The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change

W. Raley Alford III
I. INTRODUCTION

In a particularly colorful closing address, a lawyer once offered a jury the following insight:

We [lawyers] have our own way of talking about witnesses. And one thing that we very often say and talk about is the three classes of liars. There is the plain liar, the damn liar, and the expert witness. And of all of them, the expert witness is the worst.¹

While this characterization of the expert witness can be dismissed as theatrical,² it nevertheless has an echo of credibility today that it may not have enjoyed 60 years ago when it was delivered. In the intervening years, courts and commentators have witnessed the rise of “professional” experts who confer with attorneys and testify at trials with such frequency that they derive a significant portion of their income from providing these services.³

Because the “universe of experts is defined only by the virtually infinite variety of fact questions in the trial courts,”⁴ the ranks of professional experts are ever increasing. This proliferation has resulted in the creation of the expert-advocate who, lured by the prospect of a substantial fee, testifies in conformity with the needs of the principal who engages him.⁵ The natural tendency of parties with interests

² In fact, in response to an objection and a request that the jury be directed to disregard the statement, the trial court ruled: “The jury may disregard it. I didn’t hear it. I was thinking about something else.” Id. at 267, 60 S. Ct. at 864. A majority of the Court found that this instruction “cured the error if it could be considered such.” Id. at 243, 60 S. Ct. at 853.
⁴ Eymard v. Pan Am. World Airways, 795 F.2d 1230, 1234 (5th Cir. 1986).
⁵ Throughout this comment, the terms “expert-advocate” and “biased expert witness” appear interchangeably. It is not the author’s intention to burden all persons who provide expert testimony in court with these characterizations. These terms refer, instead, to a growing contingent among the ranks of professional experts. See supra text accompanying note 3. In the author’s view, the following passage describes this contingent with alarming accuracy:

[The expert-advocate] works alone, or in partnership with a handful of others. He advertises. His clients gradually learn that they can’t risk going without him, for the opposition will surely hire his mirror-image clone from the other referral agency. He is “neat but not dapper; respectable but not pompous; mature but not senile.” He is cautious about putting things in writing, far more comfortable when working strictly with his mouth.
adverse to those of the principal has been to counter testimony perceived as biased with "hired guns" of their own. The result is a "battle of the experts" in which outcomes at trial are all too often dependent on which party's expert has the greatest impact on the jury. As proclaimed by a former president of the American Bar Association, "I would go into a lawsuit with an objective, uncommitted, independent expert about as willingly as I would occupy a foxhole with a couple of noncombatant soldiers." While the present concern over biased expert testimony is well placed, it must nevertheless be acknowledged that the marketability of expert testimony is directly influenced by the needs of litigation and by admissibility standards. Put simply, expert testimony is often essential. Cases in the areas of toxic tort and products liability have risen to such a level of scientific and technological complexity that triers of fact have come to rely on expert testimony both to understand difficult facts and to determine what inferences can correctly and comfortably be drawn from those facts. This reliance is by no means limited to the cases that garner headlines. In even the most common personal injury actions, medical experts explain injuries, economists quantify damages and engineers reconstruct accident scenes. To ensure the availability of such testimony, it is admissible in court if it will "assist the trier of fact." To further encourage the participation of experts in the judicial process, courts traditionally afford the expert witness absolute immunity from a

He sees himself as a team player, who helps with trial preparation, assists in the examination of opposing witnesses, advises on new areas of inquiry. He works consistently for one side (insurance companies) or the other (plaintiffs' lawyers). ... He can earn hundreds of dollars an hour, hundreds of thousands a year. For all practical purposes, he is working on a contingency fee, though the contingent nature of his employment and compensation will always be angrily denied. Where have we seen this character before? In his employer's office. He is the spit and image of a trial lawyer. Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom 19-20 (1991) (citations omitted).

6. By 1975, problems associated with the "battle of the experts" had become widespread enough to attract the attention of the Advisory Committee to the drafters of the Federal Rules of Evidence. Lee, supra note 3, at 483. See Fed. R. Evid. 706 advisory committee's notes ("The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern."). Rule 706 codified the common law right of courts to appoint experts to testify. See infra Part V.A.


11. See, e.g., Sears v. Rutishauser, 466 N.E.2d 210, 212 (Ill. 1984) (discussing the role of the expert medical witness in personal injury litigation); Eymard v. Pan Am. World Airways, 795 F.2d 1230, 1235 (5th Cir. 1986) (criticizing economist for abusing "known facts" to inflate damage awards); Wehbe v. Waguespack, 720 So. 2d 1267, 1275 (La. App. 5th Cir. 1998) (finding that the trial judge was properly skeptical as to the value of the accident reconstructionist's testimony).

defamation action based upon his in-court statements. This protection from
liability reflects the historical view that witnesses are "friends of the court" who
come forward to "assist in the attempt to achieve justice." However, the modern
expert-advocate has challenged, if not obliterated, this amicable view and
necessitated an increase in appellate supervision of trial court decisions on the
admissibility of expert testimony.

Tort law has provided the landscape upon which recent battles over the
admissibility of expert testimony have been fought. Of primary concern has
been the protection of parties from biased or "suspect" expert testimony. For
the benefit of comparison with national developments, as well as to avoid
the constitutional issues raised by expert testimony in the criminal arena, this
comment examines issues surrounding the biased expert witness in Louisiana tort
law and, more specifically, the protections afforded litigants under the law and by
the courts.

Part II will discuss the challenges the expert witness presents to the jury
system. Part III will address existing methods of controlling biased expert
testimony. Part IV will assess the effectiveness of existing safeguards, while
Part V will consider two current proposals for correcting abuses. The
comment will conclude with a determination that heightened vigilance on the
part of trial judges and a modification in the testimonial immunity of the expert
witness are the best solutions to the problems presented by the biased expert
witness.

II. THE EXPERT WITNESS AND THE JURY

In the modern adversarial system, the jury is "ideally both an unbiased and an
uninformed fact-finding body whose members ... give their verdict solely on the
basis of the evidence presented at trial." For a variety of reasons, expert testimony
challenges the traditionally celebrated ability of lay jurors to sift through opposing
arguments and bring a fair resolution to a controversy.

First, expert testimony differs significantly from lay testimony with respect to
both substance and form. Under the Louisiana Code of Evidence, a lay witness may
testify only as to matters within his "personal knowledge." The personal

13. See infra Part V.B.1.
roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue
the cause of another, while that of a witness is to state facts objectively.").
17. Parker, supra note 8, at 10.
18. Louisiana Code of Evidence article 602 provides, in pertinent part: "A witness may not
testify to a matter unless evidence is introduced sufficient to support a finding that he has personal
knowledge of the matter." The article is subject to the provisions of Louisiana Code of Evidence article
703. See infra note 22 and accompanying text.
knowledge rule is clearly consistent with the modern institutional arrangement, wherein jurors form opinions, while witnesses provide the facts. Thus, opinion testimony by lay witnesses generally is excluded from evidence as irrelevant or incompetent. Expert testimony, on the other hand, is admissible in the form of an opinion. In further contrast with the lay witness, the expert may base his testimony on matters not within his personal knowledge. This wide latitude not only makes it easier for experts to qualify to give testimony, but also equips them with tremendous power to influence a jury.

Second, because the expert testifies to matters beyond the knowledge of the jury, the jury is ill-equipped to meaningfully evaluate the merit of the expert's opinion. Therefore, as one commentator has observed, "there is a great tendency, or at least a temptation, for the trier of fact to take the expert's recitation of facts and opinions as truth and adopt those recitations as its own."

The tendency of jurors to abdicate their ultimate duties can be attributed, at least in part, to the "apparent objectivity" of the polished expert witness. However, within the context of the "battle of the experts," jurors are frequently left to choose between two contending experts whose opinions seem equally plausible or "objective." When jurors are faced with this situation, they are likely to resort

19. Maraist, supra note 10, § 11.1, at 193. See also Parker, supra note 8, at 11-12.
20. Exceptions to the general rule against admission of lay opinion testimony flow from Louisiana Code of Evidence article 701 (a witness may provide an opinion if it is (1) rationally based upon the perception of the witness, and (2) helpful to a clear understanding of his testimony). See generally Maraist, supra note 10, § 11.2, at 194-96.
21. La. Code Evid. art. 702. The opinion advanced by the expert "is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact." La. Code Evid. art. 704.
22. La. Code Evid. art. 703 cmt. (c). In fact, rarely will the expert have personal knowledge of the facts that form the basis of the opinion. Furthermore, "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." La. Code Evid. art. 703.
23. In a 1993 survey conducted by the National Law Journal and Lexis/Nexis, nearly 800 people who served on criminal and civil juries responded to more than 100 questions concerning the legal system. Of those surveyed, eighty-nine percent felt that paid experts were believable. Seventy-one percent of the jurors said the experts made a difference in the verdict. Furthermore, over fifty-eight percent of those surveyed thought the experts were unbiased. Eric G. Jensen, Comment, When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness, 62 UMKC L. Rev. 185, 188 (1993) (citing Joan M. Cheever & Joanne Naiman, The View from the Jury Box, Nat'l L. J., Feb. 22, 1993, at S4).
25. Christopher M. McDowell, Note, Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness, 28 U. Mem. L. Rev. 239, 264 (1997). See also Hand, supra note 24, at 52 ("Now the important thing and the only important thing to notice is that the expert has taken the jury's place if they believe him.").
26. Simard & Young, supra note 24, at 1460.
27. As Judge Learned Hand once observed:
   The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two
to the same criteria they employ in assessing the credibility of lay witnesses.\textsuperscript{28} Thus, considerations of demeanor, personality, appearance and communication skills will determine not only which opinion is accepted, but often the outcome of the litigation.\textsuperscript{29}

Finally, unlike lay witnesses, the expert receives a fee for preparation and testimony provided in court.\textsuperscript{30} In and of itself, the compensation of the expert merely reflects that the time spent preparing for or testifying in court is time spent away from the expert's customary professional endeavors. However, lawyers today are keenly aware that an expert's showmanship may be at least as important as the substance of his testimony.\textsuperscript{31} This awareness has generated a profitable market for the services of the expert-advocate, as lawyers jockey for the "best" expert possible.\textsuperscript{32} The product contemplated in this market is not the independent exercise of professional judgment, but rather charismatic testimony to a pre-ordained conclusion.\textsuperscript{33} Lawyers, then, have used their ability to compensate expert witnesses to integrate them into the litigation team.\textsuperscript{34} An expert who does not advance the interests of the team through his testimony is not likely to be retained again.\textsuperscript{35} Consequently, many experts who testify in courts today have a financial stake in the outcome of the litigation, which inevitably results in a decrease in the reliability of their testimony.\textsuperscript{36}

\textsuperscript{28} See supra note 24, at 54.

\textsuperscript{29} Richard H. Underwood, "X-Spurt" Witnesses, 19 Am. J. Trial Advoc. 343, 374 (1995). See Pendleton v. Barrett, 706 So. 2d 498 (La. App. 3d Cir. 1997) (trial court should evaluate expert testimony by the same rules which are applicable to other witnesses); Lopez v. Wal-Mart Stores, Inc., 700 So. 2d 215 (La. App. 4th Cir. 1997) (trial of fact may evaluate expert testimony by the same principles as apply to other witnesses, and has great discretion to accept or reject expert opinions). See also Mistich v. Volkswagen of Germany, Inc., 666 So. 2d 1073, 1077 (La. 1996) ("Where the testimony of expert witnesses differ, it is the responsibility of the trier of fact to determine which evidence is most credible.").

