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Stories of obstetricians being forced to stop delivering babies because of skyrocketing malpractice premiums brought national attention to the malpractice crisis.[1] The medical profession has convinced many Americans that tort reform[2] is needed to stabilize malpractice premiums. Now, the medical profession is turning its attention to improper testimony given by physician experts in medical malpractice suits. Physicians have long

1. *See generally* William M. Sage, *The Forgotten Third: Liability Insurance and the Medical Malpractice Crisis*, HEALTH AFF., Jul.-Aug. 2004, at 10, 12-13 (detailing earlier malpractice crises).

2. Common examples of tort reform include damage caps and shortening statutes of limitations. *Id.* at 10. A discussion of tort reform is beyond the scope of this Article.

suspected expert witness testimony was available for sale.[3] Only recently, however, has organized medicine begun to consider whether the medical profession may keep "hired guns" out of the courtroom.[4] This Article explains that, because of this trend, state medical boards are the proper authority to police improper testimony given by physician experts in medical malpractice actions.

I. INTRODUCTION

In 2002, the North Carolina Medical Board disciplined Dr. Gary Lustgarten for giving improper expert testimony for a plaintiff in a medical malpractice suit.[5] The Board, finding Dr. Lustgarten gave "'disparaging, demeaning, or impertinent responses ... and 'totally unsubstantiated, inflammatory' testimony," became the first state medical board to revoke a medical license for improper expert witness testimony.[6] Dr. Lustgarten appealed the board's action, and in 2003, a court stayed the license revocation.[7] Both parties are appealing the decision to a North Carolina appellate court.[8]

This Article demonstrates that medical boards may properly discipline physicians who provide improper testimony in medical malpractice suits. Improper testimony, for the purposes of this Article, is defined as testimony not based on generally accepted theories about medical science.[9] Part II

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3. *See* M. Lawrence Podolsky, *Which Truth Are These Hired Guns Telling?*, PRIVATE PRACTICE, July 1991, at 45. *See generally* Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 YALE J. ON REG. 253, 253 (2001) (explaining that since experts are not held accountable in tort or contract law for their testimony, they are thus motivated to deliver the testimony expected by the market).

4. *See, e.g.*, Russell M. Pelton, *Medical Societies' Self-Policing of Unprofessional Expert Testimony*, 13 ANNALS HEALTH L. 549, 551-52 (2004).

5. Stephanie Mencimer, *The White Wall: A New Code of Conduct is Taking Hold of the Medical Profession: First Do No Harm—To Your Colleagues*, 65 LEGAL AFF., Mar./Apr. 2004, *available at* http://www.legalaffairs.org/issues/March-April-2004/story_mencimer_marpar04.html.

6. *Id.* This is particularly troubling because Dr. Lustgarten was punished solely for opinion testimony. *See* Fred L. Cohen, *The Expert Medical Witness in Legal Perspective*, 25 J. LEGAL MED. 185, 188-89 (2004). There were no explicit allegations that he testified falsely; nor were there any ascertainable facts by which to measure his testimony. *See id.* at 204 (noting that Lustgarten was punished for stating his expert medical opinion on the proper standard of care under the circumstances).

7. Cohen, *supra* note 6, at 204.

8. Maureen Gladman, *Scared Silent: The Clash Between Malpractice Lawsuits and Expert Testimony*, PHYSICIAN EXECUTIVE, July-Aug. 2003, *available at* http://www.findarticles.com/p/articles/mi_m0843/is_4_29/ai_105542617.

9. An example of improper testimony based on this definition can be found in *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001). Dr. Austin was suspended from the

explains that the medical profession is justified in attempting to regulate improper expert witness testimony.[10] Part III briefly reviews other methods of regulating improper expert witness testimony and concludes that discipline by state medical boards is the most effective way to prevent improper testimony.[11] Part IV examines the mechanisms medical boards currently have in place to regulate expert witness testimony.[12] It explains that boards may consider the giving of improper testimony to be either negligent practice of medicine or an ethical violation.[13] It continues by discussing the strengths and weaknesses of both approaches, and finally proposes that medical boards promulgate standards of practice for giving expert witness testimony.[14] Finally, Part V considers implications of allowing medical boards to regulate medical expert testimony.[15]

II. THE MEDICAL PROFESSION IS JUSTIFIED IN SEEKING TO REGULATE PHYSICIAN EXPERT TESTIMONY THROUGH DISCIPLINARY ACTION

The medical profession is self-regulating,[16] so it is obligated to protect the public from incompetent and dishonest physicians.[17] The public is harmed by doctors who provide improper expert testimony because increasing medical malpractice premiums negatively affect access to healthcare services.[18] Thus, because a presumed link exists between improper expert witness testimony and increasing malpractice premiums, the profession should be obligated to police expert witness testimony.[19]

American Association of Neurological Surgeons (AANS) for giving improper testimony as a plaintiff's expert. *Id.* at 968. The court's opinion seems to indicate that Dr. Austin's testimony had no basis in scientific fact. *Id.* at 970-71. Dr. Austin testified that "the majority of neurosurgeons" would agree with his opinion when, in fact, he had not discussed the matter with other physicians. *Id.* at 970. Moreover, Dr. Austin claimed that two scholarly articles supported his position when, in fact, they did not. *Id.* The above example is admittedly a vague definition of improper testimony: it would include testimony advocating a minority opinion if the expert made it seem as if the minority opinion was the generally accepted practice.

10. *See* discussion *infra* notes 16-46 and accompanying text.

11. *See* discussion *infra* notes 47-120 and accompanying text.

12. *See* discussion *infra* notes 121-234 and accompanying text.

13. *See* discussion *infra* notes 121-229 and accompanying text.

14. *See* discussion *infra* notes 230-34 and accompanying text.

15. *See* discussion *infra* notes 235-55 and accompanying text.

16. *See, e.g.*, Criton A. Constantinides, Note, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327, 1328 (1991) (noting that "professions self-regulate through the adoption of ethical standards."). *See generally* 1 BARRY R. FURROW ET AL., HEALTH LAW § 3-1 (2d ed. 2000) (discussing the history of regulation and licensure of healthcare professionals).

17. *See* Constantinides, *supra* note 16, at 1340.

18. *See* discussion *infra* Part II.B.

19. *Id.*

A. The Medical Profession Is Self-Regulating and Therefore Determines Which Activities To Regulate

Despite a "chipping away" at the traditional deference given professions,[20] the medical profession is still allowed to regulate itself. First, although a license[21] is required to practice medicine,[22] states delegate authority to promulgate standards of practice and sanction physicians[23] to medical licensing boards, whose members are mostly physicians.[24] Second, the profession controls the primary prerequisite for state licensure by accrediting medical schools.[25] Third (and most importantly), the medical profession establishes the standard of care in medical malpractice suits.[26] In return, the profession should protect the public from incompetent and dishonest physicians. Therefore, self-regulation benefits the public as well as the profession.

The public benefits from self-regulation in several ways.[27] The primary justification for professional self-regulation is that it removes the burden of

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20. Michael J. Polelle, *Who's on First, and What's a Professional?* 33 U.S.F.L. REV., 205, 230 (1999).

21. Licensure schemes are generally classified into two types: revenue-raising and regulatory. Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 189 1995). Medical licensure is a regulatory licensure scheme because it is intended to safeguard the public's interest instead of to raise money for the state. *See id.* at 189-90 (explaining that the purpose of revenue-raising licenses is to increase the state's revenue, while the purpose of regulatory licenses is to regulate activities to protect the public interest).

22. *See generally* 1 FURROW, *supra* note 16, at § 3-8. It is generally illegal for non-licensed persons to practice medicine. Randall G. Holcombe, *Eliminating Scope of Practice and Licensing Laws to Improve Health Care*, 31 J.L. MED. & ETHICS 236, 236 (2003).

23. 1 FURROW, *supra* note 16, at § 3-1.

24. The California medical board has twenty-one members, of which twelve must be physicians. CAL. BUS. & PROF. CODE § 2001, 2007 (2004). Under the Illinois Medical Practice Act, five of the disciplinary board's nine members must be physicians. 225 ILL. COMP. STAT. 60/7(A) (2004 & Supp. 2005). In Texas, the medical board has nineteen members, nine of which must be medical doctors and three of which must be doctors of osteopathy. TEX. OCC. CODE § 152.002 (Vernon 2004).

25. 1 FURROW, *supra* note 16, at § 3-2.

26. *Id.* at § 6-2. *But see* Helling v. Carey, 519 P.2d 981, 982-83 (Wash. 1974) (finding that compliance with medical custom was not a valid defense in a medical malpractice suit).

27. Critics contend that professions are self-serving monopolies who use their influence to prevent competition. *See, e.g.*, Polelle, *supra* note 20, at 224-26. Arguably, licensure statutes were designed as barriers to entry to prevent competition. *See* Am. Med. Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942) (finding that stringent medical regulations were purely self-serving). *See generally* Tanya J. Dobash, Note, *Physician-Patient Sexual Contact: The Battle Between the State and the Medical Profession*, 50 WASH. & LEE L. REV. 1725, 1738 (1993) (explaining that the medical profession asked states to help it regulate the practice of medicine by requiring licensure).

regulating the profession from the judicial and administrative systems.[28] Another justification is based on the economic theory of "market failure." According to this theory, the profession must ensure compliance with minimum standards of practice because consumers cannot adequately evaluate the quality of medical care.[29] Most importantly, self-regulation promotes a professional "sense of ethical obligation."[30] Because professional regulation both privileges and burdens the profession, it is basically a "social contract" between the profession and the public.[31]

Because of this social contract, courts and state legislatures must permit the profession to determine standards for the provision of expert witness testimony. In turn, the profession must protect society from self-interested expert witnesses.[32]

B. The Public Is Harmed by Skyrocketing Medical Malpractice Premiums

In 2003, the General Accounting Office (GAO) reported that medical malpractice premiums for select specialties had increased dramatically since 1999,[33] which reduced access to healthcare services.[34] Physicians were reluctant to perform high risk procedures. As a consequence of these factors, some left the profession.[35] Rural areas have been most affected.[36] For example, maternity units in two rural West Virginia counties recently closed because the obstetricians could not afford the premium increases.[37] Therefore, the negative effects of the current malpractice crisis are felt not

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28. *See* Polelle, *supra* note 20, at 226.

29. 1 FURROW, *supra* note 16, at § 3-1. But this does not mean that patients have no responsibility to protect themselves: a consumer should make an informed decision in choosing a physician. Heyward H. Bouknight, III, Note, *Between the Scalpel and the Lie: Comparing Theories of Physician Accountability for Misrepresentations of Experience and Competence*, 60 WASH. & LEE L. REV. 1515, 1516 (2003).

30. *See* Polelle, *supra* note 20, at 230.

31. *See id.*

32. *See id.* at 229.

33. UNITED STATES GENERAL ACCOUNTING OFFICE, GAO-03-702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES (2003), *available at* http://www.gao.gov/new.items/d03702.pdf.

34. UNITED STATES GENERAL ACCOUNTING OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTHCARE (2003), *available at* http://www.gao.gov/highlights/d03836high.pdf [hereinafter IMPLICATIONS OF RISING PREMIUMS].

35. Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms*, HEALTH AFF., Jan. 21, 2004, *available at* http://content.healthaffairs.org/cgi/content/full/hlthaff.w4.20v1/DC1.

36. *See* Diane Cook, *Beware the Hidden Consequences of the Malpractice Crisis,* MANAGED CARE MAGAZINE, Dec. 2002, *available at* http://www.managedcaremag.com/archives/0212/0212.malpractice.html.

