



# Ethics and Experts: Costs of the For-Profit Expert Witness Industry

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*An expert witness is someone who has knowledge beyond that of the ordinary person enabling him or her to give testimony regarding an issue that requires expertise to understand. Experts are allowed to give opinion testimony which a non-expert witness may be prohibited from testifying to. In court, the party offering the expert must lay a foundation for the expert's testimony. Laying the foundation involves testifying about the expert's credentials and experience that qualifies him/her as an expert. Sometimes the opposing party will agree to the expert's qualifications in the interests of judicial economy.*

*Experts are qualified according to a number of factors, including but not limited to, the number of years they have practiced in their respective field, work experience related to the case, published works, certifications, licensing, training, education, awards, and peer recognition. They may be called as upon as consultants to a case and used to give testimony at trial.<sup>1</sup>*

<sup>1</sup> US Legal Definitions. Copyright 1997-2019 airSlate Legal Forms, Inc. d/b/a USLegal.  
Available at: <https://definitions.uslegal.com/e/expert-witness/>

In the United States, there are federal rules set forth regarding expert witnesses. Federal Rule 702 states that, “a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: the expert’s scientific, technical, or other specialized knowledge will help the tier of fact to understand the evidence to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principals and methods; and the expert has reliably applied the principals and methods to the facts of the case.”<sup>2</sup>

Though there are federal statutes, many states adhere to different standards. These, more often than not, are based upon the Frye or Daubert standards, or an incorporation of both. California and Minnesota are two of the states that have combined the standards. New York is one of the few states left that uses only the Frye standard as a guide for expert witness testimony.<sup>3</sup> What sets New York apart from other states is that expert witness testimony is deemed ‘necessary’ to describe subject matter.<sup>4</sup>

Throughout the rest of the world there are civil law systems in place, such as Italy, Germany or France. In a civil law system, a judge appoints expert witnesses to ensure that they are unbiased. Unlike in the common law system of the United States, where judges play a much more passive role.<sup>5</sup> Experts are paid for on both sides, through lawyers, not the clients themselves. American judges are generally free to appoint their own experts, but rarely do. Other countries like New Zealand and Canada also use partisan methods of selecting expert witnesses, like the United States. However, the United States “amplifies their power by using juries in civil cases, a practice most of the common-law world has rejected.”<sup>6</sup> The use of juries in trials is written into the sixth (criminal) and seventh (civil) amendments of the United States constitution, therefore it will likely not change.<sup>7</sup>

<sup>2</sup> Pub.L 93-595, § Jan. 2, 1975, 88 Stat. 1937; Apr.17, 2000, eff. Dec 1, 2000; Apr. 26,2011, eff. Dec. 1, 2011.

<sup>3</sup> Ryskamp, Dani Alexis. Beyond Daubert: State-Specific Expert Witness Requirements. 2019 June. The Expert Institute. Available at: <https://www.theexpertinstitute.com/beyond-daubert-state-specific-expert-witness-requirements/>

<sup>4</sup> Furguson v. Hubbell, 97 NY 507, 514 [1884]

<sup>5</sup> World Bank. Comparative Study on Expert Witnesses in Court Proceedings. 2010 June. Report no. 62832 – TR.

<sup>6</sup> Liptak, Adam. Experts Hired to Shed Light Can Leave US Courts in Dark. 2008 August. New York Times.A1.

<sup>7</sup> <https://www.aclu.org/united-states-bill-rights-first-10-amendments-constitution>



# History

The existence of the expert witness solidified during England’s Adversarial Revolution in the 1730’s. This revolution created two distinct doctrines, “the hearsay doctrine, which attempted to limit testimony to information based solely on personal observation, and the opinion doctrine, which sought to control the form in which witnesses communicated their perceptions to the jury, requiring them not to use inferences where the subject matter is susceptible to factual statements,” thus the concept of the expert witness was born.<sup>8</sup>

The notion of allowing an expert witness to testify directly to a jury and provide opinionated evidence on the facts of other

witnesses was first introduced by Lord Mansfield in the case of *Folkes v. Chadd* in 1782. In this case, the court allowed leading civil engineer, John Smeaton, to provide scientific rational behind proposed legislation. The decision by the English Court to allow for an expert to provide background and detail on a case is often cited as the root of modern rules on expert testimony.<sup>9</sup>

The United States’ first use of expert testimony on record was *United States v. Driver*, 1921. This was the first published court case in which a psychologist’s expert witness testimony was heard. This set an important precedent for the application of psychology in

<sup>8</sup> Landsman, supra note 14, at 572; Gallanis, supra note 17, at 530-37; see also Hand, supra note 2, at 44-45; John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 448 (1904).

<sup>9</sup> Ryskamp, Dani Alexis. *A Brief History of Expert Witnesses in US Courts*. 2018 May. The Expert Institute. Available at <https://www.the-expertinstitute.com/a-brief-history-of-expert-witnesses-in-u-s-courts/>

<sup>10</sup> Ryskamp, Dani Alexis. *A Brief History of Expert Witnesses in US Courts*. 2018 May. The Expert Institute. Available at <https://www.the-expertinstitute.com/a-brief-history-of-expert-witnesses-in-u-s-courts/>



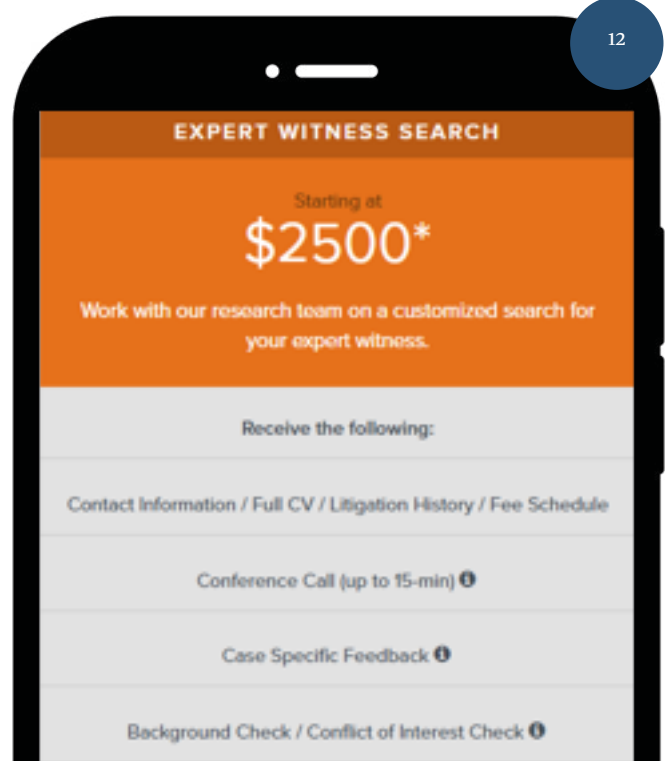
# Market

In civil law countries, where the expert is appointed by the judge, most countries have official lists of experts. Experts on these lists must request to be added and must fulfill requirements for ethics and competence. They are held to very strict standards.