\textsuperscript{30} See supra note 28, at 374 n.165.

\textsuperscript{31} Jensen, supra note 23, at 188. See also Fleetwood, supra note 7 (discussing advertisements of expert services in various mediums, some of which go so far as to boast of bringing in the "highest verdicts").

\textsuperscript{32} Professor Imwinkelried states that leading contemporary commentators are "not merely alleging that financial interest biases experts at a subconscious level; they go further and aver outright fraud and perjury." Edward J. Imwinkelried, The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law, 46 U. Miami L. Rev. 1069, 1089 (1992) (quoted in McDowell, supra note 25, at 272).

\textsuperscript{33} See supra note 5. See also Eymard v. Pan Am. World Airways, 795 F.2d 1230, 1233 (5th Cir. 1986) ("[T]rial courts must be wary lest the expert become nothing more than an advocate of policy before the jury. Stated more directly, the trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument.").

\textsuperscript{34} See supra note 5.

\textsuperscript{35} See supra note 5.

The challenges presented by the biased expert to the jury system are "not merely of academic or hypothetical concern." For most litigants, "the only day in court of consequence is the one spent at the trial court level. . . ." This is so because an appellate court may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." Litigants, then, are "occasionally justified in their concern that a well-heeled party can obtain its version of justice at the trial court simply by retaining an arsenal of 'hired guns' to prove its case, particularly in the context of a jury trial, then rest on the [manifest error] line of defense." The rise to prominence of biased experts and the danger that their testimony will carry "undue weight" with a jury demand the attention of the courts. As stated by the United States Court of Appeals for the Fifth Circuit in Eymard v. Pan American World Airways:

[T]he professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an "expert."

If an expert whose testimony is available at a price has no place in a court of law, then the inquiry properly shifts to the institutional protections which may be employed to keep such testimony beyond the hearing of the jury.

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38. Id.
40. Frederick, 626 So. 2d at 473. The court's concern with abuse of the system by "well-heeled" parties begs the question of whether the "battle of the experts" represents a best-case scenario. The common disparity in wealth among tort litigants implies unequal access to expert testimony. Some commentators argue that this implication is unwarranted in light of the contingent fee, at least where the "poor" party is the plaintiff. See, e.g., Parker, supra note 8, at 33 n.95. However, while the contingent fee arrangement is an effective mechanism for financing "slam-dunk" cases, in closer disputes the interests of the litigant and the interests of his lawyer, who risks the loss of money invested in the case, may conflict. It is therefore possible, even under a contingent fee arrangement, for a party to lack the resources necessary to rebut the expert testimony advanced by his adversary. As a matter of societal policy, this is acceptable so long as the adversary's expert delivers a reliable opinion, for the litigant's claim may have no merit. But if trial judges do not exert sufficient quality control on expert testimony, the concerns articulated by the Frederick court may materialize to defeat a valid claim. See infra Part III.A. See also Wehbe v. Waguespack, 720 So. 2d 1267, 1273-74 (La. App. 5th Cir. 1998) (discussing the "great discretion" afforded the trial court in its assessment of expert witness fees against the party cast in judgment).
42. 795 F.2d 1230 (5th Cir. 1986).
43. Id. at 1233.
III. EXISTING METHODS OF CONTROL

A. Judicial Oversight

1. Standards for Admissibility of Expert Testimony

Whether a witness is qualified to testify as an expert is an inquiry committed to the “broad discretion” of the trial court. Article 104(A) of the Louisiana Code of Evidence assigns to trial judges the duty of resolving “preliminary questions concerning the competency or qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence…” Implicit in this directive is the requirement that parties seeking to challenge expert testimony do so prior to its admission. Depending on the complexity of the case or the importance of the proffered testimony, courts may prefer to entertain such challenges well before trial.

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44. La. Code Evid. art. 702 cmt. (d). See, e.g., Hattori v. Peairs, 662 So. 2d 509 (La. App. 1st Cir. 1995), writ denied, 666 So. 2d 322 (1996) (stating that a trial judge’s decision to qualify an expert witness will not be disturbed on appeal unless it is clearly erroneous).


Because summary judgment procedure is now “favored,” Louisiana courts are currently being asked to determine the admissibility of expert testimony at that stage of litigation. In his concurring opinion in Simmons v. Berry, 748 So. 2d 473, 481 (La. App. 1st Cir. 1999), Judge Gonzales advised that “[t]rial lawyers need to be made aware that the possibility of exclusion of expert testimony looms down the road and thus should make their… challenges during the course of the deposition.” The Simmons court held that deposition testimony of an expert is admissible in support of a motion for summary judgment. Id. at 477. However, the court also held that the affidavit of a doctor, which was based upon a review of the plaintiff’s medical records rather than “personal knowledge” as required by Louisiana Code of Civil Procedure article 967, was not properly before the trial court on a motion for summary judgment. Id. The Supreme Court of Louisiana subsequently confronted this curious distinction between depositions and affidavits. In Independent Fire Insurance Co. v. Sunbeam Corp., 755 So. 2d 226, 235 (La. 2000), the court pointed out that Louisiana Code of Civil Procedure article 967 was enacted in 1960, “well before the proliferation of expert opinion evidence on summary judgment.” Thus, the court found it “doubtful that the redactors of the Code had experts in mind when they used the term ‘personal knowledge.’” Id. (quoting Frank L. Maraist & Harry T. Lemmon, Civil Procedure § 6.8, at 144, in 1 Louisiana Civil Law Treatise (1999)). The court therefore held that:

Article 967 of the Louisiana Rules [sic] of Civil Procedure does not preclude from consideration expert opinion testimony in the form of an affidavit or deposition submitted in support of or opposition to a motion for summary judgment. Assuming no credibility determination is at issue, the trial judge must consider this evidence if he or she determines
In making the preliminary assessment, the judge must look to Article 702, which provides the general standard governing expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. 48

Whether the testimony will assist the trier of fact is the key criterion established by the article. 49 The court properly excludes expert testimony as unnecessary if it relates to matters within the knowledge or understanding of the average layman. 50 Furthermore, testimony is not helpful to the trier of fact unless the witness's claimed expertise is sufficiently definite. 51 Upon establishing the area of expertise, the witness may still be precluded under the article from testifying on subjects beyond the scope of that expertise. 52 Significantly, experience alone may provide an adequate basis for qualification as an expert. 53

In practice, the "broad discretion" afforded trial judges in interpreting the rather liberal "helpfulness" standard set forth in Article 702 resulted in few tendered experts being rejected. 54 In response to this laxity in policing expert opinions,
appellate courts began to provide further guidance for trial judges in determining the admissibility of expert testimony under Article 702. Three Louisiana Courts of Appeal adopted the standards for admissibility set forth by the United States Court of Appeals for the Fifth Circuit in *Christophersen v. Allied-Signal Corp.* The factors established by the court include:

1. whether the witness is qualified to express an expert opinion;  
2. whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field;  
3. whether in reaching his conclusion the expert used well-founded methodology; and  
4. assuming the expert's testimony passes these tests, whether the testimony's potential for unfair prejudice substantially outweighs its probative value under the relevant rules.

The first three inquiries are properly understood as "threshold requirements that all expert testimony must meet before being deemed admissible." The fourth inquiry, which invokes the Article 403 balancing test, functions as "an overlay—a final mechanism for screening out otherwise admissible testimony whose potential for prejudice substantially outweighs its probative value." Article 403, while applicable to all evidence, provides trial judges with an especially powerful tool for regulating expert testimony. In performing the Article 403 balancing test, courts may consider issues that were properly excluded from the narrower threshold inquiries. For example, in *Frederick v. Woman's Hospital of Acadiana*, the court was asked to determine the point at which a "parade of expert

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58. *Christophersen*, 939 F.2d at 1110. At the time of its pronouncement in this case, the Fifth Circuit employed the Frye general acceptance standard to resolve challenges to an expert's methodology. See infra notes 71-77 and accompanying text.

59. *Christophersen*, 939 F.2d at 1110.

60. Id.

61. Id. Louisiana Code of Evidence article 403, which generally follows Federal Rule of Evidence 403, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."


63. 626 So. 2d 467 (La. App. 3d Cir. 1993), writ denied, 633 So. 2d 169 (1994).
witnesses" called by the defendant "becomes counterproductive to the necessary twin goals of fairness and judicial economy." The plaintiffs, appealing a jury verdict absolving the defendant doctor and hospital of any liability for serious injuries suffered by their minor daughter prior to birth, assigned as error the trial judge’s refusal to limit cumulative expert evidence. The trial judge permitted two pediatric neurologists and three obstetrician-gynecologists to testify favorably as to the standard of care practiced by the defendant physician. The plaintiffs conceded, however, that the challenged testimony satisfied the threshold inquiries of the Christophersen analysis. The court was therefore left to decide whether the probative value of the cumulative testimony was substantially outweighed by any of the concerns articulated in Article 403.

In finding that the trial judge did not abuse his "great discretion" in admitting the cumulative testimony, the court recognized that "a party has a fundamental right to elicit the medical expert testimony of one witness on any point of significance to resolution of the issues presented and probably a second witness as well, for added perspective." As to whether subsequent experts should be permitted to testify, the court found that several factors should be included in the Article 403 balance, among them:

- the background and testimonial nature of the witnesses; whether the trier of fact is a jury or a judge; whether either of the parties litigant is a pauper whose lack of means would otherwise result in a lack of due process; the amount in controversy; [and] the costs in time and money which would attend inclusion of the cumulative testimony.

These and other factors are properly considered by the trial judge in determining the admissibility of expert testimony challenged as biased. Thus, assuming the witness is qualified, that his testimony has the appropriate basis in fact, and that the methodology employed is well-founded, an expert’s long history of partiality could render his testimony unreasonably prejudicial, and therefore inadmissible, under Article 403.

2. The Impact of Daubert

The third inquiry of the Christophersen analysis concerns the expert’s methodology. For nearly 70 years, most American jurisdictions considered an expert’s opinion admissible if his methodology had achieved "general scientific
acceptance." This test, as formulated in *Frye v. United States*, essentially required courts to "count the noses" of the expert's peers to determine general acceptance. The central criticism launched at this approach concerned its extension of "equal dignity to the opinions of charlatans and Nobel Prize winners." Following the enactment of the Federal Rules of Evidence in 1975, some courts began rejecting the much-debated standard, reasoning that helpfulness to the trier of fact does not mandate general acceptance. Other courts, including the U.S. Fifth Circuit, apparently relied on the silence of the Federal Rules as to the *Frye* standard in continuing its application.

In 1993, the United States Supreme Court finally addressed the validity of the *Frye* general acceptance standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* There, the Court held that the Federal Rules of Evidence, and not *Frye*, provide the standard for admitting expert scientific testimony at trial, reasoning that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" The Court was quick to point out, however, that the "liberal thrust" of the Federal Rules did not displace all limits on the admissibility of scientific evidence: "To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In performing this "gatekeeping" obligation, the judge must determine whether the reasoning or methodology underlying the proffered testimony is scientifically valid and whether it can properly be applied to the facts in issue.

