⁸ In the world of professional sports, the origins of the various unwritten codes players live by can be traced back to medieval Camelot, in which Arthurian knights first began the unwritten codes of chivalry through the sport of jousting.⁹ The legendary Knights of the Round Table brought “an infusion of virtue into jousts and other types of ‘play’ that were really extensions of battle.”¹⁰ Though there was no official rulebook for these war games, the knights took it upon themselves to “establish a set of principles based on the much-lauded concepts of honor, honesty, valor, and loyalty.”¹¹ The more a knight exuded these principles during the games, the higher his status as a hero became in the eyes of his colleagues and the public.¹² Roughly 1,500 years later, the same

7. See generally Stephanie Mencimer, *The White Wall*, LEGAL AFFAIRS, http://www.legalaffairs.org/issues/March-April-2004/story_mencimer_marpar04.msp (last visited May 1, 2016) (explaining that part of the culture of medicine includes an unspoken contract between peers never to testify against one another); see also David S. Seidelson, *Medical Malpractice and the Reluctant Expert*, 16 CATH. U. L. REV. 158, 159–61 (1967) (describing that doctors who testify on behalf of medical malpractice plaintiffs are a very rare and ostracized exception to the norm).

8. Compare Wulf, *supra* note 1 (stating that the unwritten rules in sports originated in medieval England), with Richard M. Markus, *Conspiracy of Silence*, 14 CLEV.-MARSHALL L. REV. 520, 520–21 (1965) (implying that the unwritten rules in medical malpractice originated during the ancient Grecian era).

9. Wulf, *supra* note 1.

10. *Id.*

11. *Id.*

12. See *id.* (noting that traits such as valor, honesty, and loyalty could elevate a knight above what their skill alone may have otherwise allowed).

unwritten set of principles persists across the myriad of modern sports, with the athletes who honor the code of sportsmanship achieving public adoration and those who dishonor the code, receiving public scrutiny.¹³

Medical malpractice originally operated with a similar code of sportsmanship and honesty that also originated from ancient times.¹⁴ The Greek physician Hippocrates—known today as “The Father of Medicine”¹⁵—established The Hippocratic Oath in which every physician is called upon to proclaim an abstention from “every voluntary act of mischief and corruption” and to punish those connected with the malpractice of medicine.¹⁶ The Oath itself derived from the Code of Hammurabi of 1750 B.C., which held physicians guilty of medical malpractice accountable for their transgressions by requiring them to publicly own up to their mistakes and to remedy them as best they could.¹⁷ This ancient concern for discipline of the medical profession by itself and by society trickled down through the ages and became the foundation for modern medical malpractice cases, establishing that defendant physicians can be held legally responsible for their malpractice.¹⁸ Thus, much like the Arthurian knights established an unwritten code of sportsmanship for today’s modern athletes, Hippocrates and his Hippocratic Oath established a code of medical sportsmanship for physicians to follow and enforce upon one another.

However, while the Arthurian code of sportsmanship has persisted in sports, Hippocrates’ code of medical sportsmanship has metamorphosed into a different code entirely. The code of medical ethics in which physicians are expected to chastise those connected with malpractice exists

13. *See id.* (describing how Alex Rodriguez was jeered by Yankee fans after taking a shortcut over the pitcher’s mound in one instance, shouting to distract a player from the opposing team so that he would drop a fly ball in another instance, and slapping the ball out of another player’s glove during Game 6 of the 2004 ALCS. Rodriguez’s treatment from fans is contrasted with Derek Jeter’s frequent ovations from fans and players for following the unwritten rules of baseball.)

14. *See* Markus, *supra* note 8, at 520 (comparing the Hippocratic Oath, the Code of Hammurabi, and Justinian Code of the Romans, which all address the importance of medically ethical conduct).

15. Ann Ellis Hanson, *Hippocrates: The “Greek Miracle” in Medicine*, *MEDICINA ANTIQUA*, http://www.ucl.ac.uk/~ucgajpd/medicina%20antiqua/sa_hippint.html (last visited May 1, 2016).

16. *See* Markus, *supra* note 8, at 520.

17. *See id.* (stating that a physician’s fingers were cut off if he caused a person’s death or the loss of an eye during an operation. Likewise, if the physician “caused the death of a slave, he was obliged to restore a slave of equal value.”)

18. *See id.* at 520–21 (discussing the consequences for physicians who make mistakes within various societies throughout history, from the Code of Hammurabi to early American law).

more in theory than it does in practice, as more and more physicians follow what has come to be known as the “conspiracy of silence.”¹⁹

III. THE SHIFT FROM MEDICAL SPORTSMANSHIP TO THE UNWRITTEN DO NOT TESTIFY RULE

The “conspiracy of silence” among doctors embodies the notion that testifying against a fellow doctor in a medical malpractice case is akin to betrayal and is grounds for punishment.²⁰ This “conspiracy of silence” has led to an implicit reluctance from members of the medical community to testify on behalf of plaintiffs and has established an unwritten rule among medical professionals of not testifying against your fellow doctor.²¹ Anyone who breaks this rule is dubbed a traitor and publicly labeled a “hired gun,” embodying the idea that expert witnesses are for sale and that attorneys can actively shop for those willing to support their cause.²² In fact, the problem has become so widespread that the “so-called *conspiracy of silence* has been recognized as a matter of judicial notice [across the country].”²³ To illustrate the effect of this unwritten code of silence in action, consider the following:

The problem for the lawyer is exemplified by a case that arose in Cleveland which involved a young lady who sustained certain psychiatric injuries as the result of plastic surgery. The physician had blatantly advertised under ‘Plastics’ in the Yellow Pages of the telephone directory with ‘before and after’ nose pictures. There have been some 20 lawsuits filed against him for medical malpractice. He had no malpractice insurance and no carrier would issue any to him. The local medical society knew all these facts and held him in very low esteem. However, when counsel requested help from that society in locating a witness to testify against this man, the society refused to make any efforts in this direction and said that it was up to each individual plastic surgeon whether he wanted to testify. When no expert witness could be

19. See Kathy George, *Doctor Wants Fellow Doctor Suspended Over Malpractice Testimony*, SEATTLE PI REPORTER (June 6, 2004, 10:00 PM), <http://www.seattlepi.com/lifestyle/health/article/Doctor-wants-fellow-doctor-suspended-over-1146594.php>.

20. See generally Seidelson, *supra* note 7, at 158–61.

21. See *id.* at 184.

22. Jennifer A. Turner, *Going After the ‘Hired Guns’: Is Improper Expert Witness Testimony Unprofessional Conduct or the Negligent Practice of Medicine?* 33 PEPP. L. REV. 275, 277 (2006) (explaining that despite recent movement by state medical boards, physician experts testifying in medical malpractice cases are not held to a minimum standard of accountability, but instead market expectations from the parties that hire them).

23. *Id.* at 275–76 (explaining widespread issues with the veracity of claims made by expert witnesses during medical malpractice litigation).

found, the case was tried solely on an assault and battery charge because the patient was only 18 years of age when she consented to the procedure.

