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Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations

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I. INTRODUCTION

A. *Medical Malpractice in Florida*

The State of Florida is a hotbed for medical malpractice litigation. Several factors come into play that confirm this contention, such as overall state population, percentage of healthcare consuming population, and the rise of tort litigation in general throughout the United States. Perhaps one of the largest contributors to the rise in medical malpractice litigation is due to the modern achievements in medicine. Indeed, physicians may have become the victims of their own success. Physicians can heal people today in a way that was not even imaginable as early as ten years ago. Certainly the medical advancements that we observe today will be outdated in a matter of years.

Florida currently ranks third in the nation with respect to frequency of medical malpractice litigation.¹ The rise in Florida medical malpractice

1. See Best's Rev. - Prop.-Casualty Ins. Ed. 78 Medical Malpractice, 1999 WL 10020781 (Aug. 9, 1999); see also F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform,"* 23 GA. L. REV. 295, 301 (1989) (discussing other factors contributing to the rise in medical malpractice: population growth, increased use of medical care, inflation, changes in physician-patient relationships, changes in attitude of jurors toward physicians, improved skills on the part of plaintiff attorneys, and a greater expectation of healing in

litigation has not occurred overnight by any account. In fact, the most noticeable rise came in the middle half of the 1980s during the “medical malpractice crisis” in Florida, a name most commonly tabbed by the insurance industry due to the astronomical rise in medical malpractice insurance premiums. The rise of medical malpractice litigation has created numerous problems and caused extreme frustration within the legal and medical communities.²

The State of Florida adopted legislation in an attempt to curtail the medical malpractice crisis of the 1980s. Chapter 766 of the *Florida Statutes*³ was adopted in an attempt to control and limit the increasingly popular tort.⁴

One of the most unique aspects of Florida’s medical malpractice statute is the mandatory ninety-day pre-suit period for prospective plaintiffs seeking to file a medical malpractice lawsuit.⁵ According to this pre-suit requirement, a prospective plaintiff alleging medical negligence against a physician, hospital or other health care provider must wait ninety days before filing a lawsuit against these prospective defendants.⁶ During those ninety days, informal discovery, including unsworn statements from perspective parties and witnesses, takes place and the prospective defendants are required to conduct investigations with respect to the prospective plaintiff’s claims.⁷ Early settlement or binding arbitration is encouraged for claims of highly probable liability.⁸

modern society) (citing David Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 DUKE L.J. 1179, 1183 (1975)).

2. Hubbard, *supra* note 1, at 313 (suggesting that many physicians are so frustrated over, or in fear of, medical malpractice that they avoid specialties and medical procedures that are considered high risk for claims. *Id.* Hubbard also notes that many physicians practice “defensive medicine” including ordering several tests and procedures that are unnecessary, but used solely to avoid a risk of liability). Also, physicians tend to practice more detailed record keeping because of fear over lawsuits. *Id.* at n.69.

3. FLA. STAT. § 766 (2000).

4. *Id.* See also Hubbard, *supra* note 1, at 309–12 (describing increases in medical malpractice litigation as caused by too many lawsuits filed, plaintiffs prevailing too often, and damage awards being too high). Hubbard presents an argument summarized in six categories: “1) recent rule changes that unfairly favor plaintiffs; 2) problems resulting from statutes of limitations that are too lengthy; 3) inadequacy of common-law rules concerning compensatory damages; 4) injustice of rules governing punitive damages; 5) the cost and unfairness involved in administering the system; and 6) inadequate mechanisms to prevent ‘frivolous’ claims.” *Id.* at 310.

5. § 766.106(3)(a).

6. *Id.*

7. *Id.*

8. *Id.*

The primary motivation behind states having a pre-suit period prior to the filing of a formal lawsuit is to reduce the overall number of lawsuits either by preventing the filing of frivolous lawsuits or providing an opportunity to settle meritorious claims.⁹ In addition to the mandatory pre-suit screening period, the prospective plaintiff must enclose a corroborating opinion from a qualified medical expert with the notice of intent to initiate medical malpractice litigation on the prospective defendants.¹⁰ This opinion must detail the alleged deviations from the prevailing standards of care or other assertions of medical negligence on the part of the prospective defendants.¹¹

In an attempt to monitor and curb medical malpractice litigation, the notice of intent to initiate medical malpractice litigation and the accompanying corroborating expert opinion are filed with the Department of Health, Agency for Health Care Administration ("AHCA").¹² AHCA may decide to conduct an independent investigation and take additional action against the licensed health care provider depending upon the seriousness of the allegations and the probability of liability. To date, there have been no conclusive observations regarding whether or not Chapter 766 of the *Florida Statutes* has had any of the intended results.

B. Rise in Complex, Scientific Based Litigation in the United States

Florida is not unique with respect to experiencing a rise in complex, medical malpractice litigation. All in all, the United States has experienced an alarming rise in the frequency of complex, scientific, and technological litigation.¹³ Courts and juries are increasingly called upon to absorb large doses of scientific theory in cases involving toxic torts, medical malpractice, criminal charges based upon scientific evidence, products liability and most types of personal injury cases.¹⁴ In fact, one study showed that ninety-seven

9. Jody Weisberg Menon, *Adversarial Medical and Scientific Testimony and Lay Jurors: A Proposal for Medical Malpractice Reform*, 21 AM. J.L. & MED. 281, 288 (1995); see also Hubbard, *supra* note 1, at 324–26 (discussing that pre-suit notices of intent to initiate medical malpractice litigation may facilitate more voluntary settlements prior to the filing of a formal lawsuit).

10. § 766.203(2)(b).

11. *Id.*

12. § 766.106(2). In addition, Professor Hubbard discusses other "internal" physician deterrents such as ethics, physicians' concerns for healing their patients, and peer review. See Hubbard, *supra* note 1, at 315 n.75.