37. *Id.*

only by physicians. The public is also harmed by reduced access to healthcare services.

C. *Improper Expert Testimony Is Connected to Increasing Malpractice Premiums*

A presumed causal link exists between improper expert witness testimony and increasing medical malpractice premiums. First, a documented connection between increases in claims payouts and malpractice premium increases exists.[38] Second, there appears to be reliable evidence that Americans have become more litigious and juries are now more generous to plaintiffs.[39] Filed medical malpractice claims[40] increased by more than 10% per year from 1975 to 1986,[41] and the average award tripled between 1994 and 2000.[42] Third, the Harvard Medical Practice Study III revealed a "gap" between potential and actual malpractice claims; most people injured by medical malpractice never file suit and most filed claims had no evident basis.[43] In light of this, it is reasonable to assume that malpractice cases based on theories of medicine or causation (not built on medical science)[44] are brought and successfully litigated.

The plaintiffs in these "frivolous" suits must generally present expert testimony establishing standard of care and breach,[45] so it is reasonable to

38. IMPLICATIONS OF RISING PREMIUMS, *supra* note 34. *But see* Sage, *supra* note 1, at 10 (arguing that malpractice crisis is actually an insurance crisis). Whether rising premiums truly affect health care access is uncertain and is beyond the scope of this Article.

39. *See generally* IMPLICATIONS OF RISING PREMIUMS, *supra* note 34. Whether this is a result of unscrupulous plaintiffs' attorneys who bring frivolous medical malpractice actions and judges and juries who are swayed by "junk science" is beyond the scope of this Article.

40. The plaintiff in a medical malpractice action must: (1) establish the appropriate standard of care, (2) prove the defendant breached that standard of care, and (3) show a causal relationship between the breach and the plaintiff's injury. *See* 1 FURROW, *supra* note 16, at § 6-2.

41. Steven K. Berenson, *Is it Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 659 (2001). The American Medical Association estimates that between 1982 and 1984, malpractice premiums increased 44%, twice the rate of increase in health care costs. Tim Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 714 (2002).

42. Jennifer E. Shannon & David Boxold, *Medical Malpractice: Verdicts, Settlements and Statistical Analysis*, JURY VERDICT RESEARCH, at 1 (2002).

43. A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III*, 325 NEW ENG. J. MED. 245, 245-51 (1991).

44. This Article will not go so far as to claim that these cases are frivolous. There may indeed be a genuine injury to the plaintiff, however, the plaintiff does not have a legal claim.

45. *See generally* 1 FURROW, *supra* note 16, at § 6-2 (explaining that standard of care and breach are normally established through expert testimony).

assume that these cases are consequently supported by improper expert witness testimony.[46] Accordingly, this Article presumes a connection exists between improper expert testimony and increasing medical malpractice premiums.

III. STATE MEDICAL BOARDS ARE THE MOST APPROPRIATE PARTY TO REGULATE PHYSICIAN EXPERT TESTIMONY

Medical societies, judges, and attorneys have tried to prevent improper testimony.[47] This section first explains that these alternative methods have not prevented improper testimony. Next, it is explained that the threat of professional discipline is the most effective way to prevent improper expert witness testimony. Finally, it is demonstrated that imposing sanctions for improper testimony is consistent with the purposes of regulating the practice of medicine.

A. Alternative Mechanisms for 'Policing' Improper Testimony Are Ineffective

1. Disciplinary Actions by Medical Professional Societies

Professional societies have become increasingly concerned with expert testimony given by their members. The American Association of Neurological Surgeons (AANS) was one of the first professional associations to review expert witness testimony.[48] Over the past fifteen years, it has reviewed expert testimony given by approximately fifty members and has disciplined about ten members.[49] The American College of Radiology (ACR) recently expelled a member who gave inaccurate expert testimony.[50] Similarly, the Florida Medical Association (FMA) recently adopted a peer review system to evaluate expert witness testimony.[51] These

46. It appears that judges are "increasingly skeptical about the ethical standards of expert witnesses." Harrison, *supra* note 3, at 254.

47. *See* discussion *infra* Part III.A.

48. Andrew D. Feld & William Carey, *Expert Witness Malfeasance: How Should Specialty Societies Respond?*, AM. J. GASTROENTEROLOGY, May 2005, at 991.

49. The AANS has promulgated Rules and Regulations pertaining to expert witness testimony given by its members. For example, the rules require that "the neurological expert witness shall identify as such any personal opinions that vary significantly from generally accepted neurological practice." AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, RULES AND REGULATIONS VII.A.3, *available at* http://www.aans.org/about/membership/ExpWitness03Dec04.pdf.

50. C.P. Kaiser, *'Expert' Witness Gets Booted from ACR*, DIAGNOSTIC IMAGINING ONLINE (July 8, 2004), http://www.diagnosticimaging.com/dinews/2004070801.shtml.

51. Steve Ellman, *Testimony*, BROWARD DAILY BUS. REV., June 25, 2003, at 11. The expert's testimony is evaluated by another expert from the same field, and the FMA's committee on ethical

review programs give the relevant association authority to sanction physicians for improper testimony.

The sanctioned physician may challenge an association's action in court. Generally, disputes between an association and a member are governed by contract law with an association's charter or bylaws defining the parties' obligations.[52] Courts generally do not require that an association have written bylaws,[53] but if there are written bylaws, they must be reasonable and not arbitrarily enforced.[54] An association's rules must be specific,[55] and any discipline must be authorized by that association's rules or bylaws.[56] Courts will not interfere with the internal affairs of a professional society unless the sanctions violate public policy,[57] the association acted in "bad faith,"[58] or membership in the organization is an important economic interest.[59] *Austin v. AANS*, which upheld an expert witness review program,[60] demonstrates that it is unlikely courts will interfere with professional associations' expert witness review programs.

Arguably these programs violate public policy because they might intimidate physician expert witnesses. For example, in *Bernstein v. Alameda-Contra Costa Medical Ass'n*,[61] a California court of appeals refused to enforce an ethical rule prohibiting criticism of other treating

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and judicial affairs may convene a hearing. *Id.* Disciplinary actions range from letters of concern to suspension or expulsion from the medical society. *Id.* In 2004, a case was filed in the Circuit Court of Leon County against the FMA by an expert witness who was accused of giving improper testimony. *See* AMERICAN MEDICAL ASSOCIATION, EXPERT WITNESS TESTIMONY, http://www.ama-assn.org/ama/pub/category/11912.html (last visited Oct. 27, 2005). The expert alleged that FMA peer review system was intimidating and deterred physicians from serving as expert witnesses for plaintiffs. *Id.* The court dismissed the lawsuit for failure to state a claim but gave the plaintiff leave to amend his complaint, which he did. *Id.* No final judgment has been rendered. *Id.*

52. Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967, 968 (2001).

53. *E.g.*, Head v. Lutheran Gen. Hosp., 516 N.E.2d 921, 928 (Ill. App. Ct. 1987).

54. *E.g.*, Butler v. USA Volleyball, 673 N.E.2d 1063, 1066 (Ill. App. Ct. 1996).

55. *See generally* 1-2B THE LAW OF ASSOCIATIONS 2B.04 (2005) (explaining when it is permissible for associations to require members to comply with association's bylaws and code of conduct or ethics).

56. *E.g.*, Van Daele v. Vinci, 282 N.E.2d 728, 732 (Ill. 1972).

57. *E.g.*, Yeomans v. Union League Club, 225 Ill. App. 234, 242 (App. Ct. 1922).

58. *E.g.*, Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967, 969 (7th Cir. 2001).

59. *E.g.*, Falcone v. Middlesex County Med. Soc'y, 170 A.2d 791, 796-97 (N.J. 1961).

60. *Austin*, 253 F.3d at 973-74. Dr. Austin was expelled from the AANS for providing improper testimony for a plaintiff in a medical malpractice action. *Id.* at 968. He challenged his expulsion from the AANS which found that he gave improper testimony for a plaintiff in a malpractice suit. The Seventh Circuit held that the AANS could sanction Dr. Austin. *Id.* at 972-73.

61. 293 P.2d 862 (Cal. Dist. Ct. App. 1956).

physicians.[62] The court found that the ethical rule would make physicians afraid to criticize other physicians.[63] However, in *Austin*, the Seventh Circuit held that the AANS expert testimony review program does not intimidate potential expert witnesses.[64] The *Austin* court found that the expert witness review policy promoted public policy interests by identifying and sanctioning witnesses who give improper expert testimony.[65] Therefore, based on the above examples, it is unlikely the argument that an expert review program violates public policy will prevail in the future.[66]

Dr. Austin claimed the AANS acted in bad faith because it never sanctioned members who testified for defendants.[67] However, the court found that this was not proof of bad faith: it implies that because of the inherent structure of such lawsuits, it is unlikely that any complaints would be filed against defense experts.[68] Complaints may be brought only by member physicians who would be either the defendant physician or experts testifying for the plaintiff or defense.[69] The court assumed a defendant would be financially motivated to complain about an AANS member testifying for the plaintiff.[70] However, an expert witness would in actuality have no incentive to complain about another member because the expert has no financial stake in the litigation's outcome.[71] Because of these assumptions, the argument that a professional association acted in bad faith by censuring a member who gave improper expert testimony will likely be unsuccessful.

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62. *Id.* at 865-66.

63. *Id.* at 865.

64. *Austin*, 253 F.3d at 972.

65. *Id.* at 973. *See also* Budwin v. Am. Psychological Ass'n, 29 Cal. Rptr. 2d 453, 458 (Ct. App. 1994) (finding that professional association's discipline of a member who gave false testimony does not violate public policy).

66. At least one circuit has found to the contrary. *See* L'Orange v. Med. Protective Co., 394 F.2d 57, 63 (6th Cir. 1968) (finding that an insurer's cancellation of a malpractice policy for the purpose of intimidating a witness violated public policy).

67. *Austin*, 253 F.3d at 969.

68. *Id.* at 972. The court explains how this would be unlikely in this way:

> If a member of the Association is sued for malpractice and another member gives testimony for the plaintiff that the defendant believes is irresponsible, it is natural for the defendant to complain to the Association; a fellow member has irresponsibly labeled him negligent. If a member of the Association who testifies for a plaintiff happens to believe that the defendant's expert witness was irresponsible, he is much less likely to complain, because that expert (and fellow member of the Association) has not accused him of negligence or harmed him in his practice or forced him to stand trial or gotten him into trouble with his liability insurer.

Id.

69. *See id.*

70. *See id.* at 973-74.

71. *See id.* at 972.

If membership in the association is an important economic interest, then the member is entitled to a hearing before a fair and impartial tribunal, adequate notice, and the opportunity to defend against the charges.[72] The association must also provide evidence supporting the allegations.[73] In *Austin*, Judge Posner explained both that an "important economic interest" must be necessary to practice in the profession, and for such an interest to exist, that membership in the particular professional society must be a practical or de facto requirement for licensure.[74] Moreover, the economic injury suffered by the physician must be to the physician's principal source of income, and Judge Posner assumed this comes from treating patients.[75] Therefore, under *Austin*, it is doubtful a physician would be able to show that membership in a professional association is an important economic interest;[76] so, a professional association's expert testimony review program can be informal.[77]

Even though these expert testimony review programs will likely be upheld in court, they will not solve the problem of improper expert witness testimony. First, not all physicians belong to professional societies.[78] Second, the professional society may not be motivated to protect the interests of the defendant physician because its primary interest is the reputation of the profession;[79] therefore, it might not intervene in every case of improper testimony. Third, if the disciplinary program is a peer review

72. *See, e.g.*, Werner v. Int'l Ass'n of Machinists, 137 N.E. 2d 100, 111-12 (stating that "courts will interfere with the decision of an association . . . if the accused member has not been afforded those rudimentary rights . . . includ[ing] notice . . . and opportunity to be present and confront and cross-examine his accusers and an opportunity to make a defense . . . .).