Eventually even this charge was lost when the Ohio Supreme Court held that a reasonably mature minor can effectively consent to such a surgical procedure. The aftermath of this story was not pleasant. The client manifested greater psychiatric complications. She eventually tried to shoot the doctor and was institutionalized. Several years after the case was concluded, the doctor was indicted for double manslaughter as a result of the deaths of two women in his office (over a two-week period), when he attempted surgery while under the influence of narcotics. He, too, was institutionalized.²⁴

As this example illustrates, the effects of the unwritten Do Not Testify Rule doctors live by can be profound and costly.²⁵ However, the code of silence typically exists only in instances where an expert testifies on behalf of plaintiffs rather than on behalf of the defendant doctor.²⁶

[R]egardless of the merits of the plaintiff's case, physicians who are members of medical societies flock to the defense of the fellow member charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners²⁷

Thus, the reluctance to testify against a fellow physician stems from fear of ostracism and a loss of future financial security. "[T]he refusal on the part of members of the profession to testify against one of their own [may stem from] fear that one day they, too, may be defendants in a malpractice case."²⁸ Doctors also rely on one another "for professional guidance and patient referrals, so speaking out against colleagues can cost them associates and impact their bottom line."²⁹ Doctors' reliance on one another for business has also become exacerbated by today's economic climate, with more and more solo practitioners becoming unable to keep business alive on their own.³⁰ This in turn has caused many doctors to drop their solo or small group practices and join larger medical organizations

24. Markus, *supra* note 8, at 521–22.

25. *Id.*

26. Seidelson, *supra* note 7, at 159–60.

27. *Id.* at 160.

28. *Id.* at 158.

29. Mencimer, *supra* note 7.

30. See Nick Madigan, *Doctors' Dilemma: Physicians Consider Ways To Thrive Economically—And Sometimes Even To Survive*, MIAMI HERALD (June 8, 2014, 7:00PM), <http://www.miamiherald.com/news/business/biz-monday/article1965640.html>.

such as hospitals or other groups of doctors in order to make ends meet.³¹ As a result, the prevalence of the unwritten rule of thou shalt not testify against thy colleague has been fueled by self-preservation and fear of being cast aside in times of financial difficulty.³²

Yet, the unwritten rule contradicts the legal role expert witnesses necessarily play in the judicial process. In order for an injured patient to sue a physician for medical malpractice, the patient's counsel needs to hire a medical expert to testify against the doctor in question.³³ "Generally, the purpose of expert witness testimony in medical malpractice is to describe standards of care relevant to a given case, identify any breaches in those standards, and if so noted, render an opinion as to whether those breaches are the most likely cause of injury."³⁴ Thus, the expert witness helps courts and juries make sense of the applicable medical standard and whether the doctor in question provided substandard medical care to the plaintiff.³⁵ In this regard, "the medical expert is indispensable to a medical malpractice case" and is nearly always necessary.³⁶ Without a medical expert, the injured patient cannot bring forth a case.³⁷ Yet, in spite of the expert's necessary role in malpractice cases, the medical community continues to target expert witnesses, with professional medical associations leading the way.

31. *See id.*

32. *See* Markus, *supra* note 8, at 520–23 (noting that the *conspiracy of silence* theory has been recognized, as a matter of judicial notice, in several states).

34. *See* American Academy of Pediatrics, *Guidelines for Expert Witness Testimony in Medical Malpractice Litigation*, 109 PEDIATRICS 974, 974–75 (2002) ("[M]edical negligence requires the plaintiff to establish the following elements: 1) the existence of the physician's duty to the plaintiff, usually based on the existence of the physician-patient relationship; 2) the applicable standard of care and its violation; 3) damages . . . ; and 4) a causal connection between the violation of the standard of care and the harm complained of.").

34. *Id.* at 974.

35. *Id.* at 975.

36. Michelle Andrews, *Making Malpractice Harder to Prove*, N.Y. TIMES (Dec. 21, 2003), <http://www.nytimes.com/2003/12/21/business/money-medicine-making-malpractice-harder-to-prove.html>; *See* Symposium, *The Expert Witness in Medical Malpractice Litigation*, 467 CLINICAL ORTHOPAEDICS & RELATED RESEARCH 383, 384 (2009) ("[U]nder FRE [Federal Rules of Evidence] 702, expert witness testimony is almost always required in medical malpractice cases to assist juries in reaching an informed decision").

37. Andrews, *supra* note 36.

IV. PROFESSIONAL MEDICAL ASSOCIATIONS PERPETUATE THE DO NOT TESTIFY RULE

With the advent of increased insurance premiums through the 1980s and early 2000s,³⁸ medical associations began to feel that increasing malpractice claims and lofty plaintiffs' verdicts were to blame for the rise in insurance premiums, with plaintiffs' expert witnesses fueling the increase in costs for malpractice premiums.³⁹ Even though government and independent studies have revealed that plaintiffs' experts have little to no effect on the increase in malpractice claims,⁴⁰ professional medical organizations continue to target expert witnesses in an attempt to quash medical malpractice claims altogether.

A. Medical Associations Take Aim

Professional medical associations have aggressively targeted plaintiffs' expert witnesses over the last several years, with one such example being the American Association of Neurological Surgeons ("AANS"). Since its inception in 1983, the AANS review board has dealt almost exclusively with plaintiffs' expert witnesses.⁴¹ Since 1983, the AANS has reviewed the cases of nearly forty physicians, with all but one of them targeting plaintiffs' expert witnesses.⁴² The organization has also been proactive in

38. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-702, 9–10, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES (2003).

39. Aaron S. Kesselheim & David M. Studdert, *Role of Professional Organizations in Regulating Physician Expert Witness Testimony*, 298 JAMA 2907, 2907 (2007) ("Apprehension about high-cost malpractice claims in recent years has focused attention on the potential for physician experts to fuel inappropriate legislation through testimony that is not well grounded in prevailing clinical standards or science.").

40. Compare GAO-03-702, *supra* note 38 (noting that insurance companies raise premiums based on low investment returns and estimated future malpractice claims), and Katherine Becker & Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, (Nat'l Bureau of Econ. Research, Working Paper No. 10709, 2004) (stating that a large majority of malpractice claims do not lead to any payment from a doctor to a patient, with statistics revealing that three out of four claims lead to no payment at all and only seven percent of doctors face a claim in a given year, with fewer than two percent making any payment relating to a claim), with CONG. BUDGET OFF., *Limiting Tort Liability for Medical Malpractice* (Jan. 8, 2004) (noting that reduced income from investments on the part of insurance companies as well as a less competitive insurance market were the top two factors found to have contributed to increased insurance premiums during the early 2000s).

41. Mencimer, *supra* note 7.

42. Gary Roberts, *Silence of the Experts: Professional Medical Associations Are Taking Aim at Doctors Who Testify For Plaintiffs Injured By Negligent Medical Care. Will The Law Protect Doctors Who Speak Out?*, TRIAL MAGAZINE, Oct. 1, 2004, available at <http://www.thefreelibrary.com/Silence+of+the+experts%3A+professional+medical+associations+are+taking...-a0123577638>.

revoking physicians licenses altogether, with a notable example shown in the case of Dr. Gary Lustgarten.⁴³ Dr. Lustgarten, a Florida neurosurgeon, testified against two North Carolina neurosurgeons who repaired a cranial shunt of a twenty-year-old man who suffered respiratory arrest during surgery, leading to his death two days later.⁴⁴ In his testimony, Dr. Lustgarten stated that the defendant neurosurgeons should have ordered a post-surgery CT scan on the patient's brain; further, he noted that the patient's medical records did not match what the physical evidence demonstrated regarding intracranial pressure, suggesting that the two neurosurgeons neglected to accurately record key symptoms the patient exhibited leading up to his death.⁴⁵ After the trial, the two neurosurgeons decided to report Lustgarten for fraudulent testimony to the AANS; the AANS suspended him for six months without holding a hearing for Dr. Lustgarten or allowing him legal representation.⁴⁶ This *ex parte* hearing contradicted standard disciplinary procedures of allowing "the complainant and respondent [to] present their arguments, often with the assistance of legal counsel" and allowing the losing party at least one chance to appeal.⁴⁷ In the end, the complaints by the defendant neurosurgeon to the AANS were in and of themselves enough to deny Dr. Lustgarten—a neurosurgeon with no prior history of fraudulent testimony—a fair hearing before the organization's review board, costing him suspension from the Association, and thus his reputation and future business.⁴⁸

