

4-2018

## A Taste of Their Own Medicine: Examining the Admissibility of Experts' Prior Malpractice Under the Federal Rules of Evidence

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### Recommended Citation

Neil Henson, A Taste of Their Own Medicine: Examining the Admissibility of Experts' Prior Malpractice Under the Federal Rules of Evidence, 71 *Vanderbilt Law Review* 995 (2018)

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# NOTES

## **A Taste of Their Own Medicine: Examining the Admissibility of Experts' Prior Malpractice Under the Federal Rules of Evidence**

*Expert witnesses play an important role in medical malpractice cases by persuading juries to adopt a theory favorable to their party. Their credibility and competency influence the jury's decision, so parties seek to discredit opposing experts through cross-examination about their own malpractice as a provider of medical care. This evidence suggests a propensity for incompetence, so courts exclude this evidence when offered against defendant doctors. However, they disagree as to whether such evidence is admissible against nonparty experts. Federal Rule of Evidence 404 should prohibit prior malpractice evidence in both contexts, but courts disregard this rule for experts and admit or exclude this evidence on a discretionary basis. While bypassing rules of evidence is problematic, the policies prompting courts to do so are persuasive. This Note proposes that Rule 404 be amended to include an exception that permits evidence of an expert's character for competency subject to two standards of judicial discretion. This prior malpractice evidence can help the jury by providing a better proxy for expert credibility and solve other problems inherent in expert-focused trials, without sacrificing democratic notions of allowing laypersons to administer justice.*

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## INTRODUCTION

Medical malpractice litigation is challenging for both plaintiffs and defendants. The intersection of legal issues with complex medical theories creates a dispute focused on expert witnesses, which leads to greater litigation expenses and cumbersome legal proceedings.<sup>1</sup> As one scholar observed, “medical malpractice has proven to be . . . an unpleasant quagmire of unending skirmishes and full-scale engagements spread across a shifting battlefield.”<sup>2</sup> That analogy is fitting considering the stakes of a medical malpractice case—the injured patient’s emotional, physical, and financial well-being may be contingent on a successful outcome, while the doctor may perceive even the threat of litigation as detrimental to his professional reputation.<sup>3</sup>

Expert witnesses are involved in almost every medical malpractice case. To recover any damages, the patient must establish the standard of care customarily exercised by other medical professionals and that her doctor’s failure to provide that care caused

1. See FRANK M. MCCLELLAN, *MEDICAL MALPRACTICE: LAW, TACTICS, AND ETHICS* 3 (1994).

2. Thomas B. Metzloff, *Understanding the Malpractice Wars*, 106 HARV. L. REV. 1169, 1169 (1993) (reviewing PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991)); see also Marc D. Ginsberg, *Good Medicine/Bad Medicine and the Law of Evidence: Is There a Role for Proof of Character, Propensity, or Prior Bad Conduct in Medical Negligence Litigation?*, 63 S.C. L. REV. 367, 402 (2011) (supporting “war model” characterization of medical malpractice litigation).

3. MCCLELLAN, *supra* note 1, at 3; PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL*, at x (1991).

her injuries.<sup>4</sup> Essential to establishing those facts are the experts,<sup>5</sup> whose testimonies and opinions aim to educate the jury and become determinative to their findings.<sup>6</sup> Unfortunately, because both the plaintiff and defendant will likely call an expert to the stand, these experts can also confuse the jury by presenting contradictory testimonies, a problem known as the “battle of the experts.”<sup>7</sup> This resulting “battle” between the patient and doctor’s experts on key elements, like the standard of care and causation, is problematic because after presenting to the jury conflicting testimonies on complex and unfamiliar subject matter, the nonexpert jury must then decide which expert is more credible or competent.<sup>8</sup>

Unable to bridge this knowledge gap, jurors ultimately rely on proxies, such as appearance and demeanor, to determine an expert’s credibility.<sup>9</sup> Because attorneys understand that the jury relies on such proxies, lawyers attempt to discredit opposing experts during cross-examination by inquiring into the experts’ personal malpractice litigation in their capacity as a provider of medical care and other forms of professional misconduct to suggest that the expert is incompetent or

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4. Ginsberg, *supra* note 2, at 368 (citing DAN B. DOBBS, *THE LAW OF TORTS* 631–32 (2000)).

5. *Id.* at 397; Larry W. Myers, “*The Battle of the Experts: A New Approach to an Old Problem in Medical Testimony*,” 44 NEB. L. REV. 539, 539 (1965); see Jeffrey A. Van Detta, *Dialogue with a Neurosurgeon: Toward a Dépeçage Approach to Achieve Tort Reform and Preserve Corrective Justice in Medical Malpractice Cases*, 71 U. PITT. L. REV. 1, 2–3 (2009).

6. Ginsberg, *supra* note 2, at 397; David Meredith, *The Medical Expert Witness in Mississippi: Outgunning the Opposition*, 64 MISS. L.J. 85, 86 (1994) (citing David E. Seidelson, *Medical Malpractice Cases and the Reluctant Expert*, 16 CATH. U. L. REV. 158 (1966)); see Locke v. Vanderark, 843 P.2d 27, 33 (Colo. App. 1992) (Dubofsky, J., dissenting) (“[A] medical expert’s opinion . . . is of such special importance in a medical malpractice case . . . [and] is often the determinative factor to the jury . . .”).

7. See Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1391 (2005); see also Crowe v. Marchand, 506 F.3d 13, 16 (1st Cir. 2007) (noting that “[m]edical malpractice cases often turn into battles between dueling experts”).

8. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1595 (1998) (“When experts disagree . . . the nonexpert must decide whom to believe on the scientific issue. But . . . the nonexpert does not have sufficient competence in the expert discipline to be able to make the choice on substantive grounds, so how can the nonexpert make that choice?”); Cheng, *supra* note 7, at 1391 (“[H]ow can we expect jurors to decide between experts when the jurors’ ignorance is the premise for allowing the expert to testify in the first place?” (citing Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901))); see also Sam A. McConkey, IV, Note, *Simplifying the Law in Medical Malpractice: The Use of Practice Guidelines As the Standard of Care in Medical Malpractice Litigation*, 97 W. VA. L. REV. 491, 493–94 (1995) (“[A] ‘battle of the experts’ is not the way to conduct a negligence trial.”).

9. Cheng, *supra* note 7, at 1391 (citing Debra L. Worthington et al., *Hindsight Bias, Daubert, and the Silicone Breast Implant Litigation*, 8 PSYCHOL. PUB. POL’Y & L. 154, 188 (2002)); Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 BROOK. L. REV. 1009, 1013 (2008).

not credible.<sup>10</sup> This cross-examination technique poses important evidentiary questions regarding the admissibility of specific acts suggestive of an expert's competency. In resolving these questions, courts disagree as to the applicable evidentiary rules that permit or prohibit parties to introduce evidence of an expert's professional misconduct.<sup>11</sup> While admitting this evidence is problematic because parties use it to show a propensity for negligence, it is useful to allow this evidence to be admitted given the jury's inherent reliance on proxies in deciding liability.

This Note examines the extent to which evidence of a medical expert's prior malpractice is admissible under the Federal Rules of Evidence.<sup>12</sup> Ultimately, this Note contends that while Rule 404 requires courts to exclude such evidence because parties use it to show a propensity for incompetence, this problem can be resolved by enacting an expert exception that provides juries with better proxies for expert credibility and minimizes other issues inherent in expert-focused trials. Part I provides an overview of medical malpractice law and expert witnesses. Part II illustrates the discrepancy in judicial application of character evidence rules between defendant doctors and expert witnesses when determining the admissibility of their prior malpractice. Part III asserts that prior malpractice evidence, whether proffered against the defendant or a nonparty expert, should theoretically be inadmissible under the evidence rules, as it is both outside Rule 608's scope<sup>13</sup> and prohibited by Rule 404,<sup>14</sup> meaning courts should not apply Rule 403 to determine its admissibility. Part IV

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10. See *Locke*, 843 P.2d at 33 (Dubofsky, J., dissenting) (explaining that a party's chances of prevailing in a malpractice case are greater if they can disparage the opponent's expert by improper collateral impeachment); Ginsberg, *supra* note 2, at 397–402 (stating that “[t]he testimony of medical expert witnesses is often the focal point of medical negligence litigation” and exploring potential subjects of cross-examination).

11. See *United States v. Ahmed*, No. 14-cr-277 (DLI), 2016 WL 3647686, at \*2 (E.D.N.Y. July 1, 2016); *Upky v. Lindsey*, No. CIV 13-0553 JB/GBW, 2015 WL 3862944, at \*19 (D.N.M. June 3, 2015) (identifying a split among courts regarding admissibility of evidence of prior malpractice suits against expert witnesses).

12. Going forward, when this Note refers to “evidence rules,” it is referring to the Federal Rules of Evidence—though, as a practical matter, most state evidence rules mirror the federal rules.

13. Rule 608 allows a witness's credibility to be attacked or supported by testimony about the witness's reputation for truthfulness or untruthfulness. This rule is strictly confined to character for veracity, not credibility in general, a limitation recognized by both the advisory committee and courts. See FED. R. EVID. 608 advisory committee's notes to 1972 proposed rules (“[T]he inquiry is strictly limited to character for veracity.”); *Ahmed*, 2016 WL 3647686, at \*2 (“The court does not consider the existence of a complaint containing unproven allegations or a settlement agreement lacking any adverse findings probative of the witness' truthfulness.”).

14. Rule 404(a) prohibits the use of “evidence of a person's character or character trait . . . to prove that on a particular occasion the person acted in accordance with the character or trait.” FED. R. EVID. 404(a).

explores two solutions: (1) complying with the rules as written and prohibiting such evidence in most cases, or (2) creating an expert exception to facilitate the admission of this prior malpractice evidence against expert witnesses. Though arguments in favor of limiting extensive cross-examination of experts' character are compelling, the better solution is to permit this evidence pursuant to two standards based on Rule 403 that account for differences between party and nonparty experts. If judges thoughtfully exercise this discretion to ensure trials remain focused on medical facts and not expert competency, this framework may minimize other problems inherent in expert-focused trials, such as the battle of the experts, questionable judicial review of experts' methods, and selection bias with experts, without sacrificing democratic notions of giving laypersons a role in the judicial process.

## I. MEDICAL MALPRACTICE LAWS AND THE ROLE OF EXPERTS

Medical malpractice claims are essentially negligence claims—and as such, they require proof of the same four elements: (1) the doctor had a duty to comply with a standard of care, (2) the doctor's conduct failed to conform to that standard, (3) the patient suffered actual harm, and (4) the doctor's conduct proximately caused those injuries.<sup>15</sup> But a defining feature of medical malpractice claims is that the standard of care is defined by the customs and practices of the doctors themselves,<sup>16</sup> a finding that usually requires expert testimony. This Part will explore the evolving role of custom in medical malpractice cases before explaining how experts are crucial to helping the jury determine key issues, such as compliance with the standard of care and causation.

### A. *The Prominence of Custom*

Courts and juries still rely on custom to determine whether a doctor acted as a "reasonable doctor" would have in the same circumstances.<sup>17</sup> The jury's knowledge gap with complex medical issues means they cannot discern the standard of care or the defendant-

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15. See, e.g., Tim Cramm, Arthur J. Hartz & Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 700 (2002).

16. See WEILER, *supra* note 3, at 19–21; John Tucker, Note, *A Novel Approach to Determining Best Medical Practices: Looking at the Evidence*, 10 HOUS. J. HEALTH L. & POL'Y 147, 178–79 (2010).

17. See Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 183 (2000).

doctor's compliance with it based on common experience alone.<sup>18</sup> Thus, a jury's decision is not based on their normative assessment of what is reasonable, but on whether a doctor complied with the standard of care customarily given by others in the field.<sup>19</sup> The prominence of custom and the necessity of experts once posed challenges to plaintiffs seeking to sue their doctors for malpractice, but two recent developments—the demise of the locality rule and the rise of the two schools of thought doctrine—eased those obstacles by expanding both the number of experts and the types of theories available to plaintiffs.

Historically, the “locality rule” confined evidence of custom to the standard of care practiced by others in a defendant-doctor's geographic community.<sup>20</sup> Unfortunately, this limitation created a “conspiracy of silence” due to “the ‘notorious unwillingness of the medical profession ever to testify against one another.’”<sup>21</sup> Such conspiracies impeded plaintiffs' attempts to find experts in the relevant community and obstructed many claims, making plaintiffs' verdicts rare.<sup>22</sup> Today, however, most jurisdictions utilize a national standard of care due to the nationalized basis of medical education and feasibility of travel.<sup>23</sup> This has rendered the locality rule obsolete in its strict application and increased the number of doctors willing to testify for plaintiffs.<sup>24</sup>

The other noteworthy shift in custom is the emergence of the “two schools of thought” doctrine.<sup>25</sup> Also referred to as the “respectable minority” rule, this doctrine functions like an affirmative defense, allowing defendants to avoid liability by demonstrating that they complied with an acceptable alternative custom, even if that custom is not what the majority of experts believe is the best method of care.<sup>26</sup> This rule recognizes that competent doctors may be divided regarding the “best” procedures and that there may be more than one acceptable

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18. See WELER, *supra* note 3, at 19–21; Karyn K. Ablin, *Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*, 82 VA. L. REV. 325, 332 (1996).