73. *See, e.g.*, Sheet Metal Workers Local Union No. 218 v. Massie, 627 N.E.2d 1154, 1158 (Ill. App. Ct. 1993) (quoting Int'l Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 246 (1971)).

74. *Austin*, 253 F.3d at 971.

75. *See id.* at 971-72.

76. This is at least true in cases where membership in the professional association is not a prerequisite to the practice of a person's profession. *Compare* Falcone v. Middlesex County Med. Soc'y, 170 A.2d 791, 794 (1971) (holding that the refusal of the local medical society to admit plaintiff jeopardized his medical practice) *with Austin*, 253 F.3d at 971-72 (holding that the AANS's regulation of Dr. Austin's expert witness testimony did not affect his medical practice, and further that his association with the AANS was not mandatory to his practice).

77. The review process can be informal, but the association still must follow its bylaws which might specify procedures that must be followed when members are sanctioned. *See* Van Daele v. Vinci, 282 N.E.2d 728, 732-33 (Ill. 1972) (Underwood, C.J., dissenting).

78. Only 25% of practicing physicians belong to the AMA. Richard R. Johnston, *Organized Medicine: Do We Need AMA?*, ASA NEWSLETTER, May 2001, http://www.asahq.org/newsletters/2001/05_01/whatsnew0501.htm.

79. Harrison, *supra* note 3, at 292.

process,[80] reviewers might be subject to liability for malpractice, negligence, and defamation.[81] Fourth, peer review records are not confidential, and thus may be disclosed in a medical malpractice action.[82] Most importantly, medical societies do not have authority to revoke a physician's license.[83] Therefore, professional association review of expert testimony will not prevent all improper expert testimony.

2. Rules of Evidence To Exclude Improper Expert Testimony

Two rules of evidence, the "general acceptance" test and the *Daubert* test, give the trial judge authority to exclude expert testimony based on faulty reasoning or bad science. Under the "general acceptance" test established in *Frye v. United States*,[84] expert witness testimony is reliable if the expert's theory has gained "general acceptance" in the field.[85] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[86] established a new test for the admissibility of scientific testimony. In the federal courts and states that have adopted *Daubert*, the trial judge acts as a "gatekeeper," allowing only relevant and reliable evidence to be admitted.[87] Under *Daubert*, opinion testimony is reliable if the reasoning and methodology underlying the opinion are scientifically valid.[88]

Daubert and *Frye* were intended to keep juries from considering novel scientific theories, but they have failed to exclude improper expert testimony about standard of care in at least three ways. First, judges may be unable to identify improper testimony, especially when the testimony involves highly

80. Peer review is a process where care provided by a physician is evaluated by other physicians. *See generally* 1 FURROW, *supra* note 16, at § 3-24 (discussing Medicare Utilization and Quality Control Peer Review Organization Program).

81. Gary N. McAbee, *Improper Expert Medical Testimony*, 19 J. LEGAL MED., 257, 261 (1998). The Health Care Quality Improvement Act of 1986 grants physicians involved in the peer review process immunity from liability for damages in civil actions. *Id.* (paraphrasing 42 U.S.C. § 11111(a)(1)). However, their immunity is not absolute because absolute immunity in civil cases is only allowed in "exceptional situations" where public policy makes it essential. Butz v. Economou, 438 U.S. 478, 507 (1978).

82. McAbee, *supra* note 81, at 261.

83. Steve Ellman, *Code of Silence*, DAILY BUS. REV., June 25, 2003, *available at* http://www.dailybusinessreview.com/AwardStories/CodeOfSilence.html.

84. 293 F. 1013 (App. D.C. 1923).

85. *Id.* at 1013-14.

86. 509 U.S. 579 (1993).

87. *Id.* at 591-92.

88. A *Daubert* reliability analysis has two stages. Note, *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2151-52 (2003). The trial judge first evaluates whether the expert's conclusion could have been reached by the methodology. *Id.* Then, the judge evaluates whether the expert properly applied the methodology. *Id.* at 2152.

complex medical issues.[89] Second, only a handful of reported cases have discussed the admissibility of standard of care evidence, indicating judges are reluctant to exclude medical expert testimony under *Daubert* and *Frye*.[90] Third, it is unclear whether *Daubert* applies to standard of care expert testimony,[91] because the foundational inquiry for this testimony is whether the expert could have observed the custom, not whether the expert's opinion is reliable.[92] Therefore, despite having a mechanism to evaluate the reliability of expert testimony, judges are generally unable to use *Daubert* or *Frye* to exclude improper standard of care testimony.

3. Exposing Improper Testimony Through Cross-Examination

The opposing attorney should try to expose bias, partisanship, or financial interest during cross-examination.[93] During cross-examination, an attorney may ask about the frequency with which the expert testifies for a particular side[94] and annual income derived from expert services.[95]

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89. A recent study indicated that some judges were unable to differentiate between theories based on accepted scientific theories and theories grounded in speculation. Margaret Bull Kovera & Bradley D. McAuliff, *The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?*, 85 J. APPLIED PSYCH. 574, 576 (2000); *see also* Austin v. Am. Ass'n of Neurological Surgeons,, 253 F.3d 967, 972-73 (2002) ("Much escapes [judges], especially in a highly technical field, such as neurosurgery. When a member of a prestigious professional association makes representations not on their face absurd. . .the judge may have no basis for questioning the belief, even if the defendant's expert testifies to the contrary.").

90. Cramm et al., *supra* note 41, at 723.

91. *Id.* at 721.

92. *Id.* at 725.

93. *See* Sears v. Rutishauser, 466 N.E.2d 210, 121 (Ill. 1984).

94. In 1988, the Illinois Supreme Court held that a plaintiff's expert could be questioned about the frequency with which the expert testified for plaintiffs as well as the expert's annual income derived from testifying as an expert witness. Trower v. Jones, 520 N.E. 2d 297, 302 (Ill. 1988). The defense argued that questioning should have been limited to questions about the expert's compensation for testifying in a particular case. *Id.* at 300. However, the court found such evidence to be relevant to show bias or whether the expert's opinion was skewed. *Id.* The court was convinced that a financial advantage to the expert could extend beyond the particular case. *Id.* For example, favorable verdicts can help an expert establish a good "track record" which can lead to more income from testifying in the future. *Id.* The defense argued that allowing an expert to be cross-examined about his or her annual income from testifying would necessarily require the extensive testimony on collateral issues to rehabilitate the witness. *Id.* at 301. The court did not believe that such testimony would necessitate a "lengthy and detailed 'rehabilitation'" because such testimony does not raise the implication that the expert's fees are unreasonable, only that the expert has a financial interest in giving expert witness testimony. *Id.* (citation omitted). The court believed that all that would be necessary to "rehabilitate" an expert witness about being questioned about his or her annual income derived from testimony would be an explanation about how the expert determines his or her fees. *Id.*

However, it is difficult for an attorney to impeach improper testimony during cross-examination. First, as one might assume, the expert will probably know more about the scientific theories than the attorney and the attorney may have insufficient resources to develop an effective cross-examination.[96] Second, at its worst, cross-examination may provide the expert with an opportunity to promote a theory detrimental to the cross-examining attorney's case.[97] Therefore, the adversarial nature of a civil trial does not necessarily mean all improper expert testimony will be exposed.

4. Subjecting Expert Witnesses to Liability for Improper Expert Testimony

Several jurisdictions have permitted negligence suits against experts,[98] but most courts refuse to waive expert witness immunity.[99] Generally, witnesses are immune to civil actions related to their testimony,[100] but some courts have waived witness immunity for expert witnesses in cases involving apparent recovered memories of childhood sexual abuse.[101] Courts are more

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95. McAbee, *supra* note 81, at 265. Early cases did not find it an abuse of discretion to exclude evidence about compensation received by an expert for testifying in cases unrelated to the parties or their attorneys. For example, an Illinois case from the early twentieth century held that an expert witness could not be questioned about how often he had testified for a given category of party. McMahon v. Chicago City Ry. Co, 88 N.E. 223 (Ill. 1909). The court concluded that it was error for a plaintiff injured in a collision with a train to ask a defendant's expert witness how many times he had previously testified against other streetcar lines. *Id.*

96. McAbee, *supra* note 81, at 264.

97. *Id.*

98. *See, e.g.*, Mattco Forge Inc. v. Arthur Young & Co., 6 Cal. Rptr. 2d 780, 790 (Ct. App. 1992) (allowing action against accounting firm retained as an expert alleging the firm misrepresented its credentials); Murphy v. A.A. Matthews, 841 S.W.2d 671, 682 (Mo. 1992) (holding that witness immunity did not bar suit against professional expert witness alleging negligence in forming opinion); *see also* Levine v. Wiss & Co., 478 A.2d 397, 398-99 (N.J. 1984) (allowing negligence action against court-appointed expert accountant alleging accountant did not use due care in preparing reports).

99. *See, e.g.*, Hughes v. Long, 242 F.3d 121, 127 (3d Cir. 2001) (holding court-appointed custody evaluators were entitled to judicial immunity); Riemers v. O'Halloran, 678 N.W.2d 547, 548-49 (N.D. 2004) (holding that court-appointed forensic accountants were entitled to witness immunity); Bruce v. Bryne-Stevens & Assocs. Eng'rs, Inc., 776 P.2d 666, 668-69 (Wash. 1989) (holding that an expert witness retained by a party nonetheless was entitled to witness immunity).

100. *See* Davis v. Wallace, 565 S.E.2d 386, 396 (W. Va. 2002). Expert witnesses also have "quasi-judicial" immunity in some states. "Quasi-judicial" immunity is given to persons, other than judges, who act in a judicial manner. Marshall L. Wilde, *The Liability of Alaska Mental Health Providers for Mandated Treatment*, 20 ALASKA L. REV. 271, 274 (2003). The immunity covers (1) making of binding decisions, (2) making of findings or recommendations to the court, or (3) arbitration, mediation, conciliation, evaluation, or other resolution of pending disputes. Howard v. Drapkin, 271 Cal. Rptr. 893, 897-98 (Ct. App. 1990).

101. *See generally* Sullivan v. Cheshier, 846 F. Supp. 654, 660 (N.D. Ill. 1994) (allowing action by parents against psychologist for intentionally causing estrangement with their daughter). Courts have also allowed lawsuits against court-appointed experts if the parties relied upon the expert's opinion. *E.g.*, Marrogi v. Howard, 805 So. 2d 1118, 1120 (La. 2002) (holding that expert was not

likely to waive witness immunity for a suit against a "friendly" expert, i.e., an expert retained by the party bringing the suit.[102] Witnesses were granted immunity because they might be afraid to testify or might give distorted testimony.[103] Arguably, this reasoning does not apply to what is a commercial market for expert testimony: Witnesses afraid of liability can simply charge more for their testimony.[104] Regardless, the public policy justification for immunity is well-established, even if the reasoning may not apply to expert witnesses.[105] Therefore, most courts will likely uphold witness immunity for expert testimony, at least for "unfriendly" experts.