71. 293 F. 1013 (D.C. Cir. 1923).
72. While Louisiana courts have frequently looked for general acceptance when considering challenges to methodology, references to *Frye* in the jurisprudence are indeed scarce. See, e.g., State v. Martin, 525 So. 2d 535 (La. App. 5th Cir. 1988) (where a trooper explained the method used in calculating the defendant's speed, and the formulas used in the calculation were developed by the nation's foremost authority on accident reconstruction, the court, without citing *Frye*, could find no manifest abuse of judicial discretion in accepting the trooper as an expert in accident reconstruction).
73. Huber, supra note 5, at 17 (quoting Edwin Donald Elliott of the Yale Law School).
77. Id. at 588, 113 S. Ct. at 2794.
78. Id. at 589, 113 S. Ct. at 2795.
79. Id. at 592-93, 113 S. Ct. at 2796. In assessing scientific validity, the judge should consider (1) whether the theory or technique "can be (and has been) tested," (2) whether it has been "subjected to peer review and publication," (3) the technique's "known or potential rate of error" and the existence
The Court’s decision in *Daubert* was met with both praise and condemnation. Louisiana quickly adopted the *Daubert* approach to admissibility in *State v. Foret*. Other states, viewing *Daubert* as a complex restatement of the *Frye* test, were less inspired. As observed by Professor Maraist, the controversy over *Daubert* may be grounded in a misunderstanding of its true impact:

*Daubert* did not introduce a new concept to evidence law. A judge always is required to serve as a “gatekeeper” to expert testimony. In most cases, however, the judge’s knowledge and common sense equip him or her adequately to the task. . . . *Daubert* speaks to the cases in which the judge’s knowledge and common sense are inadequate to the “gatekeeper” task. . . . [In such cases] the proponent should present evidence to satisfy the judge that the proffered expert opinion is sufficiently trustworthy.

Many courts in the wake of *Daubert* failed to interpret the case in such a practical manner. While the discussion in *Daubert* was limited to “scientific” expert testimony, the Court pointed out that Rule 702 also applies to “technical, or other specialized knowledge.” However, courts seeking to mechanically apply the four *Daubert* factors to every case found the task difficult when the testimony was not grounded in a “hard science” discipline. Although the Court made it clear that the factors did not constitute a “definitive checklist,” the debate nevertheless surfaced as to whether *Daubert* should apply to nonscientific testimony.

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80. 628 So. 2d 1116 (La. 1993).
83. *Daubert*, 509 U.S. at 590 n.8, 113 S. Ct. at 2795 n.8.
85. This debate divided the U.S. Fifth Circuit. Compare Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997) (*Daubert* factors applicable to an expert’s safety evaluation and alternative design analysis where his work was grounded in his experience and common engineering principles), with Moore v. Ashland Chem., Inc., 126 F.3d 679 (5th Cir. 1997) (*Daubert* factors are, as a general rule, inappropriate for assessing the reliability of expert clinical medical testimony). In his dissenting opinion, occasioned by the court’s *en banc* reversal of *Moore*, 151 F.3d 269 (5th Cir. 1998), Judge Dennis observed as follows:

This circuit now takes the position that a clinical medical expert, correctly using and applying generally accepted clinical medical methodology, may not express an opinion as to whether a particular chemical compound caused, aggravated, or contributed to a person’s disease or disorder unless that opinion is corroborated by hard scientific methodology that passes muster under a rigid application of the *Daubert* factors. *Id.* at 280 (Dennis, J., dissenting).
In *Kumho Tire Co., Ltd. v. Carmichael*, the Supreme Court resolved this debate in the affirmative, holding that the trial judge's general "gatekeeping" obligation "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." More importantly, however, the Court emphatically maintained that the test for evidentiary reliability is "flexible" and that "Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Thus, the proper lesson for trial courts to take from *Daubert* and its progeny is the importance of the gatekeeping function. Because this basic obligation was acknowledged rather than created by the Court in *Daubert*, the *Christophersen* analysis remains valid for use by Louisiana judges. A judge should look to *Daubert* for guidance only when his experience and common sense do not adequately equip him to determine whether the methodology underlying an expert's opinion is well-founded. Otherwise, the Code of Evidence provides judges with the tools necessary to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."
It is well settled that questions concerning the weight and credibility of expert testimony are left to the trier of fact.\textsuperscript{[93]} Even uncontradicted expert testimony is not binding on the court.\textsuperscript{[94]} As recognized by the United States Supreme Court, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”\textsuperscript{[95]}

Of the three safeguards mentioned by the Court, cross-examination is generally considered the most important mechanism for controlling expert testimony. Though subject to the general rules applicable to all witnesses, courts have traditionally afforded attorneys greater freedom in the cross-examination of experts.\textsuperscript{[96]} The scope of cross-examination includes inquiry as to qualifications, financial interest, bias, felony convictions, inconsistent statements, and the content of learned treatises.\textsuperscript{[97]} Furthermore, an expert may be cross-examined concerning the bases for his opinion, regardless of whether they were disclosed on direct examination.\textsuperscript{[98]}

Louisiana courts have acknowledged that cross-examination, “uncompromised by other discovery methods, seldom is of adequate value when thrust against the broadside of the litigation expert who can so gracefully stiff-arm his unprepared cross-examiner.”\textsuperscript{[99]} Adverse parties, then, should generally be permitted to discover records and other relevant information bearing on an expert’s “track record” in order to demonstrate an expert’s alleged bias.\textsuperscript{[100]}

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\footnote{93. Mistich v. Volkswagen of Germany, Inc., 666 So. 2d 1073, 1079 (La. 1996).}
\footnote{94. Sanders v. Wysocki, 631 So. 2d 1330, 1334 (La. App. 4th Cir.), \textit{writ denied}, 637 So. 2d 156 (1994).}
\footnote{96. See McDowell, \textit{supra} note 25, at 272. See also Smith v. Scott, 577 So. 2d 809, 811 (La. App. 2d Cir. 1991) ("The cross-examination of a witness at a civil trial is an essential part of our adversarial system of justice.... Defendant cannot be expected to pay for his right to cross-examine this [expert] witness.").}
\footnote{97. See generally Gross, \textit{supra} note 36, at 1165-76. See La. Code Evid. art. 611(B) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."). See also La. Code Evid. art. 607 (general provision concerning attacks on witness credibility); La. Code Evid. art. 608; La. Code Evid. art. 609 (contains guidelines for attacking credibility in civil cases through evidence of criminal conviction); La. Code Evid. art. 613 (extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity is admissible for the purpose of attacking credibility "after the proponent has first fairly directed the witness' attention to the statement, act, or matter alleged, and the witness has been given the opportunity to admit the fact and has failed distinctly to do so.").}
\footnote{98. La. Code Evid. art. 705(A).}
\footnote{100. \textit{But see} Navarro v. Aries Marine Corp., 713 So. 2d 613, 616 (La. App. 3d Cir. 1998) (stating...
But the scope of discovery for cross-examination purposes is not without limits. As in most other areas of evidence law, the trial judge enjoys much discretion in ensuring that witnesses are appropriately examined.  

In Louisiana civil cases, an expert’s opinion is fully discoverable, although the facts the expert knows are subject to some discovery restrictions. Thus, an attorney for an adverse party is typically familiar with the expert testimony with which he must contend at trial and is therefore in a position to present favorable expert testimony in rebuttal. As noted by one commentator, a lawyer’s failure to produce the most effective expert witness possible “could even result in a malpractice suit for failure to perform to the generally accepted level of competence of the legal profession.”

IV. THE EFFECTIVENESS OF EXISTING SAFEGUARDS

Although trial judges have both the obligation and the necessary instruments to control biased expert testimony, they have historically preferred to err on the side of admission, reasoning that objections by opposing counsel should “go to the weight” given the expert’s testimony. This “let it all in” approach was not surprising in light of the broad discretion afforded trial judges and the general jurisprudential rule that bias does not preclude a witness from being qualified as an expert, but rather “is a factor to be considered by the factfinder in deciding how much weight to give her testimony.” While the concern that a jury will attach inordinate weight to the testimony of the biased expert has been well documented, every indication is that the “let it all in” approach is alive and well in post-\textit{Daubert} proceedings.

\footnotesize

\begin{itemize}
  \item \textnumero 101. See La. Code Evid. art. 611.
  \item \textnumero 102. Maraist, \textit{supra} note 10, § 11.7, at 210. See also La. Code Civ. P. art. 1425.
  \item \textnumero 103. Jensen, \textit{supra} note 23, at 192.
  \item \textnumero 104. Veron, \textit{supra} note 46, at 657.
  \item \textnumero 105. State v. Lewis, 654 So. 2d 761, 766 (La. App. 4th Cir. 1995). \textit{Compare} Eymard v. Pan Am. World Airways, 795 F.2d 1230, 1234 (5th Cir. 1986): We will turn to [the deferential standard for review] with a sharp eye, particularly in those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a “let it all in” philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials.
  \item \textnumero 106. See Weisgram v. Marley Co., 528 U.S. 440, 120 S. Ct. 1011 (2000) (holding that Fed. R. Civ. P. 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that expert evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to support a jury’s verdict).
\end{itemize}
A. Case Illustration: Rowe v. State Farm Mutual Automobile Insurance Co.

In Rowe v. State Farm Mutual Automobile Insurance Co., the plaintiff sought damages from his uninsured/underinsured motorist carrier for serious neck and back injuries allegedly sustained in an automobile collision. In response to this claim, the defendant retained the services of a physician, who subsequently performed an independent medical examination (IME) of the plaintiff. At trial, the physician provided the only support for the defendant's argument that the plaintiff's back injuries were unrelated to the accident. The plaintiff's efforts to discover and present to the jury evidence of the physician's history as an advocate for the insurance industry were blocked by the trial court. The jury, apparently impressed with the physician's testimony and ignorant of his alleged history, did not award damages despite testimony by Rowe's treating physicians that attributed his injuries to the accident in question.

Rowe appealed the jury's failure to award damages, asserting manifest error as well as error on the part of the trial judge in evidentiary rulings. Further, the court held that the

108. Id. at 721.
109. Id. at 722. Dr. James C. McDaniel, the physician retained by State Farm, had developed a reputation with the Louisiana Third Circuit Court of Appeal "for testimony that often crosses the border into advocacy." Nugent v. Continental Cas. Co., 634 So. 2d 406, 409 (La. App. 3d Cir. 1994). In Chevalier v. L.H. Bossier, Inc., 617 So. 2d 1278, 1284 (La. App. 3d Cir. 1993), the court found that Dr. McDaniel's "sweeping denouncement of pain clinics" reflected a "general bias against litigants." But see Boyd v. Allstate Ins. Co., 640 So. 2d 603, 606 (La. App. 3d Cir. 1994) ("There is no testimony in this record by Dr. McDaniel to justify a finding of bias, certainly not to the extent that his testimony should be disregarded.") (emphasis in original).
110. Rowe, 670 So. 2d at 722.
111. On appeal, the plaintiff specifically complained of the following rulings by the trial judge: (1) the refusal to permit plaintiff to discover certain medical and financial records believed to demonstrate the physician's close association with insurance companies in personal injury cases; (2) the order excluding as evidence of the physician's bias the timing of defendant's motion in limine, which sought to prevent the introduction of certain evidence pertaining to the physician's credibility and was filed two months before the plaintiff was examined by the physician; and (3) the order excluding the testimony of a trial attorney who had personally observed the physician's alleged insurance advocacy in some 250 cases. Id. at 723.
112. Id.
113. See supra note 111.
114. The court found no error in the jury's conclusion that the plaintiff's neck injury did not result from the automobile accident, but rather from a separate incident some seven months later. Rowe, 670 So. 2d at 722. The court reached a different conclusion with respect to the plaintiff's back injury, ruling that the jury failed to take into proper account the testimony of the plaintiff's treating physicians. As stated by the court, "It is well-settled that the treating physicians' testimony will ordinarily be given greater weight than the testimony of a physician who examines a plaintiff for diagnosis only." Id. at 723. Finding that the causal connection between the plaintiff's back injury and the accident was legally
trial judge erred in denying plaintiff the opportunity to discover and present evidence of the expert's bias. However, in finding an abuse of discretion, the court's principal concern was not the "let it all in" approach practiced by the trial judge, but rather the detrimental effect of the evidentiary rulings on the cross-examination of the expert. The court remained faithful to the notion that bias, except in "extreme" cases, should not prevent a witness from testifying as an expert. In light of the court's "disposition of the merits on other grounds," a remand to determine whether this presented an "extreme" case was not necessary.

