Expert Witness Malpractice

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ARTICLES

1 The Racial Bias Exception to the General Rule that Precludes Jurors from Offering Testimony to Impeach Their Own Verdict
   Terrence W. McCarthy

15 Expert Witness Malpractice
   Michael Flynn

39 How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation
   William L. Anderson & Kieran Tuckley

TRIAL TECHNIQUES

127 The Most Important Deposition You Will Never Take
   Frank Ramos

143 The Abraham Lincoln Exception to the Hearsay Rule
   James J. Duane

151 Trial Techniques for a Florida Prosecutor—A Positive Prescription for Ethical Closing Arguments
   Steven N. Gosney

STUDENT COMMENTS

185 United States v. Grant: Does a Term-of-Years Sentence that Meets a Juvenile’s Expected Life Span Violate the Eighth Amendment’s Ban on Cruel and Unusual Punishment?
   Lindsey A. Phillips

209 Gonzalez-Alarcon v. Macias: A United States Citizen’s Path to Judicial Review Under the REAL ID Act
   N. Nickolas Jackson

223 In re Bayou Shores SNF, LLC: Do Bankruptcy Courts Have Jurisdiction to Hear Medicare and Medicaid Cases Under the 1984 Amendment to the Social Security Act?
   Anthony R. Anello

RECENT DEVELOPMENTS

CUMBERLAND SCHOOL OF LAW
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Expert Witness Malpractice

Michael Flynn†

Introduction

Today is the big day! You have done all you can think of to do. You are nervous and anxious but hopeful that all will work out right. You are introducing (and letting others become acquainted with) someone who is important to you. We have all felt this experience at least once. Sometimes it all works out but other times, despite all your preparation and planning, the result is not what you had hoped. This happens in personal and family relationships and even to trial lawyers!

Trial lawyers spend countless hours and money to select, prepare and present expert witnesses designed to convince juries of the correctness of the plaintiff’s or the defendant’s case. Yet despite this effort, sometimes the lawyer’s own hand-selected expert witness’s testimony fails to deliver. There are plenty of places to lay blame—the lawyer, the opposing lawyer, the jury, and the judge are all likely targets to explain and rationalize what went wrong. However, in some instances it may be the expert witness who is to blame, even a friendly expert witness. There are many times when a lawyer’s own expert witness falters and surprises the lawyer and unexpectedly damages the client’s case. The result is a situation that is very difficult for a trial lawyer, who then has to scramble to undo, remedy and recover the case from the ineffective testimony of the lawyer’s own expert witness. Sometimes it becomes impossible to erase the expert witness testimony and the case ends badly for your client. Well, maybe not!

This article explores the option to sue a friendly expert witness for negligence, in the form of professional malpractice. The first segment of this article examines the long-standing immunity from lawsuits that is granted to friendly witnesses, including expert witnesses, by the party who called the witness or hired the expert witness. The article then

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analyzes case law that seems to begin to remove this immunity that is granted to friendly expert witnesses. Finally, this article examines a trial lawyer’s liability for using an expert witness found to be negligent.

I. The Expert Witness Rule

The Supreme Court of the United States, in Briscoe v. LaHue,\(^1\) stated succinctly that

\[\text{[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence . . . . But the truth-finding process is better served if the witness' testimony is submitted to "the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies."}^2\]

Based in part on this statement, the Briscoe Court granted immunity from a subsequent civil lawsuit to police officer fact witnesses whose testimonies in trial were false and misleading.\(^3\) In Briscoe, the plaintiffs claimed they were victims of perjured testimony in their criminal trials and only convicted because of the false testimony.\(^4\) The lower court dismissed the plaintiffs’ claims against the police officer witnesses in the same opinion and the United States Supreme Court accepted the case for review.\(^5\) The Supreme Court upheld the lower court’s dismissal and concluded that the common law specifies immunity from lawsuits against a witness unless subsequent litigation would modify this result.\(^6\) The Supreme Court then offered examples of modification, including perjury.\(^7\) In turn,

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\(^1\) 460 U.S. 325 (1983).

\(^2\) Briscoe, 460 U.S. at 333-34 (citation omitted) (quoting Imbler v. Pachtman, 424 U.S. 409, 440 (1976) (White, J., concurring)).

\(^3\) Id. at 325.

\(^4\) Id. at 327.

\(^5\) Id. at 327-28.

\(^6\) Id. at 345-46.

\(^7\) Id. at 342.
this principle of witness immunity has expanded over time to cover expert witness testimony.\(^8\)

It is important to note that this immunity from a civil lawsuit would not include immunity from criminal prosecution for perjury.\(^9\) However, the lasting impact of the *Briscoe* ruling has protected witnesses from subsequent civil lawsuits over the witness' testimony.\(^10\) This court-declared doctrine has long been a part of the common law and certainly provides some comfort to witnesses but no remedy for litigants prejudiced by potentially lying or mistaken witnesses.\(^11\) This ruling shielded expert witnesses who have carelessly provided testimony or even lied to a trier of fact.\(^12\) Granted, to prove that a negligent or lying expert witness is the cause of a client losing a lawsuit is not an easy burden of proof, but the *Briscoe* ruling precludes even a chance to do so.\(^13\) However, this long-standing legal doctrine of immunity from a subsequent civil lawsuit for a party's own expert witness is showing signs of erosion as some states have allowed lawsuits by lawyers and parties against their own expert witnesses for malpractice.\(^14\)

Generally, there are two types of witness immunity: immunity against civil liability for harm caused by the testimony and immunity against

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\(^8\) Bruce v. Byrne-Stevens & Assocs. Eng’rs, Inc., 776 P.2d 666, 669 (Wash. 1989) (en banc) ("An expert witness] is a participant in a judicial proceeding. It is that status on which witness immunity rests.").