B. *State Medical Boards Are the Most Effective and Appropriate Regulators of Expert Witness Testimony*

As discussed above in Part II.A, the state allows the medical profession to regulate itself because physicians can better evaluate another physician's competency than non-physicians.[106] Consequently, groups such as the American Medical Association (AMA) urge subjecting expert witness testimony to a "peer review" process where the physician's testimony would be evaluated by a group of physicians.[107] Review by a state medical licensure board is similar to peer review because most medical board members are physicians.[108] Unlike private associations, state medical boards may revoke a physician's license.[109] Because physicians cannot practice medicine without a license, the threat of professional discipline is

immune from suit where he prepared erroneous report that caused plaintiff to file a motion to compel based on that report).

102. Harrison, *supra* note 3, at 286.

103. *See* Briscoe v. LaHue, 460 U.S. 325, 333 (1983). *But see* Harrison, *supra* note 3, at 257 (arguing that "Briscoe fits awkwardly into the expert witness context.").

104. Harrison, *supra* note 3, at 257, 290.

105. *See generally* Wilde, *supra* note 100 (exploring the extension of the doctrine of judicial immunity or quasi-judicial immunity to mental health officials). The article goes on to mention several public policy considerations in expanding such immunity, including, among others, the "taint of exercise and discretion in . . . actions and testimony." *Id.* at 274-75.

106. In addition to the above discussion, see *Coe v. United States Dist. Court*, 676 F.2d 411, 414 (10th Cir. 1982).

107. Tanya Albert, *Expert Witness Sues Critics*, AMEDNEWS.COM (June 28, 2004), http://www.ama-assn.org/amednews/2004/06/28/prl10628.htm.

108. *E.g.*, statutes cited *supra* note 24.

109. *See, e.g.*, N.Y. PUB HEALTH LAW § 230 (McKinney 2002).

the most effective way to enforce minimum standards of physician conduct.[110]

C. *Regulation of Expert Witness Testimony Is Consistent with the Purpose of Regulating Medicine*

State licensure allows consumers to assume physicians meet minimal levels of competency.[111] This is achieved in three ways: first, state regulation establishes entry requirements, thereby controlling quality of medical care; second, it sets forth standards of professional conduct for physicians; and third, it provides a means of enforcing these standards through the threat of disciplinary actions.[112] Accordingly, the primary purpose of the regulation of medicine is to protect the public from incompetent physicians.[113] The assumption underlying this purpose is that the state can better monitor the professional conduct of physicians than can individual consumers.[114]

Arguably, this justification does not apply to expert witness testimony. The opposing attorney in a medical malpractice case is hardly in the same position as a consumer of healthcare services. The other side may hire its own medical expert who can identify improper testimony without the state's help. However, this argument is short-sighted because it assumes the only one harmed by improper testimony is the opposing party. In fact, the public is also harmed because of the presumed connection between rising malpractice premiums and improper expert testimony.[115] The harm to the parties from improper testimony is different from the harm to the public,[116] so neither attorney will adequately protect the public's interests. Therefore, this justification for regulating the medical profession also applies to regulating expert witness testimony.

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110. *See, e.g.*, Deatherage v. State Examining Bd. of Psychology, 948 P.2d 828, 832 (Wash. 1997) (arguing that threat of professional discipline is an "appropriate check" on witnesses who are civilly immune). *But see* Harrison, *supra* note 3, at 292 (arguing peer review will not prevent improper expert testimony because the adversely affected party has no financial motivation to bring a complaint).

111. SIMON ROTTENBERG, *Introduction* to OCCUPATIONAL LICENSURE AND REGULATION 2-3 (Simon Rottenberg ed., 1980).

112. Alison M. Sulentic, *Crossing Borders: The Licensure of Interstate Telemedicine Practitioners*, 25 J. LEGIS. 1, 6. (1999).

113. *See generally* 1 FURROW, *supra* note 16, at § 3-1 (discussing "market failure," i.e., consumers' inability to assess quality of care, as a justification for restrictive licensure).

114. *See* Sulentic, *supra* note 112, at 5.

115. IMPLICATIONS OF RISING PREMIUMS, *supra* note 34, at 5-6 (finding that, in an attempt to curtail increased medical malpractice insurance premiums, physicians and medical facilities both reduce access to services and/or practice defensive medicine. However, the GAO report also found that rural locations contribute to the access problem).

116. The only party harmed by the improper testimony would be the party who loses the lawsuit.

A secondary purpose of state regulation is to protect the image of the medical profession.[117] Arguably, safeguarding the medical profession's image does not serve the public interest.[118] However, protecting the image of the profession furthers legitimate state interests.[119] For example, people might not seek medical treatment if they do not trust physicians.[120] Improper testimony tarnishes the image of the medical profession; therefore, preventing improper testimony serves the purpose of the state regulation of medicine.

IV. STATE MEDICAL BOARDS HAVE AN EXISTING FRAMEWORK UPON WHICH TO EXPAND AND PROMULGATE REGULATIONS REGARDING IMPROPER EXPERT TESTIMONY

Every state has a medical practice act delegating authority to a medical board to discipline physicians.[121] Statutory grounds for discipline are found in these acts.[122] Typical grounds for discipline include: obtaining a license to practice medicine by fraud, deceit, or misrepresentation;[123] practicing medicine fraudulently or incompetently;[124] practicing medicine while under

117. *See* Levy v. Bd. of Registration & Discipline in Med., 392 N.E.2d 1036, 1041 (Mass. 1979). Critics claim that professional regulation serves the profession more than the public and slows innovation in the profession. *E.g.*, Barbara J. Safriet, *Closing the Gap Between* Can *and* May *in Health-Care Providers' Scopes of Practice: A Primer for Policymakers*, 19 YALE J. ON REG. 301, 316 (2002).

118. *See* Am. Med. Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942).

119. *See Levy*, 392 N.E.2d at 1041 ("The revocation of a physician's license . . . [is] to protect the public health, safety, and welfare.").

120. *See* Julia E. Connelly & Courtney Campbell, *Patients Who Refuse Treatment in Medical Offices*, 147 ARCHIVES OF INTERNAL MED. 1829, 1831-32 (1987) (finding that reasons for refusing medical intervention included distrust of physicians).

121. *See, e.g.*, N.Y. PUB. HEALTH LAW § 230 (McKinney 2002); OHIO REV. CODE ANN. § 4731.01 (LexisNexis 2003). State medical boards rarely discipline physicians; however, the number of disciplinary actions brought by medical boards has increased significantly in the past ten years. Francis H. Miller, *Medical Discipline in the Twenty-First Century: Are Purchases the Answer?*, 60 LAW & CONTEMP. PROBS. 31, 41-42 (1997).

122. 1 FURROW, *supra* note 16, at § 3-20.

123. *See, e.g.*, Abrahamson v. Dep't of Prof'l Regulation, 606 N.E.2d 1111, 1121 (Ill. 1992) (finding that misrepresentations have to be material to warrant discipline).

124. *E.g.*, Colo. State Bd. of Med. Exam'rs v. Lopez-Samayoa, 887 P.2d 8, 12 (Colo. 1994) (allowing suspension of physician's license for failing to meet generally accepted standards of medical practice); Kansas State Bd. of Healing Arts v. Foote, 436 P.2d 828, 837 (Kan. 1968) (upholding suspension of physician who demonstrated extreme incompetence); Levesque v. Bd. of Osteopathic Examination & Registration, 1994 Me. Super. LEXIS 18 (Super. Ct. Jan. 14, 1994) (allowing discipline of physician who tried to cover up an inaccurate sponge count). *See generally* 1 FURROW, *supra* note 16, at § 3-23 (discussing specific grounds for disciplinary actions). It is uncertain whether one instance of negligence is enough to justify discipline. Glenn E. Bradford &

the influence of alcohol or drugs or a physical or mental disability;[125] habitual addiction to alcohol or narcotics;[126] conviction of a crime;[127] engaging in dishonorable, immoral, or unprofessional conduct;[128] or violating the rules of the state medical board.[129] According to a study of state medical boards, most believe these grounds give them authority to discipline physicians who give improper testimony.[130]

This section first discusses whether boards have authority to consider improper expert testimony to be an immoral activity or unprofessional conduct.[131] Next, this section next examines whether medical boards may consider the giving of improper testimony to be the incompetent or negligent practice of medicine.[132] Finally, this section proposes modifications to the existing disciplinary framework to adequately regulate expert witness testimony.[133]

David G. Meyers, *The Legal and Regulatory Climate in the State of Missouri for Complementary and Alternative Medicine—Honest Disagreement Among Competent Physicians or Medical McCarthyism?*, 70 UMKC L. REV. 55, 59-60 (2001).

125. *E.g.*, Arkansas State Med. Bd. v. Young, 1994 Ark. App. LEXIS 407 (Ark. Ct. App.. Sept. 7, 1994) (allowing discipline of physician who attempted suicide); Corder v. Kansas Bd. of Healing Arts, 889 P.2d 1127 (Kan. 1994) (allowing suspension of physician who expressed belief in unidentified flying objects and extraterrestrial beings).

126. *E.g.*, Colorado State Bd. of Med. Exam'rs v. Hoffner, 832 P.2d 1062, 1066 (Colo. Ct. App. 1992) (holding that statute defining unprofessional conduct as including "habitual intemperance" was not vague).

127. *E.g.*, Hughes v. State Bd. of Health, 159 S.W.2d 277 (Mo. 1942) (upholding suspension of physician convicted of mail fraud). Some statutes require conviction of a felony. *See, e.g.*, ALA. CODE § 34-24-360(4) (LexisNexis 2002); IOWA CODE ANN. § 148.6(b) (West 2003). Other statutes do not specify whether the crime must be a felony. *E.g.*, FLA. STAT. ANN. § 458.331(1)(c) (West 2001). If the statute is silent about whether the conviction must be for a felony conviction, courts often find that a physician can be suspended for a misdemeanor conviction. *E.g.*, Krain v. Med. Bd. of Cal., 84 Cal. Rptr. 2d 586, 590-91 (Ct. App. 1999).

128. *See, e.g.*, Storrs v. State Med. Bd., 664 P.2d 547 (Alaska 1983) (revoking medical license for "professional incompetence" under the state statute); Moran v. Bd. of Med. Exam'rs, 196 P.2d 20, 22 (Cal. 1948) (disciplining for "unprofessional conduct" in prescription practices); McKay v. Bd. of Med. Exam'rs, 788 P.2d 476, 479 (Ore. Ct. App. 1990) (noting that under the state statute, "the Board may discipline a physician for 'unprofessional or dishonorable conduct.'").

129. *E.g.*, Barngrover v. Med. Licensure Comm'n of Ala., 852 So. 2d 147, 149 (Ala. Civ. App. 2002) (allowing discipline of physician who made an untrue statement during an investigation by the state medical licensure board).

130. Douglas R. Eitel et al., *Medicine on Trial: Physicians' Attitudes about Expert Medical Testimony*, 18 J. LEGAL MED. 345, 350 (1997).

131. *See* discussion *infra* notes 134-90 and accompanying text.

132. *See* discussion *infra* notes 191-229 and accompanying text.

133. *See* discussion *infra* notes 230-34 and accompanying text.

A. Is Improper Testimony Unprofessional Conduct or Immoral Conduct?

Medical boards may discipline a physician for "unprofessional conduct,"[134] but it is uncertain whether courts will uphold disciplinary actions based on the assertion that giving improper testimony is unprofessional conduct.[135]

The first issue courts will consider is whether the giving of improper testimony is unprofessional or immoral conduct. Several courts have considered whether improper expert testimony given by psychologists was unprofessional conduct, and their reasoning should apply to cases analyzing disciplinary actions against physicians.[136] The next issue is whether giving expert testimony is sufficiently related to the practice of medicine to warrant discipline as unprofessional conduct. Many courts have addressed the "related to" requirement so it will not be a matter of initial review.[137] As explained *infra* at Part IV.A.1, most courts will likely defer to the board's decision that giving improper testimony is unprofessional conduct sufficiently related to the practice of medicine.