Another illustration of the AANS's enforcement of the Do Not Testify Rule is the case of Dr. Robert Rand. Dr. Rand was set to testify on behalf of Cristine Del Cueto, a patient who received neurosurgery as a toddler and was subsequently crippled when the operating neurosurgeon severed a main blood vessel in her brain.⁴⁹ After seven years of preparation, Dr. Rand suddenly withdrew from the case, informing Del Cueto's lawyer that he could no longer testify.⁵⁰ The reason for Dr. Rand's sudden withdraw was the Do Not Testify Rule set into action—less than one month from trial, Dr. Rand explained the reasoning behind his abrupt withdrawal from the case with the following: "I have been informed by the senior neurological

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Kesselheim & Studdert, *supra* note 39, at 2908.

48. *See* Roberts, *supra* note 42 (noting that the AANS initially issued a penalty of permanent revocation of Lustgarten's license, resulting in many medical experts coming to Lustgarten's defense as having done nothing wrong; the AANS later converted the punishment to a suspension after confirming its original finding of impropriety).

49. Andrews, *supra* note 36.

50. *Id.*

society to discontinue expert testimony for plaintiffs or risk membership. Therefore I am withdrawing as your expert.”⁵¹ The “senior neurological society” Dr. Rand referred to in the letter was the AANS, which denied that it sent such a letter.⁵² Letter or no letter, the message Dr. Rand received from his medical organization was clear: Do not testify against your fellow neurosurgeon or you will be punished. The ensuing result? “Because [Dr. Rand] was so well known—he had trained many of the country’s cadre of pediatric neurosurgeons—[the Del Cueto’s lawyer] could not find a single doctor in the country or overseas who was both an expert and willing to testify.”⁵³ Consequently, the Del Cueto’s were unable to successfully file a claim and were ultimately “pushed down a path to settle” for an undisclosed sum.⁵⁴ The Do Not Testify Rule and its ugly effects were once again thrust upon an honest medical expert and an innocent patient.

Other medical associations have enforced the unwritten Do Not Testify Rule against plaintiffs’ expert witnesses by threatening to publish the names and testimony of plaintiffs’ expert witnesses on the associations’ online accounts.⁵⁵ One known professional organization to do so is the American Academy of Emergency Medicine, which publishes experts’ testimony online for the rest of the medical community to see in an effort to deter “fraudulent testimony.”⁵⁶ Other groups such as the American Society of Anesthesiologists publicly announce harsh policy stances towards plaintiffs’ expert witnesses, announcing in their newsletter that “as a rule, defense work is good, and plaintiff’s work is bad.”⁵⁷ With medical societies promoting such propaganda, it is easy to see how medical expert witnesses continually face an uphill battle when it comes to serving their role in the legal process.

B. Doctors and Hospitals Organize Ad Hoc Groups and Blacklists

In addition to professional organizations, doctors across the country have formed ad hoc groups targeting plaintiff’s expert witnesses. One such ad hoc program is the “Coalition and Center for Ethical Medical Testimony,

51. *Id.*

52. Mencimer, *supra* note 7.

53. *Id.*

54. *Id.*

55. See Christina M. Jordan, *States Enact Expert Witness Legislation for Medical Injury Actions*, LITIGATION NEWS, Oct. 19, 2011, http://apps.americanbar.org/litigationnews/top_stories/1901911-medical-malpractice-expert-witness-florida.html.

56. *Id.*

57. Mark J. Lema, *Ventilations: Aliens Among Us*, 66 ASA NEWSLETTER 1, 1 (2002).

whose website, www.ccemt.org, has an expert witness ‘hot list’ where members, which include doctors and lawyers, share names of expert witnesses and examples of what they consider unethical testimony.”⁵⁸ According to the group’s co-founder, Dr. Louise B. Andrew, thus far, all of the examples of unethical testimony on the Coalition’s website are of plaintiff’s testimony only.⁵⁹ Other doctors have founded their own insurance company called Medical Justice, a company designed to provide resources to doctors in order to countersue other doctors who testify against them.⁶⁰ The company’s website touts that it will “protect you against frivolous lawsuits and damage to your good name.”⁶¹

Yet another website called “Doctorsknow.us” was formed by a group of doctors in Texas with an eye towards enforcing the unwritten code of silence among doctors.⁶² The website compiled lists of patients who sued, their attorneys, and the expert witnesses in Texas who testified on the plaintiffs’ behalf, with the purported purpose of allowing doctors to “assess the risk of offering their services to patients and potential patients” who made the blacklist.⁶³ The website had a catchy line that read, “They can sue but they can’t hide.”⁶⁴ Although the Texas-born website has been removed from the internet, it shows the extent of how far doctors are willing to punish anyone who sues or testifies against them, allowing them to withhold medical treatment and to stop patient referrals for physicians brave enough to testify on behalf of plaintiffs.⁶⁵

Even hospitals have publicly enforced the Do Not Testify Rule.⁶⁶ For instance, in the spring of 2004, the hospital management at Tampa General Hospital revised its employee Code of Conduct to prohibit hospital employees from serving as expert witnesses or consultants for plaintiffs.⁶⁷ Yet the code affirmatively states that these same hospital employees may serve as experts for hospitals and doctors.⁶⁸ In other words, Tampa General

58. Andrews, *supra* note 36.

59. *Id.*

60. Vickie Chachere, *Doctors Feel Heat for Taking Patients’ Sides in Malpractice Cases*, FLORIDA TIMES-UNION (Apr. 11, 2004, 10:15 AM), <http://jacksonville.com/apnews/stories/041104/D81SKUTO2.shtml>.

61. MEDICAL JUSTICE, <http://www.medicaljustice.com> (last visited Feb. 15, 2016).

62. *Doctor’s Blacklist is Blackmail*, TEXAS TRIAL LAWYERS ASS’N (2004), <https://www.tla.com/index.cfm?pg=DoctorBlacklistisBlackmail2004>.

63. *Id.*

64. *Id.* See also Ralph Blumenthal, *In Texas, Hire a Lawyer, Forget About a Doctor?* N.Y. TIMES (Mar. 5, 2004), <http://www.nytimes.com/2004/03/05/national/05DOCT.html>.

65. *Doctor’s Blacklist is Blackmail*, *supra* note 62.