\(^9\) *Briscoe*, 460 U.S. at 341-43 (stating that, although a police officer is shielded from civil liability for perjury, "[a] police officer...may be prosecuted subsequently for perjury").


\(^12\) See San Filippo v. U.S. Trust Co. of N.Y., Inc., 737 F.2d 246, 254 ("[I]t is settled under *Briscoe* v. LaHue that a witness has absolute immunity from § 1983 liability based on the substance of his trial testimony." (citations omitted)).

\(^13\) *Briscoe*, 460 U.S. at 345.

\(^14\) See, e.g., LLMD of Mich., Inc. v. Jackson, 740 A.2d 186, 191 (Pa. 1999) (finding the justifications for absolute witness immunity did not apply to suits against experts alleging professional negligence when the allegations did not relate to the substance of the witnesses' testimony).
criminal prosecution based on the testimony.\textsuperscript{15} If the witness lies in a deposition or lies in court during trial, the witness may be prosecuted for the crime of perjury.\textsuperscript{16}

Multiple state courts have ruled that expert witnesses are no longer afforded absolute immunity from civil liability if the witness is found to have negligently carried out her professional duties.\textsuperscript{17} In cases involving negligence in the expert’s performance rather than what the expert’s conclusion actually is, and such negligence allegedly contributes to the client losing the lawsuit, immunity does not protect the expert.\textsuperscript{18} In such a lawsuit, having to prove that one of the contributing causes of the party losing the lawsuit was the negligence of the expert witness in providing testimony is analogous to a legal malpractice case.\textsuperscript{19} Such a lawsuit is essentially two cases in one with the plaintiff’s burden being to not only show negligence on the part of the lawyer but then also show that a jury or other trier of fact would have found for the plaintiff had the lawyer not acted negligently.\textsuperscript{20} So too in the expert witness malpractice case, the plaintiff would have to hurdle the burden of two lawsuits with proof of causation resting in a successful judgment in the second retrial of the original lawsuit.

\footnotesize{\textsuperscript{15} See, e.g., GA. CODE ANN. § 24-5-507 (2013) (providing for the possibility of prosecution for perjury for witnesses granted immunity to testify under a court order); Andrew Jurs, The Rationale for Expert Immunity or Liability Exposure and Case Law Since Briscoe: Reasserting Immunity Protection for Friendly Expert Witnesses, 38 U. MEM. L. REV. 49, 51-52 (2007) (citing Briscoe, 460 U.S. at 345-46) (describing the U.S. Supreme Court decision that “granted immunity specifically to trial fact witnesses . . . even if the witnesses perjured themselves on the stand”).

\textsuperscript{16} See 18 U.S.C.A. § 1621 (West 1994) (prescribing “fine[s] . . . or imprison[ment] [for] not more than five years, or both” for individuals who lie in a court proceeding while under oath).

\textsuperscript{17} See LLMD of Mich., 740 A.2d at 191 (allowing a professional malpractice action to proceed against an expert witness); see also Murphy v. A.A. Mathews, 841 S.W.2d 671, 672 (Mo. 1992) (en banc) (“hold[ing] that witness immunity does not bar suit if the professional is negligent in providing the agreed services”).

\textsuperscript{18} LLMD of Mich., 740 A.2d at 191.

\textsuperscript{19} Forensis Group, Inc. v. Frantz, Townsend & Foldenauer, 29 Cal. Rptr. 3d 622, 635 (Cal. Ct. App. 2005) (citations omitted).

\textsuperscript{20} See Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 780, 787-88 (Cal. Ct. App. 1997) (noting various cases that required the plaintiff to bear a ‘trial-within-a-trial’ burden to prove a malpractice claim).}
California, Connecticut, Louisiana, Massachusetts, Missouri, Oklahoma, Pennsylvania, Texas and Wyoming do not offer absolute witness immunity to experts hired by the same party seeking redress. New Jersey and Vermont allow expert witness civil liability against experts appointed by the court rather than a party to the case, and New Jersey and West Virginia do not provide absolute witness immunity to witnesses testifying for the opposing party.

II. The Erosion of Immunity for Witnesses, Specifically, Friendly Expert Witnesses

In recent years, several state courts have examined and analyzed the conflicting rationales for granting immunity from civil liability for the negligent friendly expert witness and for the removal of such immunity.

In Pennsylvania, the Supreme Court found, in *LLMD Michigan, Inc. v. Jackson-Cross Co.*,23 that the witness immunity doctrine did not bar a “professional negligence” action against the expert witness.24 In the underlying case, Wintoll filed a breach of contract suit against Marine Midland Realty and UsLife.25 Shortly thereafter, Wintoll’s counsel contracted with Jackson-Cross for Charles Seymour to serve “as Wintoll’s expert on the issue of the lost profits suffered as a result of the defendants’ breach of their financing commitment for [Wintoll’s] industrial rehabilitation project.”26 It was decided that Seymour “would quantify the damages sustained because of the lenders’ failure to close under the mortgage commitments; prepare a signed report outlining what was done, stating the conclusions and supporting them; and participate in pre-trial conferences, depositions and trial.”27 Upon an agreement for


22 Id.


24 *LLMD of Mich.*, 740 A.2d at 191.

