Louisiana Law Review

Volume 81
Number 4 *Summer 2021*

Article 12

6-2-2021

Let It All in? Expert Witness Qualification in Medical Malpractice Lawsuits

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Let It All in? Expert Witness Qualification in Medical Malpractice Lawsuits

Benjamin M. Parks[*]

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"We will turn a sharp eye to those instances 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."[1]

INTRODUCTION

On June 13, 2012, a frightened mother rushed her 13-month-old baby, Landon Lee, to Our Lady of the Lake Regional Medical Center (OLOL) in Baton Rouge, Louisiana when he began struggling to breathe and vomiting.[2] Emergency room physicians determined that Landon's symptoms were heart-related and transferred him to OLOL's Pediatric Intensive Care Unit.[3] As Landon's condition worsened, OLOL physicians decided to transfer him by helicopter to Ochsner Medical Center in the

1. *In re* Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1233–34 (5th Cir. 1986).
2. Lee v. Quinn, 229 So. 3d 13, 14 (La. Ct. App. 1st Cir. 2017).
3. *Id.*

ECMO[4] unit.[5] Landon died shortly after arriving at Ochsner due to an enlarged heart.[6] After receiving the medical review panel's decision,[7] Landon's mother, Anjel Lee, filed a medical malpractice claim against OLOL and Dr. Boudreaux, the emergency room physician who treated Landon at OLOL.[8] Lee's case illustrates the fatal or severe injuries that are often associated with a medical malpractice claim, making the court's determination on the claim a crucial one.[9]

Medical malpractice claims are among Louisiana's most frequently litigated lawsuits.[10] In Louisiana, plaintiffs alleging medical malpractice bear the often challenging burden of establishing the defendant healthcare provider's standard of care and proving that there was a breach of that standard of care.[11] To meet this burden of proof, plaintiffs must present expert witness testimony, unless a defendant healthcare provider's negligence is obvious to a lay jury.[12] The outcome of a medical

4. *See Extracorporeal Membrane Oxygenation*, MEDLINE PLUS, https://medlineplus.gov/ency/article/007234.htm [https://perma.cc/B8UH-TJQ6] (last visited Apr. 12, 2021) ("Extracorporeal membrane oxygenation (ECMO) is a treatment that uses a pump to circulate blood through an artificial lung back into the bloodstream of a very ill baby. This system provides heart-lung bypass support outside of the baby's body.").

5. *Lee*, 229 So. 3d at 14.

6. *Id.*

7. LA. REV. STAT. § 40:1231.8 (2019). A medical review panel, made up of three health care providers and a non-voting attorney, issues an "expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care." *Id.*; *see also* Sarah M. Nickel, *The Medical Malpractice Cure: Stitching Together the Coleman Factors*, 78 LA. L. REV. 311, 314 (2017). An action for medical malpractice cannot be commenced prior to a claimant's presentation of his or her proposed complaint to a medical review panel. LA. REV. STAT. § 40:1231.8(B).

8. *Lee*, 229 So. 3d at 14.

9. *See, e.g.*, *id.*

10. *See* Natalie J. Dekaris & Michael C. Mims, *Recent Developments: Louisiana Medical Malpractice*, 74 LA. L. REV. 873, 873 (2014); *see also* Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation*, 54 CATH. U. L. REV. 703, 710–12 (2005) (noting that a medical malpractice case generally costs $50,000, at minimum, to prepare).

11. LA. REV. STAT. § 9:2794 (2018).

12. *See* Schultz v. Guoth, 57 So. 3d 1002 (La. 2011); *see also* Pfiffner v. Correa, 643 So. 2d 1228, 1233 (La. 1994) ("Expert testimony is not required where the physician does an obviously careless act, such as fracturing a leg during examination, amputating the wrong arm, dropping a knife, scalpel, or acid on a

malpractice action, thus, is contingent upon credible expert witness testimony.[13] Louisiana courts, however, struggle to classify the scope of persons able to qualify as expert witnesses in medical malpractice cases.[14] Specifically, Louisiana courts disagree as to whether a potential expert witness practicing in a different area of medicine than the defendant is qualified to provide expert testimony on the applicable standard of care and on whether a breach of that standard of care occurred.[15] Indeed, expert witness testimony is vital to a litigant's success in a medical malpractice lawsuit, such as Landon's case; thus, the Louisiana Legislature must provide clear standards to govern expert witness qualification.[16]

Louisiana Revised Statutes § 9:2794 sets forth the standards governing whether a potential witness is qualified to testify as an expert in a medical malpractice action.[17] Section 9:2794(D)(1) provides a broad standard that an individual may serve as an expert witness if "he is qualified on the basis of training or experience to offer an expert opinion" concerning the standard of care.[18] To determine whether a witness is "qualified on the basis of training or experience," § 9:2794(D)(3) states that the court "shall consider whether . . . the witness is board certified or has other substantial training in an area of medical practice relevant to the claim and *is actively practicing in that area*."[19]

Louisiana courts continue to inconsistently interpret the broad language in § 9:2794(D).[20] In some cases, courts adopt a liberal approach

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patient, or leaving a sponge in a patient's body, from which a lay person can infer negligence.").

13. *See Schultz*, 57 So. 3d 1002; *see also* Riser v. Am. Med. Intern., Inc., 620 So. 2d 372, 382 (La. Ct. App. 5th Cir. 1993) (holding that the trial court's decision to credit and adopt the testimony of one medical expert over another equally qualified expert was not manifestly erroneous).

14. *See generally* Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018); *Lee*, 229 So. 3d at 18.

15. *See Pennington*, 245 So. 3d at 64 (allowing a board-certified general surgeon to testify, as an expert, regarding the standard of care applicable to an orthopedic surgeon, hospitalists, and a nurse practitioner). *But see Lee*, 229 So. 2d at 18 (holding that a board-certified pediatric cardiologist was not qualified to offer an opinion as to the standard of care owed by an emergency room physician).

16. *See generally Schultz*, 57 So. 3d at 1006–07; Morris v. Rainwater, 218 So. 3d 226, 235 (La. Ct. App. 2d Cir. 2017).

17. LA. REV. STAT. § 9:2794 (2018).

18. *Id.*

19. *Id.* (emphasis added).

20. *See* Pertuit v. Jefferson Parish Hosp. Serv. Dist. No. 2, 170 So. 3d 1106, 1110 (La. Ct. App. 5th Cir. 2015). *But see* Penn v. CarePoint Partners of La., L.L.C., 181 So. 3d 26, 31 (La. Ct. App. 1st Cir. 2015).

to qualify an expert witness "on the basis of training or experience" without considering whether that witness is "actively practicing" in an area of medicine "relevant to the claim."[21] In direct contravention of the statute, these courts admit expert witness testimony from a healthcare provider who practices in a different area of medicine than the defendant.[22] Conversely, other courts take a literal approach to § 9:2794's requirement that the witness is "actively practicing" in an area of medicine "relevant to the claim" and hold that an expert witness must practice in the defendant's same field of medicine.[23] Medical malpractice litigants, therefore, practice with unpredictability and ambiguity because courts continue to apply different standards.[24] The Louisiana Legislature must revise § 9:2794, because courts will continually depart from the statute and embrace a "'let it all in' philosophy."[25]

To resolve the current inconsistency, the Louisiana Legislature should amend § 9:2794(D)(3) to require that the witness actively practice in the same field of medicine as the defendant healthcare provider.[26] Instead of

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21. LA. REV. STAT. § 9:2794(D)(3); *see* Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 684–85 (La. Ct. App. 5th Cir. 2014) (allowing a neurologist to testify as to the standard of care of an internist); Thompson v. Ctr. for Pediatric & Adolescent Med., L.L.C., 224 So. 3d 441 (La. Ct. App. 1st Cir. 2018) (holding that a board-certified pediatrician could testify as to the standard of care applicable to a nurse practitioner).

22. *See* Harper v. Minor, 86 So. 3d 690, 696 (La. Ct. App. 2d Cir. 2012); *Kieffer*, 138 So. 3d at 684–85.

23. LA. REV. STAT. § 9:2794(D)(3); *see Harper*, 86 So. 3d at 696 (allowing a general surgeon to offer expert testimony concerning the standard of care applicable to a radiologist); *Kieffer*, 138 So. 3d at 684–85 (allowing a neurologist to testify as to the standard of care of an internist). *But see* Lee v. Quinn, 229 So. 2d 13, 18 (La. App. Ct. 1st Cir. 2017) (excluding testimony of a pediatric cardiologist regarding the standard of care to be exercised by an emergency room physician); *Penn*, 181 So. 3d at 31–32 (holding that a board-certified expert in cardiology was not qualified to offer an expert opinion regarding the standard of care applicable to a hospitalist).

24. *See* Primeaux v. St. Paul Fire & Marine Ins. Co., 862 So. 2d 496, 503 (La. Ct. App. 3d Cir. 2003) ("When the alleged negligence of a specialist is at issue, only those qualified in that specialty may offer expert testimony and evidence of the applicable standard of care."). *But see Pertuit*, 170 So. 3d at 1110 ("R.S. 9:2794 has no absolute requirement that a proffered expert must practice in the same specialty as the defendant.").

25. *See In re* Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1233–34 (5th Cir. 1986); *see also* LA. REV. STAT. § 9:2794.

26. *See Pertuit*, 170 So. 3d at 1110. *But see Penn*, 181 So. 3d at 31; Steib v. Waguespack, 168 So. 3d 410, 414 (La. Ct. App. 1st Cir. 2014) ("Where the defendant practices in a particular specialty and the alleged acts of medical

providing that courts "shall consider" whether the witness is "actively practicing" in an area of "medical practice relevant to the claim," the statute should contain an explicit requirement that the witness's field of medical practice match the defendant's.[27] The legislature should replace the words "substantial training or experience" with language that the court shall consider "as the deciding factor . . . whether the witness is actively practicing in, or has within five years prior to the date of the alleged malpractice actively practiced in, the same field of medical practice as the defendant healthcare provider."[28] This revision will reduce litigation concerning expert witness qualification, allow litigants to instead focus on the merits of the case at hand, and provide consistency among the courts.[29] Because § (D)(1) requires the witness to be a practicing physician in good standing,[30] the proposed legislative revision guarantees that judges will base their rulings on whether the witness has within five years prior to the alleged malpractice actively practiced in the defendant's field of medicine or is actively practicing in that field.[31] Further, this revision balances the interests of both plaintiffs and defendants.[32] Defendant healthcare providers facing medical malpractice claims will no longer incur liability based on testimony from an expert who has never practiced in the

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negligence raise issues peculiar to the particular medical specialty involved," the plaintiff must prove the standard of care of "practiced by physicians within that specialty."). *See generally* LA. REV. STAT. § 9:2794(D)(3).

27. *See id.* § 9:2794(D)(3).

28. *See generally id.*

29. *See generally Pertuit*, 170 So. 3d 1106.

30. *See* LA. REV. STAT. § 9:2794(D)(1) (providing that to testify as an expert, a witness must meet all of the following criteria: (A) he is practicing medicine at the time he offers testimony or at the time the claim arose; (B) he has knowledge of the applicable standards of care; (C) he is "qualified on the basis of training or experience" to offer expert testimony regarding those standards of care; and (D) he is licensed to practice medicine in Louisiana or any other U.S. jurisdiction, or is a graduate of an accredited medical school); *see also* Benjamin v. Zeichner, 113 So. 3d 197, 204 (La. 2013) (holding that § 9:2794(D)(1) requires that the witness is a physician currently licensed to practice medicine or is a graduate of an accredited medical school).

31. *See generally Pertuit*, 170 So. 3d at 1110; Primeaux v. St. Paul Fire & Marine Ins. Co., 862 So. 2d 496, 503 (La. Ct. App. 3d Cir. 2003).

32. *See Primeaux*, 862 So. 2d at 503 ("When the alleged negligence of a specialist is at issue, only those qualified in that specialty may offer expert testimony and evidence of the applicable standard of care."); Steib v. Waguespack, 168 So. 3d 410, 414 (La. Ct. App. 5th Cir. 2015). *But see Pertuit*, 170 So. 3d at 1110.

defendant's same field of medicine.[33] In addition, the revision guarantees that a plaintiff, experiencing difficulty locating an expert witness actively practicing in the defendant's field of medical practice, will not be left without a qualified expert witness.[34]

Part I of this Comment will discuss the issues that gave rise to the Louisiana Medical Malpractice Act and the Act's current requirements. Part I will further discuss expert witness qualification under Louisiana Revised Statutes § 9:2794 and the statute's legislative history. Lastly, Part I will explain the judicial standards regarding expert witness qualification and examine the basic structure of medical education. Part II will analyze Louisiana cases in which expert witness testimony was either admitted or excluded, based on differing judicial interpretations of § 9:2794, in light of the practice area of the defendant healthcare provider. Part III will examine how other states determine expert witness qualification in medical malpractice actions. In conclusion, Part IV will propose that the Louisiana Legislature should revise § 9:2794 to promote clarity and consistency for Louisiana medical malpractice litigants.

I. LOUISIANA'S MEDICAL MALPRACTICE LAW

In 1975, the Louisiana Legislature enacted the Louisiana Medical Malpractice Act.[35] The Act provides the limits associated with bringing a medical malpractice claim, such as a cap on damages, prescriptive periods, and standards governing expert testimony.[36] Nearly 30 years after enactment, the legislature added § 9:2794(D) to the Medical Malpractice Act.[37] Section 9:2794(D) provides additional standards regarding expert witness qualification in medical malpractice claims.[38]

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33. *See* Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 685 (La. Ct. App. 5th Cir 2014).