66. See Terry Carter, *M.D. with a Mission*, 90 A.B.A. J. 41, 44 (2004).

67. *Id.*

68. *Id.*

established policies prohibiting hospital staff from testifying in any capacity on behalf of plaintiffs yet simultaneously encouraged them to testify on behalf of fellow doctors.⁶⁹ Such blatant prejudice against medical malpractice plaintiffs and plaintiffs' expert witnesses shrinks the pool of experts willing to testify on behalf of injured patients. Even though Tampa General's policy was eventually revised to eliminate such prejudice, the efforts the Hospital made to suppress plaintiffs' expert witnesses shows the extent to which the medical profession's unwritten Do Not Testify Rule is alive and dominant.⁷⁰ As the medical establishment continues to make restrictions on medical malpractice lawsuits its top priority, "it has gone beyond seeking to limit who can testify as expert witnesses and taken steps to muzzle them altogether."⁷¹

V. THE ROLE OF STATE MEDICAL BOARDS

In addition to the actions of medical associations, state medical boards have also bolstered the unwritten Do Not Testify Rule by actively seeking to obtain disciplinary authority over an expert's legal testimony.⁷² By "construing inappropriate expert witness testimony as a form of 'unprofessional conduct,'"⁷³ state medical boards have established a proverbial chokehold over plaintiffs' expert witnesses whose testimony is viewed with "sufficient disfavor" from a colleague.⁷⁴

As an example, recall the aforementioned case of Dr. Lustgarten and his battle with the AANS. After the AANS suspended Lustgarten for six months without affording him a hearing, Lustgarten found himself targeted by the same angry defendant-neurosurgeons who issued a complaint against him with the North Carolina Medical Board, again with the accusations that he testified falsely.⁷⁵ The board held a hearing without him or his attorney, since Lustgarten had been subpoenaed to testify in court in another state that same day.⁷⁶ On the strength of statements from one of the defendant neurosurgeons, the North Carolina Medical Board took the unprecedented action of permanently revoking Lustgarten's license, concluding that his testimony was a "departure from . . . the standards of acceptable and prevailing medical practice" and constituted an "act contrary to honesty,

69. *See id.*

70. *See id.*

71. Mencimer, *supra* note 7.

72. Kesselheim & Studdert, *supra* note 39, at 2908.

73. *Id.*

74. Doug Jones & Matthew Scanlan, *Expert Witness Certificates: Creating Accountability for Out-of-State Witnesses in Florida Courts*, 32 TRIAL ADVOC. Q. 11, 11–12 (2012).

75. Mencimer, *supra* note 7.

76. *Id.*

justice, or good morals' within the meaning of the state's medical licensing law."⁷⁷ Contrast this case with the fact that a few years later, the same North Carolina Medical Board allowed five physicians to continue practicing even after they were found to have "compromised patient care, abused drugs, sexually abused patients, or engaged in violent behavior."⁷⁸ In light of the facts about these five physicians and the board's decision to have them keep their licenses, it seems that the North Carolina Medical Board, and not Lustgarten, was the party guilty of acting "contrary to honesty, justice, or good morals."⁷⁹ Of course, honesty, justice, and good morals only proved to be secondary to the real priority of upholding the unwritten rule.

The Florida Medical Association ("FMA") and the Florida Board of Medicine have also teamed up to establish a system in which vengeful defendant doctors have the advantage in filing complaints against expert witnesses who dare to break the unwritten Do Not Testify Rule. Under the FMA's Expert Witness Program, a malpractice defendant need only charge a colleague with "improper expert testimony" to receive the benefits of an immediate investigation into the testimony.⁸⁰ A committee comprised of medical practitioners screens complaints, "then forwards them to an expert approved by the Florida Board of Medicine. If the evidence warrants, the complaints then go before the association's council on Ethical and Judicial Affairs. After a hearing the council issues a final report that is sent to the complainant and the expert witness."⁸¹ From there, the FMA board can vote to suspend or expel the doctor from the association and can ask "the Florida Board of Medicine to allow complainants to forward the FMA's final report to the board of medicine's complaint section."⁸² The Florida Board of Medicine then has an "arsenal of sanctions rang[ing] from fines to revocation of a doctor's license."⁸³

As it turns out, nearly all of the complaints the FMA receives are against plaintiffs' expert witnesses.⁸⁴ In 2004, for instance, roughly twenty complaints were filed with the FMA's complaint system over expert testimony, all of which were filed by defendant doctors and none of which

77. Roberts, *supra* note 42.

78. Mencimer, *supra* note 7.

79. *Id.*

80. Roberts, *supra* note 42.

81. Pat Dunnigan, *Doctors vs. Doctors*, FL TREND (Sept. 1, 2004), <http://www.floridatrend.com/print/article/11954>.

82. *Id.*

83. *Id.*

84. *See id.*

involved a doctor who testified for the defense.⁸⁵ In light of the unwritten rules of medical malpractice, this trend makes perfect sense. Defending a defendant doctor is seen as upholding the fraternal oath of protecting thy own, but testifying against a possibly negligent doctor is akin to treachery.⁸⁶

This enforcement of the unwritten Do Not Testify Rule extends beyond the scope and jurisdiction of state medical associations and their boards. For instance, John Fullerton—a San Francisco internist—recently sued the FMA and three complainant malpractice-defendant doctors for libel, witness intimidation, and racketeering after the FMA charged him with an ethics violation.⁸⁷ The ethics violation derived from a complaint to the FMA filed by the three Tampa doctors who alleged Fullerton gave false testimony in a case involving a man with diabetes who alleged that negligent care caused him to have a stroke.⁸⁸ Fullerton—the recipient of a congressional award that named him California’s “Physician of the Year” for 2003—received a letter from the FMA accusing him of “‘terrorizing’ the medical profession” and stated that the FMA sought to discipline him under FMA policy, despite Fullerton not being a member of the group.⁸⁹ Even though the charges against Fullerton were later dropped, such harassment of out-of-state expert witnesses demonstrates the desperate need for medical boards to maintain control over any and all plaintiffs’ expert witnesses, regardless of their membership or the merits of their testimony.

Contrast the FMA’s and the Florida Board of Medicine’s strident focus on disciplining expert witnesses with the story of Dr. Peter V. Choy of South Florida. In 2014, the Florida Board of Medicine concluded an investigation into the medical practices of Dr. Choy and found him guilty of “failing to keep proper medical records, committing medical malpractice, and concealing material facts in the 2010 case of a woman with pancreatic cancer.”⁹⁰ Choy admitted to altering the records of the female patient out of “fear of a lawsuit at the end of [his] career.”⁹¹ The patient had visited Choy five times in two years and during all those visits, Choy knew of the pancreatic tumor growing inside the patient but never informed her of it and

85. *Id.*

86. See Seidelson, *supra* note 7, at 158–61 (explaining that there is a natural reluctance for expert witnesses to assume “the Judas role” and be seen as a traitor among his peers).

87. Roberts, *supra* note 42.

88. Dunnigan, *supra* note 81.

89. *Id.*

90. Daniel Chang, *Miami Doctor Who Falsified Patient Records Keeps License*, MIAMI HERALD (June 11, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article1965834.html>.