19. Cramm, Hartz & Green, *supra* note 15, at 702. For a discussion of the experts' role in malpractice litigation, see *infra* Section I.B.

20. Jeffrey I.H. Soffer, *A Professional (Lack of) Courtesy: The Emergence of Expert Testimony in Legal and Medical Malpractice Cases*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 346, 356–57 (2015).

21. Ablin, *supra* note 18, at 333 (internal citations omitted); see also Soffer, *supra* note 20, at 356–57.

22. Ablin, *supra* note 18, at 333; Soffer, *supra* note 20, at 356–57.

23. MCCLELLAN, *supra* note 1, at 31; Cramm, Hartz & Green, *supra* note 15, at 706; Tucker, *supra* note 16, at 179.

24. See Ablin, *supra* note 18, at 351–52; Cramm, Hartz & Green, *supra* note 15, at 705–06.

25. Cramm, Hartz & Green, *supra* note 15, at 702.

26. *Id.* at 704.

form of treatment.<sup>27</sup> It also reflects a reluctance by judges to choose from competing schools of thought when the experts themselves cannot reach a consensus.<sup>28</sup> So, if a doctor can demonstrate that he followed a treatment that is advocated by a considerable number of competent doctors in the field, he will not be liable for failing to comply with the particular custom or standard advocated by the patient-plaintiff's experts.<sup>29</sup>

These doctrinal shifts have empowered both plaintiffs and defendants in medical malpractice cases.<sup>30</sup> The demise of the locality rule in favor of a nationalized standard of care has enabled plaintiffs by expanding the number of experts willing to testify, and the two schools of thought doctrine has assisted both sides by expanding the possible standards of care.<sup>31</sup> Consequently, plaintiffs and defendants alike have a breadth of medical experts to choose from in any given medical malpractice case.

### B. *The Necessity of Expert Witnesses*

In addition to custom, another defining feature of medical malpractice claims is the prominence of expert witnesses.<sup>32</sup> Selecting experts is one of the most critical decisions in a litigant's trial strategy because the comparison of the patient-plaintiff's expert to the defendant-doctor's expert is often the focal point of trial.<sup>33</sup> A highly qualified expert with impressive professional credentials can buttress the jury's belief in her opinions and even eliminate juror speculation

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27. *Id.*; John W. Ely, Arthur J. Hartz, Paul A. James & Cynda A. Johnson, *Determining the Standard of Care in Medical Malpractice: The Physician's Perspective*, 37 WAKE FOREST L. REV. 861, 862 (2002); *see also* DAVID S. CAUDILL & LEWIS H. LARUE, NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN LAW 25–26 (2006) (explaining that science is based on reasonable belief and is subject to internal disagreements).

28. Peters, *supra* note 17, at 168.

29. Cramm, Hartz & Green, *supra* note 15, at 705; *see* Laughridge v. Moss, 294 S.E.2d 672, 674 (Ga. Ct. App. 1982) (“[M]edical expert testimony showing a mere difference in views . . . is insufficient to show malpractice when it is shown that the procedure or judgment preferred by each doctor is an acceptable and customary medical approach.” (first alteration in original) (internal quotation marks omitted) (quoting trial court)). Courts have declined to create a bright-line rule or define a numerical value for how many doctors compose a “considerable number,” creating some ambiguity in the doctrine’s application. Cramm, Hartz & Green, *supra* note 15, at 705.

30. *See* Ablin, *supra* note 18, at 328, 351 (explaining that the demise of the locality rule and use of doctrines like *res ipsa loquitur* increased the pool of potential medical experts and the types of evidence utilized in medical malpractice cases).

31. Cramm, Hartz & Green, *supra* note 15, at 705–06.

32. *See id.* at 700 (explaining that experts are ordinarily required, subject to the unusual case where a doctor’s negligence is so gross that his malpractice is obvious).

33. MCCLELLAN, *supra* note 1, at 174; Ginsberg, *supra* note 2, at 397; John P. DiBlasi, *Preparing an Expert Witness Is a Multi-step Process*, N.Y. ST. B. ASS’N J., May 2003, at 22, 22.



regarding the appropriate standard of care.<sup>34</sup> While most jurisdictions require each party to present an expert,<sup>35</sup> parties would be imprudent to proceed without one given the persuasiveness of experts to the jury.<sup>36</sup>

The benchmark for qualifying expert witnesses in federal courts is Federal Rule of Evidence 702, which gives the trial court judge discretion to initially determine whether a party is sufficiently qualified as an expert based upon knowledge, skill, training, or education.<sup>37</sup> Pursuant to the rule, a judge must also independently evaluate the expert's testimony to ensure it stems from reliable scientific principles and will assist the jury in its findings.<sup>38</sup>

Before 1993, most states followed the "general acceptance" standard articulated in *Frye v. United States*.<sup>39</sup> Under *Frye*, judges determine an expert's reliability by looking to the medical community's opinion of the expert's methods.<sup>40</sup> Because this standard assigns the "gatekeeping" of expert testimony's admissibility to the scientific community rather than the judge, the judge need not have any expertise in the particular subject matter.<sup>41</sup>

In 1993 the Supreme Court established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* a new standard for evaluating the admissibility of an expert's methods.<sup>42</sup> Unlike *Frye*, *Daubert* vests judges with the "gatekeeping" role, requiring they "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."<sup>43</sup> Additionally, to assist judges in making this independent evaluation, *Daubert* provides a nonexhaustive list of factors, such as the theory's ability to be tested, the presence of any peer review and publication, any known or potential error rates, and the scientific community's acceptance of the principles.<sup>44</sup> While the parties and amici worried that

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34. See MCCLELLAN, *supra* note 1, at 166–67.

35. See *id.*; see also H.H. Henry, Annotation, *Necessity of Expert Evidence to Support an Action for Malpractice Against a Physician or Surgeon*, 81 A.L.R.2d 597 (1962) (cumulative supplement of cases supporting this finding).

36. See MCCLELLAN, *supra* note 1, at 166 ("Overwhelming authority supports the general rule that expert testimony is usually necessary to sustain a medical malpractice action.").

37. See FED. R. EVID. 702 (providing standards for admission of testimony by expert witnesses). *But see* Cramm, Hartz & Green, *supra* note 15, at 725 (suggesting *Daubert* may be inapplicable to medical expert witnesses because "[h]ow physicians practice medicine is a fact, not an opinion derived from data").

38. See FED. R. EVID. 702(a)–(d); Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 981 (2004).

39. 293 F. 1013, 1014 (D.C. Cir. 1923).

40. See *id.*; Struve, *supra* note 38, at 981.

41. Struve, *supra* note 38, at 981.

42. 509 U.S. 579 (1993); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (extending *Daubert* application from scientific testimony to all expert testimony).

43. 509 U.S. at 589.

44. *Id.* at 592–95.

judges' shortcomings in making this evaluation would "result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions," the Court believed that problem could be addressed by opportunities for cross-examination and presentation of contrary evidence.<sup>45</sup> The Federal Rules of Evidence incorporated *Daubert's* standard and factors in its recent amendments to Rule 702, and while most states followed its lead, many elected to retain *Frye's* general acceptance principle.<sup>46</sup>

Regardless of the jurisdiction's method of qualifying experts, the use of party-selected experts in an adversarial system creates numerous evidentiary issues,<sup>47</sup> including the "battle of the experts."<sup>48</sup> In medical malpractice cases, parties present impressively qualified experts to educate the jury on substantive medical issues and persuade them to adopt a particular theory of liability. These experts inevitably disagree on determinative issues, such as the standard of care and causation, and their disagreement, or "battle," is an important aspect at trial.<sup>49</sup> Presenting expert testimony reflects parties and judges' awareness that juries lack the specialized knowledge to understand how complex medical theories and legal issues intersect.<sup>50</sup> Yet despite this awareness, we still rely on the jury to decide the truth based on conflicting information from an adversarial presentation of experts.<sup>51</sup>

Further complicating the jury's decision is the extensive cross-examination of these experts about their qualifications and credibility. For instance, may a party on cross-examination ask an opposing expert if it is true that they have been "sued for medical malpractice six or

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45. *Id.* at 595–96.

46. See Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 474–76 (2005).

47. James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. (forthcoming 2018) (manuscript at 8), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2956078](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956078) [<https://perma.cc/Y2LV-C92J>] [hereinafter Dillon, *Expertise on Trial*]; see James Dillon, *Expertise on Trial*, EXCITED UTTERANCE (Oct. 16, 2017), <https://www.excitedutterancepodcast.com/listen/2017/10/16/37-james-dillon> [<https://perma.cc/6DL5-MXLX>] [hereinafter Dillon, EXCITED UTTERANCE].

48. *E.g.*, *Crowe v. Marchand*, 506 F.3d 13, 16 (1st Cir. 2007) (noting that "medical malpractice cases often turn into battles between dueling experts"); Cheng, *supra* note 7, at 1391.

49. Cramm, Hartz & Green, *supra* note 15, at 701. Our judicial system reflects a belief that experts should promote certainty and produce one right answer, and has an overly idealized notion of science, which inevitably involves disagreements and competing ideas. See generally CAUDILL & LARUE, *supra* note 27; Jennifer L. Mnookin, *Idealizing Science and Demoning Experts: An Intellectual History of Expert Evidence*, 52 VILL. L. REV. 763, 772–76 (2007).

50. Dillon, EXCITED UTTERANCE, *supra* note 47.

51. Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 2); Mnookin, *supra* note 9, at 1012 ("Experts are necessary precisely because of what the jury does not know. . . . But if the jury lacks the knowledge that the expert provides, how, then, can it rationally evaluate the expertise on offer?").

eight times.”<sup>52</sup> Scholars and courts disagree as to whether these collateral attacks on credibility are helpful or harmful to the jury’s ultimate determination of fault.<sup>53</sup> Courts generally believe this evidence assists the jury’s decisionmaking,<sup>54</sup> but some scholars argue this evidence encourages the jury to decide liability based on the experts’ comparative qualifications rather than medical and legal facts.<sup>55</sup> But regardless of the normative desirability of this form of cross-examination, the frequency with which it occurs justifies an examination of the evidentiary issues it raises regarding character evidence and whether this tactic is permissible under the rules at all.

## II. DISCREPANCIES IN ADMITTING PRIOR MALPRACTICE EVIDENCE

Courts almost unanimously use Rule 404 to exclude evidence of a defendant-doctors’ prior malpractice, but they are inconsistent as to whether the same type of evidence is admissible against an expert witness.<sup>56</sup> Rule 404 prohibits parties from using evidence of a person’s character or evidence of a crime, wrong, or other act that proves such character “to prove that on a particular occasion the person acted in accordance with the character or trait.”<sup>57</sup> While some describe jurisdictional differences over the admissibility of experts’ prior

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52. See, e.g., *Persichini v. William Beaumont Hosp.*, 607 N.W.2d 100, 103 (Mich. Ct. App. 1999).

53. Compare *Upky v. Lindsey*, No. CIV 13–0553 JB/GBW, 2015 WL 3862944, at \*19 (D.N.M. June 3, 2015) (finding expert’s prior malpractice generally relevant and helpful to the jury), with *Lindon v. Kakavand*, No. 5:13–26–DCR, 2014 WL 6473621, at \*1 (E.D. Ky. Nov. 18, 2014) (implying that to the extent prior malpractice claims would be used to attack the expert’s credibility, they would be excluded), and *Locke v. Vanderark*, 843 P.2d 27, 32–33 (Colo. App. 1992) (Dubofsky, J., dissenting) (agreeing with majority’s explanation that prior malpractice is improper but disagreeing with finding that admitting it was harmless error); see *Ginsberg*, *supra* note 2, at 398.

54. See, e.g., *Navarro de Cosme v. Hosp. Pavia*, 922 F.2d 926, 932–33 (1st Cir. 1991); *Upky*, 2015 WL 3862944, at \*19.

55. Steven E. Pegalis, *Medical Malpractice: The Art of Advocacy When Engaging in the “Battle of the Experts,”* 23 AM. J. TRIAL ADVOC. 259, 259 (1999); Amanda E. Spinner, *Common Ignorance: Medical Malpractice Law and the Misconceived Application of the “Common Knowledge” and “Res Ipsa Loquitur” Doctrines*, 31 TOURO L. REV. 521, 530–31 (2015) (citing *NEJM: Neurosurgeons Face the Most Malpractice Claims*, ADVISORY BOARD (Aug. 18, 2011), <http://www.advisory.com/Daily-Briefing/2011/08/18/NEJM-Neurosurgeons-face-the-most-malpractice-claims> [<https://perma.cc/KV53-VDG2>]).