13. See Menon, *supra* note 9, at 281–82.

14. *Id.*

percent of all medical malpractice lawsuits required the use of medical experts to assist jurors in understanding the material presented in the case.¹⁵

A study of all California civil jury trials from 1985 to 1986 revealed that expert witnesses testified in eighty-six percent of all civil trials and the cases, on average, involved nearly four different expert witnesses.¹⁶ Due to increases in technology, science, medicine, and, subsequently, litigation, expert witnesses have become a “mainstay” in the courtroom.¹⁷ More specifically, the significant majority of expert witnesses in trials are medical doctors.¹⁸

1. Complexity of Litigation

With increases in complexity of litigation and technological advancements, particularly in medicine, medical issues are often far beyond the comprehension of the normal citizen.¹⁹ Because of these increases, it is argued that most complex lawsuits “may be properly outside of the province of the current jury system when they involve very complex issues . . . [such as] medical testimony.”²⁰ Add the adversarial manner in which this complex information is presented and it even further perplexes the layperson.²¹ The complexity and scientific nature of litigation has increased so much that one

15. See *id.* at 289. Menon also discusses a quote from *Connors v. Univ. Assocs. in Obstetrics & Gynecology*, in which the court states: “in this era of constantly developing medical science, cases in which injuries bespeak negligence to the average person occur less and less and complex cases predominate.” 769 F. Supp. 578, 585 (D. Vt. 1991).

16. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1120 (1991).

17. Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 358 (1998).

18. *Id.*

19. See Menon, *supra* note 9, at 296. Menon argues that because of this fact, juries composed of “laypersons are no longer suitable for cases involving complex medical evidence.” *Id.*

20. *Id.* at 299.

21. Keith Broyles, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 715 (1996) (quoting B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights:*” *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1244 (1993) (comparing the courtroom to the classroom and concluding that the principle discrepancy between the two is that classrooms encourage interaction and the exchange of information to effectuate learning and understanding whereas, in the courtroom, jurors are “acted upon” and expected to remain passive yet render judgment based on what they supposedly should comprehend).

author was prompted to comment that “jurisprudence” has now been circumvented by “juriscience.”²²

What constitutes a “complex case” has been defined using four elements.²³ These four most prominent elements are: multiple party litigation, complex issues and case facts, cases involving “highly technical evidence,” and difficulties associated with providing the proper remedy.²⁴ Some of the difficulties associated with complex litigation exist because these cases typically involve several parties, several issues, technical evidence, and difficult questions of law.²⁵ These types of cases commonly turn on the believability of the respective parties’ expert witnesses. Unfortunately, with the high dollar stakes of modern complex litigation, expert witnesses are often called upon to stretch the truth, deviate from generally accepted scientific concepts within their respective professions, or present fraudulent evidence or theories. The testimony these experts provide is commonly referred to as “junk science.”²⁶

2. Science v. Law

One of the most prominent quandaries between science and law rests in the fact that law demands absolute truths and science cannot indisputably provide them.²⁷ The lack of absolute certainty in science is the basis for much of the debate in complex litigation. The legal community seems devoid of the understanding that science is the search for truth, not the determination of the truth.²⁸ Unfortunately, the influence of the courtroom

22. See Howard T. Markey, *Jurisprudence or “Juriscience?”* 25 WM. & MARY L. REV. 525, 532 (1984).

23. See Broyles, *supra* note 21, at 720; see also *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084–86 (1980) (identifying litigation complexity as encompassing three common elements: the size of the lawsuit, the difficulty of the issues of the case, and the difficulty of separating the different aspects of the case).

24. *Id.* (quoting Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1711 (1992)).

25. *Id.* at 737.

26. See PETER W. HUBER, *GALILEO’S REVENGE* 2–3 (1991). Huber describes junk science as trial testimony provided by an expert that is unsupported by any scientific method, valid data, and standard scientific thinking. *Id.*

27. Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror “Incompetence” and Scientific “Objectivity,”* 25 CONN. L. REV. 1083, 1098 (1993) (discussing the beliefs that scientists are fair and objective in their search for “truth” and the erroneous assumption that for every difficult scientific question, there is always some definite answer).

28. See Markey, *supra* note 22, at 526–27.

dollar may lead scientists to insist upon “justice-friendly” absolute certainties despite the fact that few to none actually exist.

With the rise in complex litigation, junk science has invaded the courtroom, allowing juries to determine causation when causation does not, in fact, exist.²⁹ One dated, yet classic, example of a court’s reliance on junk science stems from a 1964 Pennsylvania case in which the Supreme Court of Pennsylvania upheld a trial court’s decision despite the fact that the jury erroneously relied upon evidence that suggested a rear end vehicle collision caused lung cancer.³⁰ In another startling case, a woman successfully sued for damages after she purportedly developed breast cancer from a slip and fall.³¹ While these “trauma induced cancer” cases were later refuted by the medical community, they provide an ample illustration of how a jury can be persuaded to rely upon inaccurate medical theories.

Law requires absolute truths on an immediate basis. When faced with litigation involving complex scientific questions, law demands that there be an answer to a question, and unfortunately, the courts are not patient in their demands. Science, on the other hand, has a more patient, thorough nature. Science, to be considered generally accepted such that law would not question its veracity, needs to be continually tested, debated, practiced, and proven to progress beyond initial uncertainty.³² What is certain, however, is that we are becoming a more complex, scientific and technologically advanced community as a matter of societal progress. Due to this progress, science, in one way or another, is now an everyday part of litigation.³³ This overwhelming influence of science is without a doubt beyond that which was contemplated by the framers of the Constitution³⁴ or even early appellate courts who handed down decisions regarding complex litigation.

29. See HUBER, *supra* note 26.

30. See *Baker v. DeRosa*, 196 A.2d 387 (Pa. 1964). Interestingly, the Chief Justice dissented, stating that:

Plaintiff's case is so farfetched and so filled with contradictions by the decedent and conjectures by his doctors, while the testimony of defendant's doctors is so positive and strong, I believe that the verdict was clearly against the weight of the evidence and that a new trial should be granted in the interest of justice.

Id. at 392.

31. See *Daly v. Bergstedt*, 126 N.W.2d 242 (Minn. 1964).

32. Renee A. Forinash, *Analyzing Scientific Evidence: From Validity to Reliability with a Two-step Approach*, 24 ST. MARY'S L.J. 223 (1992).

33. Franklin Strier, *The Educated Jury: A Proposal For Complex Litigation*, 47 DEPAUL L. REV. 49, 66 (1997).

34. *Id.* at 65.