Although the plaintiff in Rowe emerged victorious, the case illustrates the danger presented by the biased expert witness. In most cases, the broad discretion afforded both the trial judge in evidentiary rulings and the jury's findings of fact prevents disturbance of those conclusions on appeal. Thus, as stated by the court in Rowe, for the litigant seeking to avoid a disappointing jury verdict, "the importance . . . of cross-examination of a crucial expert witness cannot be overstated."

B. Cross-Examination

The Rowe court is certainly not unique in the significance it attaches to the cross-examination of the expert witness. In fact, the opportunity for cross-examination is realistically viewed as the driving force, albeit unspoken, behind the "let it all in" approach. However, despite this
reliance, cross-examination often proves ineffective as a safeguard against the expert witness.

In cross-examining a lay witness, lawyers frequently trudge back through the witness's testimony on direct, seeking either to get the witness to admit that he made a mistake or to frame an issue for rebuttal testimony. The lawyer exercises tight control over this process by asking leading questions to which he knows the answers. However, because of greater experience and preparation, the expert is not as likely to be led into such a trap. Unlike most lay witnesses, many experts are "repeat performers" who have gained from past experience an ability to remain calm and focused in the midst of an attack on their opinions or credibility. As a result, the expert witness usually remains consistent in his testimony, and "searching cross-examination may not yield any result other than to provide an opportunity for . . . [the] expert witness to repeat his already damaging testimony. . . ."

Furthermore, the content of expert testimony presents an enormous challenge for the cross-examiner. By definition the expert testifies to issues beyond the range of common knowledge. If an expert gives a confusing or unexpected response to a question, it is dangerous for the lawyer to request an explanation because it provides the experienced expert witness with an opportunity to bolster his credibility in the eyes of the jury. Thus the question, as deftly framed by Judge Weinstein, becomes "[h]ow can the nonexperts control the experts?" Some lawyers assert that developing a proficiency in the expert's field solves this problem. But this is an expensive solution which, even when possible, is rarely

suggested that the oath is an insignificant formality, the threat of perjury is likely to prove ineffective as a safeguard in most cases. After all, the expert usually testifies in the form of an opinion, and the inferences that he encourages the jury to draw are typically grounded in facts not within his personal knowledge. Thus, as recognized by the Supreme Court of Illinois:

It is virtually impossible to prosecute an expert witness for perjury. . . . "[T]he expert is often the hired partisan and his opinion is a response to a pecuniary stimulus. The opinion has the sanction of an oath but lacks the substantial safeguard of truth applied to testimony concerning facts observed by a witness which is afforded by the criminal law since the opinion is the result of reasoning, and no one can be prosecuted for defective mental processes. The field of medicine is not an exact science, and the expert being immune from penalties for perjury, his opinion is too often the natural and expected result of his employment."


124. In the context of lay witnesses, the "strongest criticism of common law cross-examination is probably that it is too effective, that it can be used too easily to discredit truthful and accurate testimony." Gross, supra note 36, at 1167.

125. Id. at 1165.

126. The belief that a lawyer is not likely to put words in the mouth of an expert explains Louisiana's authorization, contrary to the Federal Rules, of leading questions on direct examination of the expert witness. See La. Code Evid. art. 611(C); Fed. R. Evid. 611(c).

127. Gross, supra note 36, at 1172.


130. See, e.g., Fitz-Gerald Ames, Sr., Modern Techniques in the Preparation and Trial of a
achieved. Moreover, even if such proficiency is realized, the ultimate effect of an intellectual jousting match between the expert and the lawyer-expert is likely to be confusion of the issues in the minds of the jury. From the point of view of the cross-examiner, this may be a desirable outcome that paves the way for rebuttal testimony. However, the resulting "battle of the experts," with all of its attendant concerns, falls woefully short of a satisfactory resolution to Judge Weinstein's dilemma.

The above mentioned control problems are even more acute in the context of the expert-advocate. In addition to the benefits of preparation and experience, an expert with a pecuniary interest in the outcome of the litigation “knows how to use her position and authority to maximum effect...” The cross-examiner who seeks to attack the opinion of the biased expert does so at the risk of having it repeated without derogation while appearing, in the eyes of the jury, to be engaged in unwarranted harassment of the witness. Therefore, to minimize the effects of biased expert testimony, the best course of action for opposing counsel may be to severely limit or altogether refrain from cross-examination.

An impaired or unexercised safeguard provides little protection. Thus, under a “let it all in” regime, cross-examination does not offer a satisfactory solution to the problems presented by the biased expert. However, there has been no shortage of proposals to compensate for the traditional abstention of trial judges from the vigilant regulation of expert testimony. The next section considers two of the most important and potentially far-reaching of these proposals.

V. PROPOSALS FOR CHANGE

A. Court-Appointed Experts: Louisiana Code of Evidence article 706

The majority of proposals to solve the problems of expert evidence involve liberating the use of expertise from partisan selection. Chief among them is the use of neutral or court-appointed experts. Unlike other avenues of reform, this proposal already enjoys the sanction of legislative bodies nationwide. Louisiana Medical Malpractice Suit, 12 Vand. L. Rev. 649, 652-53 (1959).

131. For a discussion of the ethical concerns raised by the lawyer-expert, see Gross, supra note 36, at 1174.
132. Id. at 1174-75.
133. See supra Part II.
134. Gross, supra note 36, at 1175.
135. Id. at 1173. See also McDowell, supra note 25, at 273.
136. See Gross, supra note 36, at 1188 ("The most conspicuous dangers of adversarial expertise are (1) that partisan choice of witnesses will produce a biased selection of experts, and (2) that partisan compensation and preparation will further bias the evidence that these witnesses present.").
has long recognized the authority of the trial judge to appoint an expert. 138

Louisiana Code of Evidence article 706 supplies the general guidelines for such an
appointment. 139

In civil cases, the court may appoint an expert (or experts) either on the motion
of a party or on its own motion after giving notice to all parties. 140 The court may
request the parties to submit nominations, and Article 706 encourages agreement
among them on the expert to be appointed. 141 However, the actual appointment is
committed to the court's broad discretion. 142 Upon appointment, the court must
inform the expert of his duties either by a written charge or at a conference with the
parties. 143 The expert must advise the parties of his findings, be available for
deposition by any party, and testify if called by the court or by a party. 144
Should the expert testify, the court has the discretion to authorize disclosure
to the jury of the expert's court-appointed status. 145 Finally, the court's power to
appoint an expert does not limit the parties' ability to call experts of their own
selection. 146

Despite this clear grant of authority, Louisiana judges infrequently exercise this
power. 147 Only in family law cases have courts demonstrated a degree of comfort
in employing appointed experts. 148 But family law cases are almost exclusively

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In Frederick v. Woman's Hosp. of Acadia, 626 So. 2d 467, 474 (La. App. 3d Cir. 1993), writ
denied, 633 So. 2d 169 (1994), the court expressed the belief that appointed experts may "level the
playing field" where parties have disparate financial resources. As stated by the court, litigants may:
request under LSA-C.E. art. 706 that the trial court appoint an unbiased expert and disclose
to the jury the expert's special court-appointed status. This underutilized provision enables
litigants of modest means to have the court use its leverage to distinguish court-appointed
neutral observers who are beyond reproach from "hired guns" retained by the highest bidder,
reducing the perceived need and advantage of litigants to hire the most (and most expensive)
experts to counter (or preempt) those that will (or might) be called by their opponents, thus
offering parties to judicial proceedings greater assurance that findings of fact are indeed
grounded on a reasonable factual basis.

Id.

138. Prior to the promulgation of the Code of Evidence in 1989, Louisiana Code of Civil
Procedure article 192 (1960) provided: "A trial court, on its own motion or on motion of a party, may
appoint persons learned or skilled in a science, art, profession, or calling as experts to assist it in the
adjudication of any case in which their special knowledge or skill may aid the court."

139. Article 706 follows Federal Rule of Evidence 706 in civil cases. Article 706, unlike its
federal counterpart, does not provide for the compensation of the court-appointed expert. See La. Code
Civ. P. art. 192(B) ("The reasonable fees and expenses of these experts shall be taxed as costs of
court.").

140. La. Code Evid. art. 706(A).
141. Id.
142. Id.
143. Id.
144. Id.
145. La. Code Evid. art. 706(B).
146. La. Code Evid. art. 706(C).
147. See supra note 137. The infrequency of appointed experts is by no means unique to
Louisiana. See Gross, supra note 36, at 1190-91; Fed. R. Evid. 706 advisory committee's notes.
148. Appointments are most common in cases that require psychological or psychiatric evaluations
of litigants and/or their children See, e.g., S.T.J. v. P.M., 556 So. 2d 244 (La. App. 2d Cir. 1990). See
tried by a judge.\footnote{149} In tort cases where the trier of fact is a jury, courts rarely appoint experts. The scarcity of appointments in this context reflects, perhaps, a concern among judges that in appointing an expert and revealing his status they inject judicial influence into the jury’s deliberations.\footnote{150} However, in light of limited experience nationwide, it is difficult to assess the validity of the fear that appointed experts “acquire an aura of infallibility” in the eyes of a jury.\footnote{151}

A more likely, though clearly related, explanation for judicial reluctance to appoint experts is respect for the adversarial system.\footnote{152} In a survey of federal judges, one explained that appointing experts “conflicts with my sense of the judicial role, which is to trust the adversaries to present information and arguments. I do not believe the judge should normally be an inquisitor.”\footnote{153} Indeed, the

\begin{footnotesize}
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\item[149.] See La. Code Civ. P. art. 1732(3) and (4).
\item[150.] See Lee, supra note 3, at 480-81.
\item[151.] See Fed. R. Evid. 706 advisory committee’s notes.
\item[152.] Lee, supra note 3, at 496-97. See, e.g., Dixon v. Winn-Dixie Louisiana, Inc., 638 So. 2d 306, 316 (La. App. 4th Cir. 1994) (“A trial judge’s only proper function during a jury trial is to act as an impartial ‘umpire’ in an adversary system.”). See also La. Code Civ. P. art. 1791; La. Code Evid. art. 614(D).
\item[153.] Cecil & Willging, supra note 137, at 1018-19. In the survey, eighty-one federal district court judges were asked why they thought the authority to appoint an expert had been used so infrequently. Id. at 1015.