56. See, e.g., *Upky*, 2015 WL 3862944, at \*19–21 (finding evidence of other claims or lawsuits against the defendant inadmissible under Rule 404(b)). But see *Kostel v. Schwartz*, 756 N.W.2d 363, 376–78 (S.D. 2008) (finding no abuse of discretion in trial court’s admittance of defendant-doctor’s prior malpractice where evidence’s purpose was knowledge rather than propensity). The Eighth Circuit in *Bair v. Callahan*, 664 F.3d 1225, 1229 (8th Cir. 2012), criticized the South Dakota Supreme Court for “misinterpret[ing] Rule 404(b)’s reference to ‘knowledge’ by allowing parties to introduce evidence showing only propensity to commit malpractice.”

57. FED. R. EVID. 404.

malpractice as a “split,”<sup>58</sup> that label is somewhat imprecise. Courts agree regarding the applicable evidentiary standards for experts—they consistently bypass Rule 404 and skip to Rule 403. Instead, their disagreement as to whether the evidence is admissible results only from varying degrees of judicial discretion. This Part will illustrate this discrepancy—first, by exploring how courts apply evidentiary rules, specifically Rules 403 and 404, to evidence of a defendant-doctor’s prior malpractice, and then detailing how courts apply those rules differently to experts.

### A. Defendant Doctors: Off Limits

Generally, evidence of a person’s character trait is inadmissible to demonstrate that she acted in accordance with that trait—a common-law rule now codified in Federal Rule of Evidence 404.<sup>59</sup> Often referred to as the “propensity ban,” this rule seeks to prevent the jury from making “the forbidden inference: the person did X in the past, therefore he probably has a propensity for doing X, and therefore he probably did X this time, too.”<sup>60</sup> That inference is not necessarily irrelevant under Rule 401,<sup>61</sup> but it can prompt the jury to decide liability or guilt on improper bases, which may be unfairly prejudicial to defendants.<sup>62</sup> This risk is greater when parties seek to prove character with evidence of specific acts because that evidence is often colorful and memorable.<sup>63</sup> Other problems, such as distracting and confusing the jury and creating mini-trials, also countenance against admitting propensity evidence.<sup>64</sup> Rather than leave this evidence’s admissibility to judicial discretion, Rule 404 reflects a legislative intent to make this evidence inadmissible as a matter of law.<sup>65</sup>

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58. *United States v. Ahmed*, No. 14-cr-277 (DLI), 2016 WL 3647686, at \*2 (E.D.N.Y. July 1, 2016); *Upky*, 2015 WL 3862944, at \*19.

59. FED. R. EVID. 404(a)–(b); GEORGE FISHER, EVIDENCE 153 (Robert C. Clark et al. eds., 3d ed. 2013).

60. *Upky*, 2015 WL 3862944, at \*8 (internal citations omitted).

61. FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”). Rule 401 is interpreted as being very liberal toward the admissibility of evidence. See FED. R. EVID. 401 advisory committee’s notes to proposed rule (“The standard of probability under the rule is ‘more probable than it would be without the evidence.’ Any more stringent requirement is unworkable and unrealistic.”).

62. See, e.g., FED. R. EVID. 404; *Old Chief v. United States*, 519 U.S. 172, 181 (1997); *Michelson v. United States*, 335 U.S. 469, 475–76 (1948); FISHER, *supra* note 59, at 153.

63. FISHER, *supra* note 59, at 153.

64. *Id.* at 154.

65. See, e.g., *Old Chief*, 519 U.S. at 181–82; FISHER, *supra* note 59, at 154.

Importantly, the rule excludes character evidence only if offered for one purpose: propensity.<sup>66</sup> The few exceptions that make that purpose permissible in civil cases are narrow,<sup>67</sup> so a more common method of using character evidence is to circumvent Rule 404 by offering a nonpropensity purpose for character evidence.<sup>68</sup> In such cases, courts must press proponents to explain the relevancy of the nonpropensity purpose,<sup>69</sup> as the chain of inferences necessary to make that purpose relevant may still impermissibly rely on propensity.<sup>70</sup> Still, courts may reject character evidence offered for legitimate nonpropensity purposes under Rule 403, which permits the exclusion of otherwise admissible evidence “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>71</sup> With character evidence, the potential unfair prejudice is that the jury will make a propensity inference even when a relevant nonpropensity purpose exists.<sup>72</sup>

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66. FISHER, *supra* note 59, at 155.

67. This Note will not discuss Rule 404(a)(2)'s exceptions because they are limited to defendants and victims in criminal cases. Rule 404(a)(3) directs courts to Rules 607, 608, and 609, which provide exceptions for witnesses. See FED. R. EVID. 404(a)(3).

68. While those “other purposes” are thought of as exceptions, that label is imprecise and likely stems from the rule’s nonexhaustive list of other purposes. See FISHER, *supra* note 59, at 157 (“[T]he list of possible other purposes presented in [Rule 404] is unnecessary.”); *id.* at 158 (“It is true that judges often *call* the permitted purposes listed in FRE 404(b)(2) ‘exceptions’ to Rule 404(a)(1). But all such references are in error.”). Fisher also explains how treating these “other purposes” as exceptions is risky and may lead courts to the wrong result. See *id.* at 159 (“[T]hinking of the permitted purposes listed in Rule 404(b)(2) as ‘exceptions’ to the propensity evidence ban can lead a court astray. . . . [The rule] simply does not grant litigants permission to invite the jury through the propensity box.”).

69. For an illustration of how courts should analyze these inferential chains, see *id.* at 158–60. At a recent conference sponsored by the Judicial Conference Advisory Committee on Evidence Rules, judges and scholars expressed their concerns that judges were admitting character evidence for other purposes with little scrutiny of that purpose’s inferential chain. See *Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(d)(1)(a)*, 85 FORDHAM L. REV. 1517, 1522–23 (2017) [hereinafter *Conference on Federal Rules of Evidence Amendments*] (explaining that appellate judges felt they “were seeing . . . too much 404(b) evidence without any careful thought in the record from district judges about why this evidence was being admitted”).

70. See FISHER, *supra* note 59, at 158–60; see also David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 442 (2001) (“If the chain of inferences leading from the evidence to the fact it is offered to prove *requires* a character inference, the evidence is inadmissible.”).

71. FED. R. EVID. 403. Unfair prejudice arises when evidence would incite the jury to decide on an improper or irrational ground. See FED. R. EVID. 403 advisory committee’s notes on proposed rules. Even confusing the issues or misleading the jury can justify exclusion to ensure the jury’s attention is focused on the issues at hand. Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 526–27 (1997).

72. See Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1494 (2005); see also *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 191 (3d Cir. 2000) (“[A] proponent’s incantation of the proper uses of [Rule 404(b) evidence] . . .

Within Rule 404's framework, courts regularly exclude evidence of a defendant-doctor's character for negligence or prior acts of malpractice to prove a doctor negligently treated a patient plaintiff.<sup>73</sup> For example, the U.S. Court of Appeals for the Eighth Circuit found a district court did not abuse its discretion in excluding evidence of a defendant-doctor's prior misplacement of surgical screws with similarly situated patients under Rule 404(b).<sup>74</sup> The Eighth Circuit, disagreeing with the appellant's argument that the evidence showed knowledge, not propensity,<sup>75</sup> explained that prior malpractice evidence did not demonstrate the kind of "knowledge" contemplated by Rule 404(b).<sup>76</sup> Instead, the evidence "ran more to showing lack of competence or care—that is, malpractice . . . [f]rom [which] the jury could infer that [the doctor] had a propensity to commit malpractice."<sup>77</sup> State court decisions mirror this analysis, properly scrutinizing the stated purpose for prior malpractice evidence against the defendant doctor and finding it inadmissible under Rule 404's propensity ban.<sup>78</sup> Thus, courts rarely

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does not magically transform inadmissible evidence into admissible evidence." (alteration in original) (quoting *United States v. Morley*, 199 F.3d 129, 133 (3d Cir. 1999))). Even if a proponent's purpose does not rely on a propensity inference, the proponent is unlikely to prevail where that purpose is pretextual because pretextual purposes have low probative value and will likely be substantially outweighed by the unfair prejudice that the jury will use that evidence for propensity. *See infra* notes 120–128 and accompanying text.

73. *See, e.g.*, *Bair v. Callahan*, 664 F.3d 1225, 1229 (8th Cir. 2012) ("Evidence concerning [the defendant's] past treatment of other patients is not admissible under Rule 404(b)."); *Velázquez ex rel. J.A.V. v. UHS of P.R., Inc.*, No. 13-1581 (MEL), 2015 WL 477198, at \*2 (D.P.R. Feb. 5, 2015) ("The fact that allegations were made in prior lawsuits, without more, has little probative value to show negligence on the part of Dr. Cortés or UHS on the occasion at issue in the amended complaint in the above-captioned case.").

74. *Bair*, 664 F.3d at 1229.

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Bair v. Callahan*, 775 F. Supp. 2d 1163, 1171 (D.S.D. 2011)) (finding that evidence of previous alleged malpractice was not probative of the kind of "knowledge" contemplated by Rule 404).

78. *See, e.g.*, *Lai v. Sagle*, 818 A.2d 237, 248 (Md. 2003) ("Unless clearly admissible for some limited purpose under the rubric of Rules 5-404 and 5-403, we can conceive of no instance where making a jury aware in a malpractice trial . . . of prior malpractice litigation against a defendant doctor would be permissible."); *Persichini v. William Beaumont Hosp.*, 607 N.W.2d 100, 107 (Mich. Ct. App. 1999):

[P]laintiff's counsel failed to establish that the question had a proper purpose. . . . [T]he question was particularly prejudicial, because it implied plaintiff's counsel had knowledge that Dr. Herbert had been sued for malpractice six or eight times. . . . The jury may well have believed that it was more likely that Dr. Herbert committed malpractice in the instant case because he had been accused of malpractice in other cases.;

*Laughridge v. Moss*, 294 S.E.2d 672, 674 (Ga. Ct. App. 1982) ("The trial court did not err in disallowing evidence of an alleged previous act of medical malpractice on the part of [the defendant].").

have to rely on Rule 403 in this context because the evidence is inadmissible under Rule 404's specific ban on propensity evidence.

### *B. Expert Witnesses: Fair Game*

Rule 404's text indicates its application should not change based on the party against whom propensity evidence is offered,<sup>79</sup> but courts bypass this rule for experts and instead use their Rule 403 discretion to admit or exclude prior malpractice evidence when it is offered against expert witnesses.<sup>80</sup> This Part will explore case law involving the admission or exclusion of experts' prior malpractice to illustrate this discrepancy.

#### 1. Permitting Prior Malpractice

Courts admitting evidence of an expert's prior malpractice suits often deem the evidence relevant and probative of the expert's credibility, competency, and expertise.<sup>81</sup> The First Circuit has seemingly approved of such questions in cross-examination, as it once upheld a trial court judge's decision to allow the plaintiff's expert to be questioned specifically about his prior malpractice suits.<sup>82</sup> In a short and, as one scholar noted, insufficient explanation,<sup>83</sup> the court merely

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79. "Evidence of a *person's* character or character trait is not admissible to prove that on a particular occasion the *person* acted in accordance with the character or trait." FED. R. EVID. 404(a)(1) (emphasis added); see Jeffrey Cole, "Bad Acts" Evidence in Civil Cases Under Rule 404(b): It's Not Just for Prosecutors Anymore, LITIGATION, Spring 2011, at 47, 49 (emphasizing breadth of Rule 404 based on its use of the term "any person"). For more explanation of Rule 404's text, see *infra* notes 113–116 and accompanying text.

80. See, e.g., *Upky v. Lindsey*, No. CIV 13–0553 JB/GBW, 2015 WL 3862944, at \*19 (D.N.M. June 3, 2015) ("[T]he Court differentiates between expert witnesses and fact witnesses when it comes to the admissibility of other-act evidence, such as lawsuits against the witness.").

81. See, e.g., *Baptista v. Carnival Corp.*, No. 1:17-cv-22115-KMM, 2018 WL 1226041, at \*4 (S.D. Fla. Mar. 5, 2018) ("[P]rior medical malpractice claims are relevant to an expert's competency. Consequently, Defendant may introduce medical malpractice claims to the extent those claims relate to the competency of Plaintiff's medical experts." (citing *Upky*, 2015 WL 3862944, at \*20)); *Upky*, 2015 WL 3862944, at \*20; *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & PMF Prods. Liab. Litig.*, No. 3:09-md-2100-DRH, 2011 WL 6740391, at \*13–14 (S.D. Ill. Dec. 22, 2011); see also *Rheinfrank v. Abbott Labs., Inc.*, No. 1:13-cv-144, 2015 WL 5258858, at \*8 (S.D. Ohio Sept. 10, 2015) (explaining that evidence of an expert's prior malpractice suits may help the jury assess credibility and competency and that it is generally relevant and admissible, but taking motion in limine under advisement).