Whereas, the United States’ modern market is saturated with websites dedicated to locating expert witnesses to testify in trials. A quick internet search for “expert witness” leads to countless results including: [www.Forenscigroup.com](http://www.Forenscigroup.com); [www.expertengine.com](http://www.expertengine.com);

<sup>11</sup> World Bank. Comparative Study on Expert Witnesses in Court Proceedings. 2010 June. Report no. 62832 – TR.

<sup>12</sup> <https://www.theexpertinstitute.com/how-we-work/>



12

www.expertwitnessfinders.com; and www.theexpertinstitute.com. These expert witness search engines commonly charge a flat fee for a search, on top of what the plaintiff or defendant will have to pay the expert. Experts themselves request to be on lists but are not held to the rigorous standards of experts in civil law systems.

Many lawyers, however, rely on advice from peers to identify expert witnesses. The most common types of expert witnesses are medical, forensic, accounting, and vocational.

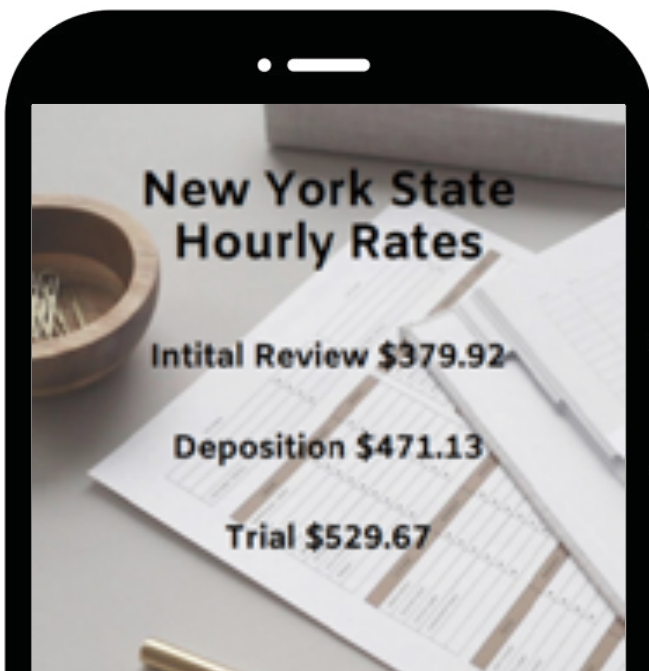
Medical expert witnesses are one of the most common kind of expert witnesses. They are most commonly found at medical malpractice trials and personal injury. However, they can testify in any case where their expertise is needed. Although a medical expert witness is

usually a doctor, nurses, physician’s assistants, or any other type of medical professional is accepted. In homicide or wrongful death cases, often the witness would be the medical examiner who testifies about the cause and nature of death.

Forensic expert witnesses have overlap with the medical expert witness, i.e. medical examiners, but forensic expert witnesses range from: ballistic experts, chemists, biologists, blood spatter analysts, psychologists, and criminal behavior experts. Forensic science is any kind of science applied to the field of law. Most large law enforcement agencies have their own dedicated forensic science teams who they rely on to analyze evidence and provide testimony in court.

In complex matters of white-collar crime and fraud, accounting experts are utilized. These expert witnesses provide testimony in complex matters of white-collar crime and fraud. They may also provide their opinions outside of a criminal context on the standard of care in the securities and banking industries. For example, a securities expert witness could testify that an investment company fell short of its responsibility to its customers by failing to conduct adequate research before making an investment.

A vocational expert witness is a specific kind of expert witness called by the social security administration, when someone appeals a



denial of social security disability benefits. Commonly the government will deny benefits to a disabled individual because they believe that they're capable of working despite their disability. The vocational expert is called to offer their expert opinion about the whether the appellant is capable of working. They will consider the person's physical and mental limitations, the transferrable skills they have from past jobs, and the state of the job market in fields in which the appellant is qualified to work.<sup>13</sup>

Vocational experts are often treated with suspicion by lawyers representing disabled individuals. Although they are supposed to have expert knowledge about working conditions, physical demands of occupations, transferability of skills, and numbers of jobs, they don't need to have any specific qualifications or training to hold the job. In fact, vocational experts are technically

independent contractors, and are supposed to be impartial. However, they are hired exclusively by the government which means that like forensic expert witnesses, their objectivity is often called into question.

<sup>14</sup> Experts are available in every imaginable field, both hard and soft sciences. The most sought-after expert witnesses in New York State are experts in the fields of orthopedics, appraisal, mining, lightning, biology, medical forensics, bariatrics, real estate, and education.<sup>15</sup> While the field that expert witnesses come from is incredibly broad, the experts themselves typically fall within three categories: Practitioners, Academics, and Professional Experts.