25 Id. at 186.

26 Id.

27 Id. at 186-87.
the work, Jackson-Cross concluded in its report that the estimated calculation of the lost profits was $6 million. However, Seymour did not prepare the report; David Anderson, another employee of Jackson-Cross, prepared it.

At trial, Wintoll’s counsel called Seymour to provide expert testimony regarding the report that was prepared. Counsel for defendants pointed out on cross-examination that the estimated $6 million was wrong, due to a mistake made in computing the lost profits. Seymour conceded that the calculation was wrong because of the error that had been made. Because Seymour had not performed the calculations himself, he was unable to explain the mathematical error in the calculations or to recalculate the lost profits by correcting the error while on the stand. Defense counsel requested that Seymour’s opinion be stricken from the record because it was based on inaccurate numbers and on erroneous mathematical calculations. The trial judge granted the motion to strike Seymour’s testimony and instructed the jury to completely disregard the testimony during its deliberations. The day after Seymour’s testimony was stricken, Wintoll accepted a settlement offer from the federal defendants for approximately $750,000. Jackson-Cross subsequently provided Wintoll with a corrected computation of estimated lost profits, which indicated such damages amounted to $2.7 million. On January 14, 1993, Wintoll filed a civil action in the Philadelphia County Common Pleas Court against Jackson-Cross, asserting causes of action for breach of contract and professional malpractice. Wintoll asserted that Jackson-Cross had breached its agreement to furnish expert services in connection

28 Id. at 187.
29 LLMD Michigan, Inc., 740 A.2d at 187.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
36 Id.
37 Id.
38 Id.
with the federal lawsuit by failing to deliver an accurate or workmanlike lost profits computation, and had failed to exercise the degree of care and skill ordinarily exercised by experts in the field of real estate counselling and computation of lost profits in real estate transactions. Wintoll alleged that it would have received a judgment for lost profits in an amount in excess of $2.7 million plus interest but for the conduct of Jackson-Cross, and thus requested not only the deficit between $2.7 million and $750,000, but also compensation for the costs of the expert. Wintoll’s lawsuit directly challenged precedent by contending that the witness immunity doctrine should not be extended to bar professional malpractice claims against an expert that is retained for litigation.

The court ruled that an expert witness was not immune from a negligence action since a mathematical error completely undermined the lost profits calculation and compromised the accuracy of the testimony given at trial. The court also found that Seymour and Jackson-Cross were negligent in the preparation and presentation of the report and testimony and that the public’s interest in accurate expert testimony would not be advanced by allowing this conduct to be sheltered by the witness immunity doctrine. The court, however, was careful when it said:

We caution, however, that our holding on the witness immunity doctrine does not preclude claims against an expert witness for professional malpractice has limited application. An expert witness may not be held liable merely because his or her opinion is challenged by another expert or authoritative source. In those circumstances, the judicial process is enhanced by the presentation of different views. Differences of opinion will not suffice to establish liability of an expert witness for professional negligence.

In October 1994, Boyes-Bogie retained Attorney Kenneth Soble of Soble, VanDam, Pearlman & Gittlesohn to represent her in a divorce

39 Id.
40 Id.
41 LLMD of Mich., 740 A.2d at 188.
42 Id. at 191.
43 Id.
44 Id.
action against her husband Andrew Rogal ("Rogal"). Soble, acting on behalf of Boyes-Bogie, retained Horvitz to provide expert litigation support and testimony relating to the valuation of the RAI stock and Rogal’s 100% ownership interests in RAI and a related corporation. Horvitz, a certified public accountant, had previously qualified as an expert in business valuations in the Probate and Family Court. "Horvitz agreed ‘to perform a review of the accounting records and other related data of [RAI and a related company] in order to determine the fair market value of the corporate stock and Andrew Rogal’s 100% ownership interests.’" Half a year later, Soble asked Horvitz about the status of the job. In each letter, Soble noted that he was at a stand-still until he heard from Horvitz. Finally, after about eight months of sending letters, Horvitz provided Soble with his conclusions, in which Horvitz concluded "the results of all my analysis is a $2,989,500 gross value of the business and a $2,093,000 net value after discounts attributed to Mr. Rogal’s 100% [ownership] interest." Four months after receiving the report, the two parties settled the case. However, Horvitz’s methods used to comprise the report did not adhere to "the applicable professional standards" and provided a false value for the stock, which was actually worth more than Horvitz stated. Boyes-Bogie drew his false conclusion based on the fact "that the capitalized value of Rogal was $8.5 million;” however, no evidence was presented on the record to support this valuation.