82. See *Navarro de Cosme v. Hosp. Pavia*, 922 F.2d 926, 932–33 (1st Cir. 1991). Presumably, a party would not ask its own expert about the expert's prior malpractice on direct unless seeking to preemptively reduce its impact where a court issued a pretrial ruling on its admissibility and the defendant would inevitably raise it on cross-examination.

83. Ginsberg, *supra* note 2, at 401 ("[T]he First Circuit, without sufficient explanation, has approved the cross-examination of a plaintiff's medical expert 'about the fact that he had been a defendant in three medical malpractice cases.'"). Courts have also found that case unpersuasive due to the court's lack of explanation for its decision. See, e.g., *Ness v. Bayhealth Med. Ctr., Inc.*,

pointed to the district court's "wide discretion under Rule 608(b)"<sup>84</sup> and explained:

An expert is a person who, due to his training, due to his education, due to his standing in the community, is allowed to come before a court and based upon that privilege, so to say, is allowed to give an opinion on something after the fact. . . . The person under those circumstances has to come to court and has to submit to the rigor of qualifications which includes not only the technical aspects . . . but also on . . . his standing in the community and his performance as a physician . . . .<sup>85</sup>

Thus, the First Circuit felt that because courts extend experts a privilege to provide opinions on matters in which they were not personally involved, the expert's reputation and performance were particularly important.

Other courts' opinions offer further explanation for admitting prior malpractice evidence against experts.<sup>86</sup> In *Upky v. Lindsey*, the plaintiff claimed his doctor's failure to timely treat postsurgical complications constituted medical negligence, and he sought to introduce evidence of the defendant-doctor's prior malpractice cases in response to the defendant offering similar evidence against the plaintiff's expert.<sup>87</sup> The patient claimed he was introducing such evidence "for the same purposes that [the defendant] was seeking to introduce [the plaintiff's expert's] prior lawsuits."<sup>88</sup> The U.S. District Court for the District of New Mexico prohibited the defendant-expert's prior malpractice from being brought before the jury,<sup>89</sup> finding such evidence inadmissible because it suggested the defendant had a "propensity for negligence."<sup>90</sup> But the court declined to limit the defendant's ability to introduce similar evidence against the plaintiff's

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No. 05C-02-130 SCD, 2006 WL 2382795, at \*3 (Del. Super. Ct. Aug. 10, 2006) ("The [*Navarro de Cosme*] court concluded, without analysis, that the trial court's ruling that all the matters related to the witness's credibility as a witness, and were not error. The paucity of facts makes it difficult to attribute any weight to this case.").

84. See *infra* Section III.B (explaining why Rule 608 is inapplicable in these contexts).

85. *Navarro de Cosme*, 922 F.2d at 932–33. See *infra* Section III.B for a discussion of why that case arguably misapplied Rule 608(b).

86. See, e.g., *Rheinfrank*, 2015 WL 5258858, at \*8 ("[E]vidence of prior lawsuits, particularly malpractice suits, is relevant and may be useful in helping the jury assess expert credibility and competency on cross-examination."); *Upky*, 2015 WL 3862944, at \*8–10.

87. 2015 WL 3862944, at \*1–2.

88. *Id.* at \*7.

89. A motion in limine is a pretrial request that certain evidence, argued to be inadmissible, not be referred to or introduced at trial. These motions are common because excluding such evidence avoids the risk that jurors will be prejudiced with potentially inadmissible evidence. See Christi Hayes, *A Motion in Limine Can Prevent Damage at Trial*, LAW DICTIONARY, <https://thelawdictionary.org/article/motion-limine-can-prevent-damage-trial/> (last visited Jan. 16, 2018) [<https://perma.cc/GBV3-2YFK>].

90. *Upky*, 2015 WL 3862944, at \*18–19 (quoting *Waconda v. United States*, No. CIV 06–0101 JB/ACT, 2007 WL 2461624, at \*6 (D.N.M. May 31, 2017)).



expert.<sup>91</sup> It found that the expert's competency was at issue and believed exposing weaknesses in his competency would assist the jury.<sup>92</sup> While the court expressly noted that Rule 608 was not the basis of its decision,<sup>93</sup> it did not offer much insight as to how Rule 404 factored into its decision, if at all.

Likewise, the Southern District of Ohio has also allowed evidence of an expert's malpractice to be admitted during cross-examination.<sup>94</sup> Responding to the defendant's motion in limine to prohibit questioning of her experts about their prior malpractice, the court stated such evidence will "generally be relevant and admissible,"<sup>95</sup> but it took the motion under advisement, recognizing that "extensive cross-examination on the topic could waste time and result in mini-trials."<sup>96</sup> Many states' courts also find an expert's competency to be relevant<sup>97</sup> and the exclusion of prior malpractice evidence to be an abuse of discretion<sup>98</sup> or reversible error.<sup>99</sup>

## 2. Prohibiting Prior Malpractice

Other courts either exclude prior malpractice evidence upon finding that it improperly attacks the expert's credibility or that it should be excluded under Rule 403.<sup>100</sup> In a recent case, the Eastern

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91. *Id.* at \*21.

92. *Id.* at \*20.

93. *See id.* at \*20 ("Prior-lawsuit evidence is not, however, introduced to show that the expert is untruthful, but, instead, to show that the expert lacks the requisite expertise and competence to give expert opinions.").

94. *See Rheinfrank v. Abbott Labs., Inc.*, No. 1:13-cv-144, 2015 WL 5258858, at \*8 (S.D. Ohio Sept. 10, 2015).

95. *Id.*

96. *Id.*

97. *Cook v. Wiggins*, No. 21047-9-II, 1998 WL 712832, at \*3 (Wash. Ct. App. Aug. 21, 1998).

98. *Richmond v. Longo*, 604 A.2d 374, 378-79 (Conn. App. Ct. 1992).

99. *See Underhill v. Stephenson*, 756 S.W.2d 459, 461 (Ky. 1988) (finding lower court's refusal to allow plaintiff to cross-examine expert on prior malpractice suits, for the purported purpose of bias, to be reversible error); *Willoughby v. Wilkins*, 310 S.E.2d 90, 97-98 (N.C. Ct. App. 1983) (finding refusal to permit cross-examination of expert witness on prior malpractice suits was reversible error because doing so "prevented the jury from hearing facts from which bias or interest on the part of the expert witness could be inferred").

100. *See, e.g., United States v. Ahmed*, No. 14-cr-277 (DLI), 2016 WL 3647686, at \*3 (E.D.N.Y. July 1, 2016) ("Because the lawsuits appear to lack the subject matter connection that could render them useful to a jury in assessing the expert's credentials and competency, the probative value of the lawsuits is substantially outweighed by the potential for unfair prejudice."); *Manhardt v. Tamton*, 832 So. 2d 129, 131-32 (Fla. Dist. Ct. App. 2002) (finding questions to expert about prior malpractice lawsuits to be improper attack on credibility); *see also Lindon v. Kakavand*, No. 5:13-26-DCR, 2014 WL 6473621, at \*1-2 (E.D. Ky. Nov. 18, 2014) (reviewing plaintiff's motion in limine to exclude evidence that its expert "was named as a defendant in a lawsuit" and deciding that "[t]o the extent the defendant intend[ed] to use [such evidence] to attack [the expert's] credibility, the evidence w[ould] be excluded").

District of New York granted the government's motion in limine to prohibit questioning of its medical expert about his prior malpractice.<sup>101</sup> The court found such evidence neither probative of untruthfulness under Rule 608—an exception to Rule 404's bar against character evidence—nor helpful to the jury's assessment of the expert's competency given the unfair prejudice created by unrelated medical issues, passage of time, and lack of adverse findings against the expert.<sup>102</sup> Under Rule 403, the court believed the slight probative value of that evidence was substantially outweighed by the unfair prejudice.<sup>103</sup>

The District of Maryland made a similar decision in a recent case where the patient plaintiff moved to strike from his expert's deposition questions about the expert's other ongoing malpractice claim.<sup>104</sup> The defendant doctor asserted the questions were relevant to the expert's credibility because they revealed an inconsistency in the expert's criticism of the defendant's treatment of his patient.<sup>105</sup> The judge did not discuss any propensity problems implicated by the questions but used Rule 403 to strike that information from the deposition.<sup>106</sup> While both cases involved alleged failures to timely diagnose cancer, the judge believed that to render the other case probative, a demonstration of the cases' medical comparability was necessary—a task that required exploration into unrelated medical issues.<sup>107</sup> But that exploration would require the jury to understand additional medical issues, prompting confusion of the issues, undue delay, and unfair prejudice that the judge ultimately found substantial enough to outweigh the potential probative value of that evidence.<sup>108</sup>

Several state courts have also found this cross-examination technique to be an improper attack on the expert's credibility.<sup>109</sup> A Florida appellate court found that the questions propounded to the defendant's expert witness on cross-examination regarding his

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101. *Ahmed*, 2016 WL 3647686, at \*3.

102. *Id.*

103. *Id.*

104. *Willison v. Pandey*, No. CCB-09-01687, 2011 WL 4899993, at \*1 (D. Md. Oct. 13, 2011).

105. *Id.* at \*8-9.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See, e.g., Musorofiti v. Vlcek*, 783 A.2d 36, 49 (Conn. App. Ct. 2001) (explaining any rule suggesting that an "expert who testifies as to his or her qualifications opens the door to an unfettered cross-examination of any malpractice claims made against that expert . . . [would] serve no purpose but to show that the expert 'has made mistakes in the past'").

professional misconduct were an improper attack on his credibility.<sup>110</sup> Similarly, the Michigan Court of Appeals, recognizing that evidence of a witness's past misconduct is admissible in narrow contexts under Rules 404(b) and 608(b),<sup>111</sup> found that "the mere fact that someone has been named as a defendant in a malpractice lawsuit could not be used to impeach his credibility as an expert."<sup>112</sup> Thus, while several federal and state courts have excluded evidence of an expert's prior malpractice, their reasons for doing so are different, ranging from vague explanations stressing the importance of an expert's credibility to Rule 403 analyses finding high unfair prejudice or low probative value.

### III. IMPERMISSIBLE CHARACTER EVIDENCE

The problem with the current analyses regarding evidence of an expert's prior malpractice is that Rule 404 should, in most cases, require exclusion of that evidence, but courts ignore this rule. Most parties, while claiming it is relevant to credibility, want that evidence admitted for propensity purposes. However, as this Part will demonstrate, prior malpractice evidence is inadmissible under Rule 404 and outside Rule 608's scope, conclusions which should render Rule 403 inapplicable. Even so, creating an expert exception to admit this evidence may be helpful to the jury as a proxy for competency.

#### *A. Rule 404's Importance*

Rule 404, which courts use to exclude evidence of a defendant-doctor's prior malpractice, should apply equally to experts for three reasons: (1) Rule 404's text indicates it applies evenhandedly to all parties; (2) prior malpractice evidence asks the jury to engage in propensity reasoning, the very thing prohibited by Rule 404; and (3) the "other purposes" given by parties for admitting this evidence are both pretextual and unpersuasive.

First, by its text and legislative history, Rule 404 applies to all persons, including expert witnesses. The Rule does not limit its protections to defendants nor impose a lower bar based on whom such evidence is being introduced against—it plainly prohibits evidence of a

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110. *Tormey v. Trout*, 748 So. 2d 303, 306 (Fla. Dist. Ct. App. 1999) (citing *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990)).

111. *Heshelman v. Lombardi*, 454 N.W.2d 603, 609 (Mich. Ct. App. 1990).

112. *Id.* (finding trial judge abused discretion by allowing cross-examination of expert's professional misconduct but that reversal not required because error was harmless).

*person's* character.<sup>113</sup> In other places, the evidentiary rules are limited to witnesses, defendants, or experts, suggesting the rulewriters will confine a rule's scope when intended.<sup>114</sup> Besides this unambiguous word choice, the exceptions created by Rule 404(a)(3) for a witness's character further evince an intent to cover all persons under the general rule—otherwise, the exceptions would be superfluous.<sup>115</sup> But instead of applying Rule 404 evenhandedly, courts lower the bar for experts—admitting prior malpractice of expert witnesses, but excluding it when offered against defendants.<sup>116</sup>

Second, disputing an expert's credibility based on prior malpractice still asks the jury engage in the type of propensity analysis prohibited by Rule 404. When an expert, often a medical professional herself, testifies, she more often than not provides the jury her normative assessment of what is reasonable.<sup>117</sup> Regardless of whether this is appropriate, her assessment is inevitably entangled with how she practices medicine—what she would have done if she was the defendant doctor.<sup>118</sup> Thus, in a medical malpractice trial, we effectively ask the jury to decide which expert is more competent in their practice as a medical provider. It follows that the party against whom prior malpractice evidence is offered is irrelevant because the propensity inference is the same as it would be if offered against the defendant; the jury infers from the prior malpractice that the expert is incompetent and likely acted in accordance with that character in testifying today—incompetent then, incompetent now.<sup>119</sup> Presumably, the distinction driving courts to apply different standards is the lower unfair prejudice

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113. See FED. R. EVID. 404(b)(1) (“Prohibited uses: Evidence of a crime, wrong, or other act is not admissible to prove a *person's* character . . .” (emphasis added)); see also FISHER, *supra* note 59, at 160 (“[Rule 404] does not apply only in criminal cases. Nor does it apply only to proof of the *defendant's* character.”).