Scientific cases often involve evidence so complex that only attorneys, physicians and other scientists can appreciate it.³⁵ The American legal system is grossly unprepared to tackle the beast of scientific litigation. Discrepancies exist between law and science that often result in less than accurate scientific theory being presented and admitted in a courtroom.³⁶ Issues as to the admissibility of “junk science” are vital to litigation reform efforts for several reasons. Problems with scientific evidence are important because science is often outcome-determinative in trials. The influx of science also affects the volume of dockets and often seriously impairs lay jurors’ ability to decipher the issues of the cases.³⁷ The courts are charged with barring immature, untested, or inaccurate scientific data, yet questions exist as to the court’s ability, as with the ability of lay jurors, to assess the veracity of scientific evidence.³⁸ As a result of the courts’ gatekeeper role, it is vital that the judge’s ability to adequately test scientific theories be improved, either by adoption of reform measures or improved guidelines established by higher court rulings.

3. “Junk Science”

Junk science, as it is named, comes in many forms.³⁹ Junk science includes scientific theories that are novel, inaccurate, experimental, and immature.⁴⁰ Experts may attempt to establish causation based upon a scientific theory which is inaccurate or which is improper for the purposes presented by the expert witness. For example, an expert medical physician may attempt to give an exact date in time when a specific cancer metastasized, which, by modern medical standards, is impossible to determine to that degree of specificity. Examples of junk science are endless; however, they often involve assertive “pinpoint” predictions of controversial events to a specific degree, which are scientifically unfounded.

35. *Id.* at 75.

36. Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgment and Scientific Research*, 4 PSYCH. PUB. POL. & L. 1226, 1234 (1998).

37. Kaushal B. Majmudar, *Daubert v. Merrell Dow: A Flexible Approach to the Admissibility of Novel Scientific Evidence*, 7 HARV. J.L. & TECH. 187, 194 (1993).

38. *See* Shuman, *supra* note 36, at 1235.

39. *See* HUBER, *supra* note 26. The term “junk science” refers to the concept of scientific evidence that is presented in a lawsuit, either for purposes of causation or damages, which is inaccurate, unfounded, controversial, untested or otherwise invalid in the scientific community. *Id.*

40. *Id.*

II. EXAMINATION OF FEDERAL AND STATE LAW PERTAINING TO COMPLEX LITIGATION

Due to the fact that most complex cases turn on scientific evidence, the parties often dispute the accuracy of their adversaries' scientific evidence or opinions. These disputes can take place in a number of ways, either by pre-trial motion, objection during trial, or hearings as to the admissibility of evidentiary testimony or opinion as well as at the appellate level. The judicial system's attempts at preventing the admissibility of junk science are challenged by the ambiguity between just when a scientific principle or discovery crosses the line between "experimental" and "accepted" status in the particular scientific communities.⁴¹

A. *Frye v. United States*

The courts since the early twentieth century have had admissibility standards for scientific evidence.⁴² In *Frye v. United States*,⁴³ the Federal Court of Appeals for the District of Columbia was called upon to assess the accuracy of a polygraph test in a criminal trial.⁴⁴ The Court held that only scientific evidence that was "generally accepted" by a substantial portion of the scientific community would be entered into evidence.⁴⁵ The *Frye* test, as it became known, was the standard that courts applied to cases where scientific evidence was challenged with respect to admissibility. For scientific evidence to be admitted for a jury to consider, it must have been generally accepted by a substantial portion of the respective scientific community involved in that particular field of practice.⁴⁶ For half of a century, *Frye* was the standard for militating against the presentation of scientific evidence that was novel, experimental, or immature. With little exception, *Frye* remains the admission standard by which scientific evidence must pass in Florida.⁴⁷

41. See Majmudar, *supra* note 37, at 187.

42. *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

43. 293 Fed. 1013 (D.C. Cir. 1923).

44. *Id.*

45. *Id.* at 1014 (emphasis added).

46. *Id.*

47. See Poulin v. Fleming, 782 So. 2d 452 (Fla. 5th Dist. Ct. App. 2001).

B. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

In 1993, the Supreme Court of the United States set aside the Frye test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁸ The Supreme Court ruled that Frye had been superseded by the Federal Rules of Evidence, specifically Rule 702.⁴⁹ Under the Federal Rules of Evidence, the admission of scientific evidence in a trial must be permitted if it will assist the jury in determining factual issues of the controversy before them.⁵⁰ The rule simply required that the particular evidentiary position must be based upon sufficient facts or data, a product of reliable methods, and the expert's position was applied to the facts before the court.⁵¹ In addition, the Supreme Court in *Daubert* charged the trial judge with being the "gatekeeper" with respect to the admissibility of scientific evidence.⁵² Justice Blackmun, who authored the *Daubert* opinion, even further pronounced the majority's opinion that the Frye test was too stringent a test to determine admissibility of scientific evidence.⁵³ Justice Blackmun blasted Frye as going against the liberal thrust of the rules of evidence which attempt to admit opinion testimony.⁵⁴

The "general acceptance" test, however, was not totally discarded by the *Daubert* decision. Under *Daubert*, "general acceptance" only remains as one of the many elements that aid a court when faced with an admissibility

48. 509 U.S. 579 (1993).

49. *Id.* (citing to FED. R. EVID. 702). FED. R. EVID. 702 holds that:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

50. FED. R. EVID. 702.

51. *Id.* See also Majmudar, *supra* note 37, at 188 (discussing *Daubert* as setting aside the general acceptance test of *Frye* making general acceptance no longer a requirement to admissibility of scientific evidence).

52. *Daubert*, 509 U.S. at 580; see also Majmudar, *supra* note 37, at 190 (discussing that the trial judge must ensure that any and all scientific testimony or evidence admitted during the trial is "not only relevant, but also reliable").

53. *Daubert*, 509 U.S. at 580.

54. *Id.* at 579.

decision.⁵⁵ The much-broadened framework of *Daubert* permit the courts, specifically the trial court judge, a wider, more liberal range of discretion that was not afforded by the *Frye* standard.⁵⁶ The majority in *Daubert* have attempted to broaden access to the courts for novel scientific evidence while permitting the trial court more discretion with the hope of keeping junk science out of the courtroom and thwarting a scientific “free-for-all.”⁵⁷ The *Daubert* analysis has now become the norm for federal courts when assessing the admissibility of scientific evidence.