34. *See generally* LA. REV. STAT. § 9:2794(D)(3). *See also* Rickee N. Arntz, *Competency of Medical Expert Witnesses: Standards and Qualifications*, 42 CREIGHTON L. REV. 1359, 1379–80 (1990) (The "reluctance of physicians to testify against fellow physicians" often makes it difficult for plaintiff's attorneys to obtain expert testimony).

35. *See* LA. REV. STAT. § 40:1231 (2019); Nickel, *supra* note 7, at 313.

36. *See* LA. REV. STAT. §§ 40:1231, 9:5628, 9:2794.

37. 2003 La. Acts No. 581 (codified at LA. REV. STAT. § 9:2794(D)(3) (2003)).

38. LA. REV. STAT. § 9:2794.

A. The Push for Reform

As a response to the insurance crisis of the 1970s,[39] the Louisiana Legislature enacted the Medical Malpractice Act to "stabilize medical malpractice insurance rates and to assure the availability of affordable medical services to the public."[40] Insurance premiums[41] drastically rose during the 1970s as medical malpractice insurers rapidly exited the market due to significant financial losses.[42] In Louisiana alone, four malpractice insurers left the market, leaving only two providers.[43] When these four providers disappeared, premiums increased by at least 300%.[44] The drastic increase in premiums left doctors unable to afford the necessary malpractice insurance required to provide healthcare.[45] In the wake of the insurance crisis, there was a dispute over whether the Louisiana Medical Malpractice Act was necessary to help lower the rising premiums.[46] Proponents of medical malpractice reform argued that excessive jury awards were responsible for premium increases, as juries were often inclined to "irrationally overcompensate medical malpractice victims."[47] Opponents of medical malpractice reform argued that the premium increases were instead the result of normal, cyclical increases in costs.[48] Nonetheless, proponents of the Medical Malpractice Act prevailed.[49] The governor signed the act into law on August 4, 1975.[50]

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39. Nickel, *supra* note 7, at 315.

40. *Id.* at 313.

41. Julie Kagan, *Insurance Premium*, INVESTOPEDIA, https://www.investopedia.com/terms/i/insurance-premium.asp [https://perma.cc/6RT5-7RW9] (last updated Aug. 19, 2020) (defining an insurance premium as "the amount of money an individual or business pays for an insurance policy").

42. *See* Allison B. Lewis, *Unreasonable and Imperfect: Constitutionality of the Louisiana Medical Malpractice Act's Limit on Recovery*, 69 LA. L. REV. 417, 418 (2009); *see also* Nickel, *supra* note 7, at 314.

43. Nickel, supra note 7, at 315.

44. *Id.*

45. *See* Lewis, *supra* note 42, at 418 ("In a 1975 national survey, doctors in sixteen states reported 'difficulty' in obtaining coverage that they considered a precondition to their individual practices."); *see also* Nickel, *supra* note 7, at 315.

46. *See generally* Nickel, *supra* note 7, at 315.

47. *See* Lewis, *supra* note 42, at 418–19.

48. Nickel, *supra* note 7, at 315.

49. *See* Lewis, *supra* note 42, at 419.

50. *Id.*

B. The Framework of Louisiana's Medical Malpractice Act

The Medical Malpractice Act sets forth the procedure for bringing a claim against a qualified healthcare provider.[51] As a prerequisite to filing suit, a plaintiff must submit a medical malpractice claim to a medical review panel.[52] The panel, made up of three healthcare providers and a non-voting attorney, issues a decision on whether the defendant healthcare provider breached the applicable standard of care, which a party may then use as evidence.[53] Even if the panel concludes that the defendant did not breach the standard of care,[54] a plaintiff can still file suit.[55] If a plaintiff prevails in his medical malpractice claim, the damages as a whole cannot exceed $500,000.[56] The damages against the defendant, in his or her individual capacity, cannot exceed $100,000.[57] Anything in excess of $100,000 is covered by the Patient's Compensation Fund.[58] Further, a claim for medical malpractice prescribes[59] one year from the date of the

51. *See* LA. REV. STAT. § 40:1231.1 (2019) (defining "health care provider" as "a person, partnership, limited liability partnership, limited liability company, corporation, facility, or institution licensed or certified by this state to provide healthcare or professional services as a physician, hospital, nursing home, community blood center, tissue bank, dentist").

52. *See id.* § 40:1231.8 (providing that a medical review panel, made up of three health care providers and a non-voting attorney, issues an "expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care"); *see also* Nickel, *supra* note 7, at 314.

53. LA. REV. STAT. § 40:1231.8(H).

54. Since 2000, only 7% of medical review panels have found that a physician breached the standard of care. *See* Rebecca Catalanello, *Five Things to Know about Medical Malpractice in Louisiana*, NOLA.COM (Feb. 6, 2015), https://www.nola.com/entertainment_life/health_fitness/article_df9a17a8-3974-5b87-90db-ef030b27e5f9.html [https://perma.cc/E6MG-GUGV].

55. *See* LA. REV. STAT. § 40:1231.8; Nickel, *supra* note 7, at 314.

56. LA. REV. STAT. § 40:1231.2.

57. *Id.*

58. *See also Louisiana Patient's Compensation Fund*, LOUISIANA DIVISION OF ADMINISTRATION, https://www.doa.la.gov/Pages/pcf/Index.aspx [https://perma.cc/HM8Y-E44H] (last visited Apr. 12, 2021) ("The Fund was created in 1975 to provide an affordable and guaranteed medical malpractice coverage system for the private healthcare providers in the state."). The Patient's Compensation Fund acts as an "excess insurer" for private healthcare providers. *Id.* Healthcare providers enrolled in the Patient's Compensation Fund pay surcharges for protection from liability in excess of $100,000. *Id.*

59. A claim that has prescribed is invalid due to prescription. *See Prescribe*, BLACK'S LAW DICTIONARY (11th ed. 2019). Prescription is the extinction of a

alleged medical malpractice or one year from the date of plaintiff's discovery of the malpractice.[60] In any event, a medical malpractice claim prescribes if not filed within three years from the date of the alleged malpractice.[61] At trial, Louisiana Revised Statutes § 9:2794 governs the standards for expert witness qualification in a medical malpractice action.[62]

1. The Legislative History of Louisiana Revised Statutes § 9:2794

In 2003, the Louisiana Legislature introduced House Bill 520 (HB 520), now codified as § 9:2794(D), as an addition to Louisiana Revised Statutes § 9:2794.[63] HB 520 states the standards that a witness must meet to testify as an expert.[64] The standards introduced in the bill are nearly identical to those in the current version of § 9:2794(D), except for two major differences.[65] First, HB 520 provided that, in deciding whether a witness is qualified on the basis of training or experience, the "court shall consider whether" the witness has "substantial training or experience in an area relevant to the claim and is actively practicing medicine and rendering medical care services relevant to the claim."[66] Next, HB 520 permitted a court to depart from the aforementioned standard if a court determined that, under the circumstances, there was "a good reason to admit the testimony of the individual."[67]

Before passing HB 520, the House of Representatives amended the bill by deleting the provisions that allowed courts to depart from the proposed language.[68] After receiving HB 520, the Senate further amended

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claim due to a failure to exercise that claim within a certain period of time. *See Prescription*, BLACK'S LAW DICTIONARY (11th ed. 2019).

60. *See* LA. REV. STAT. § 9:5628. A filing of a request for a medical review panel suspends the running of prescription. *Id.* § 40:1231.8(A)(2)(a). However, the suspension of prescription ceases 90 days after all parties are notified of the panel's decision. *Id*. § 40:1231.8(L).

61. *See id.* § 9:5628.

62. *See id*. § 9:2794. *See generally* Leonard J. Nelson, III et al., *Medical Malpractice Reform in Three Southern States*, 4. J. HEALTH & BIOMEDICAL L. 69, 98 (2008).

63. 2003 La. Acts No. 581 (codified at LA. REV. STAT. § 9:2794(D) (2003)); *see* H.B. 520, Reg. Sess. (La. 2003).

64. 2003 La. Acts No. 581 (codified at LA. REV. STAT. § 9:2794(D) (2003)); H.B. 520, Reg. Sess. (La. 2003).

65. *See* H.B. 520, Reg. Sess. (La. 2003). *But see id.* § 9:2794(D).

66. H.B. 520, Reg. Sess. (La. 2003).

67. *Id.*

68. *Id.*

the House's version by changing "substantial training or experience in an area relevant to the claim and is actively practicing medicine and rendering medical care services relevant to the claim" to require that the court consider whether the witness has "substantial training or experience in an area *of medical practice* relevant to the claim and is actively practicing *in that area*."[69] The bill's initial language directed courts to consider whether the witness provided healthcare services "in an area relevant to the claim," without any focus on whether the witness was "actively practicing *in that area*" of "*medical practice* relevant to the claim."[70] The Senate's addition of the words "medical practice" and "in that area" demonstrates that the Senate viewed both the witness's area of medicine and his active practice in that area as important in determining whether he is qualified to testify against a medical malpractice defendant, whose "area of medical practice" is that which is "relevant to the claim."[71]

The amendments to HB 520, and the bill's final passage including those amendments, demonstrate that the legislature did not intend for courts to have unbridled discretion in establishing expert witness qualification under the statute.[72] Instead, the legislature intended for courts to look to both the witness's field of medicine and that of the defendant in ruling on expert witness qualification.[73]

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69. *See* H.B. 520, Reg. Sess., Summary of Senate Amendments (La. 2003) (emphasis added).

70. *See* H.B. 520, Reg. Sess. (La. 2003) (emphasis added).

71. *See* H.B. 520, Reg. Sess., Summary of Senate Amendments (La. 2003); LA. REV. STAT. § 9:2794(D) (2018).

72. *See* H.B. 520, Reg. Sess., Summary of Senate Amendments (La. 2003); 2003 La. Acts No. 581 (codified at LA. REV. STAT. § 9:2794(D)(3) (2003)).

73. *See* H.B. 520, Reg. Sess. When the bill was originally introduced, subsection (D)(3) provided that the court shall consider whether "the witness is board certified or has other substantial training or experience in an area of medical practice relevant to the claim and is actively practicing medicine and rendering medical care services relevant to the claim" to determine whether a witness is qualified on the basis of training or experience. *Id.* After the bill's final passage, which included the adoption of the Senate's amendments, subsection (D)(3) provided that the court shall consider whether the witness "has other substantial training or experience in an area of medical practice relevant to the claim and is actively practicing in that area" to determine if a witness qualifies as an expert on the basis of training or experience. 2003 La. Acts No. 581 (codified at LA. REV. STAT. § 9:2794(D) (2003)); H.B. 520, Reg. Sess., Summary of Senate Amendments (La. 2003).

2. Louisiana Revised Statutes § 9:2794 Today

Louisiana Revised Statutes § 9:2794 explains the plaintiff's burden of proof in a medical malpractice lawsuit and the guidelines that a witness must meet to qualify as an expert.[74] The plaintiff must establish: (1) the relevant standard of care, or the defendant's duty; (2) a breach of that duty; (3) that the plaintiff suffered injury; and (4) that the injuries were a "proximate result" of the defendant's breach.[75] The applicable standard of care depends on whether the defendant is a general practitioner or a specialist.[76] When the defendant is a general practitioner, the plaintiff must prove the standard of care exercised by providers practicing in "a similar community or locale and under similar circumstances" to the defendant.[77] When the defendant is a specialist, the plaintiff must prove the standard of care owed by healthcare providers in that "involved medical specialty."[78] Thus, the plaintiff must prove a more specific standard of care for specialists.[79]

Section 9:2794(D)(1) provides the standards a witness must meet to qualify as an expert regarding the applicable standard of care.[80] A witness must meet all of the following requirements: (1) the witness is practicing medicine at the time he offers testimony or at the time the claim arose; (2) the witness has knowledge of the "accepted standards of medical care" involved in the claim; (3) the witness is "qualified on the basis of training or experience" to testify as to the those standards; and (4) the witness is licensed to practice medicine or is a graduate of an accredited medical school.[81] Section 9:2794(D)(2) states that "practicing medicine" or "medical practice" under the statute includes teaching students or residents at an accredited medical school.[82]

Section 9:2794(D)(3) directs courts to consider whether the witness is "actively practicing" in an area of medicine "relevant to the claim" in

74. *See* LA. REV. STAT. § 9:2794 (2018).
75. *See id.* § 9:2794(A).
76. *See id.* § 9:2794(A)(1).
77. *See id.*
78. *See id.*; Steib v. Waguespack, 168 So. 3d 410, 414 (La. Ct. App. 1st Cir. 2014). For example, when the defendant is an emergency room physician, a recognized medical specialty, the plaintiff must prove the standard of care owed by an emergency room physician. *See* Lee v. Quinn, 229 So. 3d 13, 17 (La. Ct. App. 1st Cir. 2017).
79. *See* LA. REV. STAT. § 9:2794(A)(1).
80. *See id.* § 9:2794(D)(1).
81. *See id.*
82. *See id.* § 9:2794(D)(2).

ruling whether a witness is "qualified on the basis of training or experience" under § 9:2794(D)(1).[83] Finally, § 9:2794(D)(4) provides that courts must apply the standards provided in (D)(1), (D)(2), and (D)(3) to establish whether a witness is qualified to testify as an expert.[84] Although § 9:2794 assists courts' rulings on expert witness qualifications, specifically in medical malpractice cases, the U.S. Supreme Court and the Louisiana Supreme Court have established factors that provide courts with general guidance when establishing whether a witness qualifies as an expert in any type of case.[85]

C. Daubert *and the Gatekeeper,* Foret*, and § 9:2794*

The U.S. Supreme Court's seminal holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* marked the advent of judicial standards, from the nation's highest court, that assist state and federal courts evaluating expert witness testimony.[86] The plaintiffs in *Daubert*, two minor children and their parents, sued for damages alleging that Bendectin, an anti-nausea medication marketed by the defendant, caused the children to be born with birth defects.[87] The district court ruled that the plaintiff's evidence that Bendectin caused birth defects was inadmissible because it "had not been published or subjected to peer review," and the court dismissed the plaintiff's suit on a motion for summary judgment.[88] After the Ninth Circuit Court of Appeals affirmed the district court's decision,[89] the Supreme Court granted certiorari "in light of sharp divisions among the courts regarding the proper standard for the admission of expert witness

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83. *See id.* § 9:2794(D)(1), (D)(3).