The issue in front of the Court was "whether the doctrine of witness immunity protects a privately retained professional who negligently provides litigation support services from liability in a case brought by

46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Boyes-Bogie, 2001 WL 1771989, at *2.
52 Id.
53 Id.
54 Id. at *4 n.3.
the individual who retained the expert." \(^{55}\) Here the court stated that to permit such a cause of action would serve to deter expert witnesses from providing anything other than "accurate, reliable testimony." \(^{56}\)

The court specifically said "by requiring that the expert witness render service to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession" the litigation process is enhanced. \(^{57}\) Furthermore, the court reasoned that witnesses retained by a party are not objective witnesses but are hired to bolster the hiring party’s case. \(^{58}\) Consequently, the court explained, holding such experts responsible will provide better testimony from experts due to the fear of being sued. \(^{59}\) Finally, the court stated that "the negligent expert would enjoy immunity at the expense of the right of the party who hired and paid the expert to enforce its contractual right to competent work." \(^{60}\) Thus, the court concluded "that the doctrine of witness immunity does not bar a claim for negligence against an expert privately retained to provide litigation support services by the party who retained the expert." \(^{61}\)

In Connecticut, in an underlying personal injury action, the issue in question was whether witness immunity applies when "an expert witness . . . fail[s] to provide competent litigation support services." \(^{62}\) In that case, Harvey Pollock, an attorney from Canada, was retained by Melvin Green to recover damages for injuries inflicted upon Green, during his arrest, by Canadian police officers. \(^{63}\) Green alleged that the two police officers who apprehended him exercised such force that Green was permanently disabled. \(^{64}\) Pollock’s complaint asserted that one of the

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\(^{55}\) Id. at *2.

\(^{56}\) Id. at *3.


\(^{58}\) Id.

\(^{59}\) Id. at *3.

\(^{60}\) Id. (citing Mattco Forge, Inc. v. Arthur Young & Co., 5 Cal. App. 4th 392, 404 (Cal. Ct. App. 1992)).

\(^{61}\) Id. at *4.


\(^{63}\) Id.

\(^{64}\) Id.
officers “placed Green in a ‘full nelson’ wrestling hold,” which “fractured his neck and rendered him a quadriplegic.” Pollock retained the services of Manohar Murlidhar Panjabi, Ph.D., a professor at Yale University, as a spinal biomechanics expert. Panjabi was hired to design and conduct experiments to demonstrate how Green’s neck injury and quadriplegia were caused by the officer’s full nelson hold.

Panjabi agreed that (a) he would prepare a report of his findings and conclusions and appear in court to communicate his expert opinion, (b) he would determine and explain the mechanism of Green’s injuries using the science of spinal biomechanics with the skill, due care and diligence expected of a ‘world-class spinal bio-mechanic,’ (c) any experiment he would use for the purpose of confirming his theory as to the biomechanics of Green’s injury and the results achieved thereof could be replicated by other scientists and would be defensible among his scientific peers, (d) he would ensure that all equipment he used in the gathering of data was fit for its intended purpose and that the data generated thereby was reliable and (e) he would adhere to the scientific process and methodology acceptable within the scientific community.

Panjabi then hired Cholewicki and the two experts “allegedly used Yale’s facilities, equipment and personnel to conduct the experiments to recreate the forces exerted on Green when [the officer] placed him in the full nelson hold.”

Panjabi provided Green and his counsel with proof that the officer’s actions were the sole cause of the injury, although the two experts had used a dysfunctional component that led to their conclusion. The court thus found that the unreliable evidence could not be introduced to the court. Pollock sought a continuance to allow for more tests with functional equipment, and the court granted the request on the conditions that (1) the original experiment be exactly replicated and any subsequent testimony of Panjabi be confined to

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65 Id.
66 Id.
67 Pollock, 781 A.2d at 521-22.
68 Id. at 522 (citation omitted).
69 Id.
70 Id.
the new results, and (2) before Panjabi’s testimony would be admissible at trial, it would have to be established that the load cell in Panjabi’s original experiment actually had been defective.\(^1\)

However, each time Panjabi conducted the new experiments, he did not comply with the court’s first condition.\(^2\) Further, Pollock paid Panjabi an additional fee for each additional experiment.\(^3\) Pollock and Green filed suit, naming Panjabi, Cholewicki, and Yale as defendants who negatively affected Green and the outcome of the case.\(^4\)

Similar to the previous cases mentioned, Green was adamant that the defendants were protected by witness immunity.\(^5\) The court began its analysis by acknowledging the long-standing rule “that there is an absolute privilege for statements made in judicial proceedings.”\(^6\) The court further stated:

> The effect of an absolute privilege is that damages cannot be recovered for a defamatory statement even if it is published falsely and maliciously. The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.\(^7\)

The court then distinguished these facts from the instant case deciding, that the policy concerns were inapplicable in this case at hand.\(^8\) The court recognized that the plaintiff’s grievance in the case at hand was the defendants’ failure to adhere to a contract and abide by professional standards in doing so.\(^9\) The court cited *LLMD of Michigan, Inc.* v. *Pollock*, 781 A.2d at 522-23.

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\(^1\) *Pollock*, 781 A.2d at 522-23.

\(^2\) *Id.* at 522-23.

\(^3\) *Id.*

\(^4\) *Id.* at 523.

\(^5\) *Id.* at 524.