Florida, unlike most of her sister states, still relies on *Frye* with respect to scientific evidence in the courtroom. From 1953 to present day, Florida courts, including the Supreme Court of Florida, have upheld the use of *Frye*.⁵⁸ By its refusal to follow the path of most jurisdictions in the United States, Florida has shown a commitment to combating junk science by maintaining the stricter, objective standards set forth in *Frye*, wherein a scientific concept must conform with the “general acceptance” test.⁵⁹ In Florida, the burden for establishing the particular scientific concept is generally accepted within the scientific community lies with the party wishing to introduce the evidence and/or testimony.⁶⁰ This gives opposing parties better opportunity to ensure that the evidence used against them will be the more trusted, viable scientific truth rather than junk science motivated by a party’s attempts to pull a judicial “fast one.”

55. *Id.* at 580–81; *see also* Majmudar, *supra* note 37, at 190. Majmudar illustrates the four principal elements cited by the Court for determining the relevance and reliability of scientific evidence. *Id.* These four elements are:

1) whether the theory or technique had been tested in order to check for falsifiability, refutability, and repeatability, 2) whether or not the evidence had been subjected to peer review, 3) the rate of error of the technique and the standards used to control it and, 4) the level of acceptance of the technique within the relevant scientific community.

Id.

56. *See* Majmudar, *supra* note 37, at 203.

57. *Daubert*, 509 U.S. at 595.

58. *See, e.g.*, *Kaminski v. State*, 63 So. 2d 339 (Fla. 1953); *Delap v. State*, 440 So. 2d 1242 (Fla. 1983); *Andrews v. State*, 533 So. 2d 841 (Fla. 5th Dist. Ct. App. 1988); *Poulin v. Fleming*, 782 So. 2d 452 (Fla. 5th Dist. Ct. App. 2001).

59. *Frye*, 293 Fed. 1013; *see also* Shuman, *supra* note 36, at 1236 (commenting that perhaps the most significant aspect of *Frye* is that it helped shape judicial scrutiny to a level beyond consideration of only the expert’s reputation, qualification and credentials when making a decision regarding the admissibility of evidence).

60. *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995).

III. PROBLEMS WITH COMPLEX MEDICAL MALPRACTICE LITIGATION

Despite maintaining the stricter *Frye* standard, medical malpractice litigation in Florida is riddled with problems. These litigation-based problems in Florida, as with other states, develop in a myriad of judicial areas, some of which are the most fundamental to the American system of justice. Given the rise of complex scientific litigation, the two areas that most commonly come under attack are the jury system and the expert witness industry.

A. Juror Incompetence

To challenge the American jury system is without question a very bold, ominous undertaking. The American system of justice is grounded upon the notion of having a jury of lay persons that is representative of the community and capable of reaching a fair, unbiased decision decide the fate of their neighbor.⁶¹ The American jury system gives jurors a level of sovereign authority that is seldom assigned to the average citizen.⁶² In fact, the United States is now the only country in the world where the jury continues to play such a powerful and central role in case adjudication.⁶³ The modern controversy rests in the glaring problems associated with selecting a lay jury that is capable of reaching fair, unbiased decisions in lengthy cases involving scores of highly technical, confusing evidence.⁶⁴

Modern lay juries are criticized for lacking the wherewithal to understand the legal system, the evidence presented, technical or scientific theory, and the court's instructions on deliberation and reaching a verdict.⁶⁵ Juries are called upon in complex medical malpractice cases to hear seemingly endless amounts of medical testimony and evidence, most of which is innovative and subject to debate amongst the medical profession. Medical malpractice cases involving numerous defendants often last for several weeks, which charges a jury with remembering very complex evidence and testimony presented to them by the litigants. Moreover, this complex evidence is often presented weeks before they begin deliberation and, in most courts, jurors are without the luxury of even taking notes to

61. Shuman, *supra* note 36, at 1227.

62. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 55 (2001).

63. *Id.* at 59.

64. *Id.* See also Menon, *supra* note 9, at 284–85.

65. Strier, *supra* note 33, at 50.

record the information presented to them.⁶⁶ As one author aptly explained, “[t]he law seeks the benefit of the common person’s judgment but asks that individual to apply legal rules often beyond the comprehension of one not trained in the law.”⁶⁷ This allegation is perhaps even further accredited when difficult medical theories are added to the jurors’ confusion in medical malpractice trials. To the most trained medical expert, this would be a difficult, frustrating, and trying task. The question has been posed and, in fact, has been the subject of much debate: do lay juries possess the level of competency to adequately and accurately render judgment in complex scientific/medical cases?⁶⁸ An equal amount of debate persists as to what reform measures to take now that it is becoming readily apparent that lay juries cannot possibly be counted on to adequately and accurately render judgment in complex scientific cases.⁶⁹

1. Lay Juror Comprehension

By simple logic, it seems somewhat archaic to hold a jury to render judgment based upon facts and evidence that took the litigants months or even years to assimilate.⁷⁰ This problem is even more compounded when you insert complex medical or scientific evidence into the fray as professionals, such as physicians or scientists, seemingly spend their entire careers attempting to master an understanding of these concepts.⁷¹ For instance, can a lay juror honestly be expected to fully comprehend the

66. Dann, *supra* note 21, at 1250–52 (advocating the permission of juries to take notes during trial with a cautionary instruction that taking notes is not required and should not be given greater weight than jurors’ memories).

67. Strier, *supra* note 33, at 52.

68. See Menon, *supra* note 9, at 284–85.

69. *Id.*

70. *Id.* at 283–84.

71. Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 263 (1993). In addition, Professor Vidmar notes that:

[S]ome legal professionals have questioned how a group of laypersons can make intelligent and unbiased judgments in tasks to which professionals devote years of education and their entire careers. At the same time, doctors and their professional organizations have questioned whether any group of persons other than physicians can make judgments about medical negligence because of the difficulty and complex technical medical questions that they allege are involved in malpractice disputes.