84. *See id.* § 9:2794(D)(1)–(4).

85. *See generally id.* § 9:2794; Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993); State v. Foret, 628 So. 2d 1116, 1123–24 (La. 1993); Cheairs v. State ex rel. Dept. of Transp. & Dev., 861 So. 2d 536, 542 (La. 2003).

86. *See Daubert*, 509 U.S. 579.

87. *Id.* at 582; s*ee also* Katherine M. Atikian, *Nasty Medicine:* Daubert v. Merrell Dow Pharmaceuticals, Inc. *Applied to a Hypothetical Medical Malpractice Case*, 27 LOY. L.A. L. REV. 1513, 1515–16 (1994).

88. *Daubert*, 509 U.S. at 584.

89. The Ninth Circuit cited *Frye v. United States* in holding that the studies introduced by the plaintiffs were not "generally accepted" by the relevant scientific community. *See Daubert*, 509 U.S. at 584; Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) ("While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.").

testimony."[90] In providing standards for state and federal courts to use to determine whether to admit expert testimony,[91] the *Daubert* Court held that Federal Rule of Evidence 702[92] requires the trial judge to assume a "gatekeeping role" to ensure that all scientific testimony or evidence is relevant and reliable.[93] Although not exclusive and not necessarily applicable to every case,[94] *Daubert* introduced four "general observations" to assist the trial judge in ruling whether the expert witness testimony is relevant and reliable scientific knowledge under Rule 702.[95] The "general observations" are: (1) whether a theory or technique has been tested; (2) whether a theory or technique has been peer reviewed and published; (3) the known or potential rate of error; and (4) general acceptance.[96]

In *State v. Foret,* the Louisiana Supreme Court adopted *Daubert*'s "general observations" based on the fact that Federal Rule of Evidence 702 and Louisiana Code of Evidence article 702 are identical.[97] The court also viewed the *Daubert* standards as helpful, though not required, in establishing reliability.[98] Following its decision in *State v. Foret*, the Louisiana Supreme Court again examined *Daubert*'s applicability to Louisiana Code of Evidence article 702 in *Cheairs v. State ex rel. Department of Transportation & Development*.[99] The defendant in the

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90. *Daubert*, 509 U.S. at 585.

91. *Id.*

92. FED. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: the expert's scientific, technical, or specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case.").

93. *Daubert*, 509 U.S. at 589.

94. The Supreme Court in articulating the *Daubert* factors did not mandate their application to every case involving scientific, expert testimony. *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150 (1999) ("The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence."). The *Daubert* factors do not apply "for all cases and for all the time." *Id.*

95. *Daubert*, 509 U.S. at 592–94.

96. *Id.* at 593–94; *see also* Atikian, *supra* note 87, at 1521.

97. State v. Foret, 628 So. 2d 1116, 1123–24 (La. 1993); *see* FED R. EVID. 702; LA. CODE. EVID. art. 702 (2019).

98. *Foret*, 628 So. 2d at 1123.

99. Cheairs v. State ex rel. Dept. of Transp. & Dev., 861 So. 2d 536, 538 (La. 2003).

case, the Department of Transportation and Development, argued that the court of appeal misapplied *Daubert* and erred in affirming the district court's ruling that the plaintiff's traffic accident reconstructionist was qualified to testify as an expert.[100] In affirming the court of appeal's ruling, the Louisiana Supreme Court held that the *Daubert* factors do not directly address whether an expert has the proper qualifications to testify.[101] Rather, the factors address whether an expert's methodology is reliable.[102] Although *Cheairs* did not reject *Daubert* and *Foret*, the court adopted three principles providing "more comprehensive guidance" to district courts ruling on whether to admit expert witness testimony.[103]

Louisiana courts determine expert witness qualifications pursuant to § 9:2794 in relation to the statute's provisions and the *Daubert* and *Cheairs* factors.[104] The *Cheairs* court's three principles for the admission of expert testimony are:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact through the application of scientific, technical, or specialized expertise, to understand the evidence or determine a fact in issue.[105]

The Louisiana Supreme Court, however, has not adopted a rule requiring a *Daubert* hearing each time a litigant challenges an expert's qualifications.[106] Where a judge does decide to employ an analysis under *Daubert* and *Cheairs*, § 9:2794 serves as guidance for the judge in establishing whether the witness meets the first prong of *Cheairs*: whether "the expert is qualified to testify competently regarding the matters he intends to address."[107] Further, § 9:2794 directs a judge to examine whether a medical witness possesses the "specialized experience" needed

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100. *Id.* at 539.
101. *Id.* at 538.
102. *Id.*
103. *See id.* at 542–43.
104. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579; State v. Foret, 628 So. 2d 1116, 1123–24 (La. 1993); *Cheairs*, 861 So. 2d at 538; Thomas v. Drew, 240 So. 3d 980, 983 (La. Ct. App. 3d Cir. 2018).
105. *See Cheairs*, 861 So. 2d at 542.
106. *See* Pertuit v. Jefferson Parish Hosp. Serv. Dist. No. 2, 170 So. 3d 1106, 1111–12 (La. Ct. App. 5th Cir. 2015). *See generally Cheairs*, 861 So. 2d at 536.
107. *See Cheairs*, 861 So. 2d at 542.

to help the plaintiff meet the burden of proof.[108] Given the great number of medical disciplines that exist, including specialty and sub-specialty fields, litigants have difficulty establishing expert witness qualification.[109] As the statute requires a witness to "actively practice" in an "area of medical practice relevant to the claim," the witness's medical education is crucial in the determination of expert witness qualification.[110]

D. Disagreement in Expert Witness Qualification

An expert witness in a medical malpractice case offers an opinion as to the relevant standard of care and the defendant healthcare provider's breach of that standard of care; thus, it is vital that the witness be adequately trained in the defendant's same field of medicine.[111] Due to the variance in the duration of post-medical school education and training between different fields of medical practice, a proposed expert witness and a defendant may be of different levels of medical education.[112] Because a plaintiff's proposed expert witness will give his opinion as to the applicable standard of care and whether there was a breach in that standard of care,[113] a detailed examination of a witness's credentials is necessary to ensure that the witness is qualified to offer that opinion.[114] Since medical education can vary according to specialty, it is crucial that § 9:2794(D)(3) contains a clear requirement that to be an expert, one must actively

108. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–48 (1999); *see also* LA. REV. STAT. § 9:2794 (2018).

109. *See Anesthesiology to Urology: Your Ultimate List of Medical Specialties and Subspecialties*, ST. GEORGE UNIVERSITY (Dec. 12, 2011), https://www.sgu.edu/blog/medical/ultimate-list-of-medical-specialties/ [https://perma.cc/GPL8-NC9D]; *Specialty and Subspecialty Certificates*, AMERICAN BOARD OF MEDICAL SPECIALTIES, https://www.abms.org/member-boards/specialty-subspecialty-certificates/ [https://perma.cc/M8MG-C499]. *See generally* Lee v. Quinn, 229 So. 2d 13 (La. Ct. App. 1st Cir. 2017); Pennington v. Ochsner Clinic Found., 245 So. 3d 58 (La. Ct. App. 4th Cir. 2018).

110. *See* LA. REV. STAT. § 9:2794(D). *See generally Anesthesiology to Urology*, *supra* note 109; *Specialty and Subspecialty Certificates*, *supra* note 109.

111. *See generally* LA. REV. STAT. § 9:2794; *Anesthesiology to Urology, supra* note 109; *Specialty and Subspecialty Certificates*, *supra* note 109.

112. *See generally* ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE ROAD TO BECOMING A DOCTOR (2020), https://www.aamc.org/system/files/2019-12/Road_to_Becoming_a_Doctor_December%202019.pdf [https://perma.cc/TY5Q-K4LE].

113. LA. REV. STAT. § 9:2794; Schultz v. Guoth, 57 So. 3d 1002 (La. 2011); Pfiffner v. Correa, 643 So. 2d 1228, 1233 (La. 1994).

114. *See* ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *supra* note 112.

practice, and thus be highly educated in, the defendant's same field of medicine.[115]

In interpreting § 9:2794, some courts already adopt the "actively practicing" approach and hold that the statute requires a witness to actively practice in the same field of medicine as the defendant to be deemed an expert.[116] The First Circuit Court of Appeal, in *Penn v. CarePoint Partners of Louisiana, L.L.C.*, excluded testimony from a cardiologist who opined that the defendant-hospitalist breached the standard of care.[117] In *Franklin v. Tulane University Hospital & Clinic*, the Fourth Circuit Court of Appeal excluded testimony from a cardiothoracic surgeon[118] and critical care specialist.[119] The Fourth Circuit ruled that the plaintiff had to introduce testimony from an expert in either of the defendants' same fields of medicine, pediatric nephrology[120] or pediatric critical care, to satisfy her burden of proof under § 9:2794.[121]

Conversely, some courts permit a witness to testify as an expert based on the witness's knowledge of the subject matter or based on an overlap between the witness's field of medicine and the defendant's field of medicine.[122] For example, in *Pennington v. Ochsner Clinic Foundation* the

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115. *See* LA. REV. STAT. § 9:2794(D)(3).

116. *See* Lee v. Quinn, 229 So. 2d 13, 18 (La. Ct. App. 1st Cir. 2017); Penn v. CarePoint Partners of La., L.L.C., 181 So. 3d 26, 31–32 (La. Ct. App. 1st Cir. 2015).

117. *See Penn*, 181 So. 3d at 31–32; *What is a Hospitalist*?, AMERICAN BOARD OF PHYSICIAN SPECIALTIES, https://www.abpsus.org/hospitalist [https://perma.cc/3RW9-8RL7] (last visited Mar. 19, 2021) (defining a hospitalist as "a physician who must master the specific skill set and knowledge required to treat and care for patients in the hospital").

118. A cardiothoracic surgeon specializes in surgery of the heart, lungs, and other organs in the chest. *What Is a Cardiothoracic Surgeon*, THE SOCIETY OF THORACIC SURGEONS?, https://ctsurgerypatients.org/what-is-a-cardiothoracic-surgeon [https://perma.cc/PG94-7G22] (last visited Mar. 19, 2021).

119. *See* Franklin v. Tulane Univ. Hosp. & Clinic, 972 So. 2d 369, 376 (La. Ct. App. 4th Cir. 2007). A critical care specialist cares for seriously injured or ill patients, and patients who have undergone major surgery. *Critical Care*, MAYO CLINIC (July 12, 2019), https://www.mayoclinic.org/departments-centers/critical-care/sections/overview/ovc-20399554 [https://perma.cc/JYG7-4HAB].

120. Nephrology involves the diagnosis and treatment of kidney diseases. *Nephrology*, AMERICAN COLLEGE OF PHYSICIANS, https://www.acponline.org/about-acp/about-internal-medicine/subspecialties/nephrology [https://perma.cc/46QC-VTWP] (last visited Mar. 19, 2021).

121. *See Franklin*, 972 So. 2d at 376; LA. REV. STAT. § 9:2794 (2018).

122. *See* Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018); Harper v. Minor, 86 So. 3d 690, 696 (La. Ct. App. 2d Cir. 2012);

Fourth Circuit Court of Appeal, marking a departure from its prior decision in *Franklin v. Tulane University Hospital & Clinic*,[123] admitted expert testimony from a general surgeon, even though he had never practiced in the defendants' fields of medicine—orthopedic surgery and hospital medicine.[124] The Fourth Circuit in *Pennington* held that the witness qualified as an expert based on his knowledge of the subject matter.[125] Also, the Fifth Circuit Court of Appeal in *Kieffer v. Plunkett-Kuspa* ruled that a neurologist was a qualified expert in internal medicine based on the neurologist's testimony that there was an overlap between the two fields of medicine.[126] The varying and unpredictable judicial interpretations of § 9:2794 force plaintiffs and defendants to spend additional time and money—on already costly claims—to litigate disputes over expert witness qualification.[127]

II. ADMIT OR EXCLUDE: WHO QUALIFIES AS AN EXPERT UNDER § 9:2794?

To the detriment of the litigant, Louisiana courts publish conflicting decisions as to whether § 9:2794(D)(3) requires a witness to practice in the same area of medicine as the defendant to qualify as an expert under § 9:2794(D)(1).[128] In particular, the Fourth Circuit's inconsistency among its own opinions exacerbates the inability of litigants to receive clear direction in the admission of expert witnesses.[129] The First and Fourth

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see also Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 684–85 (La. Ct. App. 5th Cir 2014).

123. *See Franklin*, 972 So. 2d at 376.

124. *See Pennington*, 245 So. 3d at 64.

125. *See id.*

126. *See Kieffer*, 138 So. 3d at 684–85.

127. *See id.*; *Pennington*, 245 So. 3d at 64. *But see Franklin*, 972 So. 2d at 376. *See generally* Peeples & Harris, *supra* note 10, at 710–12.