In light of Louisiana’s Civilian heritage, the argument may be advanced that the state’s judges should feel more comfortable than their Common Law colleagues with functioning as an “inquisitor.” Civil law courts frequently employ official experts who act, in effect, as consultants to the court rather than as witnesses. See M. Cappelletti & J.M. Perillo, Civil Procedure in Italy (1965); John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 835-41 (1985).

The consultant status of experts in Civilian courts reflects fundamental institutional differences between the Civil Law and the Common Law. In Common Law countries, rules of procedure and evidence contemplate trial by jury. In Civil Law countries, trial by jury is rare in criminal matters and not used at all in civil matters. AJGM Sanders, The Characteristic Features of the Civil Law, 14 Comp. & Int’l. L. J. S. Afr. 196, 206 (1981). Because of its dependence on the active role of the trial judge, the Civil Law generally “acknowledges no exclusionary rules of evidence, particularly no hearsay or opinion rule. In the eyes of Civil lawyers most of the grounds which under the Common Law serve to preclude the admission of evidence merely affect the weight to be attached to a particular item of evidence...” Id. at 207.

Even the most cursory survey of Louisiana procedure and evidence law clearly reveals a closer alignment with the Common Law tradition. See, e.g., La. Code Civ. P. art. 1731(A) (“Except as limited by Article 1732, the right of trial by jury is recognized.”). See also La. Code Evid. art. 101 cmt. (a) (“The provisions of this Code are largely modeled after the provisions of the Federal Rules of Evidence of 1975.”). In fact, the adversarial system is as firmly entrenched in Louisiana as it is in her sister states. It is unreasonable, then, to assume that Louisiana judges would be more willing than their colleagues in other states to assume a more active role in litigation. Louisiana’s experience with Code of Evidence article 706 demonstrates that this has not been the case.

But see Lee, supra note 3, at 496-97 (observing that the Anglo-American trial system has, since the late nineteenth century, been moving closer to the inquisitorial systems of countries on the European Continent, citing the practices of plea bargaining and bench trials as examples of this movement). See also John H. Merryman, On the Convergence (and Divergence) of the Civil Law and the Common Law,
adversarial system focuses inward, with fact-finding highly internalized to the immediate litigation and litigants. The divergent interests of opposing parties generally result in well-prepared witnesses and a reasonably efficient presentation of evidence. In appointing an expert, the judge brings to this system an external actor whose preparation is not guaranteed. Moreover, in an age where judicial resources are scarce, most judges simply cannot (or will not) find the time to ensure that witnesses come to court prepared. Thus, as observed by Professor Gross:

[A]ppointed experts are on their own, which makes judges reluctant to use them in all cases, and doubly reluctant to do so in jury trials, where the formalities, the ritual, and the need for preparation are all greatest. In a system in which expert witnesses generally come from well managed stables, a court-appointed expert is a horse with no rider.

Not only does the appointment of experts conflict with commonly held notions of the judicial role in an adversarial system, but in a state with an elected judiciary, such a decision has political overtones as well. When a lawyer seeks the office of judge, his proclivities, whether they be plaintiff or defense oriented, may be important factors in both his election and subsequent attempts at re-election. In light of the broad discretion afforded the trial judge in appointing an expert under Article 706, a more frequent resort to this authority may result in the selection of witnesses who share the judge's personal preferences on liability. Court appointment of experts, then, has the potential to influence jury deliberations not

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154. See Parker, supra note 8, at 24.
155. See Gross, supra note 36, at 1203 ("By comparison to most other countries, the legal system in the United States includes very few judges per lawyer. As a result, a large measure of judicial passivity is structurally inevitable.").
156. Id. at 1204.
157. Louisiana is one of thirty-nine states with an elected judiciary. In the wake of the 1998 elections, which saw the Chief Justice of the Louisiana Supreme Court retain his seat upon his opponent’s withdrawal from an expensive and often bitter campaign, a proposal to amend the state constitution to provide for merit selection of judges surfaced in the legislature. See Ed Anderson, Bill Would End Judicial Campaigns; Senate Panel Oks Merit Selection, Appointment by Governor, Times-Picayune, May 5, 1999, at A2. See also Susan Finch, Cusimano Quits Court Race, Times-Picayune, Oct. 10, 1998, at A2; Sheila Kaplan & Zoë Davidson, The Buying of the Bench, The Nation, Jan. 26, 1998, at 11.
158. See James Gill, Influencing Louisiana's Judiciary, Times-Picayune, Dec. 3, 1999, at B7: There may be the odd campaign contributor who wants justice, but most of them are more interested in favorable verdicts. Polls confirm that few people think judges rule with only the law and the facts as their guide, because neither trial lawyers nor business types are about to pay the piper and let him call his own tune. That means, at best, a prejudiced bench, at worst a crooked one, or so the public has apparently concluded.
only with the prestige of the judicial office, but also with the personal bias of the
trial judge. In a system designed to resolve disputes properly limited to the interests
of the litigants, this risk is unacceptable.

Louisiana's current mechanism for the appointment of experts is devoid of
incentives to do so. Lawyers fear witnesses that they cannot control, and
therefore rarely request the court to appoint an expert. Even where one is
appointed, parties remain free to call their own experts. Judges hold valid
concerns as to the propriety of selecting a witness who will testify before a jury, and
therefore typically refrain from appointing experts on their own motion. In short,
appointed experts are never required, which, in light of the structure of the
adversarial system and concerns of judicial economy and impartiality, may speak
to the wisdom of Article 706 rather than to a grave deficiency. Under either view,
court appointment of experts is not an adequate response to the problems generated
by the biased expert witness.

B. Liability in Tort for Improper Expert Testimony

In light of the pressure felt by many experts to ensure future demand for their
services by way of zealous advocacy for their clients, the concern that the present
method for use of experts in court does not exert sufficient quality control on their
opinions has led some to argue that the law should provide a remedy for litigants
harmed by the improper testimony of “hired guns.” Another argument is that the
threat of civil liability, in addition to compensating the injured party, “would
courage experts to be more careful, resulting in more accurate, reliable
testimony.” Nevertheless, competing public policies, including concerns as to the
willingness of experts to participate in the litigation process if they are exposed to
subsequent liability, have compelled courts to protect experts through the doctrine
of witness immunity. The remainder of this section will examine the policy
considerations on both sides of this debate to determine whether the law currently
strikes a suitable balance among them.

160. Professor Gross has formulated two very different mandatory procedures for using court-
appointed experts. See Gross, supra note 36, at 1220-30. These proposals, while theoretically sound,
entail significant changes in modern litigation practice. Legislative action is therefore unlikely without
the support of the lawyers and judges who must ultimately work with appointed experts. Such support
does not appear to be forming. See Parker, supra note 8, at 36 (Court appointment of experts grants
“external or public agents more control over the litigants’ factual presentation, thereby diluting the
system of private property rights in litigative fact-finding. Given the minimal social interest in the
particular factual outcome of the litigants’ case, this is likely to have a detrimental effect from a social
perspective.”).

161. Because the appointed expert’s fees are taxed as costs of court, a party who is dissatisfied
with the appointed expert’s opinion faces increased litigation expenses should he decide to further
pursue his claim or defense. See supra note 139.

162. See, e.g., McDowell, supra note 25.

163. Carol H. Garcia, Expert Witness Malpractice: A Solution to the Problem of the Negligent
Inc., 776 P.2d 666, 670 (Wash. 1989)).
1. Defamation and Witness Immunity

Where the consultation material prepared by the expert or his testimony at trial includes statements that are false and cause injury to the adverse party's reputation, the adverse party may bring an action in defamation. However, the expert witness who finds himself the defendant in a defamation suit will raise the powerful defense of absolute witness immunity, which is typically fatal to the plaintiff's claim.

The Restatement (Second) of Torts explains the doctrine of absolute immunity for testimony as follows: "A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding." Under the common law, recovery was denied even if a witness knowingly advanced false statements with malice.

In Briscoe v. LaHue, the United States Supreme Court found that absolute immunity for nonlitigant witnesses reflects an instance where "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unrestricted as possible." Under these same principles, state judges have been afforded absolute immunity from liability for their judicial acts, as have district attorneys for their decisions to initiate prosecution.

In Louisiana, prosecutorial immunity encompasses more than just the decision to initiate prosecution. See Knapper v. Connick, 681 So. 2d 944, 950 (La. 1996) (The court employed the "functional approach" to immunity and found that "granting absolute immunity to prosecutors from malicious prosecution suits is appropriate when the activities complained of fall within the scope of the prosecutor's role as an advocate for the state and are intimately associated with the conduct of the judicial phase of the criminal process.

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many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict.\footnote{170}

Without the protection of absolute immunity, witnesses “might be reluctant to come forward to testify,” and those who do may offer testimony that is “distorted by the fear of subsequent liability.”\footnote{171} Thus, courts generally acknowledge that the public has an interest in obtaining expert testimony without the intimidating threat of subsequent litigation.\footnote{172}

Witness immunity has been followed to some extent in all states.\footnote{173} In \textit{Bienvenu v. Angelle},\footnote{174} the Supreme Court of Louisiana recognized that “communications made in judicial or quasi-judicial proceedings carry an absolute privilege.”\footnote{175} However, in determining whether statements made by the defendant to investigators for the Civil Service Commission carry an absolute privilege, the court held that “[i]nvestigatory work in the field . . . is not the exercise of an adjudicative or quasi-adjudicative function, for those who are questioned are not under oath or subject to sanctions for maling a false statement, and such investigations are not encompassed within quasi-judicial hearings or proceedings.”\footnote{176} Communications made in the context of investigatory work “are not accorded an absolute but only a qualified privilege.”\footnote{177}

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\item \footnote{171} Briscoe, 460 U.S. at 333, 103 S. Ct. at 1114.
\item \footnote{173} Keeton et al., \textit{supra} note 169, § 114, at 817.
\item \footnote{174} Bienvenu, 254 La. 182, 223 So. 2d 140 (1969), \textit{overruled on other grounds}, Gonzales v. Xerox Corp., 320 So. 2d 163 (La. 1975).
\item \footnote{175} Id. at 194, 223 So. 2d at 144 (“This protection is offered in such proceedings so that the witness, who is bound by his oath to tell the truth, may speak freely without fear of civil suit for damages for defamation.”). Decisions reported after \textit{Bienvenu} assumed that the court intended the absolute privilege to apply exclusively to the non-litigant witness. \textit{See} Spellman v. Desselles, 596 So. 2d 843 (La. App. 4th Cir.) \textit{writ denied}, 605 So. 2d 1080 (1992); Moity v. Busch, 368 So. 2d 1134 (La. App. 3d Cir. 1979). \textit{See also} Calvert v. Simon, 311 So. 2d 13 (La. App. 2d Cir. 1975) (finding that the doctrine of absolute privilege is not applicable to statements made by a party in a judicial proceeding; such statements enjoy only a qualified privilege).
\item \footnote{176} Some cases prior to \textit{Bienvenu} required a showing that the witness's allegedly defamatory statements were relevant to the judicial proceeding. Once this threshold showing had been made, the witness could invoke the absolute privilege. \textit{See}, e.g., Gardeval v. McWilliams, 43 La. Ann. 454, 9 So. 106, 108 (La. 1891); Burke v. Ryan, 36 La. Ann. 951, 951-52 (1884). After \textit{Bienvenu}, some cases mentioned the relevancy requirement, while others did not. \textit{Compare} Steed v. St. Paul's United Methodist Church, 728 So. 2d 931, 941 n.6 (La. App. 2d Cir. 1999) (statements made by a witness in a judicial proceeding "where the testimony may be required and the statement is reasonably believed by the witness to be relevant to the matter" are afforded an absolute privilege), \textit{with} Hairford v. Long, 430 So. 2d 393, 394 (La. App. 3d Cir. 1983) ("Testimony given by a non-litigant witness in a judicial proceeding carries with it an absolute privilege.").
\item \footnote{177} Id. An absolute privilege renders a defendant absolutely immune from civil liability for his defamatory statements without any inquiry into his motives. A qualified privilege protects a defendant from liability only if he made defamatory statements without actual malice. Black's Law Dictionary
\end{itemize}
The language quoted above begs inquiry into the protection afforded an expert for statements made in pre-trial consultations and reports.\textsuperscript{178} While courts in many jurisdictions extend absolute immunity so long as the consultations, reports, or other support materials are prepared in anticipation of litigation,\textsuperscript{179} there is authority in the Louisiana jurisprudence indicating that the privilege with respect to such statements is a qualified one.\textsuperscript{180}