Id. See also HUBER, *supra* note 26, at 33 (claiming that nonscientists are “unequipped to differentiate good science from bad”).

prevailing professional standard of care⁷² with respect to an issue as complex and ill-defined as cancer staging? Not only are they charged with understanding standards of care in medical malpractice cases, they are also called upon to determine whether or not that ill-defined, vague standard of care has, in fact, been breached.⁷³

One author conducted a study involving eleven anesthesiologists from Harvard Medical School in which these physicians were given the facts of twelve medical malpractice cases where juries brought back verdicts against other anesthesiologists.⁷⁴ The surveyed anesthesiologists were asked to review the facts of these twelve cases and determine whether or not the standard of care had, in fact, been violated as found by the juries in the actual trials.⁷⁵ Physician agreement with the jury verdicts was less than sixty percent.⁷⁶ It may be argued that the surveyed anesthesiologists were biased in favor of their peers; however, it should also be noted that those physicians surveyed had no stake in these lawsuits and their judgment, favorable or unfavorable, had no bearing on the cases. The fact that less than sixty percent of the verdicts were agreed with by physicians skilled in the field of anesthesiology suggests that at least some errors were made by these juries.⁷⁷

For the most part, the less educated a juror is, the less likely they will be able to comprehend this type of evidence.⁷⁸ On the other hand, the more education, skills, or related life experience a juror has, the more comfortable they will be with complex cases.⁷⁹ The more educated types of jurors tend to dominate those with less education, skills or experience.⁸⁰ Education, training, and experience play a far less crucial role in civil and criminal trials involving shorter presentations of more simple, everyday-life evidentiary issues.⁸¹ Jurors in these roles can call upon their everyday-life experiences

72. "Prevailing professional standard of care" in medical malpractice cases in Florida is defined as: "[t]hat level of care, skill, and treatment which, in light of all relevant surrounding circumstances is recognized as acceptable and appropriate by reasonably prudent similar health care providers." FLA. STAT. § 766.102 (2000).

73. See Menon, *supra* note 9, at 284. Menon notes that because of this difficult responsibility, juries are quite often "guessing when they render a verdict." *Id.*

74. Bryan A. Liang, *Assessing Medical Malpractice Jury Verdicts: A Case Study of an Anesthesiology Department*, 7 CORNELL J.L. & PUB. POL'Y. 121 (1997).

75. *Id.*

76. *Id.* at 129.

77. Sanders, *supra* note 17, at 361.

78. See Broyles, *supra* note 21, at 720.

79. *Id.* at 720-23.

80. *Id.* at 720.

81. *Id.* at 723.

to plug in gaps in evidence or issues.⁸² This ability to plug in holes is widely absent when it comes to complex cases.⁸³ In several surveys of judges and jurors involved in complex cases, the common theme of difficulty or frustration was centered on technical, medical and/or scientific evidence.⁸⁴ One author noted that “an uncomprehending jury could frustrate a complete remedy and could be an instrument of injustice.”⁸⁵

With the yearly advances in medical science and technology, medical malpractice cases and medical standards of care are, for the most part, far beyond the comprehension of the average citizen.⁸⁶ These advances in medicine require practicing physicians to constantly study and update their knowledge with respect to the changes in their respective specialties. Lay jurors who are confronted with complex scientific issues tend to be frustrated by the difficulty of the evidence presented to them.⁸⁷ As a result, studies have shown that these jurors focused more on the appearances of witnesses, the credentials of the expert witnesses, and the demeanor of the attorneys trying the cases.⁸⁸ Jury attention span decreases in long trials, especially when concerning technical medical evidence.⁸⁹ These difficulties are even further progressed by the adversarial nature with which they are presented in trials.⁹⁰ Arguably, opposing attorneys and their retained expert witnesses may even further confuse jurors when they attack the evidence presented by their adversaries with equally complex and completely different evidence. Lay jurors are simply not qualified to accurately assess the credibility of the evidence and the witnesses.

82. *Id.*

83. *See* Broyles, *supra* note 21, at 723.

84. *Id.*

85. Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1637 (1983) (discussing the controversial theory that a jury not represented by educated persons could be deemed unconstitutional); *see also* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (suggesting that the “practical abilities and limitations of juries” may be a limit on the Seventh Amendment right to a jury trial); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (finding that lay jurors lacked the capacity to decide complex litigation case involving antitrust issues).

86. *See* Menon, *supra* note 9, at 296.

87. *See* Broyles, *supra* note 21, at 722.

88. *Id.* (discussing case study by the American Bar Association).

89. Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROBS., 269, 280 (1989).

90. *See* Broyles, *supra* note 21, at 722.

Former Chief Justice Warren Burger has been quoted on occasion discussing the problems with jurors, particularly in complex cases.⁹¹ In one of his most noted comments concerning this issue, Justice Burger stated that, "civil juries waste time and are often incapable of understanding the issues presented to them."⁹² Some appellate courts have also noted the limitations of lay juries.⁹³ In one appellate case, the court commented that "while the jury can contribute nothing of value so far as the law is concerned, it has an infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour."⁹⁴

Questions exist as to whether lay jurors even attentively consider the evidence when it stretches beyond their realm of understanding. In Florida, prospective jurors are often questioned during voir dire regarding jury instructions with respect to their capabilities of harboring no sympathy considerations for plaintiffs.⁹⁵ This is done in an attempt to set an early mindset to jurors that they will not only be able to render a verdict not based on sympathy but this instruction will remain in their collective minds throughout the trial.⁹⁶

Studies suggest that the more complicated the case and evidence, the less attentive the lay jury will be.⁹⁷ Jurors in one particular study involving

91. *Id.* at 723.

92. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process – The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 17 (1990). Interestingly, Justice Burger is not the only Supreme Court Justice who has voiced disapproval for the modern jury system. Justice Sandra Day O'Connor has commented:

It is unfortunate that, in high-profile cases in this country, which sometimes are high-profile precisely because they are very important, courts are forced to look high and low for jurors who never read newspapers, never watch the news, and never give much thought to issues of public importance. I'm not saying that those jurors are incapable of deciding cases properly. But I am saying that those jurors probably are unrepresentative of their community, because they probably are on average considerably less well-informed citizens than a random cross-section would provide.

See Lilly, supra note 62, at 65 n.39 (quoting Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, FED. LAW 20, 23 (June, 1997)).

93. *See Ross v. Bernhard*, 396 U.S. 531 (1970); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54 (2d Cir. 1948).

94. *See Skidmore*, 167 F.2d at 60.