\(^6\) *Id.* (quoting *Petyan v. Ellis*, 510 A.2d 1337, 1338 (Conn. 1986), superseded by statute, CON. GEN. STAT. ANN. § 19a-17b (West 2014), as recognized in *Chadha v. Charlotte Hungerford Hosp.*, 865 A.2d 1163, 1171-77 (Conn. 2005))

\(^7\) *Pollock*, 781 A.2d at 524 (quoting *Petyan*, 510 A.2d at 1338 (citations omitted) (internal quotation marks omitted)).

\(^8\) *Id.* at 525.

\(^9\) *Id.* at 525-26.
Jackson-Cross Co. as both factual and legal precedent. The court explained that the mathematical error committed by the defendants in that case resulted in expert witness opinion "stricken from the record." Once the Pennsylvania Supreme Court reviewed the concept of witness immunity, it found that "[t]he judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession." As a result, the Superior Court of Connecticut also ruled in accordance with the Pennsylvania Supreme Court and held the witness immunity doctrine did not bar Pollock’s lawsuit for failure to provide proper expert witness testimony.

In Missouri, the court in Murphy v. A.A. Mathews held that if a professional is negligent as a witness or consultant in a lawsuit, then witness immunity does protect the expert witness. In Murphy, the plaintiff (American Drilling Service Company Liquidating Trust, of which Clifford Murphy was trustee) appealed after its engineering malpractice claim was dismissed. The malpractice suit was related to the plaintiff’s contract with Zurn for engineering work. Issues throughout Zurn’s work led to unexpected expenses for the plaintiffs.

In 1980, American retained Mathews, as professional engineers, to prepare claims for additional compensation from Zurn and to present those claims at an arbitration proceeding, if necessary. Mathews testified at the arbitration proceeding on behalf of American for additional compensation in the amount of $4,888,390. The arbitrators awarded American $1,118,608. Originally, American Drilling filed its Complaint against Mathews on October 23, 1984, but thereafter on August 14, 1990, it filed an amended
EXPERT WITNESS MALPRACTICE

complaint alleging negligence in Count I and breach of contract in Count II against Matthews for failing to provide professional expert services as an engineer. After almost a week and a half of trial, the negligence claim was dismissed by the court due to the doctrine of witness immunity. Once the matter reached the Supreme Court of Missouri, the Court, using the standard of review for a motion to dismiss for failure to state a cause of action, took the plaintiff's version of the facts at face value in presenting its decision. Among the facts the court accepted was that the defendants attempted to "condense the claims data and oversimplify the record" rendering the claims by American Drilling "vague, unspecific and ambiguous." American Drilling argued that, under Missouri law, this finding would support a claim for professional negligence. Mathews responded by asserting the defense of witness immunity to the allegations made by American Drilling. The court ruled that none of the underlying policy reasons for granting witness immunity justified extending immunity to an expert witness such as Mathews. The court reasoned that granting witness immunity is an exception, not the general rule. Further, the court reasoned that in the state of Missouri, witness immunity is generally only applicable to "defamation, defamation-type, or retaliatory cases against adverse witnesses." The court did recognize, however, that witness immunity could be expanded in different circumstances.

However, the court decided that American Drilling’s claim for negligence against Matthews was not prohibited due to witness immunity because witness immunity was not does not protect a "privately retained professional who negligently provides litigation support services." The

90 Id.
91 Id.
92 Murphy, 841 S.W.2d at 672.
93 Id. at 673.
94 Id.
95 Id. at 674.
96 Id. at 680.
97 Id. at 673 (citing Laun v. Union Elec., 166 S.W.2d 1065, 1069 (Mo. 1942)).
98 Murphy, 841 S.W.2d at 673.
99 Id. at 680.
100 Id.
Court posited that, in *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*\(^{101}\), the Missouri court overstated the holding in *Briscoe v. LaHue*\(^{102}\) by recognizing that it "establish[ed] a single immunity for all participants involved in a judicial proceeding."\(^{103}\) The *Byrne-Stevens* stated "that [t]he mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding. It is that status on which immunity rests."\(^{104}\) The Supreme Court of Missouri ruled that *Briscoe* was not intended to have such a widespread effect.\(^{105}\) Unlike *Briscoe*, the case did not involve a police officer testifying as to facts observed.\(^{106}\) The court subsequently determined that testimony of an expert witness is very distinguishable from a police officer testifying as to facts observed.\(^{107}\) Expert witness testimony is typically paid for by one party and involves an expert analysis of the facts presented in a manner that helps the case of the party paying for the expert witness.\(^{108}\) The court concluded that imposing liability would encourage experts to be cautious and professional to avoid being sued.\(^{109}\) "Mathews voluntarily agreed to provide these services and thereby also to assume the duty of care of a skillful professional in exchange for a $350,000 fee."\(^{110}\) The court ruled that the doctrine of witness immunity did not prohibit American Drilling's claim for damages against Mathews for negligently providing expert witness services.\(^{111}\)

In California, Mattco Forge, Inc. sold products to General Electric and several other businesses.\(^{112}\) After losing General Electric as a buyer,
Mattco filed suit against General Electric, alleging discrimination. Mattco hired Arthur Young, an accounting firm, as an expert to calculate Mattco’s lost profits when GE removed Mattco as its supplier. The managing partner at Arthur Young assured the owner of Mattco, Mateo Minguez, of the firm’s ability to provide experts who “were specially trained in legal procedures.” Arthur Young then assigned Tom Blumer to the job, though he had no such litigation training or experience.