91. *Id.*

never made notes in her medical records of the tumor's existence.⁹² Then, two weeks before the patient died, Choy finally informed the patient of the large, malignant tumor for the first time.⁹³ By then the information was too late and the patient never had a chance to treat the tumor.⁹⁴

In spite of all this information and in spite of the fact that Choy had been previously charged with unprofessional conduct by New York's Board of Professional Medical Conduct, had his New York license revoked, and had previously been fined by three other states for misrepresenting his credentials, the Florida Board of Medicine decided to let Choy keep his license, with only a minimal suspension and fine in conjunction with five years' probation and mandatory courses on rules and ethics.⁹⁵ And yet, the FMA and the Florida Board of Medicine are focused on disciplining non-member, out-of-state expert witnesses for upsetting defendant doctors? Something is wrong when state medical boards stridently pursue defendants' tattletale stories over the intentional negligence and repeated deceptions committed by one of their own members before their very eyes. In the words of the deceased patient's son, "There's no integrity The system [has] failed" ⁹⁶

VI. THE EMERGING WRITTEN RULES: TARGETING EXPERT WITNESSES THROUGH STATE LAWS

In light of the medical community's harsh stance towards expert witnesses, it is not surprising that over the last several years, state medical boards have pushed state legislatures to enact statutes reinforcing the unwritten Do Not Testify Rule.⁹⁷ Leading the charge has been the FMA, which for the last ten years has been lobbying the Florida legislature to enact unfriendly laws towards medical malpractice plaintiffs and plaintiffs'

92. *Id.*

93. *Id.*

94. *Id.*

95. Chang, *supra* note 90 (The Board ordered Choy "to pay a \$30,000 fine, serve a six-month suspension followed by five years of probation, and attend courses on laws and rules, record-keeping and ethics." This decision was made in spite of the Florida Division of Administrative Hearings judge's recommendation that the Board revoke Choy's license and impose a \$4,000 fine.).

96. *Id.*

97. See Kenneth Artz, *Florida Passes Expert Witness Bill*, HEARTLAND INSTITUTE, <http://news.heartland.org/newspaper-article/florida-passes-expert-witness-bill> (last visited Feb. 15, 2016) (reporting that the Florida legislature passed HB 479, placing guidelines on use of expert witnesses in malpractice suits in the state); see also Jordan, *supra* note 55 (explaining that HB 479 adds a requirement for physicians and dentists licensed in another state to obtain an "expert witness certificate" prior to testifying).

expert witnesses.⁹⁸ The FMA's lobbying efforts first came to fruition in October 2011 with the passage of Florida Statutes sections 766.102(12) and 458.3175.⁹⁹ Florida Statute section 766.102(12) requires physicians who wish to serve as expert witnesses in a medical negligence case to possess either a valid license to practice medicine in Florida or obtain an expert witness certificate from the Board of Medicine.¹⁰⁰ Florida Statute section 458.3175 works in tandem with section 766.102 by detailing how a physician who wishes to testify can obtain an expert witness certificate.¹⁰¹ To obtain the certificate, a physician must pay a \$50.00 fee and certify that he or she holds a valid and active license in another state and has never had an expert witness certificate previously revoked.¹⁰² The certificate is valid for two years and allows the physician to render medical expert testimony in the state of Florida during that time.¹⁰³ The ultimate purpose of the expert witness certificate is to subject the testifying physician to disciplinary authority by the Board of Medicine in the event of fraudulent or deceptive testimony.¹⁰⁴ The certification requirements apply to physicians for medicine,¹⁰⁵ physicians for osteopathic medicine,¹⁰⁶ and for dentists.¹⁰⁷

A. *The Effects of Writing the Unwritten Rule*

Although the FMA claims unregulated experts are the cause of frivolous lawsuits, other medical professionals and malpractice lawyers suspect the FMA's real incentive behind the legislation is to stop malpractice cases altogether.¹⁰⁸ While “[a]n expert witness certificate does

98. *See id.*

99. *See* Heather Hernandez, *Say No to Expert Witness “Certification” in Medical Malpractice Cases*, EDWARD & RAGATZ, P.A. (Nov. 21, 2012), <http://www.edwardsragatz.com/say-no-to-expert-witness-certification-in-medical-malpractice-cases>.

100. FLA. STAT. § 766.102(12) (2013).

101. *See* FLA. STAT. § 458.3175 (2013).

102. FLA. STAT. §§ 458.3175(2), 458.3175(2)(b) (2013).

103. FLA. STAT. § 458.3175(c) (2013).

104. *See* FLA. STAT. § 458.3175(3) (2013) (“An expert witness certificate shall be treated as a license in any disciplinary action, and the holder of the expert witness certificate shall be subject to discipline by the board.”); Fla. Legis., Final Bill Analysis, 2011 Reg. Sess., C.S. for HB 479 (“This bill provides for discipline against the license of a physician, osteopathic physician or dentist that provides misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine or the practice of dentistry.”).

105. FLA. STAT. § 458.3175 (2013).

106. FLA. STAT. § 459.0066 (2013).

107. FLA. STAT. § 466.005 (2013).

108. *See* Jason Garcia, *Efforts to Limit Lawsuits Advance*, ORLANDO SENTINEL (Apr. 16, 2006), http://articles.orlandosentinel.com/2006-04-16/news/LAWSUITS16_1_hospitals-in-florida-witness-doctors.

not authorize a physician to engage in the practice of medicine or dentistry . . . [the] certificate is [nevertheless] treated as a license in any disciplinary action, and the holder of an expert witness certificate is subject to discipline by the board.”¹⁰⁹ As a result, the law does not grant experts the right to practice in Florida but nevertheless treats him or her as though he or she is licensed when it comes to disciplinary standards.¹¹⁰ This double standard has already had a negative impact on the medical community and victims of malpractice by deterring some physicians from testifying in court.¹¹¹ In the case of *Christian v. Diaco*, the plaintiff’s medical expert withdrew one week from the trial after having agreed to testify three years earlier.¹¹² The expert witness already had given sworn depositions and was to testify against Dr. Diaco in a lawsuit filed after the patient underwent a routine hernia surgery that resulted in a severe infection which left him disabled.¹¹³ Yet when it came time to discuss the trial, the expert witness told the plaintiff’s lawyer that he had no intention of appearing in court while Florida’s new medical malpractice laws were valid.¹¹⁴ The patient, Thomas Christian, was consequently left with no expert witness and thus, no trial.¹¹⁵ As the patient commented to the Associated Press, “I’m being held hostage by my own experts. . . . It’s a blackball listing. They are eating their own.”¹¹⁶

Further promulgating the unwritten Do Not Testify Rule are recently amended Florida Statute sections 458.331(oo) and 458.331(2), which add language that subjects out-of-state expert witnesses to potential disciplinary proceedings if their opinion is found to be fraudulent or deceptive.¹¹⁷ Yet the new language abstains from defining what constitutes “fraudulent” or “deceptive testimony,” which in turn, ultimately provides administrative problems for the Florida Board of Medicine since it has no framework to determine what amounts to “fraudulent” or “deceptive testimony.”¹¹⁸ As a

109. Hernandez, *supra* note 99.

110. See *Expert Witness Certificate*, FLA. BOARD OF MED., <http://flboardofmedicine.gov/licensing/expert-witness-certificate/> (last updated Sept. 11, 2015) (“An expert witness certificate shall be treated as a license in any disciplinary action, and the holder of an expert witness certificate shall be subject to discipline by the board.”).

111. Chachere, *supra* note 60.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* Though the issues with the expert witnesses delayed his trial, Mr. Christian eventually had one in 2005. The jury returned a verdict for the Defendant. See Vicki Chachere, *Tampa Jury Clears Surgeon in Medical Malpractice Lawsuit*, FLORIDA TIMES-UNION (Apr. 22, 2005, 8:15 PM), <http://jacksonville.com/apnews/stories/042205/D89KM6CO0.shtml>.