95. FLA. STD. JURY INST. 7.1.

96. *Id.*

97. *See Broyles, supra* note 21, at 722 (citing a study conducted by Molly Selvin and Larry Picus of The Rand Corporation. *The Debate over Jury Performance: Observations from a Recent Asbestos Case*, 24–25 (Rand Inst. For Civil Justice 1987)). Selvin and Picus

asbestos commented that when the evidence fell outside of their level of competency, they focused more on the appearance and demeanor of the attorney and the expert witnesses rather than the substantive testimony being given.⁹⁸ Collectively, the jurors in the asbestos case study had difficulty with understanding the chemical reaction and its nature, the progression of the chemical with respect to the human physiology, and the long-term effects of exposure.⁹⁹ Understanding these types of concepts in all complex litigation cases is absolutely crucial to determining causation and damages as well as adequately reaching a verdict.

2. Exclusion of Highly Educated or Skilled Jurors

One of the most common problems with modern lay juries is the exclusion of highly trained, educated, and skilled citizens from panels.¹⁰⁰ There are many reasons why college educated or other highly skilled jurors do not make it on to panels. Attorneys, particularly on the plaintiff side, fear that more educated jurors would be capable of seeing through weak points in their cases and serve as leaders on jury panels who are able to sway less educated, "follower" jurors to better understand what has been presented at trial.¹⁰¹ Jury consultants are often retained in one way or another to develop a profile of the specific attributes that the attorney should look for in a juror which appear favorable toward their case. Persons that appear to be well educated, perceptive, and independent-minded tend to be the antithesis of what attorneys, particularly plaintiff attorneys, want on a panel.¹⁰² The more educated and sophisticated the juror is, the more he or she tends to dominate the less educated jurors.¹⁰³ Also, the less educated jurors are commonly preferred by plaintiff attorneys because they tend to be swayed by sympathy

illustrated that jurors involved in a class action lawsuit concerning asbestos were confused by the adversarial presentation of scientific and medical evidence. See Broyles, *supra* note 21, at 722.

98. *Id.* See also Sanders, *supra* note 17, at 362 (discussing that jurors in this study misunderstood the development of medical problems associated with asbestos exposure).

99. Broyles, *supra* note 21, at 722; see also Lilly, *supra* note 62, at 59–60 (commenting that doubts about juries, unfamiliar with the subject case material, contribute to doubts about the fairness and efficiency of the American jury system).

100. See Strier, *supra* note 33, at 72–73.

101. *Id.*

102. See Lilly, *supra* note 62, at 64.

103. See Broyles, *supra* note 21, at 722.

and to question the claims of the plaintiff far less than those jurors with more education.¹⁰⁴

3. Juror Sacrifice

Jurors such as doctors, lawyers, accountants, engineers, and other professionals are often stricken because of the obvious financial difficulties they would incur from serving on jury panels during complex, lengthy trials.¹⁰⁵ Not only can these individuals not afford the financial sacrifice of serving on a jury panel, their professional practices typically would suffer gravely from their absence.¹⁰⁶ Imagine the problems associated with a pediatrician, or any other physician for that matter, being suddenly taken away from their patients because of jury duty or, even worse, a four-week jury trial. Yet, converse to that empathy, that physician may be precisely what the jury panel is lacking when faced with a need for an educated professional who is capable of understanding and appreciating the complex evidence which will be proffered at trial. It has been suggested that long, complex trials have a built-in bias, favoring jurors who are ill-informed, less skilled and less educated than the average citizen.¹⁰⁷ Likewise, it is difficult to contradict the theory that a decline in the capacity and qualifications of jurors would result in a decline in the accuracy and fairness of jury verdicts.¹⁰⁸ In addition, regardless of where a person fits into society, it cannot be argued that the burdens associated with jury duty are not far heavier in modern day America than were ever contemplated in the past.¹⁰⁹

4. Cross-Section of the Community?

Questions exist as to whether or not a jury comprised of no college-educated individuals is, in fact, a representative cross-section of the community.¹¹⁰ Moreover, is a jury comprised of no college-educated jurors or other professionals really a jury of a defendant-physician's peers in a medical malpractice trial?¹¹¹ If roughly forty percent of American citizens

104. *Id.*

105. Strier, *supra* note 33, at 72–73.

106. *Id.*

107. *See* Lilly, *supra* note 62, at 65.

108. *Id.*

109. *Id.* at 61.

110. Strier, *supra* note 33, at 76.

111. *Id.*

have at least some college education,¹¹² a jury comprised of six or twelve individuals below that educational level does not represent a cross-section.

One of the major advantages to using, or even requiring, a certain number of college educated jurors on a complex litigation panel is that college tends to train an individual in the art of analyzing data and various theories to better formulate an educated understanding of what has actually been presented to them.¹¹³ It is suggested that a college-educated individual gets less frustrated when faced with mountains of difficult information because they have experienced at least some degree of similar challenges at some point in college.¹¹⁴ In addition, college educated jurors tend to better understand and follow standard jury instructions which are one of the most difficult tasks faced by juries.¹¹⁵ Unfortunately, with the rise in the college-educated population, there has been a resulting rise in these more capable individuals having the highest level of motivation to avoid jury service.¹¹⁶

With education on the rise in society, it could be argued that a jury containing few educated members is not a cross-section of the community.¹¹⁷ Arguments are made that we must find a way to make avoiding jury duty more difficult for these higher educated jurors or begin requiring full or partial "blue ribbon" juries comprised of certain percentage of highly educated individuals.¹¹⁸ A higher court ruling requiring a certain percentage of educated jurors would significantly aid in the establishment of "blue ribbon" juries.¹¹⁹ Opponents argue that requiring a mandatory percentage of higher educated jurors is an elitist ideology.¹²⁰ Proponents claim that requiring juries to contain an adequate cross-section of the community

112. *Id.* at 63 n.68; *see also* Lilly, *supra* note 62, at 62–64.

113. *See* Lilly, *supra* note 62, at 62–65 (referencing studies regarding changes in percentages of college-educated citizens as well as changes in the national workforce); *see also* Strier, *supra* note 33, at 59–60.

114. *See* Strier, *supra* note 33, at 59–60.

115. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1320 (1979).