The diminished protection afforded pre-trial statements only applies, however, to party-selected experts. Louisiana Code of Civil Procedure article 373 provides that an expert appointed by a trial court to assist it in the adjudication of a case is "an officer of the court from the time of his qualification until the rendition of final judgment in the case."\textsuperscript{181} In \textit{S.T.J. v. P.M.},\textsuperscript{182} the Louisiana Second Circuit Court of Appeal rendered an extensive review of modern witness immunity and specifically addressed the immunity of court-appointed psychologists under Article 373. In affirming the dismissal of suit against the court-appointed experts, the court stated:

[Appointed psychologists are non-judicial persons fulfilling quasi-judicial functions and are classified as officers of the court with functions intimately related to the judicial process. Hence ... they are entitled to absolute immunity protecting them from having to litigate the manner in which they perform those functions. Should they be found unprotected by such immunity, it can be envisioned that psychologists would seek to avoid future court appointments and

\begin{footnotesize}
\begin{enumerate}
\item[178.] In \textit{Moity v. Busch}, 368 So. 2d 1134 (La. App. 3d Cir. 1979), the court observed that an expert witness is "free to give his opinion whether others might disagree with his conclusions or not." \textit{Id.} at 1136. However, the plaintiff cited \textit{Bienvenu} for the proposition that while an expert's testimony is privileged, statements made during preparation for trial are not. The court did not reach the merits of this argument, finding that the plaintiff did not include in his petition any allegations as to defamatory statements made by the defendant, an expert in brick manufacture, during his preparation for trial.
\item[179.] \textit{See} Restatement (Second) of Torts § 588 (1977). \textit{See also} Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 172 A.2d 22, 25 (N.J. Super. Ct. App. Div. 1961) (reasoning that if preliminary materials were not protected by absolute immunity, the expert "would be liable to suit at the hands of his client's adversary on the theory that while the expert's testimony was privileged, his preliminary conferences with and reports to his client were not and could form the basis of a suit... ").
\item[180.] \textit{See} Oakes v. Walther, 179 La. 365, 154 So. 26 (1934) (finding that the doctor examining plaintiff in personal injury action at request of defense counsel was protected by qualified privilege regarding the statement in a letter to attorney that patient's mental state was abnormal); La. Atty. Gen. Op. No. 83-818 (1983).
\item[181.] \textit{See also} Quirk v. Mustang Eng., Inc., 143 F.3d 973 (5th Cir. 1998) (finding that physician who performed independent medical examination (IME) on injured pipe fitter was not entitled to absolute quasi-judicial immunity from malpractice liability based on his opinions where he was unaware that these opinions would be used in an adjudicatory proceeding relating to plaintiff's claim for Longshoremen's and Harbor Workers' Compensation Act benefits).
\item[182.] 556 So. 2d 244 (La. App. 2d Cir. 1990).
\end{enumerate}
\end{footnotesize}
that fear of civil liability could mar opinions and recommendations given to the court.183

Perhaps the most striking aspect of the court's consideration of immunity is the broad scope of its language, which may extend beyond the context of court-appointed experts. Proponents of the recognition of a cause of action for parties harmed by negligent experts argue that the witness privilege is "clearly limited to the publication of defamatory matter. It does not offer wholesale immunity for any civil wrong."184 But neither S.T.J. nor Briscoe v. LaHue, a case upon which the second circuit heavily relied, were defamation actions.185 Thus, it is at least possible that future litigants will argue that S.T.J. compels the recognition of absolute immunity from all tort liability stemming from litigation services provided by experts. On the other hand, because the court's decision in S.T.J. was clearly grounded in the appointed experts' "officer of the court" status, it may not reflect a willingness to broaden the scope of immunity afforded party-selected experts.186

183. Id. at 247. The immunity afforded by the court is not that of the traditional witness, but rather that of the judge. See Williams v. Rappeport, 699 F.Supp. 501 (D. Md. 1988) (court appointed doctors are generally entitled to the same immunity as judges).

184. Garcia, supra note 163, at 63.


186. Indeed, the trend emerging nationwide is to narrow rather than extend the scope of witness immunity. Courts in three states have recognized a cause of action in negligence against "friendly" experts who provide litigation-related services for compensation. See Matteo Forge, Inc. v. Arthur Young & Co., 6 Cal. Rptr. 2d 781 (Cal. Ct. App. 1992); Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo. 1992); Levine v. Wiss & Co., 478 A.2d 397 (N.J. 1984). The rationale has been that experts should be held to the same standard of care in providing litigation services that would be applicable to their other areas of practice. Murphy, 841 S.W.2d at 681. The California court reasoned that if an expert's negligence causes damage to the party who hired him, "[a]pplying the privilege in this circumstance does not encourage witnesses to testify truthfully; indeed by shielding a negligent expert witness from liability, it has the opposite effect." Matteo Forge, 6 Cal. Rptr. 2d at 788. In reaching a similar conclusion, the Supreme Court of Missouri focused upon "the commercial relationship assumed by the professional and his or her role as an advocate." Murphy, 841 S.W.2d at 682. In Levine, the New Jersey Supreme Court recognized that a court-appointed appraiser, whose appointment was agreed to by the parties to a divorce action, may be held liable for his allegedly negligent valuation of marital property.

On the other hand, two states, Pennsylvania and Washington, have determined that friendly experts should be afforded absolute immunity not only as to their testimony in court, but also to acts (negligent or otherwise) and communications which occur in connection with the preparation of testimony. Panitz v. Behrend, 632 A.2d 562 (Pa. Super. Ct. 1993); Bruce v. Byrne-Stevens & Assocs. Eng'ts, 776 P.2d 666 (Wash. 1989). The Supreme Court of Washington found it "immaterial that an expert witness is retained by a party rather than appointed by the court. The basic policy [underlying witness immunity] of ensuring frank and objective testimony obtains regardless of how the witness comes to court." Bruce, 776 P.2d at 669. "As a matter of law," the Bruce court added, "the expert serves the court." Id.

For a detailed discussion of these cases see Hanson, supra note 14.
2. Negligence: Is There a Duty?

The scope of the witness privilege beyond the defamation action may be of little consequence to parties seeking redress for an opposing expert’s negligence. While some courts have permitted negligence actions against “friendly” experts, no state has recognized a similar cause of action for an adverse party.187 It is generally held that experts retained for litigation purposes do not owe professional duties to their adversaries. This determination reflects the traditional common law rule that economic losses cannot be recovered in tort in the absence of privity of contract. Because an expert retained by one party has no contractual relationship with the party’s adversary, an action in negligence is thereby foreclosed.

Louisiana has traditionally taken a more flexible approach than the common law to the duty inquiry.188 Whether a duty is owed in a particular case is a question of law.189 In Barrie v. V.P. Exterminators, Inc.,190 the Supreme Court of Louisiana ruled that a termite inspector’s duty to exercise reasonable care in obtaining and communicating information in an inspection report extends to protect third persons, such as the plaintiff purchasers, for whose benefit the information is supplied and

187. A possible exception here is the Texas Supreme Court’s decision in James v. Brown, 637 S.W.2d 914 (Tex. 1982). In James, the plaintiff brought suit against three doctors who had examined her in the course of a judicial commitment proceeding and filed reports with the court indicating that she was mentally ill. The suit, filed after the plaintiff secured her release from the hospital, alleged libel, negligent misdiagnosis, medical malpractice, false imprisonment, and malicious prosecution. Id. at 916. The false imprisonment and malicious prosecution claims were dismissed for failure to state a cause of action. Id. at 918. The court also dismissed the libel claim based upon the doctrine of absolute witness immunity. Id. at 917. However, the court expressly rejected a blanket immunity from all civil liability: “While the doctors’ communications to the court of their diagnoses of [the plaintiff’s] mental condition, regardless of how negligently made, cannot serve as the basis for a defamation action, the diagnoses themselves may be actionable on other grounds.” Id. The court explained that the plaintiff was not prevented from recovering from the doctors for negligent misdiagnosis—medical malpractice simply because the diagnoses were later communicated to a court in a commitment proceeding. Id. The court then determined that a Texas statute that provided immunity to persons who perform, without negligence, examinations and other acts required by the Texas Mental Health Code imposed a duty on the defendant doctors to “exercise that degree of skill ordinarily employed under similar circumstances by similar specialists in the field.” Id. at 918. In the absence of this statutory duty of care, it is unclear whether the court would have allowed the negligence action to proceed. See Douglas R. Pahl, Absolute Immunity for the Negligent Expert Witness: Bruce v. Byrne-Stevens, 26 Willamette L. Rev. 1051, 1070 (1990).

188. See, e.g., Barrie v. V.P. Exterminators, Inc., 625 So. 2d 1007, 1014 (La. 1993) (“Louisiana is a jurisdiction which allows recovery in tort for purely economic loss caused by negligent misrepresentation where privity of contract is absent.”).

189. Louisiana Civil Code article 2315 provides, in part, “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” “In determining whether article 2315 contemplates the existence of a particularly undefined duty, the Louisiana Supreme Court has looked to the foreseeability of the risks involved as well as ‘policy considerations, including social, moral and economic elements.’” Green v. Walker, 910 F.2d 291, 295 (5th Cir. 1990) (quoting Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 568 (La. 1990)).

190. 625 So. 2d 1007 (La. 1993).
who may detrimentally rely on its contents and thereby suffer economic loss.\textsuperscript{191} Thus, although there was no privity of contract, the defendant’s knowledge that the plaintiffs would rely on the report in deciding whether to purchase the inspected house “made the magnitude of their loss a foreseeable probability. The obligation for the liability is imposed by law based upon policy considerations due to the tortfeasor’s knowledge of the prospective use of the information which expands the bounds of his duty of reasonable care to encompass the intended user.”\textsuperscript{192}

The reliance interest of the plaintiffs that was crucial to the court’s recognition of a cause of action in negligent misrepresentation in \textit{Barrie} presents a problem to an adverse party seeking remedial action for alleged economic loss caused by the biased expert. In the confines of adversarial litigation, battle lines are clearly drawn. A party retains an expert and bears the associated cost because he believes, on the basis of private self-interest, that doing so will improve his chances of success on the merits.\textsuperscript{193} The adverse party undoubtedly takes notice of the retention of an expert by his opponent, and is then left to determine how to best allocate his resources, which may include contracting for the services of his own expert.\textsuperscript{194} In the midst of this polarity, it seems unreasonable, at first blush, for either of the parties to rely on an expert associated with his adversary.