Upon reviewing Mattco’s records in order to calculate damages, Blumer discovered twenty-six missing estimate sheets, generated as bids for prospective customers, and asked Minguez to recreate them. During discovery, General Electric made “a request for all documents Arthur Young had relied on in calculating damages.” Blumer provided the documents and never disclosed to GE that the estimate sheets were recreated. After reviewing the documents, GE filed “a counterclaim against Mattco for procurement fraud or bid rigging.” The court ordered sanctions against Mattco that prevented the case from progressing. The court’s “sanction order then found that ‘in an attempt to fraudulently increase the damages they seek, [Mattco & Minguez] altered and fabricated estimate sheets used to help calculate damages’” and “further [found] that [Mattco & Minguez] knowingly produced those false estimate sheets to [GE], and thereby perpetrated a fraud upon defendants.” The sanction went further to prohibit Arthur Young’s future involvement in the case. The court assessed a $1.4 million sanction against Mattco and Minguez and further stated that it would dismiss Mattco’s lawsuit if the money was not paid within forty-five

113 Id. at 783.
114 Id. at 784.
115 Id.
116 Id. (footnote omitted).
117 Id. at 784.
118 Id.
119 Mattco Forge, Inc., 60 Cal. Rptr. 2d 780 at 784.
120 Id. at 785.
121 Id.
122 Id.
123 Id.
days.\textsuperscript{124} Rather than pay the sanction, Mattco settled the lawsuit with GE, and both parties dropped their claims against each other.\textsuperscript{125}

Subsequently, Mattco brought a professional malpractice lawsuit against Arthur Young.\textsuperscript{126} At trial, Young asserted "that Mattco had to meet the burden of a trial-within-a-trial."\textsuperscript{127} This meant "that Mattco had to prove it would have reached trial in the federal lawsuit, prevailed and obtained a judgment against GE."\textsuperscript{128} The trial court disagreed and ruled that Mattco only needed to show Young had caused Mattco to suffer "harm."\textsuperscript{129} On appeal, the court stated that Mattco's cause of action against Young was sustainable and was similar to a legal malpractice lawsuit.\textsuperscript{130} The appeals court went on to state that Mattco, as the plaintiff in such a lawsuit, "ha[d] the burden to establish that had Arthur Young properly handled the underlying case, Mattco would have prevailed against GE."\textsuperscript{131} The court established the following prima facie elements for an expert witness negligence case:

(1) [T]he professional was negligent in the handling of the prior lawsuit; (2) the professional's negligence was a substantial factor in the plaintiff's loss of the prior lawsuit; and (3) the proper handling of the prior lawsuit by the professional would have resulted in a collectible judgment in plaintiff's favor.\textsuperscript{132}

Aside from foregoing state court precedent, one federal court also addressed the issue of immunity for friendly expert witnesses in \textit{Marrogi v. Howard}.\textsuperscript{133} Dr. Aizenhawar Marrogi sued the Tulane Educational Fund

\textsuperscript{124} Id.
\textsuperscript{125} Mattco Forge, Inc., 60 Cal. Rptr. 2d 780 at 786.
\textsuperscript{126} Id. at 783.
\textsuperscript{127} Id. at 786.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 790.
\textsuperscript{131} Mattco Forge, Inc., 60 Cal. Rptr. 2d at 790 (citing Walker v. Porter, 118 Cal. Rptr. 468 (Ct. App. 1974) (involving a plaintiff in a legal malpractice case who did not need to prove which co-defendant caused her injury in order to be successful)).
\textsuperscript{132} Mattco Forge, Inc., 60 Cal. Rptr. 2d at 795.
\textsuperscript{133} 805 So. 2d 1118 (La. 2002).
EXPERT WITNESS MALPRACTICE

(d/b/a Tulane University School of Medicine) to recover compensation for medical services Marrogi performed while employed at Tulane. Marrogi hired Ray Howard as an expert to assist in his claim. Howard agreed to “review pathology reports,” submit his findings to Marrogi’s Louisiana attorney, and to testify in depositions, hearings and at trial.

According to Howard’s findings, for one of five fiscal years in question, Tulane should have billed $523,485 for the medical services provided by Marrogi—more than twice the $250,000 Tulane actually billed. Based on this analysis, Marrogi sought to obtain Tulane’s record for the other four years. However, “[a]t the hearing on the motion to compel, Tulane pointed to numerous mathematical errors in Howard’s affidavit, as well as errors in his assignment of prices to coded services.” Howard recalculated the numbers, this time finding that $392,740 is what actually should have been billed. At Howard’s court-ordered deposition, Howard privately expressed his embarrassment and apologies for the issues to counsel for Marrogi and indicated that he would not continue with any aspect of the case because of his mistakes. Tulane, upon Howard’s withdrawal as an expert witness, filed a summary judgement motion contending that Marrogi could not present “any credible evidence of underbilling.” The court granted Tulane’s motion for summary judgment.

Following the granting of the motion, Marrogi filed suit against Howard, claiming breach of contract and negligence “or in the alternative,

134 Marrogi, 805 So. 2d at 1120 n.2 (“While employed by Tulane, Marrogi, a pathologist, participated in the Faculty Practice Plan, which requires Tulane as administrators/fiduciaries to bill and collect for the participant’s professional services performed for patients at Tulane’s various clinics or hospitals and then distribute to the participant a percentage of the collected money.”).