114. See, e.g., FED. R. EVID. 410; FED. R. EVID. 608.

115. See FED. R. EVID. 404(a)(3) (“Exceptions for a Witness: Evidence of a witness's character may be admitted under Rules 607, 608, and 609.”).

116. See *Waconda v. United States*, No. CIV 06–0101 JB/ACT, 2007 WL 2461624, at \*6 (D.N.M. May 31, 2007) (finding evidence regarding pending malpractice suits against defendant inadmissible under Rule 404(b) but admitting evidence of malpractice suits brought against plaintiff's experts because it was relevant to credibility and experience).

117. Cramm, Hartz & Green, *supra* note 15, at 700, 710.

118. *Id.*

119. See *Lindon v. Kakavand*, No. 5: 13–26–DCR, 2014 WL 6473621, at \*1 (E.D. Ky. Nov. 18, 2014) (indicating that evidence of plaintiff's medical expert's previous involvement in malpractice lawsuits were irrelevant and “likely inadmissible under Rules 404(b) and 608”); cf. *Bair v. Callahan*, 664 F.3d 1225, 1229 (8th Cir. 2012) (prohibiting evidence showing lack of competence or care because it would allow jury to infer that defendant doctor had a propensity to commit malpractice and thus perhaps likely committed similar malpractice in this case); *Waconda*, 2007 WL 2461624, at \*6 (excluding evidence of defendant's other medical malpractice suits because it had “little probative value . . . other than to suggest [the defendant] has a propensity for negligence”).

against experts because they are often not parties to the case, but that finding cannot justify judicial disregard for Rule 404's application.

Third, while Rule 404 would permit evidence of an expert's prior malpractice for any purpose other than propensity,<sup>120</sup> those "other purposes," commonly bias and knowledge, are pretextual and often still rely on a chain of inferences leading back to propensity.<sup>121</sup> As to knowledge, parties assert that prior malpractice evidence is probative of the expert's knowledge or lack thereof—but courts should recognize the incompatibility of this purpose with regard to experts.<sup>122</sup> Importantly, using prior malpractice evidence to show knowledge involves a propensity inference—the evidence suggests that the doctor has a propensity for applying his knowledge *incompetently*, but not that he lacks such knowledge altogether.<sup>123</sup>

Bias, another purpose commonly offered for prior malpractice evidence, is equally unconvincing. In medical malpractice cases, bias is often shown by an expert's excessive fees or tendency to testify for a particular party or lawyer.<sup>124</sup> It is not impossible that a prior malpractice suit could show bias—the Ohio Supreme Court has upheld the admissibility of evidence of an expert's *ongoing* malpractice suit

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120. Importantly, Rule 404(b) only prohibits evidence of specific acts probative of character when used for propensity. Although subsection (b)(2) contains a list of permitted purposes, this list is not exclusive, but merely illustrative of the commonly used "other purposes." See *supra* note 68.

121. See *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 191 (3d Cir. 2000) (explaining that a proponent of character evidence "must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity" to commit the act in question); cf. *Bair*, 664 F.3d at 1229 (recognizing that appellant's proffered purpose of knowledge for introducing prior malpractice evidence still entailed a propensity inference). Judges should require proponents to explain the chain of reasoning underlying their nonpropensity purpose to ensure it does not rely on propensity, but judges may not be doing this as often as they should. See *Conference on Federal Rules of Evidence Amendments*, *supra* note 69, at 1523.

122. Cf. *Bair*, 664 F.3d at 1229 (holding evidence of defendant-doctor's prior malpractice and purported incompetency in administering surgical screws inadmissible under Rule 404 because offering such evidence for the purpose of "knowledge" misconceived the rule's application).

123. Cf. *id.* (noting that the doctor had knowledge to perform surgery based on credentials and that evidence of prior malpractice showed a lack of competency or care which would allow the jury to infer the doctor has a propensity to commit malpractice). But cf. *Kostel v. Schwartz*, 756 N.W.2d 363, 376 (S.D. 2008) (finding no abuse of discretion where trial court allowed plaintiff to introduce evidence of the defendant's similar prior malpractice to show knowledge and skill). Often, when a party introduces evidence of specific acts to prove "knowledge," it is with the intent of demonstrating a party's knowledge of some fact or a capability of performing the act in question. For example, if a defendant doctor denied knowledge of a complication or side effect from a treatment, using a specific act in which he encountered that issue suggests awareness. For additional illustrations and hypotheticals, see FISHER, *supra* note 59, at 165.

124. See *Cruz-Vázquez v. Mennonite Gen. Hosp., Inc.*, 613 F.3d 54, 59 (1st Cir. 2010); *Oberlin v. Akron Gen. Med. Ctr.*, 743 N.E.2d 890, 892–93 (Ohio 2001) (finding no error where trial court admitted evidence of expert's pending malpractice suit because evidence may be relevant to show the expert's bias to testify in a manner favorable to his pending litigation on very similar medical issues).

upon finding that the similarities in medical theories could lead the expert to slant his opinion in a manner favorable to his defense in that other suit.<sup>125</sup> But admitting evidence of *prior* malpractice against defense experts on the theory that they are generally biased against plaintiffs as a result of being sued is much more tenuous.<sup>126</sup> Unlike in *Oberlin*, where the expert could color his opinion so as to avoid contradicting his defense in *ongoing* litigation, introducing evidence of a *prior* malpractice suit—where litigation is complete—does not create that same risk.<sup>127</sup> Moreover, assuming any expert who has been sued by a patient for malpractice is subsequently biased against all other patients in unrelated litigation arguably eliminates any protection experts theoretically have under Rule 404. Thus, absent an outlier case like *Oberlin*, prior malpractice evidence is rarely probative of bias. Instead of simply accepting a party's "other purpose" for introducing prior malpractice evidence, courts must scrutinize that purpose closely, as their analyses will often reveal that, despite the parties' contentions, they are still asking the jury to make impermissible propensity inferences.<sup>128</sup>

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125. See *Oberlin*, 743 N.E.2d at 892–93. Bias is an issue because the ongoing litigation may motivate the expert to testify in a manner favorable to his defense in his own case to avoid providing inconsistent opinions, an issue that could harm his credibility in his own defense. See FED. R. EVID. 613; FED. R. EVID. 801(d)(1); Ginsberg, *supra* note 2, at 402.

126. See *Wilson v. Stilwill*, 309 N.W.2d 898, 902–03 (Mich. 1981) ("A pattern of testifying as an expert witness for a particular category of plaintiffs or defendants may suggest bias. However, such testimony is only minimally probative of bias and should be carefully scrutinized by the trial court."); Ginsberg, *supra* note 2, at 400 (finding courts that regularly allow evidence of a defense-expert's prior malpractice for the purpose of bias to be "dubious" because doing so assumes that any doctor previously sued would thereafter only serve as an expert for defendants due to their bias against plaintiffs, and explaining that the better approach for evidence of bias is to discover the expert's track record for testifying and their income from these services).

127. See *Underhill v. Stephenson*, 756 S.W.2d 459, 462 (Ky. 1988) (Stephenson, J., dissenting) ("[T]he majority opinion does not cite a case . . . to permit appellants to bring out that the appellees' doctor's medical witness had a malpractice suit pending against him. This evidence is not offered to show bias but a bold attempt to attack the reputation of the medical witness.").

128. See *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (explaining that courts "should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but . . . how the evidence is relevant without relying on a propensity inference"); *Conference on Federal Rules of Evidence Amendments*, *supra* note 69, at 1522 (including statements by the Honorable David Hamilton of the Seventh Circuit, who discusses his "discomfort with excessive use and automatic admission . . . of prior bad acts evidence" and suggests that "to insist on increased rigor and discipline in making decisions about admitting Rule 404(b) evidence," trial judges should "lay out on the record . . . the chain of reasoning that takes you from the 404(b) evidence to some [other purpose]").

### B. Rule 608's Inapplicability

Prior malpractice is also outside the scope of Rules 608 and 609<sup>129</sup>—the only exceptions for admitting evidence of a witness's character in a civil case.<sup>130</sup> Rule 609 is inapplicable to admitting evidence of prior malpractice because it does not involve elements of deceit nor permit incarceration greater than a year.<sup>131</sup> And while Rule 608 allows any party to attack a witness's character for truthfulness or untruthfulness,<sup>132</sup> the advisory committee's comments highlight the rule's narrow application, emphasizing that it is strictly limited to character for *veracity*.<sup>133</sup> The rule previously used the word "credibility," but broad judicial interpretations prompted an amendment changing the rule's text to "truthfulness" to clarify the rule's limited application.<sup>134</sup>

Rule 608's narrow scope makes it important to distinguish between evidence showing truthfulness and evidence showing incompetency. As most courts recognize, prior malpractice is offered to demonstrate the expert's *incompetency*, not untruthfulness.<sup>135</sup> Whether

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129. FED. R. EVID. 608 (allowing evidence of a witness's character for truthfulness or untruthfulness); FED. R. EVID. 609 (admitting evidence of past criminal convictions for witness impeachment upon certain conditions).

130. See FED. R. EVID. 404(a)(3), (b); see also *Heshelman v. Lombardi*, 454 N.W.2d 603, 609 (Mich. Ct. App. 1990) (emphasizing that evidence of prior malfeasance by witnesses is admissible only in narrow circumstances of state's equivalent to Rule 608(b)); cf. MICH. R. EVID. 608 editors' 1978 note (explaining that the state's rule is identical to its federal counterpart except for a portion of (a) relating to rehabilitating witness for truthfulness).

131. See H.R. REP. NO. 93-650, at 7084 (1973) (notes of the House Committee on the Judiciary):

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

132. FED. R. EVID. 608.

133. FED. R. EVID. 608 advisory committee's notes to 1972 proposed rules ("[T]he inquiry is strictly limited to character for veracity.").

134. FED. R. EVID. 608 advisory committee's notes to 2003 amendments (explaining that the rule was amended to use the term "truthfulness" rather than the overbroad term "credibility" to conform the rule to its original intent of only applying to character for veracity, and to leave the admissibility of other extrinsic evidence to other rules).

135. *Baptista v. Carnival Corp.*, No. 1:17-cv-22115-KMM, 2018 WL 1226041, at \*4 (S.D. Fla. Mar. 5, 2018) ("Defendant may introduce medical malpractice claims to the extent those claims relate to the competency of Plaintiff's medical experts."); *United States v. Ahmed*, No. 14-cr-277 (DLL), 2016 WL 3647686, at \*3 (E.D.N.Y. July 1, 2016); *Upky v. Lindsey*, No. CIV 13-0553 JB/GBW, 2015 WL 3862944, at \*19 (D.N.M. June 3, 2015) ("[A] prior malpractice lawsuit does not necessarily concern an act that is probative of untruthfulness."); *Lindon v. Kakavand*, No. 5:13-26-DCR, 2014 WL 6473621, at \*2 (E.D. Ky. Nov. 18, 2014) (explaining that to the extent to which the defendant sought to use the plaintiff's expert's prior malpractice to attack his credibility, it would be excluded); *Moses v. Haney*, 725 P.2d 866, 868 (Okla. 1986) ("[T]he trial court properly excluded evidence of the malpractice suit. That case dealt with professional, medical negligence and the issues and burdens of proof in such causes of action do not necessarily relate to matters of

an expert has been sued for malpractice is not probative of whether she was truthful in forming that opinion.<sup>136</sup>

Thus, while Rule 608's use of the word credibility in its title could imply a broad ability to attack a witness's character for competency, the advisory committee notes explain that the exception is narrow, only permitting impeachment of character for truthfulness.

### C. Rule 403's Irrelevance

Assuming Rule 404 requires the exclusion of prior malpractice evidence and Rules 608 and 609 do not apply, Rule 403 is inapplicable. Rule 403 is a "general screening function for otherwise admissible evidence."<sup>137</sup> Thus, it is implicated only if evidence is otherwise *admissible*—accepting as true the premise that evidence of an expert witness's prior malpractice is *inadmissible* character evidence, a judge should rarely, if ever, evaluate its admissibility at this discretionary stage.