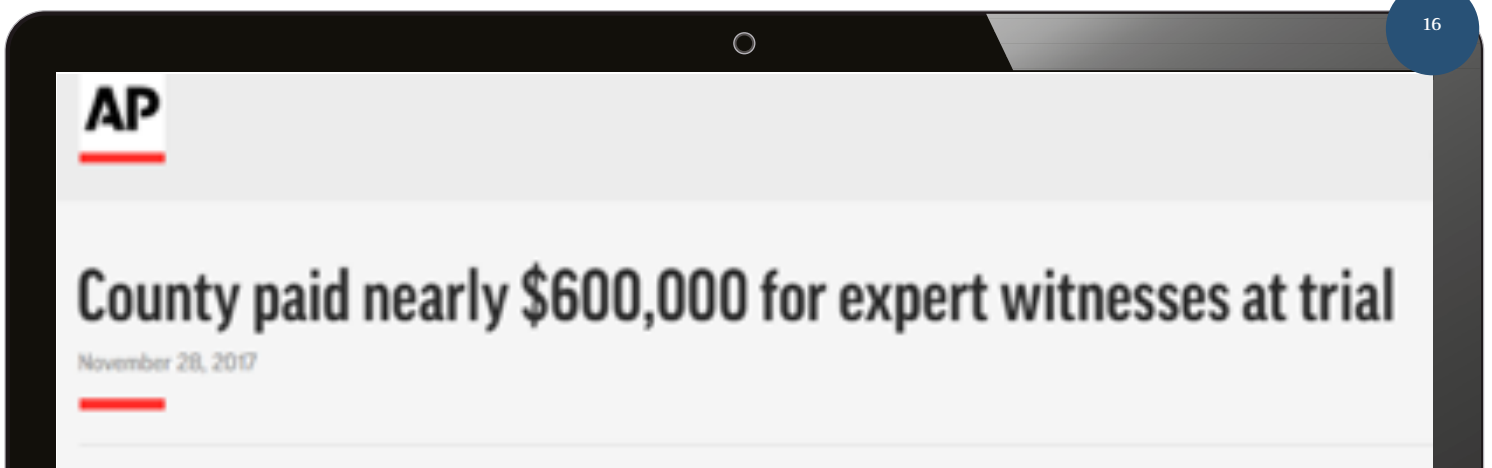
Practitioners perform hands-on work in their fields, such as a physician or engineer. Their 'expertise' comes from practical experiences. Typically, expert testimony will be a small part of the practitioner's workload.

<sup>13</sup> Available at: <https://www.justipedia.com/definition/1009/vocational-expert-social-security>

<sup>14</sup> (Babitsky, Esq., Donovan, Esq., Mangraviti, Esq. Survey of Expert Witness Fees. 2017. SEAK, Inc. Available at: <https://seak.com/expert-witness-fee-data-form/>

<sup>15</sup> Expert Witness Fee Calculator. The Expert Institute. Available at: <https://www.theexpertinstitute.com/expert-witness-fees/>

<sup>16</sup> County Paid Nearly \$600,000 for Expert Witness at Trial. The Associated Press. 2017 November. Available at: <https://www.apnews.com/c2e65f9d62b9460780f6e56f600a15c0>



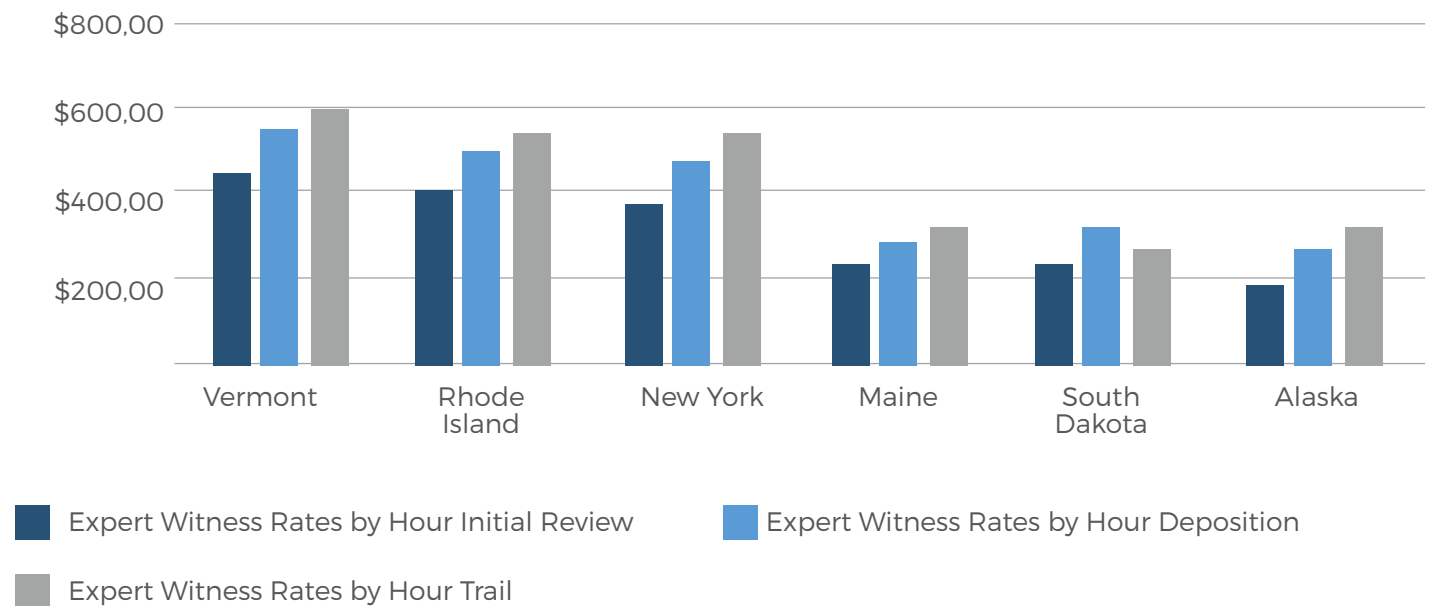
Academics work with methodological approaches with regards to expert testimony. They testify to the facts of issue in the case being tried and will provide an analysis or assessment.

Professional Experts are those who started as an academic or practitioner and then provide expert testimony as their full-time career. These individuals are often quite knowledgeable in their field, although their changing career path may cause them to be

less up to date than their peers on relevant information. They tend to be frowned upon by the courts for the amount testimony they may provide. This category of expert is most at risk of being accused of being a ‘hired gun’.<sup>17</sup>

The exact reasons for the disparity between regional hourly costs for expert witnesses is beyond the scope of the current study.

### States With the Highest and Lowest Expert Witness Hourly Rates <sup>(18)</sup>



<sup>17</sup> Ryskamp, Dani Alexis. Selecting an Expert Witness: Pitfalls and Best Practices. 2017 September. The Expert Institute. Available at: <https://www.theexpertinstitute.com/selecting-an-expert-witness-pitfalls-and-best-practice/>

<sup>18</sup> Ryskamp, Dani Alexis. A Brief History of Expert Witnesses in US Courts. 2018 May. The Expert Institute. Available at <https://www.the-expertinstitute.com/a-brief-history-of-expert-witnesses-in-u-s-courts/>





# Advantages

The value of having an expert witness testify in a case is varied. Most obviously, an expert witness can help to explain complex terms related to the field of their expertise that a lay person may not understand. Having an expert witness present at a trial also lends credibility to the issue being argued. While it is often not the case, expert witnesses give the impression of impartiality to the case.<sup>19</sup> Experts are also given more flexibility in their testimony than a lay witness. Lay witnesses are required to give only opinions “rationally based on the perception of the witness.”<sup>20</sup> An expert may testify freely as they are defined as experts in their field.