116. *Id.*

117. See FLA. STAT. §§ 458.331(oo), 458.331(2) (2013).

118. See *id.*

result of this ambiguity, the potential for imposing negative bias against plaintiffs' expert witnesses becomes exponentially greater since the begrudged defendant doctor bringing the complaint has more leeway to shape and define "fraudulent" and "deceptive testimony" to a panel of doctors who already abide by the unwritten Do Not Testify Rule.¹¹⁹ Moreover, the Florida Board of Medicine—or Board of Osteopathic Medicine, depending on the individual physician under review—is comprised of a fifteen-member panel of doctors appointed by the Florida governor to run these disciplinary hearings and oversee any subsequent charges.¹²⁰ The irony of doctors disciplining other doctors for breaking the unwritten rule of not testifying against a colleague facing legal charges seems circular in logic. On the one hand, it is not okay for an expert witness to call out the negligence of a fellow doctor but, on the other hand, doing so makes it okay for the defendant doctor to take disciplinary aim at the same colleague? This reality mirrors a twisted version of baseball pitchers taking aim at an opposing team's batter after the other team's pitcher has intentionally hit his teammate.¹²¹ The only differences are, both the expert witness and the defendant are supposed to be on the same team, and the expert witness never intended to aim and injure the defendant doctor. He was merely playing his required role in the legal process.¹²²

With state medical boards and state legislation in the corner of defendant doctors, it is easy to see why expert witnesses are reluctant to testify on behalf of plaintiffs, fearing the knockout punch of license revocation.¹²³ "These professional penalties effectively control expert testimony, because few lawyers want to hire a doctor censured as a witness by his own professional organization."¹²⁴ Given the fact that it has always been difficult for victims of medical malpractice to find in-state doctors willing to testify against their local colleagues, it comes as no surprise that the FMA and the Florida legislature have chosen to target out-of-state

119. See Courtney L. Rice et al., *Raising the Bar for Medical Expert Witness Testimony*, DRI (Nov. 9, 2012), <http://dritoday.org/feature.aspx?id=458>.

120. See Garcia, *supra* note 108.

121. Martin, *supra* note 3 (explaining that you do not have your pitcher throw at an opposing batter without expecting that the opposing pitcher will throw at your hitters the next inning).

122. See Dunnigan, *supra* note 81 ("Expert witness testimony is critical in medical malpractice cases—state law requires a medical expert's affidavit before a medical malpractice case can even be filed. At trial, testimony from an expert is often the key factor in determining whether the defendant doctor followed generally accepted procedure—'standards of care'—in treating a patient.").

123. See FLA. STAT. § 458.331(2) (2013) ("The board may enter an order denying licensure . . . against any applicant for licensure or licensee who is found guilty of violating any provision of this subsection. . . .").

124. Mencimer, *supra* note 7.

expert witnesses. The legislation promises to create a chilling effect on an already small pool of available expert witnesses.¹²⁵ As one doctor put it, “The question is: If you’re a doctor and making a good living, are you going to take a chance of losing the right to practice medicine so you can testify against a doctor who you think made a mistake? Nobody would do that.”¹²⁶

B. Additional State Laws Silencing Expert Witnesses

As of 2014, Florida is the only state to require that physicians obtain expert witness certificates prior to rendering testimony.¹²⁷ However, other states are expected to enact similar legislation or already have in place laws that severely restrict plaintiffs’ expert witnesses.¹²⁸ For instance, Ohio mirrors Florida’s expert witness certificate most closely by maintaining that physicians who render expert testimony are deemed to hold a temporary license in the state, which subjects them to the disciplinary authority of Ohio’s board of medicine.¹²⁹ South Carolina also pursued similar legislation by requiring out-of-state physicians to obtain a state license before acting as medical experts.¹³⁰ However, the proposed legislation was overturned in 2006 when the South Carolina Supreme Court reasoned that the law would “unreasonably exclude the country’s leading medical scholars” from contributing their opinions and “ha[d] the potential to substantially impair the orderly administration of justice.”¹³¹ Despite the

125. See Rice et al., *supra* note 119 (stating “these more stringent requirements could have a ‘chilling effect’ on medical expert testimony and dissuade physicians from serving as expert witnesses in the state”).

126. Valerie Jablow, *Expert Witnesses Win Their Day in Court Against Medical Groups*, TRIAL (Sep. 1, 2006), http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=151664290.

127. *State Laws Chart II: Liability Reforms*, AM. MED ASS’N: ADVOCACY RESOURCE CTR. (2015), <http://www.ama-assn.org/resources/doc/arc/x-pub/state-laws-chart-2.pdf> (citing the requirements each state imposes on medical expert witnesses).

128. See Jordan, *supra* note 55 (recommending similar legislation, the American Medical Association urged states to require out-of-state expert witnesses to obtain an in-state certificate before offering testimony).

129. Compare OHIO REV. CODE ANN. § 2323.421 (LexisNexis 2015) (“A person licensed in another state to practice medicine, who testifies as an expert witness on behalf of any party in this state in any action against a physician for injury or death, whether in contract or tort, arising out of the provision of or failure to provide health care services, shall be deemed to have a temporary license to practice medicine in this state solely for the purpose of providing such testimony and is subject to the authority of the state medical board and the provisions of Chapter 4731 of the Revised Code. The conclusion of an action against a physician shall not be construed to have any effect on the board’s authority to take action against a physician who testifies as an expert witness under this section.”).

130. Kesselheim & Studdert, *supra* note 39, at 2908; see also S.C. CODE ANN. § 40-47-35 (2011); see also S.C. CODE ANN. § 40-47-20 (36)(h) (2011).

131. See *In re Act No. 385 of 2006*, 2006 S.C. Lexis 287 (S.C. Aug. 24, 2006).

law's failure, South Carolina's efforts paved the way for Florida's latest expert witness certificate requirement, which thus far has managed to circumvent the legal challenges the South Carolina law faced.¹³² However, the similarities between Florida's expert witness certificate law and the failed South Carolina law suggest that Florida may not be in the clear just yet when it comes to facing future legal challenges.¹³³ For now though, Florida leads the way in requiring expert witness certificates that subject out-of-state medical expert witnesses to its board's disciplinary authority, with Ohio following close behind and with the possibility of other states following suit.¹³⁴

Elsewhere, states are imposing other types of strict expert witness requirements. In Mississippi for instance, doctors from out of state who are found guilty of giving fraudulent testimony can be prohibited by court injunction from testifying in future cases.¹³⁵ "The state medical board also can revoke the licenses of doctors who provide false testimony and charge physicians up to \$10,000 for investigating a case."¹³⁶ Twenty-eight other states require that plaintiffs obtain a "certificate-of-merit" or a sworn affidavit from their expert witnesses, which requires plaintiffs to file an expert report confirming the merits of a medical liability case before filing a claim.¹³⁷ While such a requirement can help verify the merits of a case before going to trial, it also places a heavy burden on the injured patient because obtaining a certificate-of-merit can be "very expensive and difficult barrier to cross" for plaintiffs' lawyers looking to sue negligent doctors.¹³⁸ In Texas for instance, plaintiffs carry a heavy burden when filing a

132. See Rice et al., *supra* note 119.

133. See *Florida Justices Cast Doubt on Malpractice Law*, HIGHLANDS TODAY (Dec. 14, 2013), <http://highlandstoday.com/hi/local-news/florida-justices-cast-doubt-on-malpractice-law-20131214/> (noting that in December of 2013, the Florida Supreme Court declined to adopt changes to the state's evidence code that would have gone along with the state's expert witness certificate law).

134. See Rice et al., *supra* note 119 ("Other states will likely look to Florida in the future to provide insight into the benefits of these additional requirements on expert witnesses.").

135. Alicia Gallegos, *Expert Witnesses on Trial*, AM. MED. NEWS (Aug. 1, 2011), <http://www.amednews.com/article/20110801/profession/308019938/4/>.