128. *See* LA. REV. STAT. § 9:2794(D)(1) (2018); *id.* § 9:2794(D)(3); Pertuit v. Jefferson Par. Hosp. Serv. Dist. No. 2, 170 So. 3d 1106, 1110 (La. Ct. App. 5th Cir. 2015) ("R.S. 9:2794 has no absolute requirement that a proffered expert must practice in the same specialty as the defendant or be board certified in that specialty."). *But see* Penn v. CarePoint Partners of La., L.L.C., 181 So. 3d 26, 31 (La. Ct. App. 1st Cir. 2015); Steib v. Waguespack, 168 So. 3d 410, 414 (La. Ct. App. 1st Cir. 2014) ("Where the defendant practices in a practices in a particular specialty and the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved," the plaintiff must prove the standard of care of "practiced by physicians within that specialty.").

129. *See* Franklin v. Tulane Univ. Hosp. & Clinic, 972 So. 2d 369 (La. Ct. App. 4th Cir. 2007). *But see Pennington*, 245 So. 3d 58.

Circuits interpret § 9:2794 as requiring that the witness practice in the same field of medicine as the defendant.[130] Conversely, the Fourth Circuit also finds, along with the Second and Fifth Circuits, that merely a witness's knowledge of the defendant's field of medicine can render him qualified as an expert "on the basis of training or experience."[131] These circuits, however, view the witness's area of practice only as a factor that the court has discretion to consider.[132]

A. Exclusion of Testimony Where the Witness Practiced in a Different Field Than the Defendant

The First and Fourth Circuit Courts of Appeal apply the literal language of § 9:2794(D) and exclude testimony from a potential expert witness practicing in a different field of medicine than the defendant, because that witness does not qualify as an expert "on the basis of training or experience."[133] These courts, specifically in *Penn v. CarePoint Partners of Louisiana, L.L.C*, *Lee v. Quinn*, and *Franklin v. Tulane University Hospital & Clinic*, require the witness's field of medicine to match the defendant's for the witness to qualify as an expert.[134]

1. Penn v. CarePoint Partners of Louisiana, L.L.C.*: A Plain Reading of § 9:2794*

In *Penn v. CarePoint Partners of Louisiana, L.L.C.*, plaintiff Danny Penn filed a medical malpractice action against Our Lady of the Lake Regional Medical Center (OLOL) after being diagnosed with Dandy's Syndrome.[135] Doctors at OLOL administered Gentamicin, an antibiotic used to treat and prevent bacterial infection, which caused Penn's Dandy's

130. Lee v. Quinn, 229 So. 2d 13, 18 (La. Ct. App. 1st Cir. 2017); *Penn*, 181 So. 3d at 31–32.

131. *See* Harper v. Minor, 86 So. 3d 690, 696 (La. Ct. App. 2d Cir. 2012); *Pennington*, 245 So. 3d at 64.

132. *See Harper*, 86 So. 3d at 696; *Pertuit*, 170 So. 3d at 1110.

133. LA. REV. STAT. § 9:2794(D); *see Penn*, 181 So. 3d at 31–32; *Lee*, 229 So. 2d at 18; *see also Franklin*, 972 So. 2d at 376.

134. *See Penn*, 181 So. 3d at 31–32; *Lee*, 229 So. 2d at 18; *Franklin*, 972 So. 2d at 376.

135. *Penn*, 181 So. 3d at 28; *see also* Daniel J. DeNoon, *Dizziness Not Always Child's Play*, WEBMD (Sept. 17, 2001), https://www.webmd.com/healthy-aging/features/dizziness-not-always-childs-play#1 [https://perma.cc/9ZP7-W9SF] (Dandy's Syndrome is characterized as dizziness and loss of balance resulting from the administering of an antibiotic that is toxic for the ears).

Syndrome.[136] Penn claimed that Dr. Giarusso, a hospitalist[137] who treated Penn at OLOL, breached the standard of care by administering an incorrect dosage of Gentamicin.[138] OLOL filed a motion for summary judgment[139] seeking to dismiss Penn's suit.[140] Penn filed an opposition to OLOL's motion for summary judgment and in support attached the affidavit of Dr. Shih, a board-certified cardiologist.[141] Dr. Shih stated in the affidavit that Dr. Giarusso breached the standard of care when he administered an incorrect dosage of Gentamicin.[142] At the hearing on the motion for summary judgment, the district court found that Dr. Shih was "not qualified," granted OLOL's motion, and dismissed Penn's claim.[143]

On appeal, the First Circuit found that Dr. Shih's affidavit was inadmissible, affirming the district court's ruling that Dr. Shih, as an expert in cardiology, was not qualified "on the basis of training or experience" to offer an expert opinion regarding the standard of care applicable to a hospitalist.[144] The First Circuit noted that Dr. Shih's affidavit offered only his expert opinion in cardiology, and, therefore, it would not assist the trier of fact in determining whether Dr. Giarusso breached the standard of care that a hospitalist owes to patients.[145] The *Penn* court's ruling indicates that a witness does not qualify as an expert on the standard of care applicable to the defendant when that witness does not actively practice in the defendant's field of medicine.[146]

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136. *Penn*, 181 So. 3d at 27–29.

137. *See What is a Hospitalist?*, *supra* note 117 (defining a hospitalist as "a physician who must master the specific skill set and knowledge required to treat and care for patients in the hospital").

138. *Penn*, 181 So. 3d at 28.

139. *See Motion for Summary Judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a motion for summary judgment as "a request that the court enter judgment without a trial because there is no genuine issue of material fact to be decided by a fact-finder—that is, because the evidence is legally insufficient to support a verdict in the nonmovant's favor").

140. *Penn*, 181 So. 3d at 28.

141. *Id.* at 28–29.

142. *Id.* at 32.

143. *Id.* at 29–30.

144. *Id.* at 32 ("The specialist . . . is held under the statute to the degree of care ordinarily practiced by physicians within his medical specialty."); *see* LA. REV. STAT. § 9:2794(D) (2018).

145. *Penn*, 181 So. 3d at 32.

146. *Id.* at 31–32.

2. Lee v. Quinn*: The First Circuit's Uniform Interpretation of § 9:2794 Following Its Decision in* Penn v. CarePoint Partners of Louisiana, L.L.C.

In *Lee v. Quinn*, the First Circuit relied on its opinion in *Penn* when again tasked with establishing expert witness qualification.[147] In *Lee v. Quinn*, plaintiff Anjel Lee filed a medical malpractice action on behalf of her infant son against OLOL and Dr. Boudreaux, an emergency room physician at OLOL.[148] Lee brought her 13-month-old son, Landon Lee, to OLOL after he began experiencing respiratory distress and vomiting.[149] Medical staff transported Landon Lee by helicopter to the ECMO unit at Ochsner Medical Center where he later died due to an enlarged heart.[150] In her petition, Anjel Lee alleged that Dr. Boudreaux provided improper care and treatment to Landon by failing to timely and properly perform a clinical exam, diagnose him, order appropriate tests and treatments, and prescribe the proper medications.[151] OLOL and Dr. Boudreaux filed a motion for summary judgment to dismiss Lee's claim.[152] In opposition, Lee introduced an affidavit from Dr. Meliones, a board-certified pediatric cardiologist specializing in pediatric critical care.[153] At the summary judgment hearing, the district court granted the defendants' motion and held that Dr. Meliones did not qualify as an expert in emergency room medicine.[154]

On appeal, the First Circuit, in affirming the district court's ruling, held that Dr. Meliones's affidavit offered only his expert opinion in cardiology and failed to show that he was qualified "on the basis of training or experience" to offer an expert opinion as to the standard of care owed by an emergency room physician.[155] As a board-certified pediatric cardiologist, Dr. Meliones specialized in pediatric critical care and ECMO ventilation.[156] He knew how to treat children with heart problems, like

147. *See* Lee v. Quinn, 229 So. 2d 13 (La. Ct. App. 1st Cir. 2017); *see also Penn*, 181 So. 3d at 31–32.
148. *Lee*, 229 So. 2d at 14.
149. *Id.*
150. *Id.*
151. *See Petition,* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining petition as "the first pleading in a lawsuit"); *Lee*, 229 So. 2d at 14.
152. *Lee*, 229 So. 2d at 15.
153. *Id.*
154. *Id.* at 16.
155. *See* LA. REV. STAT. § 9:2794(D) (2018); *Lee*, 229 So. 2d at 18.
156. *See* LA. REV. STAT § 9:2794(D); *Lee*, 229 So. 2d at 18.

Landon Lee.[157] Regardless, the court excluded Dr. Meliones's affidavit and reasoned that a witness's knowledge of the subject matter or level of specialization is not relevant when determining whether a witness is qualified as an expert "on the basis of training or experience" under § 9:2794.[158] A plain-reading interpretation of § 9:2794(D), as conducted first by the *Penn* court and again by the court in *Lee*, supports a finding that a witness cannot offer an expert opinion concerning the standard of care owed by a defendant when the witness does not practice in the defendant's field of medicine.[159]

3. Franklin v. Tulane University Hospital & Clinic*: Exclusion of Testimony Where the Witness's Medical Field Did Not Match the Defendant's*

In addition to the First Circuit, the Fourth Circuit also applies a literal approach to § 9:2794(D).[160] In *Franklin v. Tulane University Hospital & Clinic*, plaintiff Brenda Franklin filed a medical malpractice suit against Dr. Boineau and Dr. Akingbola on behalf of her seven-year-old daughter, Shaylon Day.[161] Day arrived at Tulane Hospital experiencing dehydration, low blood pressure, and shock.[162] She was transferred to the Pediatric Intensive Care Unit and placed under the care of Dr. Boineau, a pediatric nephrologist, and Dr. Akingbola, a pediatric critical care specialist.[163] The doctors diagnosed Day with a possible ruptured appendix and kidney failure.[164] Day's condition soon worsened.[165] She suffered cardiac arrest and the doctors resuscitated her, but later she experienced multiple seizures that left her in a persistent vegetative state.[166] Franklin filed a

157. *See Lee*, 229 So. 2d at 18.

158. LA. REV. STAT § 9:2794(D); *see Lee*, 229 So. 2d at 18.

159. LA. REV. STAT. § 9:2794(D); *see Lee*, 229 So. 2d at 17–18.

160. *See* LA. REV. STAT. § 9:2794; Franklin v. Tulane Univ. Hosp. & Clinic, 972 So. 2d 369 (La. Ct. App. 4th Cir. 2007); *Lee*, 229 So. 2d at 13.

161. *Franklin*, 972 So. 2d at 370.

162. *Id.*

163. *Id.*; *see also id.* at 370 n.3 (defining a nephrologist as "a specialist in the treatment of kidney insufficiency and kidney disease").

164. *Id.* at 370–71.

165. *See id.* at 371.

166. *Id.*; *see also* Stephen Ashwal M.D. et al., *Medical Aspects of the Persistent Vegetative State*, 330 NEW J. MED. 1499 (1994), *available at* https://www.nejm.org/doi/full/10.1056/NEJM199405263302107 [https://perma.cc/AN4N-S AD3] (defining persistent vegetative state as "a vegetative state present one month after acute trauma or nontraumatic brain injury

medical malpractice claim, alleging that Dr. Boineau and Dr. Akingbola failed to promptly and properly diagnose and treat Day.[167] In discovery, Franklin identified Dr. Palder, a pediatric general surgeon, and Dr. Viator, a pediatrician and emergency room physician, as potential expert witnesses.[168] At their depositions, Dr. Palder and Dr. Viator separately testified that both Dr. Boineau and Dr. Akingbola did not breach the standard of care.[169]

Based on the testimony of Franklin's witnesses, the defendants filed a motion for summary judgment seeking to dismiss her claim.[170] In her opposition, Franklin submitted an affidavit from Dr. Adams, a cardiothoracic surgeon and critical care specialist, who opined that the defendants failed to properly treat and diagnose Day.[171] The trial court granted the defendants' motion for summary judgment and dismissed Franklin's claim on the grounds that Dr. Adams was not qualified to render an expert opinion on pediatric nephrology or pediatric critical care.[172] On appeal, the Fourth Circuit affirmed the trial court's ruling and found that to defeat the motion for summary judgment, Franklin had to submit an affidavit or deposition testimony from a doctor specializing in pediatric nephrology and pediatric critical care, the fields of medicine the defendants practiced.[173] The Fourth Circuit excluded Dr. Adams's testimony under § 9:2794 because Dr. Adams did not practice, nor had he ever practiced, pediatric nephrology or pediatric critical care.[174] The *Franklin*, *Penn*, and *Lee* courts' holdings demonstrate that § 9:2794's plain language necessitates the exclusion of testimony from a purported

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or lasting for at least one month in patients with degenerative or metabolic disorders or developmental malformations").

167. Petition for Damages for Permanent and Irreversible Brain Damage at 13, Franklin v. Tulane Univ. Hosp. & Clinic, 972 So. 2d 369 (La. Ct. App. 4th Cir. 2007) (No. 20052307).

168. *Franklin*, 972 So. 2d at 372; *see also Discovery*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining discovery as "compulsory disclosure, at a party's request, of information that relates to litigation").

169. *Franklin*, 972 So. 2d at 372–73.

170. *Id.* at 373; *see Motion for Summary Judgment*, *supra* note 139 (defining a motion for summary judgment as "a request that the court enter judgment without a trial because there is no genuine issue of material fact to be decided by a fact-finder—that is, because the evidence is legally insufficient to support a verdict in the nonmovant's favor").

171. *Franklin*, 972 So.2d at 373.

172. *Id.* at 373–74 n.8.

173. *Id.* at 376.