Expert witnesses are also valuable in assessing damages, as far as economic damages are

concerned. They can provide a fact-based opinion with regards to how much economic loss a person will suffer over the course of their life. Expert witnesses can explain to the jury how exactly they arrived at this opinion, making it seem highly credible. The lawyer can then use the amount provided by the expert witness as a guide for non-economic damage rewards.<sup>21</sup>

The presence of an expert witness may also cause the other side to settle more quickly, based upon the expert’s testimony, in order to avoid incurring lengthy and costly trial proceedings. The pressure to settle could be heightened in areas where the expert is anonymous as is the case with New York’s medical malpractice experts.

<sup>19</sup> Shaughnessy, Esq. Robert. The Value of an Expert Witness. Summer 2010. Dispute Resolution Insights. Available at:

<sup>20</sup> Federal Rules of Evidence. 701.

<sup>21</sup> Ryskamp, Dani Alexis. 2018 August. Using Expert Witnesses to Calculate or Prove Damages. The Expert Institute. Available at: <https://www.theexpertinstitute.com/using-expert-witnesses-to-calculate-or-prove-damages/>



# Disadvantages

There are also negative consequences of hiring an expert witness for a trial. The biggest being the time and cost. When an expert witness is hired, the opposing side must then perform their due diligence to vet them. This involves: locating the expert's website (if there is one), searching expert directories, the expert's social media, online resumes, researching their educational background, locating licensing and certification information, searching for disciplinary records, publications, previous

court opinions and testimony, news/media involvement, and a search for involvement in discussion boards or blog posts. This requires a great deal of time on behalf of the lawyers and their staff. Time, in the legal field, equals money.<sup>22</sup> The lawyers will then come to court, armed with the information that they have gathered and engage in an extensive cross-examination of the opposing expert, to discredit or impeach them. The attention, time, and cost going toward the expert witnesses

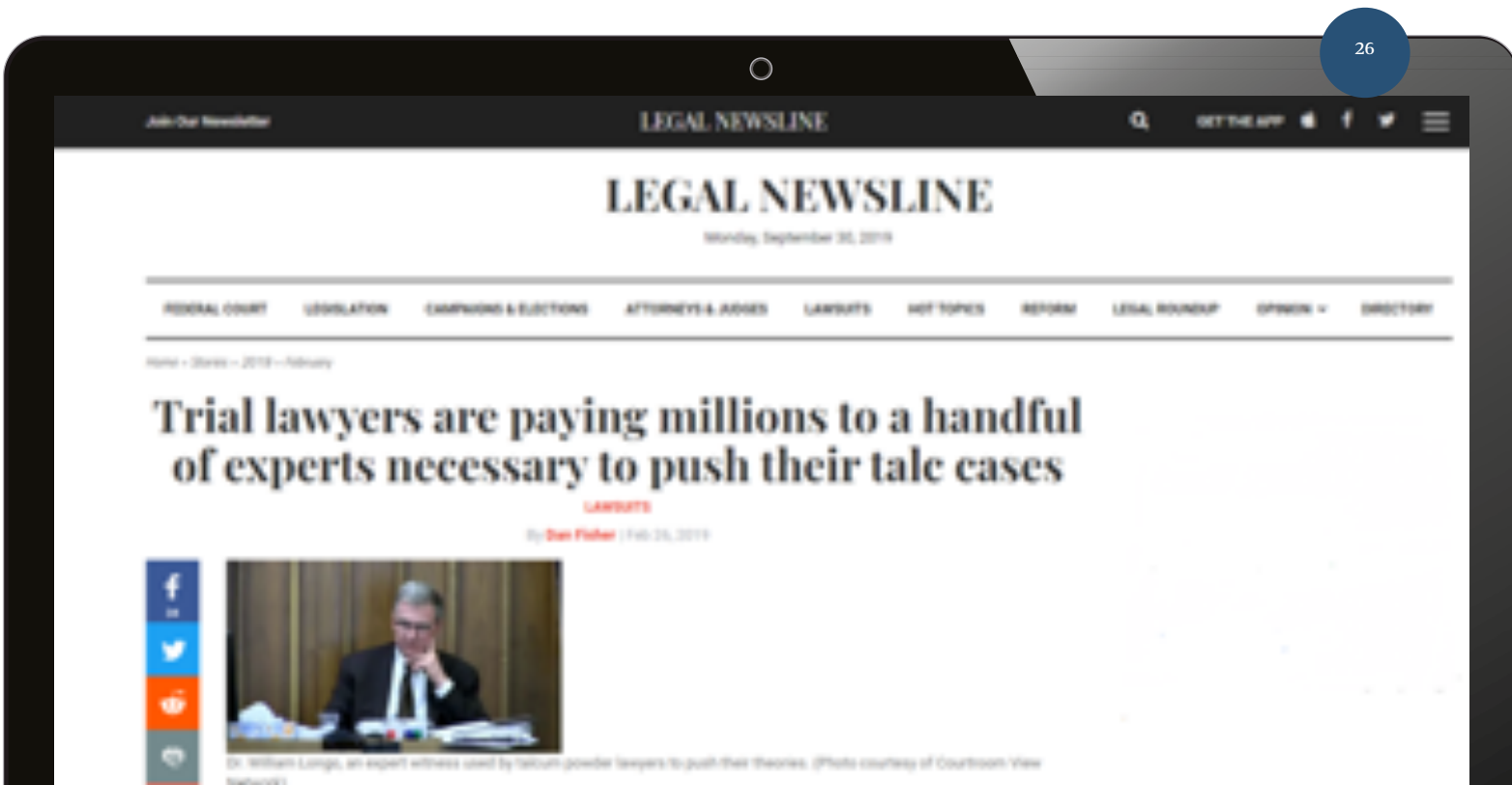
<sup>22</sup> Brennan, Dilenschneider, Levin and Robinson. Finding and Researching Experts and their Testimony. 2009 May. 2nd.Ed. White Paper. Available at: [https://www.lexisnexis.com/documents/pdf/20071211111707\\_large.pdf](https://www.lexisnexis.com/documents/pdf/20071211111707_large.pdf)