135 Id.

136 Id.

137 Id.

138 Id.

139 Id. at 1120.

140 Marrogi, 805 So. 2d at 1121.

141 Id.

142 Id.

143 Id.
unjust enrichment." Marrogi's claim of negligence asserted that Howard's many mathematical errors—despite having held himself out as an expert in medical billing and coding—directly resulted in the dismissal of Marrogi's case against Tulane. Marrogi also insisted "that Howard's actions breached the professional duties owed to Dr. Marrogi, and that Howard [was] liable to Dr. Marrogi for all losses incurred as a result thereof." Howard countered by seeking dismissal of the case because he was owed absolute witness immunity. Marrogi countered, claiming that friendly experts may be sued for expert reports in which the applicable professional standards were not adhered to. Even though the district court judge granted Howard's motion to dismiss, the judge recognized "a certain logic to the rationale adopted by" the court in *LLMD of Michigan, Inc. v. Jackson-Cross Co.* The court also noted "that making an exception to the general rule of witness immunity for retained expert witnesses might entail 'a multitude of evidentiary and practical problems in its application.'"" On appeal, the Fifth Circuit Court of Appeals specifically tackled the issue of whether witness immunity should apply to friendly expert witnesses, and concluded that the question is more fit for the Supreme Court of Louisiana. In Louisiana, "[t]he policy basis [of witness immunity] has been explained as follows: 'The administration of justice requires the testimony of witnesses to be unrestrained by liability to vexatious litigation. The words they utter are protected by the occasion, and cannot be the founda-

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144 *Id.*
145 *Id.*
146 *Marrogi*, 805 So. 2d at 1121.
147 *Id.* at 1121 n.4 ("Howard also sought dismissal on the grounds that venue was improper in Louisiana and that the federal district court had no personal jurisdiction over the defendant because all of the actions complained of had transpired in the State of Florida. Alternatively, Howard sought transfer to the federal district court in Jacksonville, Florida, on the ground of forum non-conveniens.").
148 *Id.* at 1121.
150 *Id.* at 1122.
151 *Id.*
tion for an action for slander."

Absolute witness immunity has been applied in Louisiana to retaliation cases, including when the adverse witness was an expert.

In analyzing both Marrogi’s and Howard’s arguments, the Fifth Circuit evaluated *LLMD of Michigan*. The Pennsylvania Supreme Court in *LLMD of Michigan* concluded that the doctrine of witness immunity does not preclude malpractice actions against professionals hired to perform services related to litigation.

In *Marrogi* the Fifth Circuit found that the doctrine of witness immunity did not bar claims against experts, retained for litigation, for an “alleged failure to provide competent litigation support.” The court found that the public policy rationale of immunity from tort liability, “generally . . . recognized only to promote an overarching public purpose,” should be narrowly construed. A narrow construction would naturally exclude any immunity that failed to promote the “overarching public purpose” of facilitating a fair and balanced presentation of the facts. Thus, it naturally follows that “immunizing the incompetence of a party’s retained expert witness simply because he or she provides . . . testimony” or other professional services fails to fall within the narrow construction, promote the “overarching public purpose,” or assist the fact-finder in ascertaining the trust. The Fifth Circuit stated juries must be presented with accurate information and concluded that the doctrine of witness immunity is a necessary tool in ensuring such accurate

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152 *Marrogi*, 805 So. 2d at 1124 (quoting Terry v. Fellows, 21 La. Ann. 375, 376 (La. 1869)). In *Terry v. Fellows*, the defendant testified before Congress that the plaintiff had participated in a “rebellion against the United States” government and had carried a flag emblazoned with “a skull and crossbones, which meant no quarter to the enemy in the fight.” *Fellows*, 21 La. Ann. at 375-76 (quotations omitted). The plaintiff later sued for libel and slander, but his suit was dismissed for no cause of action. *Id.* at 375. The Supreme Court of Louisiana affirmed. *Id.* at 377. Because the defendant “was compelled to answer the questions propounded to him by the committee,” the defendant was protected by witness immunity. *Id.* at 376.

153 *Marrogi*, 805 So. 2d at 1126.

154 740 A.2d 186.

155 *LLMD of Mich.*, 740 A.2d at 191.

156 *Marrogi*, 805 So. 2d at 1131.

157 *Id.* at 1131-32.

158 *Id.*

159 *Id.*
testimony. The expert's job is not only to clarify a case, but also to advocate for the party's position in a case. According to the Fifth Circuit, "the absence of immunity would not only encourage the expert witness to exercise more care in formulating his or her opinion but would also protect the litigant from the negligence of an incompetent professional."

Although a small sampling of cases, courts faced with this issue appear to value protecting the innocent client from the negligence of a retained expert over the policy behind granting immunity to witnesses.

III. The Consequences of Not Granting Friendly Expert Witnesses Immunity from Civil Liability

Granting witnesses immunity from civil liability, especially friendly expert witnesses, is a deeply rooted doctrine designed to uphold the integrity of the judicial process. Additionally, it encourages those with something to say in court to do so without fear of reprisal. These principles, to some, ensure that the trial process has the best chance of providing truthful and unguarded testimony. In this way, a jury or judge can decide, based on the facts that are provided through the adversarial trial process, what happened. Therefore, witness immunity in this context supports the quest for justice among litigants.