Courts are probably overlooking Rule 404 in the context of experts and instead exercising their Rule 403 discretion because the policies underlying Rule 404 are less persuasive in the context of experts. Much of Rule 404 was concerned with protecting defendants from unfair prejudice.<sup>138</sup> When a party seeks to introduce prior malpractice evidence against a defendant, there is a risk the jury will be influenced to decide liability based on a belief that the defendant is prone to provide care incompetently.<sup>139</sup> Introducing that same evidence against an expert does not change the propensity inference, but the manner in which it impacts the jury's decisionmaking is more tenuous. Instead of directly suggesting the defendant is liable, that evidence affects the jury's perception of the experts, who, while important to the jury's decisionmaking, are not the parties on trial.

Ultimately, while the reasons underlying judicial decisions to admit evidence of an expert's prior malpractice are not unpersuasive, they are not relevant when Rule 404 requires that evidence be excluded

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truth-telling and credibility."). *But see* Navarro de Cosme v. Hosp. Pavia, 922 F.2d 926, 932–33 (1st Cir. 1991) (finding no abuse of discretion where trial court allowed defendant to question plaintiff's expert witness about malpractice cases under Rule 608(b)).

136. *E.g.*, Ahmed, 2016 WL 3647686, at \*3.

137. Richmond, *supra* note 71, at 521 (quoting Christopherson v. Allied-Signal Corp., 939 F.2d 1106, 1112 (5th Cir. 1991)).

138. FISHER, *supra* note 59, at 153.

139. *See, e.g.*, Bair v. Callahan, 664 F.3d 1225, 1229 (8th Cir. 2012) (finding that evidence of the defendant-doctor's prior malpractice showed a lack of competence from which "the jury could infer that [he] had a propensity to commit malpractice"); Lai v. Sagle, 818 A.2d 237, 248 (Md. 2003) ("[S]imilar acts of prior malpractice litigation should be excluded to prevent a jury from concluding that a doctor has a propensity to commit medical malpractice.").



and prevents judges from considering those reasons in a Rule 403 analysis.

#### IV. EXPERT EXCEPTION OR RULE ENFORCEMENT

While courts' disregard for Rule 404 with experts is problematic, the solution is simple: enforce the rule or change it. Creating an exception to Rule 404 for expert witnesses is preferable because it would permit cross-examination of experts with prior malpractice and allow juries to use this evidence as proxies for credibility and competency. Moreover, such an exception could mitigate other existing problems with experts, such as liberal qualification of experts by judges, selection bias by attorneys, and the battle of the experts. Still, an exploration of the reasons cited for excluding prior malpractice evidence help illustrate why an expert exception is the preferable outcome.

##### A. *Problems with Rule Enforcement: Excluding Useful Evidence*

A simple solution that requires no change to Rule 404 is to enforce the rule as written and prohibit cross-examination of experts regarding their prior malpractice. Complying with Rule 404 as currently written would require judges to be more thorough in screening experts and to apply more scrutiny to discern whether prior malpractice evidence is being used for propensity—and if so, to prohibit it despite their leanings under a Rule 403 balance. This suggestion is based on normative notions of ensuring malpractice trials are decided on the proper basis—medical theories, not expert competency.

Many judges and scholars feel this evidence has low probative value that is outweighed by concerns of unfair prejudice, mini-trials, and jury confusion.<sup>140</sup> Malpractice claims are common and often not meritorious,<sup>141</sup> and other professional misconduct or disciplinary problems may result from issues unrelated to medical expertise or

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140. See Ginsberg, *supra* note 2, at 402; see also *Locke v. Vanderark*, 843 P.2d 27, 33 (Colo. App. 1992) (Dubofsky, J., dissenting) (“[I]t is doubtful that such a finding is relevant either to the credibility of the physician or to the accuracy of his testimony in the subsequent but unrelated trial.”).

141. Research shows that more than forty percent of doctors were sued for malpractice at some point in their career and that approximately one in fourteen doctors have a claim filed against them in an average year. See Ginsberg, *supra* note 2, at 368 (citing CAROL K. KANE, AM. MED. ASS'N, POLICY RESEARCH PERSPECTIVES: MEDICAL LIABILITY CLAIM FREQUENCY: A 2007–2008 SNAPSHOT OF PHYSICIANS 2 (2010), <https://www.ama-assn.org/sites/default/files/media-browser/public/health-policy/prp-201001-claim-freq.pdf> [<https://perma.cc/RLU2-228Q>]); Spinner, *supra* note 55, at 521.

care.<sup>142</sup> If almost every doctor deals with a malpractice claim at some point in her career, perhaps this evidence is not probative of credibility.<sup>143</sup> On the other side of this Rule 403 balance, prior malpractice evidence may confuse the jury, create mini-trials and cause undue delay. Those concerns may be greater in cases where the prior malpractice's medical theories are unrelated to the ongoing case.<sup>144</sup> To admit such evidence and provide context for the jury not only takes time, but also diverts the jury's attention and exacerbates their confusion.<sup>145</sup> Experts aim to educate the jury about medicine,<sup>146</sup> so adding extraneous evidence of the experts' prior malpractice may undermine the trial's goal of determining liability in case at hand.

More importantly, extensive cross-examination of expert credentials may alter the trial's purpose and encourage decisionmaking on arguably improper bases.<sup>147</sup> Overemphasizing expert competency may encourage the jury to decide liability based on which party's expert they like or dislike instead of legal and medical fact.<sup>148</sup> Thus, admitting evidence of experts' prior malpractice or other professional misconduct may be imprudent if malpractice claims are to fulfill their intended purpose—incentivizing good medical care and compensating injured parties when they suffer harms at the hands of a negligent doctor.<sup>149</sup> Rule 403 seeks to ensure claims are adjudicated on proper bases by

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142. See *Heshelman v. Lombardi*, 454 N.W.2d 603, 609 (Mich. Ct. App. 1990) (explaining that prior malpractice suits were not probative of competency because even the most knowledgeable and competent doctors have been sued); Ginsberg, *supra* note 2, at 400 (citing David A. Fishbain et al., *What Patient Attributes Are Associated with Thoughts of Suing a Physician?*, 38 ARCHIVES PHYSICAL MED. & REHABILITATION 589, 589 (2007)) (noting that patients may sue doctors for a variety of reasons other than negligence).

143. See Ginsberg, *supra* note 2, at 368 (implying that medical malpractice suits are common and referring to a survey finding that over forty percent of doctors had dealt with a malpractice claim during their career (citing CAROL K. KANE, AM. MED. ASS'N, POLICY RESEARCH PERSPECTIVES: MEDICAL LIABILITY CLAIM FREQUENCY: A 2007–2008 SNAPSHOT OF PHYSICIANS 2 (2010), <https://www.ama-assn.org/sites/default/files/media-browser/public/health-policy/prp-201001-claim-freq.pdf> [<https://perma.cc/RLU2-228Q>])).

144. Cf. *Musorofiti v. Vleck*, 783 A.2d 36, 49 (Conn. App. Ct. 2001) (finding no abuse of discretion where trial court excluded evidence of expert's prior malpractice and emphasizing that lawsuit was ten years old and wholly unrelated to the medical issues in the present case).

145. See *Willison v. Pandey*, No. CCB–09–01687, 2011 WL 4899993, at \*8 (D. Md. Oct. 13, 2011).

146. Ginsberg, *supra* note 2, at 397.

147. Pegalis, *supra* note 55, at 259–60.

148. *Id.* at 259; see also *Locke v. Vanderark*, 843 P.2d 27, 33 (Colo. App. 1992) (Dubofsky, J., dissenting):

To admit collateral evidence of unrelated prior bad acts is to alter the essential purpose of a trial from resolving the dispute on the direct evidence into a morality play in which the jury decides whether the parties and their witnesses are good or bad people. Such is not the proper purpose of a trial, and the courts should be on guard to prevent it.

149. Tucker, *supra* note 16, at 185–86.

permitting the exclusion of admissible evidence when it has an “undue tendency to suggest decision on an *improper* basis.”<sup>150</sup> If we prevent parties from extensively examining the experts’ competency, they may focus more on exposing weaknesses in the substantive medical theories.

Ultimately, while the concerns posed by admitting prior malpractice evidence warrant consideration, they are insufficient to justify a complete prohibition on evidence of an expert’s prior malpractice. Courts ask nonexperts to make decisions in cases so substantively complex and technical that experts are deemed necessary.<sup>151</sup> Inevitably, these nonexperts use proxies to decide which expert is more credible, and prior malpractice evidence may be a better proxy than those currently used.<sup>152</sup> The irony and perceived flaws of this judicial structure is why some scholars have suggested we instead delegate this legal decisionmaking to the experts themselves,<sup>153</sup> but those proposals are criticized for conflicting with historical democratic notions of providing laypersons a role in legal resolutions.<sup>154</sup> It is impractical to believe that eliminating extensive cross-examination of experts’ credibility would force judges and juries to make more substantively accurate judgments from an adversarial presentation of experts.<sup>155</sup> Thus, to the extent we continue to prefer democratic decisionmaking over substantive justice, we must provide those decisionmakers with the tools and knowledge necessary to make more

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150. See FED. R. EVID. 403 advisory committee’s notes to 1972 proposed rules (emphasis added).

151. See generally Dillon, *EXCITED UTTERANCE*, *supra* note 47 (explaining problem of epistemic incompetence—the inability of laypersons to engage with complex scientific theories to resolve legal disputes—and discussing ways that courts have attempted to mitigate this problem).

152. See, e.g., *Upky v. Lindsey*, No. CIV 13–0553 JB/GBW, 2015 WL 3862944, at \*18 (D.N.M. June 3, 2015) (“[I]f a doctor with an exemplary record and a number of awards testifies about the proper standard of care, and a doctor who has been reprimanded and sued many times testifies, the doctor with the exemplary record’s testimony is likely more credible.”); *supra* note 9 and accompanying text. While proxies are not perfect, they are often necessary when nonexperts make decisions in situations requiring specialized knowledge. See Dillon, *EXCITED UTTERANCE*, *supra* note 47 (discussing with Vanderbilt Law School Professor Edward Cheng the use of proxies in other situations, such as two car mechanics providing different recommendations on car maintenance to a car owner who, having consulted a mechanic precisely because she lacks expertise in car maintenance, must rely on proxies like demeanor, training, or experience to decide which mechanic to hire).

153. See, e.g., Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 42–48); Mnookin, *supra* note 9, at 1028 (collecting sources); Dillon, *EXCITED UTTERANCE*, *supra* note 47.

154. See Dillon, *EXCITED UTTERANCE*, *supra* note 47.

155. CAUDILL & LARUE, *supra* note 27, at xv; Mnookin, *supra* note 49, at 799 (“[E]ven if we eliminated all of the structural problems so often complained about [with experts]—we would still, almost certainly, find ourselves within a battle of the experts. The experts would still contradict each other and disagree because even genuine experts do often have genuine disagreements.”).

substantively accurate judgments,<sup>156</sup> a goal that can be met by enacting an expert exception.

### *B. Expert Exception: Cross-Examination with Prior Malpractice*

To properly admit prior malpractice evidence, an exception is necessary because Rule 404 functions as a rule of exclusion. Such an exception should consider not only the expert's role in the litigation, but the outcome of that prior malpractice—importantly, only prior malpractice that resulted in a finding of liability.<sup>157</sup> Those limitations leave us with three types of evidence: (1) prior malpractice of a defendant doctor; (2) prior malpractice of a defendant doctor testifying in an expert capacity; and (3) prior malpractice of a nonparty expert. The first category of evidence—that applicable to a defendant doctor—should remain inadmissible under Rule 404.<sup>158</sup> But the other two—those applicable to parties providing expert opinions—should be admissible under two standards of judicial discretion, one more lenient to nonparty experts and one more stringent toward defendant experts.

#### 1. Sliding Scale: From Defendant Doctors to Nonparty Experts

An expert exception should utilize two standards of judicial discretion: (1) a traditional Rule 403 test for prior malpractice suits of nonparty experts, and (2) a more stringent 403 balance for prior malpractice of expert defendants. Such an exception could be enacted as follows:

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156. *Dillon*, EXCITED UTTERANCE, *supra* note 47.

157. Scholars and courts have recognized that, without a judgment finding the defendant doctor liable or not liable, a medical malpractice claim is not very probative of competency. *See, e.g.*, *United States v. Ahmed*, No. 14-cr-277 (DLI), 2016 WL 3647686, at \*2 (E.D.N.Y. July 1, 2016); *see also* *Heshelman v. Lombardi*, 454 N.W.2d 603, 609 (Mich. Ct. App. 1990) (“Highly competent and knowledgeable physicians have been sued for malpractice. . . . Such allegations of malpractice are analogous to unproven charges of criminal activity. Arrests and charges not resulting in conviction may not be used for impeachment.”); *Pyle ex rel. Pyle v. Morrison*, 716 S.W.2d 930, 933–34 (Tenn. Ct. App. 1986) (finding no abuse of discretion where trial court disallowed cross-examination of plaintiff's expert with prior malpractice evidence because charges and accusations raise no presumption of guilt and are thus merely hearsay); *Ginsberg*, *supra* note 2, at 400 (suggesting patients may file malpractice claims for reasons other than belief of negligence). While judges, in exercising their discretion, may assign a claim less probative value than a judgment and exclude it anyways, malpractice claims are so common and often without merit that it is preferable to simply exclude them from consideration.