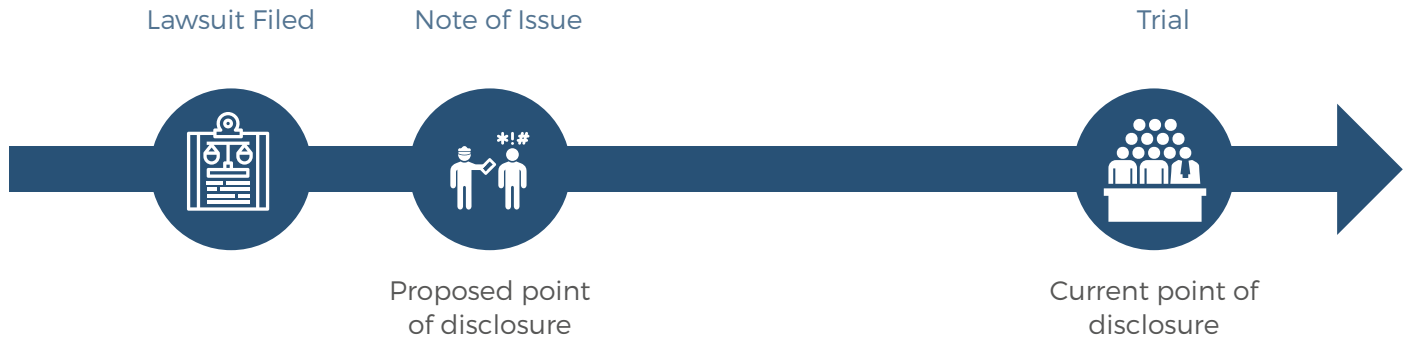
**An expert witness industry has been created that critics say is riddled with ‘fringe science’, and with experts willing to fudge facts for fees that can top \$100,000 per year**

takes away from what the central focus should be, the merits of the case being tried. It becomes a battle between the expert’s, rather than the Plaintiff and Defendant.

New York rules differ from Federal rules regarding expert witnesses and evidence. In

New York, experts are not required to provide written reports regarding their opinion on the matter at hand, as well as the grounds to that opinion. In New York, CPLR3101(d) is a pleading written by the attorney in the case, not the expert themselves “that





identifies the expert and their qualifications and summarizes ‘in reasonable detail’ the substance of the facts and opinions on which the expert is expected to testify.”<sup>23</sup>

The statement ‘in reasonable detail’ gives both sides the chance to be vague in their responses. Therefore, the opposing side may not have a real sense of what the expert’s opinion is. This also makes expert witness impeachment<sup>24</sup> in New York far more difficult to do, which in turn requires the opposing side to engage in the intense vetting of opposing experts outlined above.

The current law in New York regarding expert disclosure requires litigants to disclose their respective experts prior to trial, but offers no definitive time frame in which the disclosure must be exchanged. Most courts throughout the state allow this disclosure to take place as late as thirty days prior to trial, making it extremely difficult to assess the merit of a case ahead of time and leading to the widespread practice of “trial by ambush,”<sup>25</sup> making appropriate preparedness impossible. Rules should be put in place to ensure that both sides, judge and jury are informed about the facts of the case long before a trial commences.

<sup>23</sup> Neidl, Benjamin F. Expert Q&A on Expert Witness Practice in New York. 2018. Jackson Lewis blog post. Available at: [https://www.jacksonlewis.com/sites/default/files/docs/NYSupp18\\_OfNote.pdf](https://www.jacksonlewis.com/sites/default/files/docs/NYSupp18_OfNote.pdf)

<sup>24</sup> Impeachment of an expert witness is the process of calling into question the credibility of the expert during cross-examination, usually on the basis of bias, inconsistency or character. Available at: <https://www.crossexam.com/impeaching-an-expert-witness.html>

<sup>25</sup> (image) Grow, Brian. Expert Witness’s Under Examination. The Chicago Tribune. 2003 July. Available at: <https://www.chicagotribune.com/news/ct-xpm-2003-07-20-0307200257-story.html>

<sup>26</sup> Fisher, Dan. Trial Lawyers are Paying Millions to a Handful of Experts Necessary to Push Their Talc Cases. Legal Newsline. 2019 February. Available at: <https://legalnewsline.com/stories/511786130-trial-lawyers-are-paying-millions-to-a-handful-of-experts-necessary-to-push-their-talc-cases>



# Ethical Considerations

In addition to doing research on the opposing expert, experts must be shepherded by their own counsel, briefed on the case, its findings and facts, which takes a great deal of time and effort, especially in cases where multiple experts are retained. While the expert witness is working with the lawyer to create their testimony, there is a chance that bias and unethical behaviors may also take place. This is magnified by the fact that the expert is also paid by the lawyer. Experts are a significant part of the high cost of litigation.<sup>27</sup>

“The expert does not come to court to share his wisdom as a neutral or disinterested explainer. Rather, his purpose – and most assuredly the purpose of the lawyer who calls him – is to persuade the fact-finder to view the facts in the way that benefits the party who sponsors his

testimony.”<sup>28</sup>

Expert witnesses giving opposing testimony can confuse jurors. If both are called ‘experts’ in their field, how can a lay person know which expert is giving the correct opinion, they are contradicting each other? This is where jurors begin to depend on other factors such as the confidence or likeability of the expert, rather than the actual merits of the case being tried.<sup>29</sup>

In these scenarios, the expert witness essentially becomes a sales person, trying to sell you their opinion on the case, based on personality rather than merit or fact.