1. Is Giving Improper Testimony Unprofessional Conduct?

Most medical practice acts give examples of behavior that is unprofessional conduct but allow the board to find other conduct to be unprofessional as well.[138] Some acts delegate authority to the medical board to define unprofessional conduct.[139] Other statutes define unprofessional conduct as conduct that fails to comply with the profession's ethical

134. For example, the Delaware Medical Practices Act allows discipline for "any dishonorable or unethical conduct likely to deceive, defraud or harm the public." DEL. CODE ANN. tit. 24, § 1731(b)(3) (2004). The Kansas Healing Arts Act allows a physician to be disciplined for committing an "act of unprofessional or dishonorable conduct. . . ." KAN. STAT. ANN. § 65-2836(b) (2003).

135. It seems clear that false testimony is unprofessional conduct. *See In re* the Medical License of Dr. Reuben Setliff, M.D., 645 N.W.2d 601, 606 (S.D. 2002). However, only one published case has dealt directly with the issue of disciplinary action based on improper expert testimony as unprofessional conduct. *See* Joseph v. Dist. of Columbia Bd. of Med., 587 A.2d 1085 (D.C. 1991).

136. *See* discussion *infra* Part IV.A.1.

137. *See* discussion *infra* Part IV.A.2.

138. For example, the California Business and Professions Code specifies that "unprofessional conduct includes, but is not limited to, the following. . .(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon." CAL. BUS. & PROF. CODE § 2234 (Deering 2003).

139. *See, e.g.*, N.M. STAT. ANN. § 61-6-15.D (2003), ARIZ. ADMIN. CODE R4-16-503 (2004).

standards.[140] Therefore, what conduct is considered to be unprofessional varies from state to state.

Courts have struggled to define unprofessional conduct because it is an ambiguous term and may be defined in many different ways,[141] but courts usually discuss it in reference to integrity.[142] Another way to understand unprofessional conduct is failure to comply with the profession's ethical standards.[143] Cases analyzing disciplinary actions against psychologist expert witnesses for unprofessional conduct provide two specific examples of unprofessional conduct. First, forming an opinion without performing the necessary tests is unprofessional conduct.[144] Second, failure to qualify one's opinion is unprofessional conduct.[145] As discussed *infra*, courts accepting these definitions of unprofessional conduct would likely uphold a finding that giving improper testimony is unprofessional conduct.

Because the public should be able to trust professionals, any conduct calling a physician's integrity into question is unprofessional conduct.[146] However, improper testimony, i.e., testimony not based on sound medical theories, is not dishonest. Nevertheless, an expert demonstrates dishonesty by testifying that the minority position is the medical custom.[147] Moreover,

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140. For example, in Oregon, "unprofessional conduct" is defined as "any conduct or practice contrary to recognized standards of ethics of the medical ... profession ...." OR. REV. STAT. § 677.188(4)(a) (2003). In Ohio, the Medical Board can discipline a physician for the "violation of any provision of a code of ethics of the American Medical Association ...." OHIO REV. CODE ANN. § 4731.22(B)(18) (2003). In Hawaii, a physician can be disciplined for "conduct or practice contrary to recognized standards of ethics of the medical profession as adopted by the Hawaii Medical Association or the American Medical Association." HAW. REV. STAT. § 453-8(a)(9) (Cum. Supp. 2004).

141. Statutory definitions of "practice of medicine" have been challenged for vagueness but most courts have refused to find them to be unconstitutionally vague. For example, in *Michigan v. Rogers*, 641 N.W.2d 595, 611-12 (Mich. Ct. App. 2001), the Court of Appeals of Michigan refused to find the Michigan medical practice act was unconstitutionally vague simply because it provided notice of criminal prosecution and gave discretion to police.

142. *E.g.*, Foster v. Bd. of Med. Quality Assurance, 278 Cal. Rptr. 117, 119 (Ct. App. 1991) (finding intentional dishonesty shows a fundamental lack of moral character which is needed to maintain physician-patient relationship); Windham v. Bd. of Med. Quality Assurance, 163 Cal. Rptr. 566, 570 (Ct. App. 1980) (refusing to believe that someone who cheated the government could be considered honest in dealings with patients). *But see* Abrahamson v. Dep't of Prof'l Regulation, 909 N.E.2d 1111, 1121 (Ill. 1992) (finding that misrepresentations have to be material to warrant discipline).

143. *See generally* Dobash, *supra* note 27, at 1752 (discussing cases where courts relied on professional ethics to determine if doctor's sexual behavior was professional misconduct). *But see* Bryant v. Hilst, 136 F.R.D. 487, 492 (D. Kan. 1991) (finding that medical ethics code is not binding law and therefore not applicable to issues before the court).

144. Cochran v. Bd. of Psychologist Exam'rs, 15 P.3d 73, 76 (Or. Ct. App. 2000); Loomis v. Bd. of Psychologist Exam'rs, 954 P.2d 839, 843 (Or. Ct. App. 1998).

145. Deatherage v. State Examining Bd. of Psychology, 948 P.2d 828, 829 (Wash. 1997).

146. *See* Levy v. Bd. of Registration & Discipline in Med., 392 N.E.2d 1036, 1041 (Mass. 1979).

147. A minority medical position is not the medical custom. *See* 1 FURROW, *supra* note 16, at § 6-2 (explaining that the medical profession establishes the relevant standard of care in each case).

an expert who bases an opinion on a minority theory demonstrates lack of respect for the law because the law requires experts to testify about what medical custom is, not what the expert thinks is right.[148] Therefore, experts who knowingly provide improper expert testimony demonstrate a lack of integrity.

The second way of looking at unprofessional conduct, as a deviation from ethical standards, is likely to support a finding that improper testimony is unprofessional conduct, because the AMA's ethical code criticizes improper expert testimony.[149] Several courts have looked to ethical standards when reviewing disciplinary actions and believe patients have a reasonable expectation that physicians will comply with professional ethics.[150] However, this is not universally accepted,[151] so it is uncertain whether ethical codes condemning improper testimony will support disciplinary actions against physicians who give improper testimony.

Several cases analyzing disciplinary actions against psychologists have held that basing an opinion on mere speculation is unprofessional conduct. In *Cochran v. Board of Psychologist Examiners*, an Oregon court found that a psychologist violated the board's ethical code by speculating about a criminal defendant's future dangerousness without performing a thorough investigation of the defendant's background.[152] In another Oregon case, *Loomis v. Board of Psychologist Examiners*, the court found that an expert witness had violated the board's ethical code of conduct when she submitted an affidavit containing inappropriate recommendations.[153] The psychologist's client was involved in a child custody dispute with her husband.[154] The psychologist submitted an affidavit supporting her client's motion to modify a custody order and testified at a hearing on the motion without examining her client's husband.[155] It follows by analogy that a

148. *See generally* 1 FURROW, *supra* note 16, at § 6-2.

149. *See* discussion *supra* note 140 and accompanying text.

150. *See* Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 959 (Ill. App. Ct. 1986) (finding that patients should be able to assume that physicians will comply with the profession's ethics); Perez v. Missouri State Bd. of Registration for the Healing Arts, 803 S.W.2d 160, 165 (Mo. Ct. App. 1991) (noting that disciplinary statutes are in place to protect the public); Haley v. Med. Disciplinary Bd., 818 P.2d 1062, 1069 (Wash. 1991) (finding that medical disciplinary proceedings are in place to protect both the public and the "standing of the medical profession in the eyes of the public").

151. *See* Dobash, *supra* note 27, at 1748 (discussing cases where courts refused to apply the profession's ethical standards).

152. Cochran v. Bd. of Psychologist Exam'rs, 15 P.3d 71, 75-76 (Or. Ct. App. 2000).

153. Loomis v. Bd. of Psychologist Exam'rs, 954 P.2d 830, 840 (Or. Ct. App. 1997).

154. *Id.*

155. *Id.* at 840-41.

medical board would be justified in disciplining experts who do not base their opinions on generally accepted medical theories.

One case has explained that failing to qualify expert testimony was unprofessional conduct. In *Deatherage v. Examining Board of Psychology*, a Washington court allowed the psychologist's board to discipline a psychologist for his testimony in several custody actions.[156] The board found that the psychologist: (1) had failed to qualify his statements properly, (2) had mischaracterized his statements, (3) had failed to verify information, and (4) improperly interpreted test data.[157] The court upheld the disciplinary action because it was consistent with the "court's goal of accurate testimony from expert witnesses, and furthers the disciplinary board's goal of protecting the public."[158] It follows that an expert who provides improper testimony without qualifying it as a minority position could be found to have engaged in unprofessional conduct.

This issue is more settled in California because its Attorney General recently issued an opinion stating that physicians may be subject to professional discipline based on their expert testimony.[159] The opinion stated that expert testimony showing "dishonesty, poor character, a lack of integrity, and an inability or unwillingness to follow the law" is unprofessional conduct related to the practice of medicine.[160] Whether the California medical board will be able to discipline physicians who give improper testimony seems to depend on whether the expert knew his or her opinion was inconsistent with established medical customs.

2. Is Giving Improper Testimony "Related To" the Practice of Medicine?

The physician's misconduct must usually be "related to" the practice of medicine to warrant discipline.[161] States take two approaches to the "related

156. Deatherage v. Examining Bd. of Psychology, 948 P.2d 828, 829 (Wash. 1997).

157. *Id.* at 829.

158. *Id.* at 832.

159. 87 Op. Att'y Gen. 48 (Cal. A.G. 2004).

160. *Id.* at 52 (quoting Griffiths v. Superior Court, 96 Cal. App. 4th 757 (2002)). *See also* In re the Medical License of Dr. Reuben Setliff, M.D., 645 N.W.2d 601 (S.D. 2002) (allowing disciplinary action for false testimony in a medical malpractice suit). See also *supra* notes 141-48 and accompanying text for a discussion of whether giving improper testimony is dishonest behavior.

161. Most state's licensing acts specify that the conduct must be related to the physician's practice. The Washington Uniform Disciplinary Act allows discipline for acts "involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession." WASH. REV. CODE § 18.130.180(1) (2004). Another example is the Maryland Medical Practice Act, which allows discipline when a physician "[i]s guilty of immoral or unprofessional conduct in the practice of medicine." MD. CODE ANN., HEALTH OCC. § 14-404(a)(3) (West 2004). Even if not required by statute, most courts require that the conduct be related to the practice of medicine. *See* Griffiths v. Med. Bd. of Cal., 117 Cal. Rptr. 2d 445, 453 (Ct. App. 2002) (requiring a "nexus" between the

to" requirement: the majority "liberal" approach and the minority "direct relationship" approach. Courts accepting the majority approach are more likely to uphold a finding that giving improper testimony is related to the practice of medicine.