158. For a discussion on why such evidence is and should remain inadmissible, see *supra* Section II.A.

**Exceptions for an Expert Witness:** The following rules apply to attacking an expert witness's credibility and character for competency:

- (a) For evidence that an expert witness was found liable for malpractice in her capacity as a provider of the services which she is testifying about in an expert capacity, the evidence:
  - (1) Must be admitted, subject to Rule 403, if that expert witness is not a defendant in the case in which the expert is testifying; and
  - (2) Must be admitted in a case in which the expert witness is also a defendant only if the evidence's probative value outweighs the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.<sup>159</sup>

Under the first standard, a court would exclude evidence of a nonparty expert's prior malpractice only if the unfair prejudice *substantially* outweighs its probative value—the familiar Rule 403 standard that weighs in favor of admissibility. This standard provides an appropriate level of protection for nonparty experts because they are less prejudiced by the risk a jury will misuse prior malpractice evidence for propensity purposes.<sup>160</sup> Unlike the defendant, a nonparty expert has nothing to lose in having his past acts exposed, save for the potential reputational detriment in the eyes of the jury, as she is not on trial risking civil liability. Moreover, that expert charges substantial fees for both her written report and oral testimony at trial.<sup>161</sup> That fee can compensate experts for their expertise and time spent reviewing the case and preparing for trial as well as the character and reputational attacks that may occur during cross-examination.

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159. This language was modeled after Federal Rule of Evidence 609 because that rule also uses a set of balancing tests, a similarity discussed *infra* notes 167–173 and accompanying text.

160. See *Persichini v. William Beaumont Hosp.*, 607 N.W.2d 100, 107 (Mich. Ct. App. 1999) (finding trial court did not abuse discretion in granting new trial after plaintiff's counsel questioned defendant doctor about previous malpractice because "prejudice was exacerbated by the fact that, unlike [previous cases finding such errors to be harmless], the question [here] was directed to a *defendant* rather than a mere expert witness").

161. See *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967, 973 (7th Cir. 2001); McConkey, *supra* note 8, at 493 ("[M]any doctors will gladly don their boxing gloves for a reasonable fee . . ." (quoting *Farley v. Meadows*, 404 S.E.2d 537, 540 (W. Va. 1991))).

By contrast, in the less common scenario where an expert witness is also the defendant,<sup>162</sup> courts should apply a higher standard—admitting prior malpractice evidence only if its probative value outweighs any unfair prejudice. While Rule 403’s standard is liberal towards admissibility, this would flip that balance in favor of exclusion. The party’s dual role as an expert and a defendant justifies this reversal.<sup>163</sup> The Federal Rules of Evidence recognize that risks of unfair prejudice are higher for a defendant than nonparties because a defendant has something to lose at trial. While the stakes for a doctor in a civil suit for malpractice are lower than that of a criminal defendant because a doctor’s liberty is not at stake, the doctor still risks that the jury’s misuse of this propensity evidence will prompt a finding of liability.<sup>164</sup> Thus, in the rare case that a defendant doctor seeks to testify in an expert capacity—explaining the standard of care and why her actions complied with it—she should not be deterred by the risk that the plaintiff could easily attack her credibility with evidence of prior malpractice.<sup>165</sup> Providing a heightened level of protection for defendant experts would appropriately reduce that risk and perhaps incentivize more defendant doctors to provide their expert opinions, which could be of immense value to the jury’s fact-finding.<sup>166</sup>

An exception asking judges to exercise their discretion under multiple tests is feasible because this framework is common in other evidentiary rules seeking to impact admissibility based on the witness’s

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162. While it seems unlikely that a defendant doctor would testify as an expert witness in their own defense, case law suggests this does occur. *See, e.g., Persichini*, 607 N.W.2d at 105–06; *Gipson v. Younes*, 724 So. 2d 530, 532 (Ala. Civ. App. 1998).

163. *See Upky v. Lindsey*, No. CIV 13–0553 JB/GBW, 2015 WL 3862944, at \*19 (D.N.M. June 3, 2015) (“There is, however, a difference between an expert witness—who is going to testify about the proper standard of care and about whether the defendant’s actions conformed with that standard—and a defendant—who is being sued for negligence.”).

164. *See infra* notes 172–174 and accompanying text; *see also Gipson*, 724 So. 2d at 532 (affirming trial court decision to exclude evidence of defendant-expert’s failure of medical boards upon finding “the proposed evidence had an undue tendency to influence a decision on the issue of Dr. Younes’s negligence”).

165. *See Upky*, 2015 WL 3862944, at \*20 (citing *M.B. v. S.P.*, 124 So. 3d 358, 361–62 (Fla. Dist. Ct. App. 2013)); *Gipson*, 724 So. 2d at 532 (“Some courts have held that other-act evidence may be admissible against a defendant in a medical malpractice case when the defendant testifies as an expert witness.”).

166. *See Gipson*, 724 So. 2d at 533 (Monroe, J., concurring in part and dissenting in part) (disagreeing with majority’s ruling that trial court did not abuse discretion by prohibiting plaintiff from cross-examining defendant expert with evidence of board examination failures because doing so denied plaintiff opportunity to challenge expert’s credentials simply because expert was also defendant). *Gipson* illustrates the challenges posed by defendant doctors who testify as experts. The dissent believed that excluding prior malpractice evidence denied the plaintiff an adequate opportunity to cross-examine the defendant expert, while the majority found the trial court acted within its discretion by excluding such evidence as unfairly prejudicial because the jury may improperly use it to resolve issues of negligence. *Id.* at 532–33 (majority opinion) (providing that a heightened Rule 403 standard appropriately balances those competing interests).

role in the case. Rule 609, for example, governs the admission of prior convictions of witnesses for impeachment purposes.<sup>167</sup> Though some criticize Rule 609's subsections as unnecessarily confusing,<sup>168</sup> creating a "bewildering jumble of standards," its "mad variety of standards has a method."<sup>169</sup> Those subsections reflect judgments about the varying probativeness and prejudice posed by evidence of criminal convictions—incorporating a number of Rule 403-style balancing tests.<sup>170</sup> Much like this Note's proposed exception,<sup>171</sup> those judgments consider whether the party is the defendant or a witness. That distinction is important because unlike ordinary witnesses, a defendant faces "a unique risk of prejudice—i.e., the danger that convictions that would [otherwise] be excluded under [Rule 404] will be misused by a jury as propensity evidence" and prompt a conviction based on character.<sup>172</sup> With medical malpractice cases, that risk of chilling a defendant doctor from testifying as an expert remains, as does the issue of "depriv[ing] the jury of a potentially valuable source of evidence."<sup>173</sup> A defendant doctor who testifies in both lay and expert capacities provides the jury with a unique perspective that should be encouraged, but not at the expense of depriving a patient plaintiff from cross-examination tactics used on other experts.

While this Note proposes an exception that uses only two Rule 403-type tests, Rule 609's other sections and its case law remain relevant to analyzing the probativeness and prejudice of prior malpractice evidence. Rule 609(b) embodies a judgment that stale

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167. See Aviva Orenstein, *Insisting That Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2)*, 75 BROOK. L. REV. 1291, 1298 n.22 (2010) (explaining three balancing tests established by Rule 609(a)(1)). Rule 609 only applies to criminal convictions, so it cannot be used to introduce prior medical malpractice claims. See FED. R. EVID. 609(a) ("[T]he following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction . . . ." (emphasis added)).

168. See, e.g., Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295–97 (1994) ("No provision of the Federal Rules of Evidence has sparked more controversy than Rule 609 . . . . [M]ost commentaries on Rule 609 have been critical and have proposed amendments.").

169. FISHER, *supra* note 59, at 294–95.

170. *Id.* at 295.

171. See *supra* Section IV.B.1 for the text of this proposed exception.

172. FED. R. EVID. 609 advisory committee's notes to 1990 amendments; see Gold, *supra* note 168, at 2319 ("Unlike an accused, other witnesses may have no direct interest in the outcome of the case."). Limiting instructions are theoretically available to warn against that inference, but many believe those instructions are futile. See Gold, *supra* note 168, at 2313; see also FISHER, *supra* note 59, at 156 (explaining that a party may request limiting instructions under Rule 105 when character evidence is offered for nonpropensity purposes but that doing so is not always advisable because judicial warnings against propensity may instead put that idea in the jury's mind).

173. Gold, *supra* note 168, at 2325.

convictions have a low probative value,<sup>174</sup> directing judges to admit evidence of decade-old convictions only if “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.”<sup>175</sup> Here, a decade-old malpractice lawsuit is also a weak indication of an expert-witness’s current skill, experience, and knowledge, so courts should take that into account when weighing its probative value.<sup>176</sup> Similarly, the *Luck-Gordon* standard—a guide of five particularly relevant factors in applying Rule 609’s standards<sup>177</sup>—may also be helpful to analyzing prior malpractice’s probativeness and unfair prejudice. These nonexhaustive factors include (1) the nature of the crime, (2) the time of conviction and the witness’ subsequent history, (3) similarities between the past crime and the charged crime, (4) the importance of the defendant’s testimony, and (5) the centrality of the credibility issue. The first and third factors encourage judges to consider the similarities in medical issues and theories between prior malpractice judgments and the current case. While courts typically find unfair prejudice heightened where a past crime is similar to that currently charged, the opposite may be true for medical malpractice cases. Prior malpractice that is similar to the ongoing case may be less prejudicial because the jury can understand its relevance without the confusion or delay created by introducing additional, unrelated medical concepts.<sup>178</sup> The second factor, the timeline of the prior malpractice, already exists in Rule 609(b), and the fourth factor, the importance of the defendant’s testimony, is only relevant if the expert is the defendant doctor, in which case the testimony’s importance may be impacted by the number and experience of the defendant’s other experts. The last factor—the centrality of the credibility issue—is inherent in every medical malpractice case, as most courts recognize that an expert’s perceived credibility is crucial to a jury’s ultimate finding of liability.<sup>179</sup> While not exclusive, these factors may guide judges in analyzing the probativeness and prejudice of prior malpractice evidence.

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174. FED. R. EVID. 609 advisory committee’s notes to subdivision (b).

175. FED. R. EVID. 609(b).

176. See FISHER, *supra* note 59, at 295 (“Older crimes are less probative of present character and so are less readily admitted.”).

177. See, e.g., *United States v. Brewer*, 451 F. Supp. 50, 53 (E.D. Tenn. 1978); see also Ted Sampson-Jones, *Implicit Stereotyping As Unfair Prejudice in Evidence Law*, 83 U. CHI. L. REV. ONLINE 174, 179 (2017) (indicating that most jurisdictions, in applying Rule 609, employ the *Luck-Gordon* test, or some variation of it, though many mistakenly apply the test as a limited, rather than nonexhaustive, set of factors).

178. See *Willison v. Pandey*, No. CCB-09-01687, 2011 WL 4899993, at \*1 (D. Md. Oct. 13, 2011); *supra* notes 104–108 and accompanying text.

179. See, e.g., *Upky v. Lindsey*, No. CIV 13-0553 JB/GBW, 2015 WL 3862944, at \*1 (D.N.M. June 3, 2015).



Implementing an expert exception that directs judges to admit prior malpractice evidence under two standards is a simple solution that allows a consideration of each case's unique facts. And by adjusting Rule 403's balance based on the expert's potential role in the case, it guards against the risk that this evidence will prompt a finding of liability on improper bases.

## 2. Side Effects: Curing Other Expert Problems

Creating this exception would not only legitimize the cross-examination technique that already occurs in many courts, but will also improve three other issues created by adversarial expert presentations: (1) the "battle of the experts," (2) lenient judicial gatekeeping, and (3) selection bias and distortion of expert opinions.

The "battle of the experts" created by conflicting expert testimonies confuses the jury, so in deciding which expert to believe, they rely on proxies like demeanor and language rather than competency.<sup>180</sup> The demise of the locality rule and growth of the two schools of thought doctrine have only increased the importance of the battleground between experts.<sup>181</sup> While some scholars argue that a jury's improper response justifies limiting cross-examination of credibility or dispensing of a jury altogether, courts should accept a jury's inability to cope with complex medical theories and instead provide a better correlative metric for the relative credibility of each theory.<sup>182</sup> For example, the District of New Mexico justified its decision to permit cross-examination of an expert's credibility by explaining how using prior malpractice suits to determine credibility correlates with the strength of an expert's testimony:

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180. Cheng, *supra* note 7, at 1391; Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 2).