The same can be argued for a jury disliking an expert witness,

<sup>27</sup> Shaughnessy, Esq. Robert. The Value of an Expert Witness. Summer 2010. Dispute Resolution Insights. Available at: [http://www.willamette.com/insights\\_journal/10/summer\\_2010\\_1.pdf](http://www.willamette.com/insights_journal/10/summer_2010_1.pdf)

<sup>28</sup> Shaughnessy, Robert J. Dirty Little Secrets of Expert Testimony. Winter 2007. Litigation. Vol.33, No.2. Pg 47-52. Available at: [https://www.jstor.org/stable/29760623?read-now=1&seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/29760623?read-now=1&seq=1#page_scan_tab_contents)



*In a medical malpractice case, our expert was a Harvard educated, well credentialed expert, who literally ‘wrote the book’ on his topic. However, he was also an arrogant jerk...he came, testified for our side and I thought, based on his credentials, that he was an impressive witness. However, his personality was still the same [at trial] and we lost the case. The judge allowed us to talk to the jury after the verdict and it was pretty clear the jury hated him too – he might have prestigious credentials, but they didn’t like his arrogance and felt that he was condescending to the defendant doctor.<sup>30</sup>*

In a worst-case scenario, as seen in *Rhodes v. E.I. Du Pont De Nemours & Co*, a hired expert may remove themselves in the middle of a trial, only to change parties and share relevant information with the opposing side. This is an obvious conflict of interest but now the time must be taken to examine and cross-examine to make that determination.<sup>31</sup>

Courts and jurors may also find an expert witness unfavorable if it is found that the expert has not testified for both Plaintiffs and

the Defense. Experts who testify solely for one side or the other may be seen as ‘pay-rolled experts’ or ‘hired guns’ who will testify to whatever the lawyer paying them wants. However, experts who have testified for both sides have a higher likelihood that they will be impeached from the trial because there is a heightened chance that contradictory testimony will be found by the opposing side and used against them.<sup>32</sup> The expert witness system in the United States is complicated and convoluted.

<sup>29</sup> Brodsky, Cramer, and DeCoster. Expert Witness Confidence and Juror Personality: Their Impact on Credibility and Persuasion in the Courtroom. *J AM Academy of Psychiatry Law*. 2009. Volume 37, Number 1. Available at: <https://www.ncbi.nlm.nih.gov/pub-med/19297636>

<sup>30</sup> Rahman, Mehjabeen. 15 Attorneys Share Their Expert Witness Horror Stories. 2016 January. The Expert Institute. Quote by Susan Cox of Edenfield, Cox, Bruce & Classens. <http://edenfieldlaw.com>. Available at: <https://www.theexpertinstitute.com/15-attorneys-share-their-expert-witness-horror-stories/>

<sup>31</sup> Vershuta, Nina. New Rules of War in the Battle of Experts: Amending the Expert Witness Disqualification Test for Conflicts of Interest. 2016. *Brooklyn Law Review*. Volume 81 Issue 2. Available at: <https://brooklynworks.brooklaw.edu/blr/vol81/iss2/6>

<sup>32</sup> J.D., Psy.D., Marinakis, Christina, Ph.D. Pitera, Merrie Jo. Will my Expert Witness Appear Biased? 2016 June. *Litigation Insights*. Available at: <https://www.litigationinsights.com/expert-witness-appear-biased/>



# Laws

Unlike other states, New York State still utilizes the Frye Standard. The Frye Standard states an expert may testify if the tests or principles underlying the expert’s testimony “have gained general acceptance in the particular field in which it belongs.” [applies to novel scientific evidence].<sup>33</sup> Frye hearing determines the admissibility of novel scientific evidence.

Frye 4-part test components are as follows:

- Is the witness competent in the field of expertise in which he seeks to testify before the court?
- Is the expert testimony that is to be offered based on scientific principle or procedure that has been ‘sufficiently established to have gained general acceptance in the particular field in which it belongs’?
- Is the proffered expert testimony ‘beyond the ken (everyday common knowledge of average jury) of the jury’? This is the most important aspect, because if it isn’t you will be denied an expert.
- Is the proposed expert witness’s opinion relevant to the issue and facts of the individual case? <sup>34</sup>

<sup>33</sup> See People v. Westley (NY COA) – DNA permitted into evidence

<sup>34</sup> Daubert v. Frye by State. Available at: <https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/>

In States where the Daubert Standard is applied, a judge will use the standard to assess whether the expert witness testimony is scientifically valid and being applied to the facts of the case correctly.<sup>35</sup>

The Daubert Standard tests are as follow:

- Has the theory or technique in question can be and has been tested?
- Has the theory or technique has been subjected to peer review and publication?
- What is the theory or techniques known or potential error rate?
- What are the standards of control for the

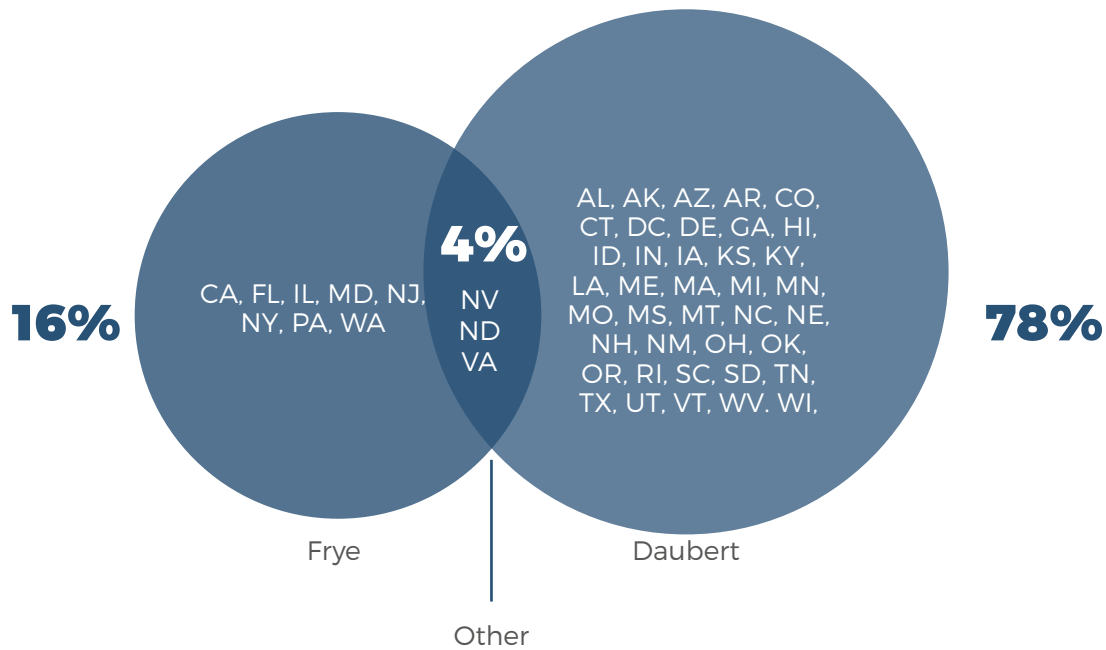
theory or technique?