174. *Id.*

expert who practices in a different area of medicine than the defendant healthcare provider.[175]

B. Admission of Testimony Where the Witness Practiced in a Different Field Than the Defendant

The Fourth, Second, and Fifth Circuit Courts of Appeal depart from the literal language of § 9:2794 in ruling on expert witness testimony.[176] All three circuits find witnesses to be experts "qualified on the basis of training or experience" in instances where the witnesses are not "actively practicing" in the "area of medical practice relevant to the claim."[177] The Fourth Circuit's decisions, specifically, indicate the inconsistency and ambiguity surrounding expert witness qualification under § 9:2794.[178] As noted above, the Fourth Circuit, in *Franklin v. Tulane University Hospital & Clinic,* followed the plain language of the statute and excluded the witness's testimony because the witness practiced in a different field of medicine than the defendants.[179] Eleven years later, however, the Fourth Circuit reached an opposite conclusion in *Pennington v. Ochsner Clinic Foundation*.[180] The Second Circuit in *Harper v. Minor* and the Fifth Circuit in *Kieffer v. Plunkett-Kuspa* also allowed expert testimony from witnesses in different fields of medical practice than the defendants.[181]

1. Pennington v. Ochsner Clinic Foundation*: The Fourth Circuit's Shift From Its* Franklin *Decision*

Unlike its ruling in *Franklin*,[182] the Fourth Circuit in *Pennington v. Ochsner Clinic Foundation* disregarded § 9:794 entirely and held that a

175. *See* LA. REV. STAT. § 9:2794 (2018); *see also Franklin*, 972 So. 2d at 376; Penn v. CarePoint Partners of La., L.L.C., 181 So. 3d 26, 31–32 (La. Ct. App. 1st Cir. 2015); Lee v. Quinn, 229 So. 2d 13, 18 (La. Ct. App. 1st Cir. 2017).

176. *See* Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018); Harper v. Minor, 86 So. 3d 690, 696 (La. Ct. App. 2d Cir. 2012); Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 684–85 (La. Ct. App. 5th Cir 2014).

177. *See Pennington*, 245 So. 3d at 64; *Harper*, 86 So. 3d at 696; *Kieffer*, 138 So. 3d at 684–85.

178. *See Franklin*, 972 So. 2d 369. *But see Pennington*, 245 So. 3d 58.

179. The Fourth Circuit held that without offering testimony from a witness practicing pediatric nephrology or pediatric critical care—the defendants' fields of medicine—the plaintiffs could not satisfy their burden of proof under Louisiana Revised Statutes § 9:2794. *Franklin*, 972 So. 2d at 376.

180. *Pennington*, 245 So. 3d at 58.

181. *See Harper*, 86 So. 3d at 690; *Kieffer*, 138 So. 3d at 682.

182. *See Franklin*, 972 So. 2d at 369.

witness's "knowledge of the requisite subject matter" controls whether a court will deem him a qualified expert.[183] In *Pennington v. Ochsner Clinic Foundation*, plaintiff Dorothy Pennington filed a medical malpractice lawsuit against Dr. Todd, Dr. Hawawini, Dr. Jones, and Dr. Ulfers on behalf of her brother Richard Smallwood.[184] Smallwood underwent knee surgery at Ochsner-Baptist Hospital and died after suffering a pulmonary embolism.[185] In her petition, Pennington alleged that Doctors Jones and Ulfers, both hospitalists, failed to order that Smallwood take appropriate anticoagulant medication[186] post-surgery.[187] The petition further alleged that Dr. Todd, an orthopedic surgeon,[188] failed to prescribe the requisite medication.[189] Pennington offered expert witness testimony from Dr. Frangipane, a board-certified general surgeon.[190] Dr. Frangipane testified to the standard of care applicable to hospitalists and orthopedic surgeons and argued that the defendants breached the standard of care relevant to each.[191] The trial court admitted Dr. Frangipane's testimony but found that the testimony did not establish the applicable standards of care and ruled in favor of the defendants.[192] Pennington subsequently appealed the ruling.[193]

On appeal, Pennington argued that Dr. Frangipane established the standards of care applicable to all of the defendants.[194] In answering the appeal, the defendants argued that Dr. Frangipane, as a general surgeon,

183. *See Pennington*, 245 So. 3d at 64.

184. *Id.* at 60.

185. *Id.* A pulmonary embolism is a blockage in the arteries of the lungs caused by blood clots. *Pulmonary Embolism*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/pulmonary-embolism/symptoms-causes/syc-20354647 [https://perma.cc/96SS-24NY] (last visited Apr. 12, 2021).

186. Anticoagulants reduce the risk of blood clots, which can lead to a heart attack or stroke. *Anticoagulant and Antiplatelet Drugs*, HEALTHLINE, https://www.healthline.com/health/anticoagulant-and-antiplatelet-drugs [https://perma.cc/JC5L-NVQ7] (last visited Apr. 12, 2021).

187. *Pennington*, 245 So. 3d at 60–64.

188. Orthopedic surgeons specialize in the "diagnosis and treatment of disorders of the bones, joints, ligaments, tendons, muscles and nerves." *Orthopedic Surgery*, MAYO CLINIC, https://www.mayoclinic.org/departments-centers/orthopedic-surgery/sections/overview/ovc-20126754 [https://perma.cc/B4QL-FQQA] (last visited Apr. 12, 2021).

189. *Pennington*, 245 So. 3d at 60.

190. *Id.* at 64.

191. *Id.* at 63–64.

192. *Id.* at 61.

193. *Id.*

194. *Id.* at 63–64.

was not qualified to testify as an expert on the applicable standards of care because he had never practiced in orthopedic surgery and hospital medicine, the specialties of the defendants.[195] The Fourth Circuit Court of Appeal departed from the plain language of § 9:2794 and held that Dr. Frangipane was qualified to testify as an expert even though he practiced neither orthopedic surgery nor hospital medicine.[196] In a divergence from its *Franklin* holding that the witness's field must match that of the defendants, the Fourth Circuit reasoned that Louisiana case law allows witnesses to testify regarding medical fields in which they do not practice, as long as the witness has "sufficient knowledge of the requisite subject matter."[197]

2. Harper v. Minor*: The Second Circuit's Admittance of Testimony Based on the Witness's Knowledge of the Defendant's Field of Medicine*

In *Harper v. Minor*, the Second Circuit also employed a broad interpretation of § 9:2794(D)(3) and admitted expert testimony based on the witness's knowledge of the subject matter, not his area of practice.[198] Plaintiff Deborah Harper filed suit against Dr. Minor and Dr. Davis following a surgery to remove a benign breast tumor.[199] Dr. Minor, a general surgeon, and Dr. Davis, a radiologist, performed the procedure together.[200] Dr. Minor reviewed an X-ray after the surgery and concluded that the procedure was successful.[201] Months later, Harper obtained a mammogram which indicated that the defendants performed the procedure incorrectly by removing breast tissue, not the tumor.[202] Harper introduced

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195. *Id.* at 64.

196. *Id. But see* LA. REV. STAT. § 9:2794(A) (2018) ("[W]here the defendant practices in a particular medical specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced . . . within the involved medical specialty."). *See also id.* § 9:2794(D)(3) ("In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether . . . the witness is board certified or has other substantial training or experience in *an area of medical practice relevant to the claim and is actively practicing in that area*.") (emphasis added).

197. *Pennington*, 245 So. 3d at 64.

198. *See* Harper v. Minor, 86 So. 3d 690, 696 (La. Ct. App. 2d Cir. 2012).

199. *Id.* at 692.

200. *Id.*

201. *Id.*

202. *Id.* (A subsequent mammogram revealed that "the earlier target lesion remained intact in her breast").

Dr. Roderick Boyd as an expert in general surgery and in interpretation of radiographic images.[203] The trial court accepted Dr. Boyd as an expert in general surgery but found that he was not qualified to offer expert testimony regarding the standard of care that applied to a radiologist.[204]

On appeal, the Second Circuit held that Dr. Boyd could testify as to the standard of care applicable to a radiologist.[205] The Second Circuit relied on § 9:2794(D)(3) and found that Dr. Boyd qualified as an expert in radiology on the basis of "substantial training or experience."[206] The Second Circuit ultimately held that a witness's knowledge of the subject matter, not his field of practice, determines whether he is qualified to testify as an expert.[207] The court viewed the "substantial training or experience" language of the statute as the most important criteria that a witness must meet, but failed to consider whether Dr. Boyd was "actively practicing" in radiology, the field of medicine "relevant to the claim."[208]

3. Kieffer v. Plunkett-Kuspa*: A Glaring Dissent to the Majority's Departure From § 9:2794*

The Fifth Circuit Court of Appeal's decision in *Kieffer v. Plunkett-Kuspa* similarly illustrates a court's departure from the "actively practicing" requirement of § 9:2794.[209] Plaintiff Jeana Kieffer brought a medical malpractice lawsuit against Dr. Plunkett, an internist at Ochsner Clinic.[210] Kieffer arrived at Ochsner Clinic complaining of a headache, fever, nausea, and vomiting.[211] Dr. Plunkett treated Kieffer, diagnosed her with a sinus infection, and prescribed medication.[212] A few days later,

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203. *Id.* at 694.

204. *Id.* at 694–95 (The trial judge stated that Dr. Boyd was "qualified to make a comment as to whether the general surgeon breached that standard of care only").

205. *Id.* at 696.

206. *Id.* ("La. R.S. 9:2794(D)(3) provides: In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness is board certified or has other *substantial training or experience in an area of medical practice relevant to the claim* and is actively practicing in that area.").

207. *See id.*

208. *See* LA. REV. STAT. § 9:2794(D)(3) (2018).

209. *See generally* Kieffer v. Plunkett-Kuspa, 138 So. 3d 682 (La. Ct. App. 5th Cir. 2014).

210. *Id.* at 683.

211. *Id.*

212. *Id.*

Kieffer awoke without memory of herself or her husband.[213] Kieffer's husband brought her to Ochsner Hospital, where she was diagnosed with viral meningitis[214] and encephalopathy.[215] Kieffer alleged in her petition that Dr. Plunkett failed to properly diagnose and treat her, and she offered testimony from Dr. Trahant, a board certified neurologist, in support.[216] Dr. Trahant opined that Dr. Plunkett breached the standard of care by failing to admit Kieffer to a hospital for evaluation.[217]

During his deposition, Dr. Trahant stated that, as a neurologist, he practiced medicine from the perspective of both an internist and a neurologist when making diagnoses.[218] He further stated that the standard of care owed by Dr. Plunkett as an internist was no different than the standard of care applicable to any other physician presented with a situation like Kieffer's.[219] Based on Dr. Trahant's testimony that there was an overlap between his practice as a neurologist and Dr. Plunkett's practice as an internist, the Fifth Circuit held that Dr. Trahant was qualified as an expert witness and admitted his testimony that Dr. Plunkett breached the standard of care by not admitting Kieffer to a hospital.[220]

Although the Fifth Circuit deviated from § 9:2794's literal standards in finding that a neurologist was qualified to testify as an expert against an internist, not all members of the court, notably, were in agreement on the majority's holding.[221] In his dissent, Judge Windhorst argued that the standard of care owed by a neurologist, in diagnosing a rare condition such as encephalitis, substantially differs from that of an internist.[222] Dr. Trahant had never practiced as an internist and was governed by the

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213. *Id.*

214. Viral meningitis is the swelling of the protective membranes covering the brain and spinal cord. *Meningitis*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/meningitis/index.html [https://perma.cc/7UKW-DF5Y] (last visited Mar. 13, 2019).

215. *Kieffer*, 138 So. 3d at 683. Encephalopathy is a disease of the brain that alters brain function or structure. *Encephalopathy Information Page*, NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, https://www.ninds.nih.gov/Disorders/All-Disorders/Encephalopathy-Information-Page [https://perma.cc/P8SZ-TV55] (last updated Mar. 27, 2019).

216. *Kieffer*, 138 So. 3d at 685.

217. *Id.*

218. *Id.*

219. *Id.* ("I don't think the standard of care for primary care physicians are different than anybody else when faced with an illness of this type with the potential implications.").

220. *See id.* at 684–85.

221. *See id.* at 685–86.

222. *Id.* at 686–87.

standard of care applicable to a neurologist.[223] Indeed, Judge Windhorst maintained that Dr. Trahant was not qualified to offer expert testimony that Dr. Plunkett breached the standard of care.[224]

Judge Windhorst's dissent demonstrates the present controversy surrounding the interpretation of § 9:2794.[225] In essence, trial judges disagree over whether § 9:2794 requires a witness to practice in the defendant's area of medicine to be qualified as an expert.[226] Under the current language of § 9:2794, medical malpractice litigants will not have predictability and consistency with respect to expert witness qualification.[227] To remedy this ambiguity, reduce litigation costs, and ensure consistency among court decisions, the Louisiana Legislature must revise § 9:2794 to provide an explicit requirement that a witness must practice in the defendant's area of medicine.[228]

Although Louisiana courts are split on whether § 9:2794 requires a witness to practice in the defendant's field of medicine, courts in other states such as Alabama and Michigan remain consistent on this issue.[229] The statutes governing expert witness qualification in Alabama and Michigan unambiguously provide that to be qualified as an expert, a witness must practice in the defendant's same field of medicine.[230]

III: EXPERT WITNESS QUALIFICATION IN MEDICAL MALPRACTICE LAWSUITS OUTSIDE LOUISIANA

Other states, such as Alabama and Michigan, have taken measures to prevent unpredictability and inconsistency in medical expert witness qualification by enacting clear statutes for medical malpractice claims.[231] The courts in Alabama and Michigan follow statutory standards that expressly require a witness to practice in the defendant's same field of

223. *Id.*
224. *Id.*
225. *See id.* at 686–88.
226. *See id.*
227. *See generally* LA. REV. STAT § 9:2794 (2018); *see also Kieffer*, 138 So. 3d at 686–88. *But see* Lee v. Quinn, 229 So. 2d 13, 18 (La. Ct. App. 1st Cir. 2017).
228. *See generally id.*
229. *See Kieffer*, 138 So. 3d at 686–88. *But see Lee*, 229 So. 2d at 18. *See generally* Shadrick v. Grana, 279 So. 3d 553 (Ala. 2018); Sherrer v. Embry, 983 So. 2d 79, 82–83 (Ala. 2007). *See also* Woodard v. Custard, 719 N.W.2d 842, 860 (Mich. 2006).
230. *See* ALA. CODE § 6-5-548 (2019); MICH. COMP. LAWS ANN. § 600.2169 (West 2019).
231. *See* ALA. CODE § 6-5-548 (2019); MICH. COMP. LAWS ANN. § 600.2169 (West 2019).

medicine to be qualified as an expert.[232] Unlike Louisiana courts, medical malpractice litigants and trial judges in Alabama and Michigan, therefore, have clarity and predictability with respect to expert witness qualification.[233]

A. Alabama's Medical Liability Act

Alabama's Medical Liability Act, which governs medical malpractice actions, provides that the plaintiff has the burden of proving that the defendant did not exercise "reasonable care, skill and diligence as other similarly situated health care providers" ordinarily exercise.[234] For a court to admit a witness as an expert in the defendant's field of medicine, the witness must be a "similarly situated health care provider" as defined by the statute.[235] When the defendant is not a specialist, the statute states that a "similarly situated health care provider" is one who has practiced in the same "discipline or school of practice" as the defendant within the year prior to the date of the alleged malpractice.[236] When the defendant is a specialist, the statute provides that a "similarly situated healthcare provider" is one who practiced in the same specialty as the defendant in the year prior to the date of the alleged malpractice.[237] Further, where the defendant is board-certified in a particular specialty, the witness must be board-certified in that specialty.[238]

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232. *See Shadrick*, 279 So. 3d 553; *Sherrer*, 983 So. 2d at 82–83; *see also Woodard*, 719 N.W.2d at 860.