It should not be unreasonable, however, for a litigant to expect an adverse expert witness to observe the same standard of care applicable outside the context of litigation services. This argument lends support to an emerging exception to the “no duty” rule concerning the physician who performs an independent medical examination (IME). Unlike most other experts who testify at trials, the physician who performs an IME has first-hand interaction with an adverse party. Though the party is probably aware that the examiner is not his doctor per se, the esteem in which society generally holds members of the medical profession may foster the expectation of a sound and unbiased opinion.

If a physician fails to report the findings of an IME in a manner that accurately reflects the condition of the examinee, it is foreseeable that the examinee will be harmed. Harm in this context could either be economic, as in cases where an erroneous opinion compels a jury to deny recovery, or physical, as in cases where the physician discovers a serious threat to the examinee’s health and fails to warn him accordingly. Examinees who suffered such harm, however, were traditionally precluded from bringing malpractice claims against the physician. The Maryland case of \textit{Hoover v. Williamson}\textsuperscript{195} is instructive on the general rule:

\textit{[O}rdinarily recovery for malpractice or negligence against a doctor is allowed only where there is a relationship of doctor and patient as a result of a contract, express or implied, that the doctor will \textit{treat} the patient with}

\textsuperscript{191} Maraist & Galligan, \textit{supra} note 164, at 122.
\textsuperscript{192} \textit{Barrie}, 625 So. 2d at 1016.
\textsuperscript{193} Parker, \textit{supra} note 8, at 33.
\textsuperscript{194} \textit{Id.} However, a party’s resources may be so limited that the retention of a rebuttal expert witness is not feasible. \textit{See supra} note 40.
\textsuperscript{195} 203 A.2d 861 (Md. 1964).
proper professional skill and the patient will pay for such treatment, and there has been a breach of professional duty to the patient.196

The rule provides, in essence, that there is no duty in the absence of a doctor/patient relationship. Louisiana courts, perhaps sensing the potential injustices of this bright-line rule, have challenged the traditional notion of what constitutes a doctor/patient relationship.

In Green v. Walker,197 the U.S. Fifth Circuit considered whether a physician hired by an employer owed a duty to an employee to perform an employment examination "with due care, consistent with the medical skills he held out to the public, and to report his findings, particularly any finding which appeared to pose a threat to the physical or mental health" of the employee.198 Applying Louisiana law, the court resolved this question affirmatively, holding:

[W]hen an individual is required, as a condition of future or continued employment, to submit to a medical examination, that examination creates a relationship between the examining physician and the examinee, at least to the extent of the tests conducted. . . . To impose a duty upon the doctor who performs such tests to do so in accordance with the degree of care expected of his/her profession for the benefit of the employee-examinee, as well as the employer, is fully consistent with the very essence of Civil Code article 2315.199

In Pena v. Fann,200 the Louisiana Fourth Circuit Court of Appeal, relying heavily on Green, recognized that a similar relationship forms in the course of an IME.201 However, the duties recognized by the Green and Pena courts are limited; they require the physician to diagnose and report his findings in a manner consistent with the level of care observed by a reasonably prudent physician possessing and exercising the requisite skills, and to warn the examinee of any findings that pose

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196. Id. at 863 (emphasis added). The court further observed that: "it has been held that there is not a doctor-patient relationship between: (a) a prospective or actual insured and the physician who examines him for the insurance company; or (b) a prospective or actual employee and the doctor who examines him for the employer." Id. As recognized by the Louisiana Third Circuit Court of Appeal in Thomas v. Kenton, 425 So. 2d 396, 400 (La. App. 3d Cir. 1982), "[c]onceptualizations to this rule would encompass situations where the doctor would assume, though gratuitously, to undertake to render services which he should recognize as necessary to another's bodily safety, and leads the other in reasonable reliance on the services to refrain from taking other protective steps, or to enter on a dangerous course of conduct, or, where the doctor himself, even without the requisite doctor-patient relationship, actually causes the condition complained of." But see Dornak v. Lafayette Gen. Hosp., 399 So. 2d 168 (La. 1981) (finding that if a hospital gives an employee a pre-employment examination, the employee is entitled to rely on the expectation that she would be informed of any dangerous condition discovered in the course of the examination). See also infra text accompanying note 199.

197. 910 F.2d 291 (5th Cir. 1990).
198. Id. at 293.
199. Id. at 296.
200. 677 So. 2d 1091 (La. App. 4th Cir. 1996).
201. In light of this "relationship," the court ruled that the Medical Malpractice Act applies, and that the plaintiff's claim was premature for failure to submit it to a Medical Review Panel. Id. at 1094.
an imminent danger to the examinee's physical or mental well-being.\textsuperscript{202} The danger that inaccurate or improper findings by the physician will cause economic harm to the examinee when used in the lawsuit that occasioned the examination may not fall within the scope of the risks contemplated by these duties. In fact, Louisiana courts are likely to prove hostile to the idea of negligence suits against adverse expert witnesses in cases where the immediate physical or mental health of the opposing party is not at issue.

As a matter of policy, courts must consider whether subjecting expert witnesses to liability for acts of negligence will make it difficult for litigants to retain their services. As feared by the Supreme Court of Washington, "imposing civil liability on expert witnesses would discourage anyone who is not a full-time professional expert from testifying. Only professional witnesses will be in a position to carry insurance to guard against such liability."\textsuperscript{203} The Supreme Court of Missouri, however, took exception to this argument, pointing out that "[p]rofessionals have been subject to liability outside this context for many years, and they have continued to provide these non-litigation related services."\textsuperscript{204} The court further emphasized the commercial reality of modern expert evidence: "Litigation support services have turned into big business. . . . There is no reason to believe that professionals will abandon the area of litigation support merely because they will be held to the same standard of care applicable to their other areas of practice."\textsuperscript{205} The Missouri court advances the stronger argument; there is no indication that experts will retreat from a profitable enterprise simply because they must perform their services in a reasonable manner.

In the end, the structure of adversarial litigation provides the best explanation for the likely refusal of Louisiana courts to entertain a negligence action brought by a litigant against an adverse expert witness. Within this system, an attorney does not owe a duty of reasonable care to the adversary of his client because such a duty would be inconsistent with zealous advocacy.\textsuperscript{206} Though courts have expressed discomfort with the advocacy role assumed by many expert witnesses, they are typically reluctant to interfere with a litigant's efforts to present the best

\textsuperscript{202} See id. at 1093. See also Maraist \& Galligan, supra note 164, at 453-56.

\textsuperscript{203} Bruce v. Byrne-Stevens \& Assocs. Eng'rs, 776 P.2d 666, 670 (Wash. 1989). But see Garcia, supra note 163, at 67 n.256 ("The court's fear was not well founded. There are many insurance plans available at a nominal fee to those who provide expert testimony, whether on a full or part-time basis.").

\textsuperscript{204} Murphy v. A.A. Mathews, 841 S.W.2d 671, 681 (Mo. 1992).

\textsuperscript{205} Id. The Bruce court further argued that the threat of liability would encourage experts to take extreme and ridiculous positions in favor of their clients in order to avoid a suit by them. The Murphy court dismissed this argument in the "friendly" expert context, finding that liability for negligent performance of their services would "encourage experts to be truthful and accurate." Id. In the context of the adverse expert, any argument that the threat of suit by an opposing party would encourage the expert to shade his testimony in favor of his adversary ignores the commercial nature of the expert's role in the dispute. Furthermore, were experts to face liability to both friend and foe for deviations from truth and accuracy, the end result would perhaps be a more consistent attainment of both.

\textsuperscript{206} See Maraist \& Galligan, supra note 164, at 121. "However, an attorney may be liable to his client's adversary for intentional tortious conduct, and may owe a duty to a third party beneficiary of his contract of employment with his client." Id.
possible case.\textsuperscript{207} Thus, although the Barrie case illustrates that Louisiana is not confined to the "citadel of privity," a litigant is not likely to allege a reliance interest in the testimony of an opposing expert sufficient to trigger a duty of reasonable care.

However, the Green and Pena cases stand as forceful reminders that a central goal of tort law is to compensate an injured party when the loss can be rightfully shifted to another. The discussion below re-examines the policy underlying witness immunity in light of this basic goal.

3. \textit{Providing a Cause of Action: Defamation and Witness Immunity Revisited}

At the heart of any immunity from liability lies the notion that "conduct which otherwise would be actionable is to escape liability because the defendant is acting in furthance of some interest of social importance..."\textsuperscript{208} Societal policy does not, however, exist in a vacuum. Because the decision to grant immunity involves a balancing of conflicting interests, even the most established policy justifications for immunity must, at times, be re-evaluated in light of subsequent developments. Consider, for example, the "post-modern immunities" created in recent years by the Louisiana legislature.\textsuperscript{209} These new immunities protect narrowly defined classes of persons, such as members of downtown development districts,\textsuperscript{210} volunteer athletic coaches,\textsuperscript{211} recreational land owners,\textsuperscript{212} and persons who gratuitously render emergency care,\textsuperscript{213} from certain types of liability, typically negligence and strict liability.\textsuperscript{214} But these immunities do not contemplate wholesale protection from all tort liability. The immunity is lost if the defendant's conduct rises above negligence to some heightened level of fault such as gross negligence or intentional tort.\textsuperscript{215} In such cases, society's interest in affording the individual a remedy for injury done to him outweighs its goal of encouraging the desirable activities of the defendant. Thus, it is fair to

\begin{itemize}
    \item \textsuperscript{207} See, e.g., supra text accompanying note 153.
    \item \textsuperscript{208} Keeton et al., supra note 169, § 114, at 815.
    \item \textsuperscript{209} See Frank L Maraist & Thomas C. Galligan, Jr., \textit{The Employer's Tort Immunity: A Case Study in Post-Modern Immunity}, 57 La. L. Rev. 467 (1997).
    \item \textsuperscript{210} La. R.S. 9:2792.2 (1997).
    \item \textsuperscript{211} La. R.S. 9:2798 (1997 and Supp. 2000).
    \item \textsuperscript{212} La. R.S. 9:2791, 2795 (1997).
    \item \textsuperscript{213} La. R.S. 9:2793 (1997).
    \item \textsuperscript{214} Maraist & Galligan, supra note 209, at 468.
    \item \textsuperscript{215} Id. at 468-69. "Gross negligence," as defined by La. R.S. 6:2(9) (Supp. 2000), "means a reckless disregard . . . or a carelessness amounting to indifference . . . and involves a substantial deviation below the standard of care expected to be maintained by a reasonably careful person under like circumstances." Conduct that constitutes gross negligence may also be termed "willful," "wanton," or "reckless." The Supreme Court of Louisiana has suggested, however, that there is only one type of wrongful conduct between intent and negligence. See Ambrose v. New Orleans Police Dept. Ambulance Serv., 639 So. 2d 216 (La. 1994). Regardless, then, of the terminology preferred by a court, conduct that falls within this intermediate level of fault is not protected by statutory immunity.
\end{itemize}
say that Louisiana public policy does not favor immunity for grossly negligent or intentional acts that cause injury to its citizens. The non-litigant witness's absolute privilege to defame conflicts with this policy by immunizing conduct that rises to high levels of fault. It permits the expert witness to knowingly advance false or inaccurate testimony on behalf of his client without fear of subsequent liability to those he may injure. This potential for abuse is only tolerable so long as the traditional justification for the immunity remains applicable to those who claim its protection.