- Has the theory or technique attracted widespread acceptance within a relevant scientific community?<sup>36</sup>

Other expert witness laws that vary from state-to-state are, disclosure and anonymity laws with regards to medical cases. Disclosure of expert testimony to be used at trial is governed by CPLR 3101(d)(1)(I), which provides:

Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial, and shall disclose

**Daubert v. Frye by State**



<sup>35</sup> Legal Information institute. Available at: [https://www.law.cornell.edu/wex/daubert\\_standard](https://www.law.cornell.edu/wex/daubert_standard)

<sup>36</sup> Cappellino, Anjelica. Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony. 2018 July. The Expert Witness Institute. Available at: <https://www.theexpertinstitute.com/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/>



in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental, or podiatric malpractice, a party responding to a request, may omit the names of medical, dental, or podiatric experts but shall be required to disclose all other information

concerning such experts otherwise required by this paragraph.

Anonymity laws are applied only to medical cases. Unlike the Federal System where the Federal Rules of Civil Procedure require full disclosure of expert witness identity and proposed testimony (Federal Rules Civil Procedure 26(a)(2)). Attorneys in New York receive limited pretrial information concerning the oppositions medical expert. New York does not allow a party to depose its opponent's medical expert and limits the exchange of information by restricting the disclosure of even the name of the medical expert.<sup>37</sup>

This law was originally based on the 'locality rule' – only local experts could be used, because so many were colleagues or known to each other.<sup>38</sup>

<sup>37</sup> Esq. Buholtz, Eileen E. Expert Disclosure in New York State-Court Practice. New York State Bar Association. Available at: <http://www.nysba.org/workarea/downloadasset.aspx?id=44107>

<sup>38</sup> Basuk, Richard. Expert Witness Discovery For Medical Malpractice Cases in the Courts of New York: Is it Time to Take Off the Blindfolds? 2001 November. Volume 76. Number 5. New York University Law Review. Available at <https://www.nyulawreview.org>



# Medical Malpractice

As previously stated, anonymity laws are applied only to medical cases. The locality rule states, “The law relating to malpractice is simple and well settled, although not always easy of application. A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery.”<sup>39</sup>

This rule was created in 1983 and used because the side with more resources could bring in a higher qualified expert from any distance away, thus putting the other side at a disadvantage. The anonymity rules were then created to protect the medical experts, so that their names would not be tarnished in their field if their opinion did not coincide with that of their local peers, thus straining their professional relationships. As noted in the ‘Market’ section, there are hundreds of expert witness search engines, each populated with thousands of experts.

<sup>39</sup> Pike v. Honsinger, 155 N.Y. 201 (N.Y. 1898)

Today, these locality rules have all but been forgotten, although they are still considered law, and experts come from all over to testify. The anonymity rules are therefore rendered unnecessary because most of the experts testifying have no working relationship at risk of strain. The disclosure rules, or lack thereof of NY CPLR 3101(d)(1)(i) don't provide the tools necessary for effective cross examination for either side, which does not benefit the case being tried in any way. The CPLR makes the entire process of medical malpractice cases inefficient and difficult for both sides.<sup>40</sup>

Keeping expert witnesses and their testimony shrouded in mystery is no help to the medical community. The current system discourages an open dialogue about trends and practices in medical malpractice cases. Patient safety is not the goal of these suits as it should be, money is. With more transparency in these cases, new patient safety measures could be developed including databases for malpractice cases and related testimony.<sup>41</sup>

New York would do well to follow the federal

guidelines, “The expert discovery provisions of the FRCP successfully balance and incorporate the advantages of extensive expert disclosure. Their mandatory pretrial exchange of information allows parties to evaluate fully their positions, to achieve early and just settlements, and to prepare effectively for cross examination so that trials proceed on cases’ merits.”<sup>42</sup>

The medical malpractice tort system is flawed. Cases are extremely burdensome and costly, with expert witness rules making it even more complicated. Is it reasonable to assume that a typical jury can separate real science from ‘junk science’? Most likely, the answer is no. When jurors lack the ability to understand the scientific facts of a case, they tend to look to other ways to decide, such as sympathy for the plaintiff, whether warranted or not. “They may focus on wanting to help the plaintiff even if the defendant may not have been the cause of the injury, or the injury was unavoidable or unpredictable.”<sup>43</sup>

<sup>39</sup> Pike v. Honsinger, 155 N.Y. 201 (N.Y. 1898)

<sup>40</sup> Basuk, Richard. Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York: Is it Time to Take Off the Blinds? 2001 November. Volume 76. Number 5. New York University Law Review. Available at <https://www.nyulawreview.org>

<sup>41</sup> Chodos, MDJD, Joel E. Should There be Specialty Courts for Medical Malpractice Litigation? Columbia Medical Review. 2015 May. Available at: <https://medicalreview.columbia.edu/article/specialty-courts-2/>

<sup>42</sup> Basuk, Richard. Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York: Is it Time to Take Off the Blinds? 2001 November. Volume 76. Number 5. New York University Law Review. Available at <https://www.nyulawreview.org>

Most medical malpractice cases last approximately three years, if they make it to the trial phase. It is also an imperfect practice, in that 15% of individuals who sustained injuries are not compensated and a similar percentage of people who did not sustain injuries were unfairly compensated, due to an over litigious clogged court system.<sup>44</sup>

In 2011, New York State created a pilot program that used a \$3 million federal grant to train judges in medical issues and created courts that specialized in medical issues. The specialized courts began in Brooklyn, but soon expanded to Queens and Manhattan. These courts favored the use of judges over juries but focused more on settling out of court than on court process.<sup>45</sup> The pilot program proved to save money and cut down on the high traffic of the regular court system. Claims were managed more efficiently, and payouts dropped from \$196 million in 2003 to \$130 million.<sup>46</sup>

Despite the obvious benefits of these specialized courts in New York State, they are no longer in use. Legislation has been introduced each legislative session in New York State from 2011 (Senator Pedro Espada, Jr. S.7693) to the latest 2019 session (Senator Kevin Parker S. 5105), regarding the implementation of specialized medical courts, but has consistently stalled in committee. This last session, it stalled in the Senate Judiciary Committee.<sup>47</sup>

<sup>43</sup> Chodos, MDJD, Joel E. Should There be Specialty Courts for Medical Malpractice Litigation? Columbia Medical Review. 2015 May. Available at: <https://medicalreview.columbia.edu/article/specialty-courts-2/>

<sup>44</sup> Chepke, Lindsey M., Sloan, Frank A. Medical Malpractice. 2008. MIT Press. Pgs. 176,181,365.