233. *See Shadrick*, 279 So. 3d 553; *Sherrer*, 983 So. 2d at 82–83; *see also Woodard*, 719 N.W.2d at 860.

234. ALA. CODE § 6-5-548 (2019).

235. *Id.*

236. *See id.* (When the defendant is not a specialist, a "'similarly situated healthcare provider' is one who meets all of the following qualifications: (1) Is licensed by the appropriate regulatory board or agency of this or some other state. (2) Is trained and experienced in the same discipline or school of practice. (3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred").

237. *See id.* (When the defendant is a specialist, a "'similarly situated healthcare provider' is one who meets all of the following requirements: (1) Is licensed by the appropriate regulatory board or agency of this or some other state. (2) Is trained and experienced in the same specialty. (3) Is certified by an appropriate American board in the same specialty. (4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred")

238. *See id.*

In examining witness qualification under the Medical Liability Act, the Alabama Supreme Court consistently holds that the Medical Liability Act requires the witness's field of medicine to precisely match the defendant's field of medicine.[239] For example, in *Shadrick v. Grana*, the court excluded testimony from the plaintiff's witness, a board-certified cardiologist.[240] The court found that the witness was not a "similarly situated healthcare provider" under the Medical Liability Act, because the defendant was a board-certified specialist in internal medicine, as opposed to cardiology.[241] Further, the Alabama Supreme Court issued a similar holding under the Medical Liability Act in *Sherrer v. Embry*.[242] The court in *Sherrer* excluded testimony from the plaintiff's witness, a physician who practiced plastic and reconstructive surgery, because the defendant in *Sherrer* was a general dentist.[243] The court held that, in order for it to deem the plaintiff's witness a "similarly situated healthcare provider" according to the Medical Liability Act, the witness had to have practiced dentistry in the year prior to the date of the alleged malpractice.[244]

The Alabama Medical Liability Act's clear definition of "similarly situated healthcare provider" produces consistent results for Alabama's medical malpractice litigants.[245] The Act protects defendant healthcare providers facing potential liability for medical malpractice from damaging testimony by witnesses who do not practice in the defendants' same field of medicine, yet hold themselves out as experts in the those fields.[246] At the same time, the Alabama Medical Liability Act provides plaintiffs with clear standards in choosing a witness that will qualify as an expert concerning the applicable standard of care and the defendant's breach of that standard of care.[247]

Although the Alabama Supreme Court consistently rejects arguments that a witness is qualified based on an overlap between his field of medicine and that of the defendant's, Louisiana courts accept the same

239. *See generally* Shadrick v. Grana, 279 So. 3d 553 (Ala. 2018); Sherrer v. Embry, 983 So. 2d 79, 82–83 (Ala. 2007); Panayiotou v. Johnson, 995 So. 2d 871 (Ala. 2008).

240. *Shadrick*, 279 So. 3d 553.

241. *Id.*; *see also* ALA. CODE § 6-5-548 (2019).

242. *Sherrer*, 983 So. 2d at 82–83; *see* ALA. CODE § 6-5-548 (2019).

243. *Sherrer*, 983 So. 2d at 82–83.

244. *Id.*; *see also* ALA. CODE § 6-5-548 (2019).

245. *See* ALA. CODE § 6-5-548 (2019); *see also Shadrick*, 279 So. 3d 553; *Sherrer*, 983 So. 2d at 82–83.

246. *See generally* Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 684–85 (La. Ct. App. 5th Cir 2014).

247. *See generally Sherrer*, 983 So. 2d at 82–83.

arguments, in contravention of the plain language of Louisiana Revised Statutes § 9:2794.[248] Louisiana courts, such as the Fifth Circuit in *Kieffer*, look past the plain language of § 9:2794 in determining expert witness qualification.[249] In *Kieffer v. Plunkett-Kuspa*, the Louisiana Fifth Circuit Court of Appeal allowed a neurologist to testify as an expert witness against the defendant-internist.[250] Based on the witness's testimony that there was an overlap between neurology and internal medicine, the Fifth Circuit found that the witness qualified as an expert regarding the standard of care applicable to the defendant-internist.[251] Conversely, the Alabama Supreme Court in *Smith v. Fisher* rejected the argument that although the witness practiced medicine in a different field than the defendant, an overlap between the two fields rendered the witness qualified as an expert.[252]

In Alabama, the clear language of the Medical Liability Act leaves no room for courts to depart from the Act's straightforward, explicit standards.[253] Alabama courts only examine the witness's practice area to decide whether that witness may testify as an expert, and not other factors such as overlap between different fields of medicine.[254] A legislative revision of § 9:2794 would ensure that all Louisiana courts look also to the witness's field of medicine in establishing whether that witness qualifies as an expert.[255] Like Alabama, Michigan's medical malpractice law contains the same requirement, that the witness's field of medicine match the defendant's, and guarantees consistent results concerning expert witness testimony.[256]

B. Michigan: § 600.2169

Michigan's statute governing expert witness testimony in medical malpractice cases, Michigan Compiled Laws Annotated § 600.2169, is

248. *See Kieffer*, 138 So. 3d at 684–85.

249. *See id.*; Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018).

250. *Kieffer*, 138 So. 3d at 684–85.

251. *Id.*

252. *See* Smith v. Fisher, 143 So. 3d 110, 121–22 (Ala. 2013).

253. *See* ALA. CODE § 6-5-548 (2019); *see also* Shadrick v. Grana, 279 So. 3d 553 (Ala. 2018); *Sherrer*, 983 So. 2d at 82–83.

254. *See* ALA. CODE § 6-5-548; *see also Shadrick*, 279 So. 3d 553; *Sherrer*, 983 So. 2d at 82–83. *But see Kieffer*, 138 So. 3d at 684–85.

255. *See generally* LA. REV. STAT. § 9:2794 (2018).

256. *See* ALA. CODE § 6-5-548; MICH. COMP. LAWS ANN. § 600.2169 (West 2019); *see also* Woodard v. Custard, 719 N.W.2d 842, 860 (Mich. 2006).

similar to Alabama's Medical Liability Act.[257] Section 600.2169 provides litigants with uniform standards that produce consistent judicial decisions regarding expert witness qualification.[258] Where the defendant is a specialist, § 600.2169 provides that a witness must specialize in the same field of medicine as the defendant.[259] When the defendant is a board-certified specialist, the witness must also be board certified in the same specialty.[260] During the year preceding the date of the alleged malpractice, a witness testifying against a specialist must have devoted a majority of her time to either active practice in the defendant's specialty or to teaching the defendant's specialty to medical students or residents.[261] When the defendant is a general practitioner, the expert must have devoted a majority of her time during the year prior to the date of malpractice to either active practice as a general practitioner or to teaching the defendant's "same health profession" to medical students or residents.[262] The vital factor in considering whether a witness qualifies as an expert is whether, in the year prior to the date of the alleged malpractice, that witness has "devoted a majority of his or her professional time" to either "active clinical practice" or the "instruction of students" in the defendant's same field of medicine.[263]

The Michigan Supreme Court interpreted the requirements of § 600.2169 in *Woodard v. Custard*, Michigan's leading case on the statute.[264] In *Woodard v. Custard*, the Michigan Supreme Court examined two lower court decisions, *Woodard v. Custard* and *Hamilton v. Kuligowski*, to determine whether the plaintiffs' witnesses in each case qualified as experts under § 600.2169.[265] In *Woodard v. Custard*, the defendant was board certified in pediatrics with certificates of special qualifications in pediatric care and neonatal-perinatal medicine.[266] The plaintiffs' proposed expert witness was board certified in pediatrics but did not possess any certificates of special qualifications.[267] Certifications of special qualifications in a specific area of medicine are equivalent to board

257. *See* MICH. COMP. LAWS ANN. § 600.2169; *see also* ALA. CODE § 6-5-548.
258. *See* MICH. COMP. LAWS ANN. § 600.2169; ALA. CODE § 6-5-548.
259. *See* MICH. COMP. LAWS ANN. § 600.2169.
260. *See id.*
261. *See id.*
262. *Id.*
263. *See* Woodard v. Custard, 719 N.W.2d 828, 860 (Mich. 2006); MICH. COMP. LAWS ANN. § 600.2169.
264. *See Woodard*, 719 N.W.2d at 842.
265. *Id.* at 847.
266. *Id.* at 847–48.
267. *Id.*

certification in that area of medicine for purposes of § 600.2169.[268] The Michigan Supreme Court ruled that, because the infant-patient in *Woodard* was critically ill when treated by the defendant, pediatric critical care was the most relevant specialty.[269] The court affirmed the trial court's ruling, excluding testimony from the plaintiffs' witness.[270] The court ruled that the witness did not qualify as an expert under § 600.2169, because the witness did not practice or teach pediatric critical care medicine in the year preceding the alleged malpractice and was not board certified in pediatric critical care medicine as required in the statute.[271]

In *Hamilton v. Kuligowski*, the defendant-physician was board certified in general internal medicine and specialized in general internal medicine.[272] Further, the defendant was practicing general internal medicine at the time of the alleged malpractice; thus, it was the relevant specialty.[273] The plaintiff's proposed expert witness was board certified in general internal medicine but specialized in treating infectious diseases.[274] In his deposition, the witness acknowledged that he was "not sure what the average internist sees day in and day out."[275] Based on the witness's focus in infectious diseases, and not general internal medicine, the Michigan Supreme Court affirmed the trial court's ruling that the witness did not qualify as an expert according to § 600.2169.[276] The court held that the witness did not "devote a majority of his time," in the year prior to the date of alleged malpractice, to practicing or teaching general internal medicine.[277]

When the defendant is a general practitioner, § 600.2169 requires that the witness must also be a general practitioner.[278] Unlike the requirements that the witness's specialty match the defendant's when the latter is a specialist, for general practitioners, Michigan courts require only that the witness is a general practitioner, not that the witness engage in the same type of general medical practice as the defendant.[279] In *Robins v. Garg*, the

268. *Id.* at 853.
269. *Id.* at 858–59.
270. *Id.*
271. *Id.* at 859.
272. *Id.* at 848.
273. *Id.*
274. *Id.*
275. *Id.* at 860.
276. *Id.*
277. *Id.*
278. MICH. COMP. LAWS ANN. § 600.2169 (West 2019).
279. *See id.*; *see also* Robins v. Garg, 714 N.W.2d 49, 54–55 (Mich. Ct. App. 2007).

defendant was a general practitioner, and the plaintiff offered a board-certified family practitioner as a potential expert witness.[280] The Michigan Court of Appeals found that the witness qualified as an expert because the witness was engaged in general practice as a family practitioner during the year prior to the date of the alleged malpractice.[281] Indeed, the Court of Appeals noted that if the roles were reversed, and the defendant were a board-certified family practitioner, the Michigan Supreme Court's holding in *Woodard v. Custer* would require that the witness also be a board-certified family practitioner.[282] The court acknowledged that a board-certified family practitioner is a specialist; therefore, a general practitioner would not qualify as an expert witness.[283]

Michigan's § 600.2169 produces consistent, uniform decisions from courts establishing expert witness qualification.[284] Section 600.2169's clear language does not allow courts to depart from the standards it requires an expert witness to meet.[285] Michigan courts exclude witnesses claiming knowledge of the defendant's field of medicine when the witness does not practice in that field.[286] Although the Louisiana First and Fourth Circuit Courts of Appeal take an approach similar to Michigan's, other Louisiana courts accept a witness as an expert under Louisiana Revised Statutes § 9:2794, despite the fact that the witness does not practice in the defendant's field of medicine, based solely on the witness's claimed knowledge of that field.[287] While Alabama and Michigan require a witness's field of medical practice to match the defendant's field precisely, Colorado takes a broader approach to medical-expert witness qualification in Colorado Revised Statutes § 13-64-401, similar to the approach taken by the Louisiana Second and Fifth Circuit Courts of Appeal.[288]

C. Colorado: § 13-64-401

Unlike Alabama and Michigan, Colorado's § 13-64-401 does not always require that a plaintiff's witness practice in the defendant's same