136. *Id.*

137. See Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 24, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx> (providing a complete list of states with the certificate of merit or sworn affidavit requirements and their respective statutes); see also Amy Lynn Sorrel, *Texas Certificate-of-Merit Law Ruled Constitutional*, AM. MED. NEWS (Sept. 7, 2011), <http://www.amednews.com/apps/pbcs.dll/peronalia?id=asorrel>.

138. Spencer Aaronfeld, *Florida's New Medical Malpractice Law Makes Suing Doctors and Hospitals More Difficult for Injured Patients*, HUFFINGTON POST (June 6, 2013, 3:05 PM), http://www.huffingtonpost.com/spencer-aronfeld/floridas-new-medical-malp_b_3390016.html.

malpractice claim because if plaintiffs fail to produce adequate expert reports within 120 days of filing their cases, they are liable for the defendants' legal fees.¹³⁹ With such laws in place, plaintiffs not only face the hurdle of overcoming the medical community's unwritten code of silence, but they also face even greater financial burdens that extend beyond their medical injuries, with the possibility of no retribution if no willing expert can be found.¹⁴⁰

Moreover, many states have adopted legislation requiring the expert witness be in the same specialty as the defendant. According to the American Medical News, "more than [thirty] states have laws that set professional standards for expert witnesses in medical liability cases. Around [twenty-four] of those states require expert witnesses to have the same . . . medical background as the defendant."¹⁴¹ In Arizona, for example, an expert witness must be "licensed in the same profession as the defendant and maintain board certification in the same specialty as the defendant."¹⁴² He or she must also "devote a majority of professional time to the active clinical practice or instruction of students in the same profession as the defendant for the year immediately preceding the occurrence giving rise to the lawsuit."¹⁴³ Other states such as Florida,¹⁴⁴ Georgia,¹⁴⁵ South Carolina,¹⁴⁶ Kansas,¹⁴⁷ North Carolina,¹⁴⁸ Arkansas,¹⁴⁹ Illinois,¹⁵⁰ New Jersey,¹⁵¹ and Tennessee,¹⁵² are a few among the twenty-

139. Becca Aaronson, *Despite Counsel, Victim is Hindered by Tort Laws*, N.Y. TIMES (Jan. 24, 2013), <http://www.nytimes.com/2013/01/25/us/even-with-counsel-texas-amputee-is-hindered-by-state-tort-laws.html>.

140. *See generally id.*

141. George F. Indest, *Florida Legislature Increases Requirements for Medical Expert Witnesses—What this Means for the Future of Medical Malpractice Cases*, LEGAL SOLUTIONS BLOG (June 28, 2013), <http://blog.legalsolutions.thomsonreuters.com/practice-of-law/florida-legislature-increases-requirements-for-medical-expert-witnesses-what-this-means-for-the-future-of-medical-malpractice-cases/>.

142. Alicia Gallegos, *Qualifications of Medical Expert Witnesses Come Under Fire*, AM. MED. NEWS (May 13, 2013), <http://www.amednews.com/article/20130513/profession/130519985/2/>; ARIZ. REV. STAT. ANN. § 12-2604(A) (2003 & Supp. 2014).

143. *Id.*; ARIZ. REV. STAT. ANN. § 12-2604(A)(2) (2003 & Supp. 2014).

144. FLA. STAT. § 766.102(5)(a)(1) (2011 & Supp. 2015).

145. GA. CODE ANN. § 24-7-702(c)(2)(C) (2013).

146. S.C. CODE ANN. § 15-36-100(A)(2) (2005 & Supp. 2012).

147. KAN. STAT. ANN. § 60-3412 (2005 & Supp. 2014).

148. N.C. GEN. STAT. § 90-21.12(a) (2013).

149. ARK. STAT. ANN. § 16-114-206(12) (2006) (note that the law was struck down in *Broussard v. St. Edward Mercy Health System Inc.*, 386 S.W.3d 385 (Ark. 2012)).

150. 735 ILL. COMP. STAT. 5/8-2501(c) (2003 & Supp. 2015).

151. N.J. STAT. ANN. § 2A:53 A-41(a) (West 2014).

152. TENN. CODE ANN. § 29-26-115(b) (2012).

four states with legislation requiring experts to be in the same specialty as the defendant in question.¹⁵³

Yet under the previous laws, experts needed only to practice in a “similar” specialty.¹⁵⁴ The transition from requiring experts to be in a “similar specialty” to being in the “same specialty” may seem trivial, but in reality, it has onerous effects on the ability for injured patients to have their fair day in court. For starters, the distinction between “same” and “similar” specialty has created ambiguity among the medical and legal professions, leaving state courts with the task of deciphering that distinction.¹⁵⁵ For instance, in 2013, the New Jersey Supreme Court imposed strict limitations on expert witnesses by ruling it was no longer sufficient for the expert to have expertise in the treatment of the condition; instead, the expert needed to be board-certified in the exact same specialty as the defendant physician or credentialed by a hospital to specialize in that specific area.¹⁵⁶ This type of ruling negates any overlap in specialties the expert and the defendant doctor might have. For instance, the expert in the New Jersey case was an expert in internal medicine and was credentialed to treat the illness at issue in the case—carbon monoxide poisoning.¹⁵⁷ Despite the fact that the case centered on the alleged negligent treatment of carbon monoxide poisoning and despite the expert’s specialization in that area, the court ruled that the expert was not allowed to testify because he was not board-certified in the exact same specialty as the defendant, which was emergency medicine.¹⁵⁸ Thus, even though internal medicine and emergency medicine are generally considered to overlap, the expert could not testify based on the court’s reading of New Jersey’s “same specialty” law.¹⁵⁹

A similar ruling was rendered by the Supreme Court of Alabama in *Hegarty v. Hudson*.¹⁶⁰ The court ruled a board certified obstetrician-gynecologist is not qualified to testify against a board-certified family physician in a negligence case related to the delivery of an infant.¹⁶¹ Again,

153. See Morton, *supra* note 137 (providing a complete list of states with certificate-of-merit or sworn affidavit requirements and their respective statutes).

154. Alicia Gallegos, *Medical Liability Reform Quick to Trigger Legal Challenges*, AM. MED. NEWS (July 15, 2013), <http://www.amednews.com/apps/pbcs.dll/personalia?id=agallegos>.

155. See Michael G. Daly, Nicholas v. Mynster: *Expert Witness Requirements for Medical Malpractice Cases are Heightened as Supreme Court Enforces the Patients First Act’s Same-Specialty Requirements*, 20 DEF. DIG. 1, 10 (2014).

156. *Id.*

157. See *id.* at 29.

158. See *id.* at 30 (citing *Kim v. Ahn*, No. A-2285-11T1, 2013 N.J. Super. LEXIS 1944 (App. Div. Aug. 2, 2013)).

159. See *id.* at 10, 29.

160. See generally *Hegarty v. Hudson*, 123 So. 3d 945, 950–51 (Ala. 2013).

161. *Id.*

despite the significant overlap in specialties between the challenging expert and the defendant, the “same specialty” requirement limited the pool of available experts to the injured patient.