<sup>45</sup> Blake, JD.MA., Valarie. The Jury is Still Out on Health Courts. 2011 September. AMA Journal of Ethics. Available at: <https://journalofethics.ama-assn.org/article/jury-still-out-health-courts/2011-09>

<sup>46</sup> NY Courts to Focus More on Medical Malpractice. 2011 November. Associated Press. Crain's New York Business. Available at: [https://www.crainnewyork.com/article/20111111/HEALTH\\_CARE/111119970/ny-courts-to-focus-more-on](https://www.crainnewyork.com/article/20111111/HEALTH_CARE/111119970/ny-courts-to-focus-more-on)

<sup>47</sup> Available at: <https://www.nysenate.gov/legislation/bills/2019/S5105-medical-malpractice>



## Conclusion

Specialized court systems have proven to be successful in the New York Court system by way of the pilot program that trained New York Judges in medical malpractice in 2011. Specialized courts allow judges to focus on a narrow field of cases rather than a general court system that forces them to rule on a wide range of cases, thus slowing decisions as they learn about the subject matter. They would also lead to a less clogged court system by sending cases to specialized courts and therefore faster decisions. It could also lead to a reduction in the necessity of expert witnesses as specialized knowledge and background would inherently already be known by court officers. There would also be more consistency in decision making and awards.<sup>48</sup> There are

many instances of successful specialized courts in the United States, including Bankruptcy Court, Tax Court, and Family Court.<sup>49</sup> New York State Legislators should work to pass the proposed legislation that has stalled in committee every session since 2011 that would implement specialized medical courts in the 2020 Legislative session.

Anonymity rules with regards to medical malpractice cases in New York State should be abolished. The law originally based on locality is no longer necessary as experts travel far and wide to testify these days. It would also ensure to both judge and jury that medical malpractice cases were being tried based on merit, rather than shrouded in secrecy and anxiety provoking surprises.

<sup>48</sup> Chodos, MD, JD, Joel E. Should There be Specialty Courts for Medical Malpractice Litigation? 2015 May. Columbia Medical Review. 1:10-22. Available at: <https://medicalreview.columbia.edu/article/specialty-courts-2/>

<sup>49</sup> Chodos, MD, JD, Joel E. Should There be Specialty Courts for Medical Malpractice Litigation? 2015 May. Columbia

Judge appointed experts, where the judge would act as an intermediary between the parties and their attorneys, and the expert, is a safeguard against bias that is largely underutilized in the United States. The role of a judge as an expert witness ‘gatekeeper’ can ensure that reliable, unbiased experts enter the courtroom. <sup>50</sup>

In civil law countries where judges appoint the experts, the expert’s payment is governed by statutes and closely regulated. <sup>51</sup> This keeps the playing field neutral and ensures that the experts are not ‘hired guns’, saying what the attorneys are paying them exorbitant amounts to say.

Judge Richard Posner summed the United States legal system up perfectly, “The fault is the culture. Our legal culture, in contrast to that of most countries in the world (notably Japan and the nations of Continental Europe), is ‘adversary’, in the sense that the judge is the arbiter of a contest—a drama, really – put on by the lawyers for the contending parties.”<sup>52</sup> Allowing judges to appoint expert witnesses would reduce the dramatic, adverse nature of our court system.

The American Bar Association has created Rules of Professional Conduct to govern expert witnesses, but expert witnesses have to standard of professional ethics. <sup>53</sup> Stricter, more defined rules need to be enforced at state levels to deter biased expert witnesses. Newly developed standards should enforce universal disclosure rules, create

universal fees based upon fields of expertise, and limit the frequency that an expert can be hired per year to lessen the risk of facing a ‘hired gun’. To end the threat of trial-by-ambush, states should require all parties to disclose their expert witnesses no later than the “note of issue,” which is the point at which a lawsuit is certified as ready for trial. This would reduce frivolous lawsuits and promote meaningful settlement negotiations before court resources are expended. Ultimately, this would reduce the financial and administrative burdens on the courts, allowing more expedient justice for those with legitimate claims. As distinguished legal scholar David Siegel noted, “As enacted...the statute [CPLR 3101(d)] is ineffective at eliciting adequate disclosure and in alleviating heavily burdened court dockets. The statute cries out for some type of amendment to impose some kind of time period on the disclosure...” <sup>54</sup> The United States as a whole, and New York in particular, need to overhaul the existing expert witness structure to ensure that the system is just, that ‘hired guns’ aren’t allowed in courtrooms and judges and juries aren’t forced to base decisions on factors such as likeability rather than the facts being tried.

<sup>50</sup> Kirshner, Laura. Professional Expert Witnesses and the Problem of the Hired Gun. 2012 January. Advanced Trial Practice. Available at: [http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system---december-2011-january-2012/final-paper\\_kirshner.pdf?sfvrsn=4](http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system---december-2011-january-2012/final-paper_kirshner.pdf?sfvrsn=4)

<sup>51</sup> World Bank. Comparative Study on Expert Witnesses in Court Proceedings. 2010 June. Report no. 62832 – TR

<sup>52</sup> Kennerly, Esq., Max. The Problems with Court-Appointed “Independent” Experts. Litigation & Trial Law Blog. 2016 April. Available at: <https://www.litigationandtrial.com/2016/04/articles/attorney/frcp-706-independent-experts/>

<sup>53</sup> Vershuta, Nina. New Rules of War in the Battle of Experts: Amending the Expert Witness Disqualification Test for Conflicts of Interest. 2016. Brooklyn Law Review. Volume 81 Issue 2. Available at: <https://brooklynworks.brooklaw.edu/blr/vol81/iss2/6>

<sup>54</sup> David D. Siegel, Thomas F. Gleason & Patrick M. Connors. Search Engine Technology “Overrules” Expert Witness Laws, NYLJ, 2005 November. New York Practice 566 (4th ed. 2005)