280. *Robins*, 714 N.W.2d at 51–52.
281. *Id.* at 54–55.
282. *Id.* at 54; *see also Woodard*, 719 N.W.2d at 828.
283. *Robins*, 714 N.W.2d at 54.
284. *See Woodard*, 719 N.W.2d at 860; *Robins*, 714 N.W.2d at 54–55; MICH. COMP. LAWS ANN. § 600.2169 (West 2019).
285. *See Woodard*, 719 N.W.2d at 860; *Robins*, 714 N.W.2d at 54–55; MICH. COMP. LAWS ANN. § 600.2169.
286. *See Woodard*, 719 N.W.2d at 860; MICH. COMP. LAWS ANN. § 600.2169.
287. *See* Harper v. Minor, 86 So. 3d 690, 694–95 (La. Ct. App. 2d Cir. 2012).
288. COLO. REV. STAT. ANN. § 13-64-401 (West 2019).

field of medicine, yet the statute explicitly provides for situations in which a witness may still qualify as an expert even though he practices in a different area of medicine than the defendant.[289] Section 13-64-401 states that an expert witness in a medical malpractice action must be "substantially familiar with applicable standards of care and practice as they relate to the act or omission which is the subject of the claim."[290] In the event that the plaintiff's witness practices in a different "medical subspecialty" than the defendant, the statute provides that a witness must demonstrate "substantial familiarity" in addition to showing that "the standards of care and practice in the two fields are similar."[291] Colorado courts hold, however, that the a witness from a field other than that of the defendant will qualify as an expert if the witness has demonstrated either: (1) "a substantial familiarity with the defendant's specialty such that his or her opinion is as well informed as any other expert in the defendant's specialty" or (2) "that the standard of care for both specialties is substantially similar."[292]

In *Hall v. Frankel*, the defendant was an orthopedic surgeon, and the plaintiffs offered expert testimony from "several orthopedic surgeons, two hematologists,[293] a pulmonologist,[294] and three forensic pathologists."[295] During trial, the defendant orthopedic surgeon made several objections to the testimony from the expert witnesses who were not orthopedic surgeons.[296] On appeal, the defendant argued that the trial court erred in

289. *See id.*

290. *Id.*

291. *Id.*

292. Hall v. Frankel, 190 P.3d 852, 858–59 (Colo. App. 2008).

293. Hematologists specialize in the treatment of diseases of blood and blood components. *Hematology*, JOHN HOPKINS MEDICINE, https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/hematology#:~:text=Hematology%20is%20the%20study%20of,blood%20and%20bone%20marrow%20cells [https://perma.cc/6TPR-Q757] (last visited Apr. 20, 2021).

294. Pulmonologists specialize in the treatment of respiratory diseases. *Know Your Providers: What Does a Pulmonologist Do?*, AMERICAN LUNG ASSOCIATION, https://www.lung.org/about-us/blog/2019/05/know-your-providers-pulmonologist.html [https://perma.cc/GX3N-SLD2] (last visited Apr. 12, 2021).

295. *Hall*, 190 P.3d at 858. A forensic pathologist specializes in "the examination of persons who die suddenly, unexpectedly, or violently" to determine the "cause and manner of death." *What Is a Forensic Pathologist?*, NEW MEXICO SCHOOL OF MEDICINE, OFFICE OF THE MEDICAL INVESTIGATOR, https://omi.unm.edu/about/faq/forensic-pathologist.html [https://perma.cc/ZU23-KFKZ].

296. *Hall*, 190 P.3d at 858.

allowing the testimony.[297] In affirming the trial court's ruling, the Colorado Court of Appeal held that a witness may testify against a defendant in another field of medicine when the witness demonstrates a "substantial familiarity with the defendant's specialty" or demonstrates that the standard of care between the two fields is "substantially similar."[298] Further, the Court of Appeal found that the applicable standard of care, which related to diagnosing and treating blood clots, was "common to all physicians and fourth-year medical students."[299]

Expert witness qualification under Colorado's § 13-64-401 is not a frequently litigated issue,[300] because Colorado courts that decide whether to admit expert witness testimony are uniform in their application of § 13-64-401.[301] A wholesale adoption of Colorado's broad standards—that an expert witness from a different field of medicine than the defendant must have either a "substantial familiarity" with the defendant's field or that the witness demonstrate that the standards of care between the two fields are similar—would generate further inconsistency and ambiguity for Louisiana litigants.[302] Section 9:2794(D)(3), as currently written, directs courts to "consider whether . . . the witness" is "actively practicing" in "an area of medical practice relevant to the claim"; and that language, although seemingly explicit, generates unpredictable and inconsistent holdings from Louisiana courts.[303] Thus, a legislative revision that simply replaced the current wording of § 9:2794(D)(3) with a general requirement that a witness demonstrate a "substantial familiarity" with the defendant's field of medicine would not resolve the current inconsistency.[304] Colorado's standard of "substantial familiarity," however, could aid in establishing an exception for Louisiana plaintiffs who cannot locate an expert willing to testify against a fellow medical colleague.[305]

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297. *Id.*

298. *Id.* at 858–59.

299. *Id.* at 859.

300. A Westlaw search of "13-64-401" shows only 20 cases that have cited the statute. *See* COLO. REV. STAT. ANN. § 13-64-401 (West 2019).

301. *See Hall*, 190 P. 3d at 859; *see also* Melville v. Southward, 791 P.2d 383 (Colo. 1990).

302. *See* COLO. REV. STAT. ANN. § 13-64-401; LA. REV. STAT. § 9:2794 (2018).

303. LA. REV. STAT § 9:2794.

304. *See generally* COLO. REV. STAT. ANN. § 13-64-401; LA. REV. STAT § 9:2794.

305. *See generally* COLO. REV. STAT. ANN. § 13-64-401; Arntz, *supra* note 34, at 1379–80.

A legislative revision of § 9:2794 is necessary to ensure that all Louisiana courts establishing expert witness qualification will consider, as courts in Alabama and Michigan do, the defendant's field of medicine in comparison to the witness's as the deciding factor.[306] Alabama's Medical Liability Act and Michigan's § 600.2169 serve as guidance for a legislative revision of § 9:2794 to ensure consistent application of the statute and predictability for litigants.[307] The Louisiana Legislature's revision must provide that the witness's field of medicine match the defendant's, but the revision must also include an exception to this requirement to protect plaintiffs from being left without an expert and shield defendants from testimony by an unqualified witness.[308] The Louisiana Legislature should draw upon Colorado's § 13-64-401's when drafting such an exception.[309]

IV. REVISE § 9:2794—MATCHING THE FIELDS OF MEDICAL PRACTICE

The Louisiana Legislature must revise § 9:2794 to ensure that all courts abide by the same standards in deciding expert witness qualification.[310] Currently, § 9:2794(D)(3) provides:

> In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness is board certified or has other substantial training or experience in an area of medical practice relevant to the claim and is actively practicing in that area.[311]

The legislative revision of § 9:2794(D)(3) should provide:

> In determining whether a witness is qualified on the basis of training or experience, the court shall consider, *as the deciding*

306. *See* Shadrick v. Grana, 279 So. 3d 553 (Ala. 2018); Sherrer v. Embry, 983 So. 2d 79, 82–83 (Ala. 2007); *see also* Woodard v. Custard, 719 N.W.2d 828, 860 (Mich. 2006); Robins v. Garg, 714 N.W.2d 49, 54–55 (Mich. Ct. App. 2007).

307. *See* MICH. COMP. LAWS ANN. § 600.2169 (West 2019); ALA. CODE § 6-5-548 (2019); *see also Shadrick*, 279 So. 3d 553; *Sherrer*, 983 So. 2d at 82–83; *Woodard*, 719 N.W.2d at 860.

308. *See, e.g.,* Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018).

309. *See* discussion *supra* Part III.C.

310. *See generally* LA. REV. STAT. § 9:2794 (2018); Lee v. Quinn, 229 So. 2d 13, 17–18 (La. Ct. App. 1st Cir. 2017). *But see* Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 684–85 (La. Ct. App. 5th Cir. 2014).

311. LA. REV. STAT § 9:2794(D)(3) (2018).

> *factor,* whether, at the time the claim arose or at the time the testimony is given, the witness is *actively practicing in,* or *has within five years prior to the date of the alleged malpractice actively practiced in, the same field of medical practice as the defendant healthcare provider.*[312]
> *(a) If a plaintiff is unable to locate a witness qualified under the requirements of this section to testify, the court, upon receipt of an affidavit in compliance with subsection (b), may permit testimony from a witness in a different field of medical practice than the defendant upon a showing of the witness's substantial familiarity with the applicable standards of care.*[313]
> *(b) The plaintiff shall submit a sworn affidavit, executed by the plaintiff's attorney, declaring that the attorney made five good faith attempts to locate a physician in the defendant's same field of medical practice and was unable to do so. The affidavit shall contain the names and fields of medical practice of the physicians contacted.*[314]

The proposed legislative revision guarantees that Louisiana trial judges will require the witness's field of medicine to match the defendant's to meet the requirements of § 9:2794.[315] Louisiana courts will no longer

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312. *See generally id.* (emphasis added).

313. *See generally* COLO. REV. STAT. ANN. § 13-64-401 (West 2019) (emphasis added).

314. *See generally* N.Y. C.P.L.R. § 3012-a (McKinney 2019) (emphasis added). New York requires medical malpractice litigants to submit a complaint "accompanied by a certificate, executed by the attorney for the plaintiff." *Id.* The certificate, referred to as a "certificate of merit," is New York's equivalent to Louisiana's Medical Review Panel. *Id.*; *see* discussion *supra* Part I.A. The certificate of merit must provide that the attorney, after consulting "with at least one physician . . . who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action," has concluded that there is "a reasonable basis" for filing suit. N.Y. C.P.L.R. § 3012-a. The certificate may also state that the attorney was unable "to obtain consultation" with a physician after making "three separate good faith attempts with three separate physicians." *Id.* New York's requirements concerning the "certificate of merit" are helpful in establishing a means through which a Louisiana plaintiff's attorney may convey to the court that he or she is unable to locate a witness willing to testify against the defendant healthcare provider. *See generally* LA. REV. STAT. § 9:2794(D)(3) (2018).

315. *See* Penn v. CarePoint Partners of La., L.L.C., 181 So. 3d 26, 31–32 (La. Ct. App. 1st Cir. 2015); *Lee*, 229 So. 2d at 18; Franklin v. Tulane Univ. Hosp. & Clinic, 972 So. 2d 369, 376 (La. Ct. App. 4th Cir. 2007).

have discretion to depart from the statute's standards.[316] The revision prevents courts from finding, as they have under the current language of § 9:2794, that a witness qualifies as an expert based on an overlap between his practice area and that of the defendant or based only on his claimed knowledge of the defendant's field of medicine, unless the facts of a particular case necessitate the application of the revision's exception.[317]

Some scholars oppose the restriction on plaintiff's attorneys retaining experts in a different field of medicine than the defendant[318] because it is often difficult to locate any physician willing to testify against a fellow healthcare provider, which makes it more difficult to find a physician practicing in the defendant's same field of medicine.[319] Further, scholars argue that physicians are hesitant to testify that a fellow doctor breached the standard of care due to a "conspiracy of silence" advanced among members of the medical profession.[320] In small communities, a physician may be hesitant to testify because he is personally acquainted with the defendant-physician.[321] Physicians often believe that most medical malpractice claims are frivolous and are filed by plaintiff's attorneys focused only on personal financial gain.[322] Doctors feel also that they will be ostracized by fellow healthcare providers if they agree to testify against a fellow physician.[323]

The proposed legislative revision of § 9:2794(D)(3), however, balances the interests of both plaintiffs and defendants.[324] In protecting defendants from testimony by a witness who does not have training in the defendant's field of medical practice, the revision of the statute would also ease the burden on plaintiffs faced with a "conspiracy of silence" when seeking to locate an expert witness.[325] Since a medical malpractice claim, on average, costs nearly $50,000 to prepare, the statute's revision would benefit plaintiffs in ensuring that they are not forced to incur additional expenses litigating needless disputes surrounding expert witness

316. *See* Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018); Harper v. Minor, 86 So. 3d 690, 696 (La. Ct. App. 2d Cir. 2012); Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 684–85 (La. Ct. App. 5th Cir 2014).

317. *See Pennington*, 245 So. 3d at 64; *Harper*, 86 So. 3d at 696.

318. *See generally* Arntz, *supra* note 34, at 1379–80.

319. *See generally id.*

320. *See id.*

321. *See id.*

322. *See id.*

323. *See id.*

324. *See* discussion *infra* Part III.

325. *See generally* LA. REV. STAT. § 9:2794(D)(3) (2018); Arntz, *supra* note 34, at 1379–80.

qualification.[326] Although Alabama and Michigan both require that the witness practice in the defendant's field of medicine in the year prior to the date of the alleged malpractice, the revision of § 9:2794(D)(3) would allow a witness who does not actively practice in the defendant's same field of medicine to testify as an expert if the witness has within five years prior to the date of the alleged malpractice practiced in that field.[327]

Based on the low number of active physicians in Louisiana in comparison to other states, the revision's five-year period is especially necessary in ensuring that medical malpractice plaintiffs are not left unable to find a qualified expert.[328] Michigan's § 600.2169 provides that the witness must have practiced the defendant's same field of medicine within the year prior to the date of the alleged malpractice.[329] Imposing the same requirement in Louisiana would make it more difficult for litigants to find a qualified expert witness.[330] According to a report issued by the Association of American Medical Colleges, there are only 12,132 active physicians in the state of Louisiana, and the report's definition of "active physician" includes those not practicing in direct patient care but engaged in other activities such as medical teaching and research.[331] Michigan has more than double that amount—28,692 active physicians as of 2018.[332] As there are much fewer active physicians in Louisiana than in Michigan, Louisiana litigants may be left without a qualified expert if they were forced to locate a physician who has practiced in the defendant's field of medicine within the year prior to the alleged malpractice.[333] In Alabama, the same one-year requirement exists, and there are even fewer active physicians than in Louisiana—10,614 as of 2018.[334] For Louisiana litigants, § 9:2794(D)(3)'s revision will guarantee the clarity and consistency, in expert witness qualification, that litigants in Michigan and

326. *See* Peeples & Harris, *supra* note 10, at 710–12.