Witness immunity, as it was originally conceived, "operated to shield the witness at trial from the specter of subsequent litigation so as to encourage the witness's participation in the judicial process and to enable the witness to speak freely."216 The extension of the immunity to party-selected expert witnesses does not advance these basic objectives. Unlike the "friends of the court" for whom this protection was designed, modern expert witnesses "function as professionals selling their expert services rather than as an unbiased court servant."217 The compensation received by the expert is sufficient to encourage participation in the judicial process. Moreover, this pecuniary interest, when combined with the protection afforded by the absolute privilege, seems to frustrate rather than advance the goal of ensuring truthful and accurate testimony.218

Furthermore, commentators have long observed that absolute immunity is generally refused where there are no adequate safeguards to prevent abuse of the privilege.219 In Bienvenu v. Angelle,220 the Supreme Court of Louisiana demonstrated allegiance to this fundamental concern by refusing to accord an absolute privilege to statements made in the course of "investigatory work in the field," where the safeguards provided in a judicial proceeding are absent.221 The absence of safeguards also explains Louisiana's denial of absolute immunity to experts for statements made in out-of-court reports.222 For in-court statements, the safeguards most often addressed by courts as applicable to witness testimony are cross-examination and criminal prosecution for perjury.223 While these safeguards are adequate to prevent abuse of absolute immunity by the lay witness, the unique

216. McDowell, supra note 25, at 262.
217. Murphy v. A.A. Mathews, 841 S.W.2d 671, 681 (Mo. 1992).
218. See supra Part II.
219. See, e.g., Van Vechte Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 470 (1909) ("underlying [the] whole doctrine of absolute immunity is the conception of an alternative remedy"). See also McDowell, supra note 25, at 253-54.
221. See supra text accompanying note 176. See also McDowell, supra note 25, at 274 ("An absolute privilege is allowed only in 'situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct.").") (quoting Demopolis v. Peoples Nat'l Bank, 796 P.2d 426, 430 (Wash. Ct. App. 1990)).
223. See supra text accompanying note 121. See also supra note 123.
characteristics of the expert witness often render them ineffective. Instead of compensating for this ineffectiveness through active "gatekeeping," many trial judges remain faithful to the "let it all in" philosophy. Taken together, the balance of public policy and the inadequacy of safeguards to prevent abuse suggest that the expert witness should be removed from the doctrine of absolute immunity. The policies underlying witness immunity do, however, compel some measure of protection for the expert witness. Fortunately, Louisiana's rejection of a different absolute privilege afforded at common law provides some guidance in this area.

In Louisiana, a defamatory statement by an attorney in a judicial proceeding enjoys only a qualified privilege, and, in order for the privilege to apply, the statement must be relevant and made with probable cause and without malice. In Freeman v. Cooper, the Supreme Court of Louisiana explained the limitation on the privilege extended to attorneys:

Attorneys must be free to represent their clients without constant fear of actions based on statements made in the zealous prosecution or defense of an action. Nevertheless, the privilege granted to an attorney is not a license to impugn the professional integrity of opposing counsel or the reputation of a litigant or witness.

By a similar rationale, qualified immunity is the appropriate level of protection for the party-selected expert witness, who, like the attorney, functions as a paid advocate in a judicial proceeding.

To prevail in a defamation action, a plaintiff must prove four elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4)
resulting injury. The qualified privilege would give the expert witness a prima facie excuse for any defamatory statements made in the course of his testimony. The protection would be lost, however, if it is proven that the expert made the statements with actual malice, i.e., with knowledge of their falsity or with reckless disregard as to their truth or falsity. In such cases, the expert should be made to answer for any damages suffered by an adverse party as a result of the defamatory statements.

The burden of proof placed on the adverse party by this proposal is an onerous one. To prove that an expert made a defamatory statement with knowledge of its falsity or with reckless disregard of its falsity, the plaintiff will usually have to demonstrate that the expert's conclusions were not arrived at through the proper application of a well-founded methodology. In the absence of such a showing, pronouncements of the court. See Maraist & Galligan, supra note 164, at 437.

233. Fitzgerald, 737 So. 2d at 715. “Damages from defamation are not confined to pecuniary losses; harm to the plaintiff's reputation will support an award.” Steed v. St. Paul's United Methodist Church, 728 So. 2d 931, 940 (La. App. 2d Cir. 1999). “General damages may include injury to reputation, personal humiliation, embarrassment, mental anguish, anxiety and hurt feelings.” Id. at 942.

234. In Freeman v. Cooper, 414 So. 2d 355, 359 (La. 1982), the court stated that the qualified privilege is inapplicable in cases where a defamatory statement is made with “malice.” Prior to the United States Supreme Court's decision in New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 1130 (1964), states were free to presume malice if the defamatory statement was false. Because falsity was also presumed, the result was a form of strict or absolute liability. In New York Times, the Court placed First Amendment restrictions on a state's power to impose tort liability for defamation. Maraist & Galligan, supra note 164, at 433. Specifically, the Court held that a plaintiff who is a public official may not recover against a media defendant for defamation unless he proves "actual malice" by "convincing clarity." Id. "Actual malice," as clarified by the "knowledge/reckless disregard" definition, requires a showing of fault. After New York Times, state courts were left to determine the status of the litigants (private citizen, public official/figure, or media) and whether the alleged defamatory matter was of public or private concern. Id. at 438-39. In cases between private citizens on matters of private concern, the First Amendment arguably may not impose any restrictions, thus freeing the states to return to the pre-New York Times absolute liability standard. Id. at 439. See Cangelosi v. Schwagmann Bros. Giant Super Markets, 390 So. 2d 196, 198 (La. 1980). In using the term "actual malice," the author suggests that a plaintiff must prove fault to a degree greater than negligence on the part of the adverse expert witness for a defamatory statement to be actionable. Furthermore, the actual malice requirement affords the expert the full measure of constitutional protection as set forth in New York Times, thereby obviating a debate as to whether an expert's testimony in court is a matter of public or private concern.

235. See supra Part III.A.2. For an example of a methodology that would fail a Daubert analysis, see Saunders v. New Orleans Pub. Serv., Inc., 387 So. 2d 603 (La. App. 4th Cir.), writ denied, 394 So. 2d 614 (1980). There, the court invalidated a contract of compromise based on a mutual mistake of fact as to the principal cause for the parties' consent. In reaching the agreement, both the claimant and the insurer mistakenly believed that the claimant had been properly examined by a physician, when in fact no thorough examination had occurred. The claimant did visit a physician in the insurer's medical department. However, as recounted by the court:

The doctor's examination was strange in that he stood across the room without touching or examining her, or asking her to remove the long-sleeved blouse which covered the egg-shaped lump on her right arm. The doctor simply instructed her to raise her arms above her head and asked if the movement produced pain, to which she responded affirmatively. He then told her she had a minor muscle bruise and "should be out of difficulty in a week or so." Relieved by the assurance of a professional medical officer, she was happy to accept
even if the statements were proven false, the expert's conduct would not rise to a level of fault sufficient to deprive him of the qualified immunity. In light of the trial judge's "gatekeeping" obligation, it seems that a plaintiff could successfully attack an expert's methodology only in those cases where the judge should not have admitted the testimony to begin with. In essence, the qualified privilege would afford the expert a rebuttable presumption that his testimony was properly admitted. The difficulty of rebutting this presumption should alleviate the fear that anything less than an absolute privilege would result in an avalanche of litigation against adverse expert witnesses. While some vexatious litigation is inevitable, this concern does not outweigh the law's obligation to provide a remedy for injury suffered by an innocent litigant as a result of the intentional or reckless conduct of another. Furthermore, even though it would function as a safeguard of last resort, the mere potential for liability would exert a form of quality control over expert services similar to that provided by malpractice liability for other professional services.

It is not suggested that this is a perfect, or even an easy solution to the problems generated by the biased expert witness. It would, however, send a clear message to the public that our system is working to ensure "that the truth . . . be ascertained and proceedings justly determined."

VI. CONCLUSION

We permit experts to deliver opinion testimony in court because their education and experience make them uniquely qualified to assist the trier of fact in its determination of issues that draw from their respective disciplines. The biased expert witness abuses this special status for personal gain. He is available to the highest bidder, and conventional safeguards such as cross-examination lose their strength when thrust against his resolve to raise his stock in the eyes of his clients.

$100.00 offered by the adjuster "for her troubles." 

Id. at 604. Later, the claimant's pain continued and she consulted other physicians who diagnosed a pre-existing bursitis severely aggravated by trauma. Id. at 605. The court concluded "that the parties would not have consented to the compromise for $100.00 if the complete and accurate diagnosis had been stated." Id.

236. Garcia, supra note 163, at 64.

237. One issue likely to arise concerns whether an expert's expression of opinion can give rise to an action in defamation. The Louisiana Supreme Court has held that an opinion cannot be defamatory unless it imparts knowledge of facts. See Bussie v. Lowenthal, 535 So. 2d 378, 381 (La. 1988). See also Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977). However, "[a]n expert's opinion is irrelevant unless the trier of fact could conclude from the evidence the existence of the facts upon which the opinion is based." Marrist, supra note 10, § 11.4, at 205. Even in cases where the expert testifies in response to a hypothetical question, the opinion is irrelevant absent the introduction of sufficient evidence as to the existence of each fact supporting the opinion. Id. Consequently, even if the expert does not expressly state the underlying facts, his opinion will typically impart sufficient knowledge as to their existence to make it actionable in defamation. See id. (observing that the proponent of expert opinion testimony will often inquire into the facts of the case on direct examination for fear that the opinion will lack weight with the trier of fact absent such an inquiry).

Relying on the insulation from liability afforded by the witness immunity doctrine, an expert can advance in court an opinion to which neither he nor his colleagues would subscribe beyond the doors of the courtroom. The protection originally designed for “friends of the court” has been perverted for use as a litigation weapon, with opposing parties bearing the ultimate risk upon its discharge. In short, the undesirable conduct of the expert-advocate works to undermine public confidence in the court system.

It is time for the system to respond. Trial judges must no longer refrain from the vigilant regulation of expert testimony. In performing their “gatekeeping” obligations, judges must demand that experts provide litigation services commensurate with the same degree of professional care applicable to their other areas of practice. In cases where a judge abdicates this responsibility in favor of a “let it all in” approach, the law should provide a remedy in tort for an adverse party harmed by the incompetent testimony of a “hired gun.” Society’s interest in ensuring the availability of expert testimony will not be jeopardized by requiring expert witnesses to discharge their duties in good faith. To the contrary, society will be better served by charging the costs associated with the biased expert witness to the person in the superior position to prevent them: the biased expert himself. Thus, qualified immunity is the proper measure of protection for the party-selected expert witness. If these safeguards are properly implemented, a resort to more problematic control mechanisms, such as court-appointed experts, will be unnecessary.

Lawyers must also accept their role in reforming the use of expert evidence in modern litigation. Finding an expert who will testify as he is told is not a legitimate component of zealous advocacy. Instead, lawyers must “come to regard expert testimony as honest work rather than prostitution—perhaps even as a form of public service—and they, and judges, and experts may learn to act accordingly.”

W. Raley Alford, III

239. Gross, supra note 36, at 1232.

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