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160 Id. at 1132 (citing Briscoe v. LaHue, 460 U.S. 325, 333 (1983)).
161 Id.
162 Id.
164 Id. at 333 (citations omitted).
165 Id. at 333-35 (quoting Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (White, J., concurring)).
166 Id. at 333-34 (quoting Imbler, 424 U.S. at 439 (White, J., concurring)).
167 Id. (quoting Imbler, 424 U.S. at 440 (White, J., concurring)).
On the other hand, providing access to the courts so that any aggrieved individual has a chance to redress said grievance in the adversarial trial process is the bedrock of the judicial system. Absent this access, people will be left helpless and will be forced to bear the consequences of the unjust actions of others. To some this principle assures not only the integrity of the judicial system but also serves the interests of a democratic republic. When these two principles collide (as in the question of friendly expert witness immunity to civil liability), the courts must tread carefully in the pursuit of justice. Yet based on the cases in the selected states that have permitted a civil claim for malpractice against a friendly expert witness, perhaps this apparent collision of two fundamental principles is a false equivalency.

Although few jurisdictions have permitted a cause of action against a friendly expert witness, the burden on a complaining plaintiff in this kind of case is substantial. The courts have equated this burden to the burden of proving lawyer malpractice, which amounts to two cases in one—proof of expert negligence and then proof that absent the expert negligence, the complaining party would have prevailed in the case or not been harmed by the outcome of the case. This two-stage process is risky and expensive, and therefore, may have its own chilling effect on potential clients and lawyers taking on such a case, absent compelling proof. In short, to take on this kind of expert witness malpractice case is a big decision for not only clients but lawyers as well. Granted, any decision to litigate a claim is an important decision for both clients and lawyers. However, some kinds of cases are fraught with more pitfalls than others. Perhaps the expert witness malpractice case fits this kind of concern because it entails essentially trying two cases in an effort to win one case. These considerations alone indicate that, even if permitting

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168 See Murphy v. A.A. Matthews, 841 S.W.2d 671, 679 (Mo. 1992) (en banc) (stating that granting immunity to witnesses “affords litigants free access to the courts to secure and defend their rights”).

169 See LLMD of Mich., Inc. v. Jackson-Cross Co., 740 A.2d 186, 191 (Pa. 1999) (The concept of allowing suit “against an expert witness for professional malpractice has limited application. An expert witness may not be held liable merely because his or her opinion is challenged by another expert or authoritative source.”).

aggrieved plaintiffs or defendants to litigate an expert malpractice lawsuit, the courts would not be flooded with expert witness malpractice cases. Not all experts are negligent, and even if a particular expert is negligent, that does not mean the complaining party will win the case.

The argument that witnesses will be better if the fear of civil liability does not exist cuts both ways. The threat of civil liability may just be incentive for a witness to be better. Access to the court does not remove the court’s authority to deny admission of expert witness testimony. Either you trust the system—the trial process—or you do not. There are protections built into the trial process designed to root out false and misleading testimony. To hold the expert witness liable for malpractice when the expert fails to live up to the standard of care furthers both principles—the goal of providing access to the court and, by example, sends a message to all expert witnesses to be careful and be truthful.

California, after an expert witness was found liable for malpractice, approved a cause of action by the expert witness to seek indemnification from the lawyer.\textsuperscript{171} In this case, the lawyer hired the expert witness, but the expert witness was later sued by the plaintiffs after the plaintiffs lost the case.\textsuperscript{172} Such a claim essentially argues that the lawyer who hired the expert witness can be held liable for the lawyer’s own negligence in hiring the expert witness.\textsuperscript{173} Thus, it follows that lawyers should become increasingly careful during the process of acquiring an expert witness for his case. The expert witness lawsuit against the lawyer will take on the same process as a legal negligence case with essentially two cases in one—it must be proved that the lawyer was negligent and then proved that, absent the lawyer’s negligence, the party would have won the case.\textsuperscript{174} This is the logical extension of permitting an expert witness malpractice case and puts another on notice, namely the lawyer, that hiring an expert witness who fails to provide competent testimony may not just be the legal responsibility of the expert witness.

\textsuperscript{171} Forensis Group, Inc. v. Frantz, Townsend & Foldenauer, 29 Cal. Rptr. 3d 622, 624-25, 641 (Ct. App. 2005).
\textsuperscript{172} Id. at 624.
\textsuperscript{173} Id. at 635-36 (citations omitted).
\textsuperscript{174} Id. at 635 (citations omitted).
Conclusion

Often the outcome of a legal dispute rests on the quality of an expert witness’s testimony. Therefore, the quality of the work done by these expert witnesses cannot be taken as a given. Furthermore, the quality of the work done by the lawyer cannot be taken as a given either. What is a given in many states, based on precedent, is that the hiring client is offered little to nothing by way of access to the court to plead a case of expert witness malpractice. By not allowing such a claim, an expert witness is free (short of committing perjury) to testify however the expert witness wants. This bar on expert witness malpractice claims may promote truthfulness and candor but also tempts lying and obfuscation. In the end, access to the court is a principle that complements, rather than collides, with the principle of insuring candid and truthful testimony. Expert witness malpractice lawsuits serve both principles well.