327. MICH. COMP. LAWS ANN. § 600.2169 (West 2019); ALA. CODE § 6-5-548 (2019); *see* discussion *supra* Part III.

328. *See 2019 State Physician Workforce Data Report,* ASSOCIATION OF AMERICAN MEDICAL COLLEGES 1, 8 (2019) https://store.aamc.org/downloadable/download/sample/sample_id/305/ [https://perma.cc/BPV2-EXUP].

329. MICH. COMP. LAWS ANN. § 600.2169.

330. *See 2019 State Physician Workforce Data Report, supra* note 328.

331. *See id.* at 8. The report's definition of active physician includes those engaged in "direct patient care, administration, medical teaching, research, or other nonpatient care activities." *Id.* at 2.

332. *See id.* at 8.

333. *See id.* at 8; MICH. COMP. LAWS ANN. § 600.2169 (West 2019).

334. *See 2019 State Physician Workforce Data Report*, *supra* note 328, at 8; MICH. COMP. LAWS ANN. § 600.2169.

Alabama already experience.[335] The proposed revision draws on Michigan and Alabama's expert witness statutes to ensure that Louisiana courts issue uniform decisions on expert witness qualification in medical malpractice.[336] The five-year period, however, eases the burden that plaintiffs in Alabama and Michigan face in retaining an expert witness.[337]

Under the current language of § 9:2794(D)(2), medical school professors may also qualify as expert witnesses under the revision of § 9:2794(D)(3).[338] Section 9:2794(D)(2) defines "medical practice" as training residents or students at an accredited medical school.[339] Thus, if a witness does not actively treat patients, the revision of § 9:2794(D)(3) does not automatically preclude the witness from testifying as an expert.[340] The witness may still qualify as an expert if he teaches students or residents at an accredited medical school, as long as he teaches the "same field of medical practice as the defendant healthcare provider."[341] Even if that witness does not actively teach the defendant's same field of medical practice, he will still be deemed an expert if he has taught the defendant's field within the five years prior to the date of the alleged malpractice.[342]

In some instances, a plaintiff may not be able to retain an expert witness that is either: (1) actively practicing in or teaching the defendant's field or (2) that has actively practiced in or taught the defendant's field within five years prior to the date of the alleged malpractice.[343] If such a situation arises, the revision of § 9:2794(D)(3) articulates a narrow, but necessary, exception to its requirement that the witness's field of medicine match the defendant's.[344] The exception provides that a plaintiff unable to find a qualified expert must submit a sworn affidavit, executed by the plaintiff's attorney, declaring that the attorney made five good faith attempts to locate a physician in the defendant's same field of medical practice and was unable to do so.[345] The affidavit must contain the names

335. *See generally* LA. REV. STAT. § 9:2794(D)(3) (2018); MICH. COMP. LAWS ANN. § 600.2169; ALA. CODE § 6-5-548 (2019).

336. *See generally* MICH. COMP. LAWS ANN. § 600.2169; ALA. CODE § 6-5-548.

337. *See* Arntz, *supra* note 34, at 1379–80.

338. LA. REV. STAT § 9:2794(D)(2). *See generally id.* § 9:2794(D)(3).

339. *Id.* § 9:2794(D)(2).

340. *Id.*

341. *Id. See generally id.* § 9:2794(D)(3) (2018).

342. *Id.* § 9:2794(D)(2). *See generally id*. § 9:2794(D)(3).

343. *See generally id*. § 9:2794(D)(2)–(3); Arntz, *supra* note 34, at 1379–80.

344. *See generally* LA. REV. STAT § 9:2794(D)(3).

345. *See generally id.*; N.Y. C.P.L.R. § 3012-a (McKinney 2019).

and medical fields of the physicians the attorney contacted.[346] After receiving the affidavit, the court may allow a witness from a different field of medicine to testify, if the witness is substantially familiar with the standards of care applicable to the case at bar.[347]

The proposed revision's requirement that the plaintiff's attorney submit a certificate containing the names and fields of practice of the physicians contacted exists to protect defendants against an abuse of the exception.[348] Absent written proof of an attorney's thorough search for a witness, the exception could be utilized as a means to shirk the main requirement of § 9:2794(D)(3)'s revision: that the witness be a member of the defendant's same field of medical practice.[349] In addition, the exception uses standards currently present and successful under Colorado law to assist plaintiffs who have conducted an exhaustive, yet unsuccessful, search for a witness in the defendant's same field of medical practice.[350] Through submission of the certificate, a plaintiff may offer testimony from a witness in a different field than the defendant upon a showing of the witness's substantial familiarity with the applicable standards of care.[351] Although expert witness qualification is rarely disputed in Colorado's medical malpractice suits,[352] the Louisiana Legislature's adoption of Colorado's standard of "substantial familiarity"[353] as a general rule would create further ambiguity concerning expert witness testimony, an issue frequently and inconsistently decided by Louisiana courts.[354] Used as a narrow exception, however, Colorado's

346. *See generally* LA. REV. STAT § 9:2794(D)(3); N.Y. C.P.L.R. § 3012-a.

347. *See generally id.* § 9:2794(D)(3) (2018); N.Y. C.P.L.R. § 3012-a; COLO. REV. STAT. ANN. § 13-64-401 (West 2019).

348. *See generally* LA. REV. STAT § 9:2794(D)(3); N.Y. C.P.L.R. § 3012-a.

349. *See generally id.* § 9:2794(D)(3); MICH. COMP. LAWS ANN. § 600.2169 (West 2019); ALA. CODE § 6-5-548 (2019).

350. *See generally* LA. REV. STAT § 9:2794(D)(2)–(3); COLO. REV. STAT. ANN. § 13-64-401; Arntz, *supra* note 34, at 1379–80.

351. *See generally* LA. REV. STAT. § 9:2794(D)(3); COLO. REV. STAT. ANN. § 13-64-401.

352. A Westlaw search of "13-64-401" shows only 20 cases that have cited the statute. *See* COLO. REV. STAT. ANN. § 13-64-401 (West 2019).

353. *See id.*

354. *See* Penn v. CarePoint Partners of La., L.L.C., 181 So. 3d 26, 31–32 (La. Ct. App. 1st Cir. 2015); Lee v. Quinn, 229 So. 2d 13, 18 (La. Ct. App. 1st Cir. 2017); Franklin v. Tulane Univ. Hosp. & Clinic, 972 So. 2d 369, 376 (La. Ct. App. 4th Cir. 2007). *But see* Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018); Harper v. Minor, 86 So. 3d 690, 696 (La. Ct. App. 2d Cir. 2012); Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 684–85 (La. Ct. App. 5th Cir. 2014).

standard is useful to ensure that a witness, although a member of a different field of medicine than the defendant, is still knowledgeable of the applicable standards of care.[355]

The most efficient way to demonstrate expert witness qualification under § 9:2794(D)(3)'s revision is to apply the language of the revision to a case previously discussed in this Comment.[356] In *Kieffer v. Plunkett-Kuspa*, the plaintiff filed suit against an internist.[357] To qualify as an expert under the statute's revision, the plaintiff's witness must practice medicine "in the same field of medical practice" as the defendant.[358] Thus, because the defendant practices as an internist, the plaintiff's witness must also actively practice as a specialist in internal medicine.[359] If the plaintiff's witness does not actively practice in that field, the witness is not necessarily prevented from testifying as an expert.[360] The witness still qualifies as an expert if he teaches internal medicine to students or residents at an accredited medical school.[361] In addition, a court will also find a witness to be an expert if he has either practiced or taught internal medicine within five years prior to the date of the alleged malpractice.[362] If a plaintiff still is unable to locate an internist willing to testify, the plaintiff's attorney can execute and submit a sworn affidavit stating that the attorney made five good faith attempts to locate an internist and was unable to do so.[363] The affidavit must contain the names and fields of medical practice of the physicians whom the attorney contacted.[364] The court may then permit testimony from a witness practicing in a field other than internal medicine, upon a showing of that witness's substantial familiarity with the standard of care applicable to an internist.[365]

The proposed legislative revision of § 9:2794 will provide clarity to Louisiana medical malpractice litigants.[366] Courts will no longer issue

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355. *See generally* COLO. REV. STAT. ANN. § 13-64-40; LA. REV. STAT. § 9:2794(D)(3).

356. *See* discussion *supra* Part II.B.3; *supra* text accompanying notes 310–14.

357. *See* discussion *supra* Part II.B.3; *supra* text accompanying notes 310–14.

358. *See* discussion *supra* Part II.B.3; *supra* text accompanying notes 310–14.

359. *See* discussion *supra* Part II.B.3; *supra* text accompanying notes 310–14.

360. *See supra* text accompanying notes 310–14.

361. *See supra* text accompanying notes 310–14.

362. *See supra* text accompanying notes 310–14.

363. *See supra* text accompanying notes 310–14.

364. *See supra* text accompanying notes 310–14; N.Y. C.P.L.R. § 3012-a (McKinney 2019).

365. *See* discussion *supra* Part III.C.; *supra* text accompanying notes 310–14; COLO. REV. STAT. ANN. § 13-64-401 (West 2019).

366. *See generally* LA. REV. STAT. § 9:2794(D)(3) (2018).

inconsistent decisions as to who qualifies as an a medical-expert witness.[367] Instead, the statute's revised language will guarantee that a witness's field of medicine matches the defendant's, and courts will issue uniform, consistent rulings on expert witness testimony.[368] Additionally, the fears of opponents of a stricter standard are mitigated, as the revision will ensure that a plaintiff asserting a claim for medical malpractice is not left unable to locate a qualified expert.[369]

CONCLUSION

The factfinder's great discretion in evaluating conflicting expert witness testimony and the necessity of the expert in medical malpractice actions make the determination of whether a witness is qualified an important one.[370] Medical malpractice claims are costly for plaintiffs and defendants alike.[371] Section 9:2794's current language forces plaintiffs to expend additional resources litigating expert witness qualification, not the merits of the case at bar.[372] Defendants under the current statute face damaging testimony from witnesses who hold themselves out as experts in the defendant's field of medicine based solely on their claimed knowledge of that field.[373] Courts admit other witnesses as experts due to the witnesses' arguments that an overlap exists between their field and the defendant's.[374] Courts should no longer have unbridled discretion to depart from § 9:2794 in establishing expert witness qualification.[375] Under the revised language of § 9:2794(D)(3), courts will not deem a witness

367. *See* discussion *supra* Part II.

368. *See generally* LA. REV. STAT. § 9:2794(D)(3).

369. *See supra* text accompanying notes 310–14; Arntz, *supra* note 34, at 1379–80.

370. *See* Morris v. Rainwater, 218 So. 3d 226, 235 (La. Ct. App. 2d Cir. 2017) (finding that where it is possible that "reasonable minds could disagree regarding the evidence presented . . . the jury was not clearly wrong in choosing to believe one side's expert over the other"); *see also* Schultz v. Guoth, 57 So. 3d 1002 (La. 2011).

371. Peeples & Harris, *supra* note 10, at 710–12.

372. *See generally id*.; Lee v. Quinn, 229 So. 2d 13, 18 (La. Ct. App. 1st Cir. 2017); Pennington v. Ochsner Clinic Found., 245 So. 3d 58, 64 (La. Ct. App. 4th Cir. 2018).

373. *See generally* LA. REV. STAT. § 9:2794(D); *Pennington*, 245 So. 3d at 64.

374. *See* Kieffer v. Plunkett-Kuspa, 138 So. 3d 682, 686–88 (La. Ct. App. 5th Cir. 2014); Pertuit v. Jefferson Parish Hosp. Service Dist. No. 2, 170 So. 3d 1106, 1110 (La. Ct. App. 5th Cir. 2015).

375. *See generally* LA. REV. STAT. § 9:2794(D); *Pennington*, 245 So. 3d at 64; *Kieffer*, 138 So. 3d at 686–88.

qualified as an expert to testify that a defendant healthcare provider breached the standard of care owed by members of the defendant's field of medicine unless the witness actually practices medicine, teaches medical students, or has, within five years prior, practiced or taught in that same field.[376] In any event, the revision prevents plaintiffs from being left without a qualified expert.[377] Where a plaintiff is unsuccessful in his search for an expert witness, Louisiana courts may then permit testimony from an expert substantially familiar with the applicable standards of care.[378] The Louisiana Legislature must reject the "let it all in philosophy" once and for all, and revise Louisiana Revised Statues § 9:2794 to hold expert witness qualification to a uniform standard.[379]

376. *See generally* Franklin v. Tulane Univ. Hosp. & Clinic, 972 So. 2d 369, 376 (La. Ct. App. 4th Cir. 2007); Penn v. CarePoint Partners of La., L.L.C., 181 So. 3d 26, 31–32 (La. Ct. App. 1st Cir. 2015); *Lee*, 229 So. 2d at 18.

377. *See generally* LA. REV. STAT. § 9:2794(D)(3); Arntz, *supra* note 34, at 1379–80.

378. *See generally* LA. REV. STAT. § 9:2794(D)(3) (2018); COLO. REV. STAT. ANN. § 13-64-401 (West 2019); Arntz, *supra* note 34, at 1379–80.

379. *See generally* LA. REV. STAT. § 9:2794; *see also In re* Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1233–34 (5th Cir. 1986).