As a result, these same specialty restrictions will have “a chilling effect on the rights of injured patients hoping to find doctors who are both qualified and willing to come to court and testify against members of their own medical community.”¹⁶² “Supporters of this change in the law claim forcing plaintiffs to find expert witness opinions from doctors who share the exact same background, education, and training will encourage early resolution of claims.”¹⁶³ But the reality is, “most doctors are afraid to testify against another doctor who practices in their community and medical specialty.”¹⁶⁴ Thus, “many suspect that the intent and the likely effect of this legislation is to remove discretion from judges and make it far more difficult for plaintiffs to obtain an expert witness.”¹⁶⁵ In the end, the truth of the matter is that these laws effectively perpetuate the medical community’s unwritten rule of not testifying against your fellow doctor.

VII. CONCLUSION

Just as sports have their unwritten rules, so too does the medical profession. The difference is that the unwritten codes in sports promote sportsmanship, professionalism, and camaraderie while the unwritten rule in the medical world promotes secrecy, reluctance, and at times, unfair retaliation. The new laws passed by state legislatures essentially make written the once unwritten rule of not testifying against a fellow doctor. Yet in a legal system where expert witnesses are essential for a plaintiff to file a medical malpractice lawsuit,¹⁶⁶ the new laws are betraying injured patients seeking to file a claim. The once unspoken conspiracy of silence among doctors and their medical societies has now become valid and encouraged thanks to state legislation. The sportsmanship that was once embodied by the Hippocratic Oath is now buried and gone due to medical societies and state medical boards exercising their political muscle over state legislatures. However, these laws do not protect physicians and plaintiffs, as medical organizations claim. Instead, these laws perpetuate an unwritten code of silence among doctors in all specialties, and in the end it is the injured patients who suffer.

162. Aaronfeld, *supra* note 139.

163. *Id.*

164. *Id.*

165. Indest, *supra* note 141.

166. *See* Andrews, *supra* note 36.

As a proposed solution, states should eliminate any special rules for medical expert testimony and follow the *Daubert* standards embodied in Federal Rule of Evidence 702.¹⁶⁷ In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court outlined a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony.¹⁶⁸ The specific factors explicated by the *Daubert* Court are:

(1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.¹⁶⁹

Since *Daubert*, Rule 702 of the Federal Rules of Evidence has been amended to reflect the above mentioned factors so that the courts can act as gatekeepers when it comes to excluding unreliable expert testimony.¹⁷⁰ As the gatekeepers, trial judges are to assess the reliability of expert witness testimony based on methodological soundness or rigor, rather than scientific consensus.¹⁷¹ As a result, the focus is “on principles and methodology, not on the conclusions they generate.”¹⁷² “If the [expert] witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts.”¹⁷³ Under this level of scrutiny, the courts are sufficient gatekeepers in weeding out unfounded expert testimony since the focus is placed on methodological soundness rather than mere conclusions.¹⁷⁴

Moreover, the *Daubert* standard promotes a greater degree of fairness than the current state rules for expert witnesses because the *Daubert* standard does not impose harsh requirements on plaintiffs' expert

167. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597–98 (1993); FED. R. EVID. 702 (advisory committee's note).

168. *Daubert*, 509 U.S. at 592–95.

169. See FED. R. EVID. 702 advisory committee's note.

170. See *id.*

171. See *Daubert*, 509 U.S. at 592–95.

172. *Id.* at 595.

173. FED. R. EVID. 702 advisory committee's note, at 400.

174. See *Daubert*, at 593, 595 (stating that the Court is confident that federal judges possess the capacity to undertake this review).

witnesses. Rather than imposing same specialty and same-licensure requirements,¹⁷⁵ onerous certificates of merit,¹⁷⁶ or biased out-of-state expert witness certificate requirements,¹⁷⁷ the *Daubert* standard is an impartial way for both the plaintiff and defendant to adequately present valid evidence that can serve their side.¹⁷⁸ Such a standard upholds the very nature and design of our adversarial system, with each side being allowed to tell their story in a system where the judge acts as the gatekeeper and the jury acts as the trier of fact.¹⁷⁹ As it stands however, the states are encroaching upon the judicial powers of the courts by stripping the courts of their gatekeeper roles through unnecessarily onerous rules for experts.¹⁸⁰

For those that are pessimistic about the capability of the courts to distinguish “junk science” from legitimate expert evidence, these critics should remember that conventional devices within the American adversary system are designed to weed out pseudoscientific assertions.¹⁸¹ As the Supreme Court noted in its unanimous opinion from *Daubert*,¹⁸² “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”¹⁸³ In addition to these conventional devices, trial courts remain free to direct a judgment in the event that the evidence presented at trial is “insufficient to allow a reasonable juror to conclude that the position more likely than not is true.”¹⁸⁴ Thus, both the jury and the trial judge act as gatekeepers in the

175. See *Indest*, *supra* note 141.

176. See, e.g., *Sorrel*, *supra* note 137.

177. See *Hernandez*, *supra* note 99.

178. See *Daubert*, 509 U.S. at 595–96.

179. See *id.* at 596–97 (stating that the traditional avenues of undermining weak evidence, including cross-examination and presentation of contrary evidence, remain unaffected by this holding).

180. See *Florida Justices Cast Doubt on Malpractice Law*, GAZETTEXTRA (Dec. 14, 2013), <http://highlands.com/hi/local-news/florida-justices-cast-doubt-on-malpractice-law-20131214/> (explaining that the Florida Supreme Court declined to approve the out-of-state expert witness certificate requirement on the grounds that it potentially violates the constitutional separation of powers. The Court also reasoned that the certificate requirement poses an “access to courts issue” and is “prejudicial to the administration of justice.”).

181. See *Daubert*, 509 U.S. at 595–97 (recognizing that summary judgment, cross-examination, and many other mechanisms protect both sides of a controversy from faulty evidence).

182. *Id.* at 580.

183. *Id.* at 596.

184. *Id.* See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (noting that the trial judge has the discretion “both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert’s reliability arises.”).

adversarial process when it comes to sifting frivolous or misleading expert testimony.¹⁸⁵ With these gatekeeping methods in place, states do not need to impose additional special rules for experts since the *Daubert* standard embodied in Rule 702 is a sufficient standard for determining the admissibility of scientific expert testimony.

Finally, disciplining actions for any testimony that is found to be frivolous or misleading should be handled by the state licensing boards rather than a panel of professionals who are the expert's peers and colleagues.¹⁸⁶ Rather than expert testimony being subject to peer review and subsequent peer discipline, state medical boards should forfeit this aspect of self-regulation and instead demand government oversight from state licensing departments.¹⁸⁷ Such a structure would help eliminate the potential for bias that inevitably is connected with the current peer review system.¹⁸⁸

As it stands, however, the medical community is only adding to the silence and making it increasingly difficult for plaintiffs' expert witnesses to come forward.¹⁸⁹ The time has come for abolishing the medical community's unwritten rule of not testifying against thy brethren.¹⁹⁰ The time has come to rewrite the laws that make the unwritten rules written. The medical community and state legislatures need to stop relegating experts to the sidelines and allow them to play their role in the legal justice system. By making it harder for plaintiffs' expert witnesses to play ball with members from their own medical team, the people who are really being fouled are the patients.

185. See *Daubert*, 509 U.S. at 595–97.

186. See *supra* notes 73–86 and accompanying text.

187. See *supra* notes 73–96 and accompanying text (citing examples of state medical boards wielding their power to silence plaintiffs' expert witnesses).

188. See *supra* notes 84–96 and accompanying text (showing that nearly all complaints received by the Florida Medical Association are against doctors who are expert witnesses for plaintiffs).

189. See Seidelson, *supra* note 7, at 183–84.

190. See *generally* Mencimer, *supra* note 7.