181. See *supra* Section I.A for a discussion on how those rules have expanded both the experts and theories available for plaintiffs. Expanding the number, geographic scope, and type of experts capable of testifying has made it more challenging to assess the reliability, qualifications, and accuracy of experts and their methods, an issue which may justify more evidence of competency.

182. See Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 18) ("[W]hen faced with competing, sincere, and roughly equally well-credentialed experts . . . a nonexpert will on average do no better in selecting which scientific expert to believe than one would by *tossing a coin*." (second alteration in original) (quoting Brewer, *supra* note 8, at 1670-71)); Stephen D. Easton, "*Yer Outta Here!*" *A Framework for Analyzing the Potential Exclusion of Expert Testimony Under the Federal Rules of Evidence*, 32 U. RICH. L. REV. 1, 1 n.2 (1998) ("That the appellate courts have routinely manifested a thorough-going skepticism of the jury's ability to cope with the complexities of scientific evidence is well-documented." (internal quotation marks omitted) (quoting James E. Starrs, Frye v. United States *Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702*, 26 *Jurimetrics J.* 249, 250 (1986))); see also Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 2) (explaining that most scholarship recognizes that juries "make decisions by relying on heuristics and stereotypes rather than substantive evaluation of the contending experts' scientific views").

If a doctor with an exemplary record and a number of awards testifies about proper standards of care, and a doctor who has been reprimanded and sued many times testifies, the doctor with the exemplary record's testimony is likely more credible. This credibility disparity is not based on the fact that more seasoned doctors with exemplary records are more truthful . . . but instead on the possibility that a seasoned doctor without any blemishes on his or her record likely better understands what the proper standard of care is and when it is breached.<sup>183</sup>

Because prior malpractice claims reflect an expert's incompetency in identifying and applying the standard of care in their practice as a medical provider, a jury may appropriately find an expert with no prior malpractice more credible than an expert who has been sued before.<sup>184</sup>

Inevitably, untested medical theories enter the courtroom "dressed in the emperor's clothes of expert testimony," but the jury, blinded by the "mystic infallibility" of science, is unable to distinguish good medicine from bad medicine.<sup>185</sup> Instead, they use proxies to decide which expert is more credible. Accordingly, courts should accept this limitation and help juries make the best proxy judgment possible instead of criticizing their inability to grasp complex theories.

It is also questionable whether judicial gatekeeping of experts is a sufficient check on an expert's reliability and credibility.<sup>186</sup> Much like the jury, the judge usually lacks the scientific expertise necessary to decide whether the proposed expert's methods are reliable and credible.<sup>187</sup> Despite *Daubert's* perceived escalation in judicial scrutiny of experts,<sup>188</sup> many scholars believe judges are less rigorous in screening

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183. *Upky*, 2015 WL 3862944, at \*18.

184. *Id.*; Ginsberg, *supra* note 2, at 368.

185. See Easton, *supra* note 182, at 1 n.2 (quoting *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974)); Mnookin, *supra* note 49, at 792 ("When occupied by such an expert, the witness box would become 'an exalted and honorable throne in the realm of truth.'").

186. Compare Cramm, Hartz & Green, *supra* note 15, at 707 ("By contrast to the 'gatekeeping' unleashed by [*Daubert*] for scientific and other technical experts, courts have been more inclined to employ the laissez-faire approach to malpractice experts reflected in pre-*Daubert* civil cases."), and Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 5) ("FRE 702 takes a permissive approach to qualification that recognizes a broad range of sources of expertise. Although no empirical studies on the frequency with which proposed experts are deemed qualified exist, FRE 702 establishes a relatively low doctrinal bar for expert qualification."), with Easton, *supra* note 182, at 14 ("[S]ince *Daubert*, trial court judges have demonstrated a new zeal for their gatekeeping responsibility . . . trad[ing] in their 'let it in for what it is worth' attitude for a healthy dose of skepticism that leads to a legitimate review of the reliability of expert opinions . . .").

187. See *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967, 973 (7th Cir. 2001) ("Judges need the help of professional associations in screening experts."); Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 11–12).

188. One study theorizes that *Daubert*, by highlighting problems posed by junk science, increased judicial scrutiny of experts generally, but that it does not matter whether *Daubert* or *Frye* is applied. See Cheng & Yoon, *supra* note 46, at 503, 511.

medical experts than other scientific or technical experts.<sup>189</sup> This lack of scrutiny may stem from *Daubert's* flawed methodology. Both scholars and courts criticize *Daubert* for demanding too much of judges—requiring that they become “amateur scientists.”<sup>190</sup> If judicial gatekeeping of experts inevitably allows some less-qualified parties or untested methods into trial, courts must ensure the jury has ample evidence of that expert’s competency.<sup>191</sup> Furthermore, judicial gatekeeping was never intended to replace the jury’s ultimate evaluation.<sup>192</sup> Thus, cross-examination about the experts’ prior malpractice can reveal the experts’ competency, or lack thereof, and ensures the jury’s credibility determination is more informed.<sup>193</sup>

Lastly, heightened scrutiny on expert credibility is warranted due to the party’s selection bias in choosing experts, which distorts the representative sample of expert opinions.<sup>194</sup> Unlike lay witnesses, experts need not have firsthand knowledge of the underlying facts giving rise to the litigation.<sup>195</sup> For example, if only five people witnessed a doctor perform surgery, the litigants are confined to those persons to provide lay testimony regarding the facts.<sup>196</sup> But when the dispute centers on the standard of care and whether the defendant doctor complied with it, litigants can hire experts from an almost unlimited pool of doctors and select those whose opinions are most favorable to their client’s case.<sup>197</sup> This self-selection gives lawyers the ability to

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189. Cramm, Hartz & Green, *supra* note 15, at 707. For a discussion of recent federal cases that illustrate the need for judges to be more rigorous in applying *Daubert*, see CAUDILL & LARUE, *supra* note 27, at 36–37.

190. Dillon, *Expertise on Trial*, *supra* note 47 (manuscript at 11–12) (citing Chief Justice Rehnquist’s dissent in *Daubert* in which he complained that the new standard required judges to become “amateur scientists”).

191. Cramm, Hartz & Green, *supra* note 15, at 707.

192. See, e.g., FED. R. EVID. 702 advisory committee’s notes to 2000 amendments; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

193. Cramm, Hartz & Green, *supra* note 15, at 725.

194. See David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451, 453 (2008) (explaining that reliability rules are necessary for experts because their “testimony is uniquely vulnerable to ‘adversarial bias’”); Cramm, Hartz & Green, *supra* note 15, at 700 (noting that our adversarial system and ability to select one’s experts produce distortions with expert testimony).

195. Bernstein, *supra* note 194, at 455; Mnookin, *supra* note 9, at 1013 (“With fact witnesses, a party is typically severely limited by the happenstance of who was there and who saw what.”).

196. Cramm, Hartz & Green, *supra* note 15, at 719 (“Lay witnesses must have first-hand knowledge of facts relevant to the case, thereby substantially confining the pool of available witnesses.”).

197. Bernstein, *supra* note 194, at 455; Cramm, Hartz & Green, *supra* note 15, at 719 (“[E]xpert witnesses need not have any [personal] knowledge,” which “enables parties to shop for expert testimony—especially with the growth of the expert witness business.”). Courts have also voiced concerns that experts may manipulate scientific theories to produce a result that comports with the party paying for their services. See *Cruz-Vázquez v. Mennonite Gen. Hosp., Inc.*, 613 F.3d 54, 59 (1st Cir. 2010) (discussing district court’s concern that experts “twist scientific methods to

create the illusion of dissent or disagreement where it may not even exist.<sup>198</sup> David Bernstein, a scholar whose work has focused on experts' adversarial biases, succinctly explained this distortion through a hypothetical example. Assume that a determinative issue in a particular medical malpractice case is whether the standard of care required the defendant doctor to perform an additional procedure in light of complications resulting from a prior surgery. Assume that out of a pool of fifty experts, forty would conclude that the procedure was necessary and that the doctor committed malpractice by not performing it. The patient plaintiff can present several experts who will testify that the standard of care required the doctor to perform the procedure. But selection bias allows the defendant doctor to find several experts from the ten doctors (twenty percent of the pool) who will testify that the standard of care did not require the doctor to perform that procedure. Thus, selection bias allows parties to distort the representative sample of expert opinions presented to the jury, which does not receive a random sample, but a selection chosen to reflect a perspective favorable to that party's side.<sup>199</sup> This presentation gives the jury a false impression that there is a close dispute among experts about the standard of care, when, in the previous hypothetical, approximately eighty percent of experts are in agreement.<sup>200</sup>

Equally troubling is the jury's unawareness of this distortion.<sup>201</sup> Discovery rules and work-product privilege prevent the discovery of opinions held by experts retained or employed by the opposing party in anticipation of litigation absent exceptional circumstances.<sup>202</sup> However, this distortion can be minimized through additional cross-examination of the experts' credibility, including evidence of their prior

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produce a result that will support the case of those footing the bill" but finding that those concerns were addressed by cross-examination and did not warrant an exclusion of the expert's testimony).

198. Mnookin, *supra* note 49, at 798.

199. *Id.* at 798 ("Legal processes . . . produce the erroneous appearance of dissent, creating a 'spectacle' of disagreement that was literally produced by and for the courtroom.").

200. This hypothetical example was adapted from Professor David Bernstein's example involving art experts to provide an illustration of how this distortion occurs in medical malpractice cases specifically. See Bernstein, *supra* note 194, at 456–57.

201. Cramm, Hartz & Green, *supra* note 15, at 719. ("Under the current rules, parties who consult with an expert who renders an unfavorable opinion are free to reject that view and shield it from their adversaries during discovery.").

202. See FED. R. CIV. P. 26(b)(4)(D). The advisory committee amended Rule 26(b)(4) in 2010 to address problems that previously prevented parties from asserting work-product privilege to expert-attorney communications. See, e.g., Robert Anderson, *Full Disclosure No More: New Amendments to Rule 26 Extend Work Product Protection to Retained Expert Witnesses*, TRIAL ADVOC. Q., Winter 2011, at 21, 21. For additional information on those amendments to Rule 26, see *id.*

malpractice.<sup>203</sup> Ultimately, an expert exception would provide the jury with better evidence of credibility and competency and also mitigate other problems inherent in expert-focused trials without sacrificing the democratic notion of allowing laypersons to administer justice.<sup>204</sup>

### CONCLUSION

The importance of a persuasive expert witness in a medical malpractice lawsuit cannot be understated. The “battle of the experts” that often arises in such cases confuses the jury and prompts a decision based on collateral issues. Lawyers exacerbate this battle by seeking to introduce evidence of an expert’s prior malpractice in hopes of discrediting the expert. While courts disagree as to whether such evidence is admissible against experts, it should be excluded under Rule 404 as impermissible character evidence because it encourages the jury to presume the expert is prone to negligence based on his or her prior incompetency. Nevertheless, extensive cross-examination is an important feature of our adversarial system, and this may be the type of evidence that can help a jury make an informed decision when deciding between two competing experts. This inadmissibility issue is solved by enacting an expert exception that uses two Rule 403-style admissibility standards, which will provide judges with discretion to admit this evidence based on the expert’s role in the litigation.

Still, courts must be vigilant to ensure trials remain focused on the pertinent issues. Shifting the trial’s focus from medical theories to the experts’ reputations may worsen the worst aspects of this battle of the experts. To ensure that malpractice claims provide recovery only when the defendant-doctor’s breach actually caused the plaintiff’s injuries, courts should first try to ensure qualified experts educate the jury on medical theories. But, in the likely scenario that the jury is unable to decide between two conflicting expert opinions, an expert exception can provide more evidence of the experts’ credibility.

Importantly, this expert exception would apply to cases and experts besides medical experts in malpractice cases. Other types of expert witnesses, such as forensics or vocational experts, could also present problems such as the battle of the experts, distorted samples,

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203. *Upky v. Lindsey*, No. CIV 13-0553 JB/GBW, 2015 WL 3862944, at \*18 (D.N.M. June 3, 2015) (“[I]f a doctor with an exemplary record and a number of awards testifies about proper standards of care, and a doctor who has been reprimanded and sued many times testifies, the doctor with the exemplary record’s testimony is likely more credible.”).

204. *Cf. Dillon*, EXCITED UTTERANCE, *supra* note 47 (advocating that decisionmaking in complex scientific cases be vested in judicial officers with substantive expertise in subject matter but recognizing this proposal conflicts with the norm of delegating fact-finding to laypersons).

and questionable judicial review of their reliability. Thus, this exception has a wide-reaching potential to improve the jury's decisionmaking in other types of complex cases where experts are deemed necessary.

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