116. *See* Lilly, *supra* note 62, at 63. Lilly points out that "the persons apt to be the most capable jurors are also the individuals with the greatest incentives to avoid jury duty . . . the proportion of the population that has both enhanced ability and a heightened motivation to escape jury service has significantly increased." *Id.*

117. *Id.* at 65.

118. *See* Strier, *supra* note 33, at 60. Professor Strier discusses the likelihood that jury decision-making would be enhanced by using specially qualified jurors. *Id.* at 58.

119. *Id.* at 76.

120. *Id.* at 59.

which, by all accounts encompasses a sizable percentage of college-educated citizens, is not elitism; rather, it is simply functionalism or fairness.¹²¹

5. The Decline of Personal Responsibility

Another area of concern that rests with juries comes from alarm over society's growing disregard for personal responsibility as well as a general increase in the litigiousness of the American people. One author noted the American ideology that "those who suffer injuries are quick to place blame upon others."¹²² Americans have quite positively embraced the notion that someone else is always at fault.¹²³ One of the most often cited examples of over zealous litigation and the unpredictability of juries is the case involving a New Mexico woman who was awarded over two million dollars for spilling hot coffee on her lap from a McDonald's fast food restaurant.¹²⁴

The rise in dollar amounts of jury verdicts in medical malpractice lawsuits, as well as other complex tort litigation, suggests that jurors are often sympathetic to allegedly injured plaintiffs and, as such, will often render verdicts in favor of these plaintiffs when faced with discrepancies over understanding complex case issues or evidence.¹²⁵ It appears the jurors often give plaintiffs the benefit of the doubt.¹²⁶ Trials involving lay juries require as much strategy to bring out the emotions and even biases of jurors than strategies attacking the opposing party's case on its principles.¹²⁷

121. *Id.*

122. *See* Forinash, *supra* note 32, at 251.

123. *Id.* at 253.

124. *See* Liebeck v. McDonalds Restaurant's, Inc., 1995 WL 360309 (D.N.M. 1994); *see also* Lilly, *supra* note 62, at 56 n.12. Professor Lilly also cites the example of an Alabama jury that awarded four million dollars in punitive damages to a car buyer after the dealer failed to disclose that the car he purchased had been repainted after being slightly damaged prior to delivery. *Id.* The Supreme Court of Alabama reduced the verdict to two million dollars. *See* BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994). This jury verdict was eventually reversed and the case was remanded to the Alabama trial court by the Supreme Court of United States, but this example is an astonishing example of how far some juries will go with excessive verdicts. *Id.* The Court noted that the Alabama jury's award was grossly excessive in light of the low level of reprehensibility of the distributor's conduct. *See* BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

125. *See* Hubbard, *supra* note 1, at 312 (commentating that "juries are likely to be sympathetic to the plight of victims and, therefore, may tend to resolve doubts in favor of plaintiffs regardless of what they are instructed to do by the judge").

126. *Id.*

127. Lilly, *supra* note 62, at 57 (pointing out that cases are far too often decided on juror sympathy and emotion rather than substance).

B. *Judicial Incompetence*

Another area for examination is the role of judges in the problems associated with complex litigation. Unfortunately, judges may very well suffer from many of the same problems associated with lay jurors.¹²⁸ Judges, it seems, may be only slightly more capable of sorting through complex scientific evidence as the common lay juror.¹²⁹ Judges are not given the training or the tools they need to understand and control the flow of scientific data that goes through their courtrooms. It is crucial that judges must have some degree of a grasp of the facts, issues and evidence presented in all cases including those involving complex scientific or medical controversies.¹³⁰ If trial court judges are incapable of deciding highly technical cases, than these decisions surely should not be placed in the hands of lay juries.¹³¹

1. Retired Judges

In Florida, judicial competency is an even greater concern because of the continuous assignment of retired judges to preside over trials that promise to span for longer periods of time.¹³² These trials typically all involve complex litigation cases and are assigned to a retired judge docket because of the docket backlog that would be created if the assigned judge presided over a lengthy trial.¹³³ Due to these reassignments, the very cases that demand the highest level of judicial competency are commonly removed from the assigned judge and tried before a retired judge who is unfamiliar with the issues involved in the cases as well as unfamiliar with modern science and technology involved in complex litigation. It should be noted that the concept of retired judges presiding over cases was designed in Florida to permit retired judges to relieve docket backlog, fill in for judges who are off sick or vacationing, or to preside over simple, shorter trials.¹³⁴

128. See Shuman, *supra* note 36, at 1244 n.90.

129. See Menon, *supra* note 9, at 286.

130. *Id.* at 295.

131. See Jacobs, *supra* note 27, at 1088 n.20.

132. See Sue Reisinger, *Lawyer challenges constitutionality of outside judges in Broward*, MIAMI HERALD, Aug. 12, 2000, at B3.

133. *Id.*

134. See *In re Certification of Add'l Judges*, 755 So. 2d 79 (Fla. 2000).

The Constitution of the State of Florida requires judges to be elected by voters within the jurisdiction of the courts over which they will preside.¹³⁵ Retired judges who are appointed to preside over trials are not elected officials and, therefore, are arguably not responsive to the electorate. The right of the citizens of Florida to select their own officials is a sovereign right.¹³⁶ Unreasonable or unnecessary restrictions on citizen's elective rights are unconstitutional.¹³⁷ The constitutional argument that exists with respect to the appointment of retired judges to preside over complex medical malpractice cases is that these retired judges are no responsive to any voting body and, therefore, have no means of being held accountable should the citizens of the particular jurisdiction be displeased with their service.

2. Judicial Instructions

Other problems with trial court judges are predominately centered on the judge's instructions to the jury or judicial assistance provided to juries. The instructions that judges give to juries at the end of the presentation of cases are filled with legal jargon and difficult for jurors to understand. Preformatted jury instructions, which are now used in most states, are unclear and they lack the simplicity and comprehensibility needed by lay jurors.¹³⁸ One author went as far as describing jury instructions as "complex and grammatically constructed in the most confounding way, rife with subordinate clauses and double negatives."¹³⁹ Juries tend to comprehend judicial instructions at an appallingly low level.¹⁴⁰ One court has gone so far as to state that the presumption that jurors understand and follow the court's instructions seems highly artificial.¹⁴¹

Trial court judges, it is argued, should make as much effort as possible to implement strategies for improving jury competence.¹⁴² Unfortunately, trial court judges are either unwilling or lack the authority to further expand their role by making these efforts to assist juror understanding. Additionally, the administrating judges of our nations trial courts should pay careful attention to assigning complex cases to judges who have exhibited some

135. FLA. CONST. art. V, § 10(b).

136. *See* Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977).