Under the majority approach, almost anything a physician does is related to the practice of medicine.[162] A physician's "unfitness" need not relate to the "specific skills needed" to practice medicine[163] or impair the physician's practice of medicine.[164] Underlying the majority approach is the assumption that the public has the right to expect "good character" from physicians.[165]

Under the majority approach, physicians may be disciplined for offenses indicating weakness of character.[166] Courts have upheld the discipline of physicians for: income tax fraud,[167] entering a guilty plea to a felony charge of solicitation of perjury,[168] a felony conviction for filing false or fraudulent

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physician's misconduct and his or her "fitness or competence to practice medicine"); Chastek v. Anderson, 416 N.E.2d 247 (Ill. 1981) (finding that statute allowing license revocation for "improper, unprofessional or dishonorable conduct" provided adequate notice of disallowed acts). Some courts have found that state statutes allowing discipline for the conviction of a felony do not require that that the felony be connected to the practice of medicine. *E.g.*, Barsky v. Bd. of Regents of Univ. of N.Y., 111 N.E.2d 222, 225-26 (N.Y. 1953) (allowing suspension of medical license for committing a crime unrelated to medical practice). Even if not found within the statute, due process standards require that there be a "rational connection" between the grounds for discipline and the "capacity to practice." Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 238-39 (1957) (holding that denial of law license because of past Communist Party affiliation did not have a rational connection to the practice of law).

162. Some California cases discus a "nexus" between the physician's misconduct and his or her "fitness or competence to practice medicine." *E.g.*, *Griffiths*, 117 Cal. Rptr. 2d at 452.

163. Haley v. Med. Disciplinary Bd., 818 P.2d 1062, 1069 (Wash. 1991); *see also* Raymond v. Bd. of Registration in Med., 443 N.E.2d 391 (Mass. 1982) (allowing disciplinary action for criminal conviction even though crime did not relate to the physician's medical practice); Barsky v. Bd. of Regents of Univ. of N.Y., 111 N.E.2d 222, 225-26 (N.Y. 1953) (same).

164. *E.g.*, *Griffiths*, 117 Cal. Rptr. 2d at 457.

165. Erdman v. Bd. of Regents of Univ. of State of N.Y., 261 N.Y.S.2d 634, 635 (App. Div. 1965). There is also the fear that intellectual power without "uprightness of character" might be more harmful to patients than ignorance. Lawrence v. Briry, 132 N.E. 174, 176 (Mass. 1921).

166. *But see* Cartwright v. Bd. of Chiropractic Exam'rs, 548 P.2d 1134 (Cal. 1976) (finding that conviction of a chiropractor for keeping or willfully residing in a house of ill fame did not warrant revocation of his license to practice medicine because there was no evidence the chiropractor misused his professional license).

167. *See, e.g.*, Bills v. Weaver, 544 P.2d 690 (Ariz. Ct. App. 1976); Windham v. Bd. of Med. Quality Assurance, 163 Cal. Rptr. 566, 570 (Ct. App. 1980); In re Kindschi, 319 P.2d 824 (Wash. 1958); State v. Margoles, 124 N.W.2d 37 (Wis. 1963).

168. *E.g.*, Krain v. Med. Bd. of Cal., 84 Cal. Rptr. 2d 586 (Ct. App. 1999).

insurance claims,[169] drunk driving offenses,[170] trying to obtain lenient treatment for an indicted defendant,[171] conspiring to influence a judge,[172] selling examination questions and answers,[173] plagiarism,[174] lying about board certifications or hospital affiliations,[175] giving false and evasive answers at a deposition and lying under oath,[176] and lying about academic credentials.[177] Courts following the liberal approach will likely accept that giving improper testimony is unprofessional conduct if they believe it indicates dishonesty.[178]

It is less certain whether courts in minority "direct relationship" states will accept that giving improper testimony is unprofessional conduct. These states require a direct connection between the physician's conduct and the practice of medicine.[179] Discipline is allowed only when the physician's conduct is related to "matters pertaining essentially to the diagnosis, care or treatment of patients."[180] Direct relationship courts have found these activities insufficiently related to the practice of medicine: operating a vehicle while under the influence of alcohol,[181] being convicted on six courts of petty larceny,[182] making a false statement on an application for staff privileges;[183] and intimidating a witness.[184] It appears that these courts will not uphold a finding that giving improper testimony is unprofessional conduct because in these states, conduct indicating a "weakness of character" is seemingly not sufficiently related to the practice of medicine.

However, whether the relationship is direct enough to satisfy these courts may depend on how the court characterizes the physician's

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169. *E.g.*, Matanky v. Bd. of Med. Exam'rs, 144 Cal. Rptr. 826 (Ct. App. 1978); Roy v. Ohio State Med. Bd., 610 N.E.2d 562 (Ohio Ct. App. 1992).

170. Griffiths v. Med. Bd. of Cal., 117 Cal. Rptr. 2d 445, 452-53 (Ct. App. 2002).

171. Erdman v. Bd. of Regents of the Univ. of the State of N.Y., 261 N.Y.S.2d 634, 635 (App. Div. 1965).

172. *Id.*

173. Pepe v. Bd. of Regents of Univ. of State of N.Y., 295 N.Y.S.2d 209 (App. Div. 1968).

174. Alsabti v. Bd. of Registration in Med., 536 N.E.2d 357 (Mass. 1989).

175. Lazachek v. Bd. of Regents of Univ. of State of N.Y., 475 N.Y.S.2d 160 (App. Div. 1984).

176. Sneed v. Stovall, 22 S.W.3d 277, 279-80 (Tenn. Ct. App. 1999).

177. Joseph v. Dist. of Columbia Bd. of Med., 587 A.2d 1085, 1086 (D.C. 1991).

178. See *supra* Part IV.A.1 for discussion of whether courts will accept that improper testimony is dishonest.

179. *E.g.*, Gromis v. Med. Bd., 10 Cal. Rptr. 2d 452, 458 (Ct. App. 1992) (finding that unprofessional conduct must affect the physician's treatment of the patient); Atienza v. Taub, 239 Cal. Rptr. 454, 457 n.3 (Ct. App. 1987) (holding that the "substantially related" requirement means that the conduct occurs under the guise of treatment).

180. *E.g.*, McDonnell v. Comm'n on Med. Discipline, 483 A.2d 76, 80 (Md. 1984).

181. Griffiths v. Med. Bd. of Cal., 117 Cal. Rptr. 2d 445, 461 (Ct. App. 2002).

182. Hummel v. Bd. of Chiropractic Exam'rs, 87 P.2d 248 (Colo. 1939).

183. Elmariah v. Dep't of Prof'l Regulation, 574 So. 2d 164 (Fla. Dist. Ct. App. 1990).

184. Meyer v. McDonnell, 392 A.2d 1129 (Md. Ct. Spec. App. 1978).

misconduct.[185] If the court sees improper testimony merely as an indication of "bad character," then there is no direct relationship with the practice of medicine.[186] However, it seems intuitive that improper testimony shows something more than bad character.[187] An expert witness "renders an opinion based on his application of scientific principles in diagnosing and treating physical diseases."[188] Therefore, arguably an expert witness is practicing medicine when offering expert testimony.[189] If the court defines the giving of expert testimony as the practice of medicine, obviously it should be sufficiently related to the practice of medicine to count as such.[190]

B. Is Giving Improper Testimony Negligent or Incompetent Practice of Medicine?

State medical boards have authority to discipline physicians for negligently or incompetently practicing medicine.[191] Whether giving improper expert witness testimony is the negligent or incompetent practice of medicine depends on whether an expert is practicing medicine.[192] A 1997 survey found that most medical boards do not believe giving expert witness testimony is the practice of medicine.[193] However, most physicians believe an expert witness is practicing medicine.[194]

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185. *See* discussion *infra* Part IV.B.1.

186. *Id.*

187. *Id.*

188. Joseph v. Dist. of Columbia Bd. of Med., 587 A.2d 1085, 1087 (D.C. 1991).

189. See *infra* Part IV.B.1, for a discussion about whether giving medical expert testimony is the practice of medicine. In 2004, the Federation of State Medical Boards amended its model medical practice act to define the giving of "false, fraudulent or deceptive testimony" by a "medical professional while serving as an expert witness" as unprofessional conduct warranting discipline. FEDERATION OF STATE MEDICAL BOARDS, A GUIDE TO THE ESSENTIALS OF A MODERN MEDICAL PRACTICE ACT (10th ed. 2003), *available at* http://www.fsmb.org/pdf/2003_grpol_Modern_Medical_Practice_Act.pdf.

190. *But see* Missouri Bd. of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, 443 (Mo. Ct. App. 1991) (finding that testifying as an expert is not the practice of medicine, so disciplinary action for unprofessional conduct was not allowed).

191. *See* 1 FURROW, *supra* note 16, at § 3-23 (explaining that boards can discipline physicians for failing to comply with specific standards of practice).

192. Eitel, *supra* note 130, at 350.

193. *Id.*

194. *Id.* at 347-48. In one study, 59.4% of surveyed physicians stated that acting as an expert witness was the "practice of medicine." *Id.* Interestingly, physicians who had testified as expert witnesses were more likely to define expert witness testimonial activity as the "practice of medicine" than physicians without expert witness experience. *Id.* at 348.

1. What is the Practice of Medicine?

State medical practice acts provide the framework for determining what activities fall within the "practice of medicine." Most modern medical practice acts share a variation of the same definition: that the practice of medicine is the diagnosis, treatment, prescription, or prevention of a disease, ailment, injury, or other condition.[195] Some statutes specify that certain activities such as tattooing fall within the practice of medicine.[196] Almost every activity related to health or sickness conceivably falls within the practice of medicine.[197] The outer limits of the practice of medicine appear to be only medical services not usually performed by physicians.[198]

Cases analyzing non-traditional medical practices indicate that at its core, the practice of medicine involves the application of medical judgment.[199] Courts generally require that the medical judgment be "carried out," i.e., applied to a particular case.[200]

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195. E. Haavi Morreim, *Playing Doctor: Corporate Medical Practice and Medical Malpractice*, 32 U. MICH. J.L. REFORM 939, 954 (1999). For example, the District of Columbia Medical Practice Act defines the practice of medicine as "the application of scientific principles to prevent, diagnose, and treat physical and mental diseases, disorders, and conditions and to safeguard the life and health of any woman and infant through pregnancy and parturition." D.C. CODE ANN. § 3-1201.02(7) (2004).

196. For example, the Indiana Medical Practice Act defines tattooing as the practice of medicine. IND. CODE § 25-22.5-1-1.1(a)(1)(c) (2004). Many statutes include a "holding out" requirement, i.e., "[t]he practice of medicine. . .means the holding out of one's self to the public as being engaged in the business of, or the actual engagement in, the diagnosing, treating, curing, or relieving of any bodily or mental disease. . . ." LA. REV. STAT. ANN. § 37:1262(1) (West 2004).

197. In *State v. Rich*, 339 N.E.2d 630, 632 (Ohio 1975), a court held that a medical license was necessary to practice acupuncture. The court concluded that because acupuncture consisted of inserting needles beneath the skin for the purpose of treating pain, infirmity, or disease, it falls within the practice of medicine. *Id.* However, some courts apply a slightly less broad definition of practice of medicine. In *Hicks v. Arkansas State Medical Board*, 537 S.W.2d 794, 796 (Ark. 1976), the Arkansas Supreme Court disagreed with the state medical board that ear-piercing constituted the practice of medicine. The Board argued that ear-piercing was a surgical procedure because it involved "the penetration of the epidermis by mechanical instruments or appliances." *Id.* at 795. The court looked to the "ordinary and usually accepted meaning" of surgery and found that it must involve a more complicated procedure than ear-piercing. *Id.* at 795-96. Similarly, in *People v. Lehrman*, 12 N.E.2d 166 (N.Y. 1937), the New York Court of Appeals found that the statutory definition of practice of medicine was never intended to encompass electrolysis even though it involved the penetration of the skin with an electrically charged needle.

198. Physicians need not perform these services because they do not involve a "medical judgment." For example, a court found that performing routine pelvic examinations was not the practice of medicine because these examinations are routinely performed by physician assistants. Biogenetics, Ltd. v. Dep't of Pub. Health, 431 N.E.2d 1042, 1044 (Ill. 1982). Another court found that services routinely performed by nurses did not fall within the "practice of medicine" because the nurses acted under the direction of physicians. Sermchief v. Gonzales, 660 S.W.2d 683, 688 (Mo. 1983) (refusing to "define and draw that thin and elusive line that separates the practice of medicine and the practice of professional nursing in modern day delivery of health services.").

199. Morreim, *supra* note 195, at 963.

200. *Id.*

The one universally accepted element of the practice of medicine is the utilization of medical judgment.[201] For example, in *Kelley v. Texas State Board of Medical Examiners*, a Texas court held that authoring a pamphlet about cancer was the practice of medicine.[202] Under the *Kelley* court's rationale, writing a book about cancer treatment is similar to testifying as a medical expert, so it follows from this case that testifying would be the practice of medicine. However, *Kelley* is an isolated case, and it seems intuitive that the practice of medicine must be more than an "intellectual exercise."[203]

The physician must do more than contemplate a patient's condition: medical judgment must be applied to a particular case.[204] Accordingly, courts have found that the following activities fall within the practice of medicine: giving advice to health food store customers about foods they should eat after listening to descriptions of their symptoms,[205] advising patients about obesity and nervousness,[206] and examining patients and writing prescriptions.[207] These activities are similar to providing expert witness testimony because an expert reviews the treatment provided to the patient to determine the standard of care. However, the expert reviews the case after the treatment has been given, so arguably it is not "carried out."[208]

Another element that might be necessary is that the applied medical judgment be carried out.[209] However, it is uncertain what the carried out requirement entails. Must the physician treat the patient? Or rather, must the physician's medical judgment affect the patient in some specific way?

If treatment of a particular patient is a necessary element of the practice of medicine, then a physician whose advice is rejected is not practicing medicine. Moreover, a clinical pathologist who only diagnoses a patient would not be practicing medicine. Most modern medical practice acts specify that the practice of medicine is more than the mere treatment of a

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201. *Id.*

202. 467 S.W.2d 539 (Tex. Civ. App. 1971). *But see* Jones v. J.B. Lippincott Co., 694 F. Supp. 1216 (D. Md. 1988) (holding that the publisher of a medical textbook owed no duty of care to readers of the textbook).

203. *See Jones*, 694 F. Supp. at 1216.

204. Morreim, *supra* note 195, at 963.

205. *See* Pinkus v. MacMahon, 29 A.2d 885 (N.J. 1943).

206. People v. Cantor, 18 Cal. Rptr. 363, 365-66 (App. Dep't Super. Ct. 1961).

207. *See* People v. Varas 487 N.Y.S.2d 577 (App. Div. 1985); Siddiqui v. Ill. Dept. of Prof'l Regulation, 718 N.E.2d 217, 225 (Ill. App. Ct. 1999).

208. Morreim, *supra* note 195, at 963.

209. *Id.* at 963 (arguing that a medical judgment must be "carried out," i.e., that it must determine or at least significantly influence the type of care provided to a patient).

patient: the statutes define the practice of medicine as "the diagnosis, treatment, prescription, or prevention of human disease."[210] Accordingly, in *Composite State Board of Medical Examiners v. Hertell*, the Georgia Court of Appeals upheld the suspension of a physician for practicing medicine under the influence of alcohol.[211] Even though Dr. Hertell did not treat a patient, the court found that he had practiced medicine while under the influence because he had made a medical judgment when he reviewed a patient's chart and determined necessary tests had been performed.[212] Therefore, the fact that testifying does not involve the treatment of a patient should not prevent a board from concluding it falls within the practice of medicine.[213]

Several cases indicate the carried out requirement means the medical judgment must affect or have the possibility of affecting the patient. In *Missouri Board of Registration for the Healing Arts v. Levine*, a Missouri appellate court overturned a disciplinary action against an expert witness who gave false testimony.[214] The court held that giving expert testimony was not the practice of medicine because an expert neither "diagnoses" nor "treats" a patient.[215] In *Murphy v. Board of Medical Examiners*,[216] an Arizona court held that a physician performing prospective utilization review[217] was practicing medicine because his decisions could "adversely affect" a patient's health.[218] However, in *Morris v. District of Columbia Board of Medicine*, the D.C. Court of Appeals rejected such an "open-ended" definition of "treatment."[219] Since expert witness testimony is

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210. *Id.* at 955.

211. 295 S.E.2d 223 (Ga. Ct. App. 1982).

212. *Id.* at 226.

213. *But see* Missouri Bd. of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, 443 (Mo. Ct. App. 1991) (holding that doctor who testified as expert witness but did not treat patient was not practicing medicine).

214. *Id.* The Missouri medical board attempted to discipline Dr. Levine for giving false answers under oath while testifying as an expert witness. *Id.* at 441. Dr. Levine testified that he passed his boards on his fourth attempt when in fact he passed his exam on his fifth attempt. *Id.*

215. *Id.* at 443.

216. 949 P.2d 530 (Ariz. Ct. App. 1997).

217. Prospective utilization is a process where a referral for a service is reviewed by a physician who determines if it is medically necessary. The reviewer determines whether the requested service will be covered by the patient's insurance. *See* Tom J. Manos, Comment, *Take Half an Aspirin and Call Your HMO in the Morning—Medical Malpractice in Managed Care: Are HMOs Practicing Medicine Without a License?*, 53 U. MIAMI L. REV. 195, 216 (1998).

218. Murphy v. Bd. of Med. Exam'rs, 949 P.2d 530, 535 (Ariz. Ct. App. 1997).

219. Morris v. Dist. of Columbia Bd. of Med., 701 A.2d 364, 367 (D.C. 1997). A minority of courts agree with the *Morris* court that utilization review is not the "practice of medicine." For example, in *Adnan Varol, M.D., P.C. v. Blue Cross & Blue Shield of Mich.*, 708 F. Supp. 826, 832 (E.D. Mich. 1989), a federal court held that neither prospective nor retrospective utilization review was the practice of medicine. In *Corcoran v. United Healthcare*, 965 F.2d 1321, 1331-33 (5th Cir. 1992), the court held that a claim against an HMO was preempted by the Employee Retirement

provided long after the patient receives treatment, it does not affect the patient's care—so if this is a necessary element of the practice of medicine, an expert is not practicing medicine.

This Article proposes that there is in actuality no carried out requirement. For example, the D.C. Court of Appeals held that an expert witness' investigation and analysis of a plaintiff's condition was arguably close to a diagnosis.[220] Moreover, a forensic pathologist determining the cause of a patient's death by performing an autopsy, by the nature of the actions involved, practices medicine.[221] Since there is no carried out requirement, an expert witness practices medicine because expert testimony involves the application of medical judgment to a particular case.

2. What is the Negligent or Incompetent Practice of Medicine?

The Federation of State Medical Boards'[222] model medical practice act defines competence as having the "requisite abilities and qualities" to effectively practice medicine and "adhering to professional ethical

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Income Safety Act (ERISA) because an HMO's medical decisions were made in order to determine the availability of insurance benefits.

220. Joseph v. Dist. of Columbia Bd. of Med., 587 A.2d 1085, 1089 (D.C. 1991). The court quoted Dr. Joseph's statement of his activities at length:

> I reviewed medical records regarding the care and treatment of the child who had an upper gastrointestinal bleeding condition .... There was a 13-year old child who was admitted to the hospital because of some type of condition which [had] produced some upper gastrointestinal bleeding. Observation and management of the child were such that she required an elective operative procedure. The day of the operative procedure, a flat and upright x-ray of the abdomen was obtained which showed a large dilated stomach filled with blood and gastric secretions. The child was brought to the operating room with no attempt to evacuate the stomach prior to the induction of anesthesia, nor was the anesthesiologist informed of the necessity to do a quick crash-in because of the largely dilated stomach. At the time of induction anesthesia, the child vomited, aspirated and expired. I testified feeling that having seen the x-ray of the child prior to the performance of an elective operative procedure, that in my opinion it was below the standard of care to either fail to insert a nasogastric tube to evacuate the child's stomach to reduce the incidence of aspiration pneumonia, or to inform the anesthesiologist [of the] failure to evacuate the stomach so that a crash-in could be performed. And that essentially was the case.

Id.

221. A forensic pathologist investigates and evaluates cases of unexpected and suspicious deaths. THE AMERICAN BOARD OF MEDICAL SPECIALTIES, WHICH MEDICAL SPECIALIST FOR YOU? 21-22 (rev. ed. Apr. 2002).

222. The Federation of State Medical Boards is an organization dedicated to promoting high standards for physicians. Its membership consists of all the state medical boards in the United States. FEDERATION OF STATE MEDICAL BOARDS, http://www.fsmb.org/.

standards."[223] Therefore, like medical malpractice, the negligent or incompetent practice of medicine is a deviation from an accepted standard of care.[224] State medical boards have authority to prospectively promulgate standards for the practice of medicine and discipline physicians for failing to comply with these standards.[225] The boards may also discipline a physician for deviating from generally accepted standards of medical practice.[226]

3. Is Giving Improper Expert Testimony the Negligent Practice of Medicine?

To determine whether giving improper testimony is the negligent practice of medicine, medical boards will first have to establish a standard of care for medical expert testimony. This article proposes basing the standard of care on ethical guidelines addressing expert testimony published by related professional associations. The AMA's ethical code requires experts to "have recent and substantive experience in the area in which they testify."[227] The American Association of Neurosurgeons (AANS) states that an expert "shall diligently and thoroughly prepare himself or herself."[228] The American College of Radiology (ACR) specifies that experts "be familiar with the relevant standard of care" and that the expert's opinion be able to withstand peer review.[229] Therefore, this Article proposes the standard of care for expert testimony includes the following requirements: (1) the expert must be knowledgeable about current medical practice standards; (2) the expert's testimony must be consistent with generally accepted medical practices; and (3) the expert's opinion must be based on generally accepted medical standards.

Under such a standard of care, improper expert testimony could be considered the negligent or incompetent practice of medicine. A physician providing improper testimony would necessarily deviate from the standard of care requiring that testimony be either consistent with generally accepted medical practices or based on generally accepted medical standards.

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223. FSMB MODEL ACT, *supra* note 189, at § XII(A)(1).

224. *Id.* at § XII(A)(2)-(3).

225. *See id.* at § III.

226. *Id.* at § XII(E). The medical practice act allows discipline of any physician found to be "dyscompetent or incompetent." *Id.* at § XII. Dyscompetent is defined as "failing to maintain [the profession's] acceptable standards." *Id.* at § XII(A)(2). Incompetent is defined as "lacking requisite abilities and qualities" needed to practice medicine. *Id.* at § XII(A)(3).

227. AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS § E-9.07 (2004).

228. AMERICAN ASSOCIATION OF NEUROSURGEONS, CODE OF ETHICS § V(B), http://www.aans.org/library/Article.aspx?ArticleId=9917.

229. AMERICAN COLLEGE OF RADIOLOGY, ACR PRACTICE GUIDELINE ON THE EXPERT WITNESS IN RADIOLOGY § IV(B)(2), (B)(4),
http://www.acr.org/s_acr/bin.asp?CID=0&DID=12217&DOC=FILE.pdf.

Therefore, a board could conclude that improper testimony is the negligent practice of medicine.

C. *What State Medical Boards Currently Have in Place and What They Need To Modify To Effectively Regulate Improper Expert Witness Testimony*

This Article argues that state medical boards currently have authority to discipline physicians who give improper testimony, by classifying the improper testimony as either unprofessional conduct or the incompetent practice of medicine.[230] Because it is uncertain whether such disciplinary actions will be upheld in court, this Article recommends that boards promulgate standards defining the standard of care for medical expert testimony or defining the giving of improper testimony to be unprofessional conduct.

This Article recommends that boards follow the lead of the Federation of State Medical Boards (FSMB) and define the giving of false or deceptive testimony to be unprofessional conduct.[231] This Article further recommends that boards establish standards for expert witness testimony.[232] According to the standard of care proposed by this Article, an expert's opinion must be based on generally accepted medical science.[233] This Article imagines that

230. The process of such proceedings can be illustrated by analogy to New York's procedure. First, disciplinary proceedings are initiated by the filing of a complaint with the medical board. *E.g.*, N.Y. EDUC. LAW § 6510(1)(a) (McKinney 2005). An investigation is then undertaken and if warranted, charges are filed. *Id.* at § 65101(1)(b). Then an adversarial hearing is held before a panel of the state medical board. *Id.* § 6510(3). The hearing results in a written report which includes findings of fact, determination of guilt or non-guilt, and a recommended penalty. *Id.* at § 65101(3)(a). The board can show breach of the standard of care through expert witness testimony; however, expert testimony is not always required because "a specialized administrative agency is expected to use its own expertise in resolving a case." 1 FURROW, *supra* note 16, at § 3-23. If the board deems the giving of improper testimony to be unprofessional conduct, it will have to prove that the physician's conduct was unprofessional. The evidentiary standard would be either preponderance of the evidence or by clear and convincing evidence. *See, e.g.*, Tara K. Widmer, *South Dakota Should Follow Public Policy and Switch to the Preponderance Standard for Medical License Revocation After* In Re the Medical License of Dr. Reuben Setliff, M.D., 48 S.D. L. REV. 388, 398-99 (2003).

231. *See* discussion *supra* Part IV.A.1 (demonstrating that improper testimony is false and deceptive).

232. *See* discussion *supra* Part IV.B.3 (proposing a standard of care for expert witness testimony).

233. *Id.*

the review of an expert's testimony would be similar to a *Daubert* analysis with the board evaluating the soundness of the expert's methodology.[234]

V. IMPLICATIONS ARISING FROM DISCIPLINING PHYSICIANS FOR IMPROPER TESTIMONY

Discipline for improper testimony raises several important questions. First, if an expert is practicing medicine, must the expert be licensed in the state where the testimony is provided? Second, if the profession established a standard of care for expert testimony, will experts be subject to liability from their testimony? Third, does discipline for expert testimony violate the First Amendment? Fourth, if experts' testimony must be consistent with accepted medical customs, will there be a revival of the "customary practice" standard? Finally, if giving expert testimony falls within the practice of medicine, what other activities might conceivably fall within the practice of medicine?

The strongest argument against considering expert witness testimony to be the practice of medicine is that experts would need to be licensed in the states where they testify. This would make it more difficult for plaintiffs to find expert witnesses.[235] However, most states have a "consultation exception" that might allow an out-of-state physician to testify as an expert witness.[236] Under the consultation exception, the plaintiff would hire a local physician who would consult with the out-of-state expert about the plaintiff's case.[237] Another possibility is for states to issue "special purpose" licenses to out-of-state experts, similar to the "special purpose" licenses

234. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93; *see also supra* note 88. The expert's peers would be defined as specialists in the field about which the expert testified. AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, REPORT OF THE BOARD OF TRUSTEES, http://www.aapl.org/AMA_expert_witness.htm.

235. This would work against one of the public policy reasons for abandoning the "locality rule." Under the locality rule an expert testifies as to the customary practice in the defendant physician's community. When the locality rule was in place, plaintiffs often had a difficult time finding local physicians willing to testify as expert witnesses against their peers. *See generally* 1 FURROW, *supra* note 16, at § 6-2 (discussing movement from locality rule to national standard for specialists).

236. Forty-six states have a consultation exception. Susan E. Volkert, *Telemedicine: RX for the Future of Health Care*, 6 MICH. TELECOMM. & TECH. L. REV. 147, 168 (2000). However, a discussion of the "consultation exception" is beyond the scope of this Article.

237. This approach is favored by the Federation of State Medical Boards. *See* FEDERATION OF STATE MEDICAL BOARDS, REPORT OF SPECIAL COMMITTEE ON LICENSE PORTABILITY (2002), http://www.fsmb.org/pdf/2002_grpol_License_Portability.pdf. This approach is opposed by the American Medical Association, which criticizes it as an infringement upon the states' right to regulate the practice of medicine within their boundaries. AMERICAN MEDICAL ASSOCIATION, PHYSICIAN LICENSURE: AN UPDATE OF TRENDS: LEGISLATION GOVERNING THE PRACTICE OF MEDICINE ACROSS STATE LINES (Sept. 4, 2004), http://www.ama-assn.org/ama/pub/category/2378.html#. Whether states should issue "special purpose" licenses for out-of-state physicians practicing within their borders on a short-term basis is beyond the scope of this Article.

issued by some states to telemedicine providers.[238] Both the consultation exception and special purpose licenses for out-of-state experts would allow plaintiffs to retain out-of-state physicians as experts.[239]

If the medical profession establishes a standard of care for medical expert witness testimony, an expert could potentially be liable for "mal-testimony,"[240] i.e., negligently testifying. However, witnesses are generally immune to civil actions resulting from their testimony[241] except in the rare cases discussed *supra* Part III.A.4.[242] Therefore, it is unlikely that expert witnesses risk exposure to liability based on their testimony.

Discipline of a physician for improper testimony could potentially raise a colorable First Amendment claim because testimony is a speech-related activity.[243] However, the government may generally regulate professional speech.[244] Regulations burdening professional speech are generally allowed because they have only an incidental impact on speech.[245] Further, the government has an interest is preventing the expressions of professional opinions that are inconsistent with the profession's accepted standards.[246] Therefore, an expert disciplined for improper testimony is unlikely to successfully challenge disciplinary action on First Amendment grounds.

Standards of practice prohibiting experts from criticizing generally accepted medical customs could revive the customary practice standard. Under the customary practice standard, the medical profession establishes the standard of care.[247] Until recently, most jurisdictions were "customary

238. *E.g.*, NEV. REV. STAT. § 630.261 (2004); 22 TEX. ADMIN. CODE § 163.14(a) (2004).

239. Which board would have authority to regulate the out-of-state physician's testimony is beyond the scope of this Article.

240. Michael S. Victoroff, *Peer Review of the Inexpert Witness, or . . . Do You Trust Chickens to Guard the Coop?*, MANAGED CARE MAGAZINE, Sept. 2002, *available at* http://www.managedcaremag.com/archives/0209/0209.ethics.html. Granted, it is hard to conceive that a plaintiff or defendant could be considered to be in a physician-patient relationship with the expert witness, which is a prerequisite for a malpractice action.

241. *See* discussion *supra* Part III.A.4.

242. *E.g.*, Mattco Forge Inc. v. Arthur Young & Co., 6 Cal. Rptr. 2d 781 (Ct. App. 1992).

243. The First Amendment protects against government limitations on freedom of speech, among others. *See* U.S. CONST. amend. I. For a discussion of the implications of the first amendment on this doctrine, see Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE L. REV. 885, 889 (2000).

244. *See* Kry, *supra* note 243, at 890.

245. *Id.* at 891.

246. *Id.* at 893.

247. In most custom-based standard of care jurisdictions, the standard is based on national customs instead of local customs; therefore the standard of care is the care and skill ordinarily provided by similar physicians throughout the country. 1 FURROW, *supra* note 16, at § 6-2.

practice" jurisdictions.[248] However, there has been a trend towards the adoption of the "reasonable physician" standard in most jurisdictions.[249] Under the reasonable physician standard, the jury determines the standard of care.[250] An expert witness in a customary practice jurisdiction plays a different role than an expert in a reasonable physician jurisdiction. In a customary practice jurisdiction, an expert testifies about what physicians normally do under similar circumstances.[251] In a reasonable physician jurisdiction, the expert testifies about what the defendant physician should have done under the particular circumstances at issue.[252] A standard preventing an expert from criticizing generally accepted practices could prevent an expert from testifying about what the defendant should have done under the circumstances.

If giving medical expert testimony is the practice of medicine, what other activities would be considered to fall within the practice of medicine? Would teaching be the practice of medicine? Would writing a book be the practice of medicine? This Article proposes that giving medical expert testimony is different from teaching and writing a book. As discussed *supra* Part IV.B.1, giving medical expert testimony is the application of medical judgment to a particular case. Therefore, the recognition that the giving of medical expert testimony can be regulated by state medical boards would not necessary support an argument for permitting medical boards to regulate teaching or writing medical textbooks.[253]

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248. Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 163 (2000).

249. *Id.* Jurisdictions generally point to common limitations on the custom-based standard. Some examples of limitations include: (1) requiring expert testimony to educate the jury about customary medical practices; (2) the "respectable minority rule" where "physicians are divided among two or more respectable schools of thought;" (3) the movement toward abandonment of the locality rule; (4) the "error in judgment rule" which insulates reasonable treatment decisions that lead to bad outcomes; (5) the "best judgment" cases where physicians with unique or special information are required to use it regardless of custom; and (6) "common knowledge" cases where plaintiffs can recover in the absence of "expert testimony and despite evidence that the physician complied with custom." *Id.* at 166-67. In jurisdictions adhering to the traditional rule, i.e., "customary-practice" jurisdictions, physicians are held to the standard of "customary care" of the "reasonable physician" standard. In most custom-based standard of care jurisdictions, the standard is based on national customs instead of local customs, therefore the standard of care is the care and skill ordinarily provided by similar physicians throughout the country. *See* 1 FURROW, *supra* note 16, at § 6-2 (explaining that standard of care for primary care physicians and specialists is a national standard).

250. Philip G. Peters, *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 909, 911 (2002).

251. *Id.* at 920.

252. *Id* at 916.

253. However, it is possible that a lecture or book about a particular case could be considered to be the practice of medicine according to the arguments made in this Article supporting the inclusion of expert testimony within the practice of medicine. *See generally* discussion *supra* Part IV.B.1.

VI. CONCLUSION

As part of the social contract between the medical profession and the public, the profession has an obligation to ensure that medical expert testimony is accurate and unbiased.[254] Therefore the profession has an obligation to police its members acting as medical experts. Further, the state should respect this social contract by permitting the profession to discipline its members. However, disciplinary actions against plaintiffs' experts give the appearance that the profession is trying to protect doctors at the expense of plaintiffs.[255] Therefore the profession should ensure that defense expert testimony is also subject to review.

If physicians are unable to prevent their peers from testifying improperly in malpractice cases, the state will be forced to intervene. This would serve only to weaken the traditional deference given professions. If the public does indeed benefit from allowing professions to regulate themselves, then surely the public would suffer the most from an infringement upon the traditional privileges of professions.

254. *E.g.*, Robert W. Bucholz, *Creating a Workable Expert Witness Program*, AAOS ONLINE BULLETIN (June 2004), http://www.aaos.org/wordhtml/bulletin/jun04/acdnws1.htm.

255. Victoroff, *supra* note 240.