137. *Id.*

138. *See* Strier, *supra* note 33, at 53.

139. *Id.*

140. *Id.*

141. *See* Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993).

142. *See* Menon, *supra* note 9, at 295.

specialization or understanding of the respective specialized fields whenever possible. For instance, a solution may be assigning medical malpractice cases to judges who used to practice in this field or that have exhibited a command for the subject matter during medical malpractice trials.

3. Appellate Courts

The principal observation with respect to appellate court problems is the untouchable sanctity of which they hold jury verdicts.¹⁴³ Appellate courts are free to exercise a very broad range of power with respect to the rulings and procedures of a trial court judge, up to and including completely overturning a trial court's decision.¹⁴⁴ Yet the appellate courts, when faced with questions as to the jury's decision-making, largely stay far and away from tampering with jury activity.¹⁴⁵ Cases where it is abundantly clear that the jury returned an incorrect, unconscionable, or clearly unjust verdict for either side, should be subject to a more liberal attack by appellate courts.

C. *Attorney Greed*

Attorneys pose equal problems to the field of complex litigation. The American tort system is criticized for being motivated by plaintiff and attorney greed.¹⁴⁶ Some even argue that the greed associated with attorneys and plaintiffs coupled with the sympathies found in lay jurors have disrupted the American tort system and prevented it from properly functioning.¹⁴⁷ For attorneys, science often will make or break their case. The law demands absolute truths and attorneys tend to believe, or they would like to believe, that the scientific theories that support their cases are completely objective and reliable. Attorneys shop for expert witnesses who will support even the most questionable of scientific causation theories.¹⁴⁸ Together with their retained experts, attorneys present scientific evidence so far beyond the

143. Lilly, *supra* note 62, at 74–75.

144. *Id.* at 74.

145. *Id.* at 74–75. Lilly notes that our legal “system elevates a jury verdict to such an impregnable point that often the only way to reverse a ‘bad’ jury verdict is to find fault with the legal decisions of the judge that may have had little actual effect on the outcome.” *Id.* If the jury's verdict has at least some evidentiary support, it is usually upheld. *Id.*

146. See Hubbard, *supra* note 1, at 302.

147. See *id.* See also Menon, *supra* note 9, at 286 (accusing lawyers of manipulating and abusing the adversarial system and capitalizing on the inexperience and relative ignorance of jurors).

148. See Forinash, *supra* note 32, at 247.

comprehension of average jurors that jurors often accept what is being said as true and give plaintiffs the “benefit of the doubt.”¹⁴⁹

Trial attorneys can choose from a number of publications and services that provide tips and techniques on influencing jurors as well as winning “the battle of the experts.”¹⁵⁰ Attorneys with this “win-at-all-cost” mentality seem to select experts from the “extremes of scientific belief” with the hope that jurors, so overwhelmed with complicated evidence, will guess with respect to their verdicts.¹⁵¹ As a result, jurors rarely hear “cautious, but accurate scientific testimony.”¹⁵² Rather, they are stuffed with a “steady diet of partisan exaggeration” which hinders “good science” from actually making it into the courtroom.¹⁵³ This environment has unfortunately created a system overshadowed by the personalities and egos of attorneys and expert witnesses rather than one focused on educating the jury and obtaining a fair verdict.¹⁵⁴

Attorneys, too, need to be specially trained to understand and deal with complex litigation. This is particularly true in medical malpractice cases. The rise in the complexity of litigation has created a need for attorneys practicing in these fields to become very familiar with medicine, science, technology, and other complex disciplines. Some attorneys have so eagerly approached a scientific practice that they are believed, or would like you to believe, that they know more about the field than some professionals working in the respective fields. With the rise in complex, scientific litigation, attorneys must commit to understanding the specialized concepts of their fields.

Another concern involving attorneys is the contingency fee system. It is argued that the contingency fee gives attorneys far too much of a stake in the outcome of a case.¹⁵⁵ The contingency fee system is criticized by Professor Frank Hubbard for several reasons, two of which are that contingency fees excessively reduce the victim’s recovery and they give attorney’s too great of an incentive to bring questionable cases.¹⁵⁶ These questionable cases are

149. *Id.* at 230 n.39; *see also* Hubbard, *supra* note 1, at 312.

150. *See* Menon, *supra* note 9, at 286 (citing studies and articles attempting to assist attorneys with expert presentation and juror persuasion).

151. *See* Jacobs, *supra* note 27, at 1088.

152. *Id.*

153. *Id.*

154. *See* Broyles, *supra* note 21, at 739.

155. *See* Hubbard, *supra* note 1, at 325.

156. *Id.*

brought forth with the hope of capturing a “lucky verdict” or a large “nuisance value” settlement.¹⁵⁷

D. *Expert Witnesses*

The expert witness industry has become a thriving industry in the United States. Because of the rise in complex, scientific litigation, often several expert witnesses are needed in each case to testify as to the complicated concepts presented to the jury.¹⁵⁸ Unfortunately, the alarming rise in commercialized expert witness work has resulted in the creation of a industry of experts who will compromise accurate scientific theory to guarantee their retention and, thus, aid in proliferation of the claim of the respective party, many times by selling “junk science.”¹⁵⁹

1. “Mystic Infallibility”

Due to the problems associated with lay juries as discussed in this article, expert witnesses commonly present evidence that is far too complex for a lay jury to realistically determine whether or not it is valid scientific theory or junk science. Critics of juries and adversarial expert witnesses charge that jurors, for the most part, hold these experts infallible because of the expert’s seemingly impeccable credentials and achievements and they lack the training, education and competency to assess the quality of expert witnesses.¹⁶⁰ Lay jurors have a tendency to give an incredibly high amount

157. *Id.*

158. Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, YALE L. & POL’Y REV. 480, 483 (1988) (discussing how the expert witness industry has become big business and, as a result, experts can be found to testify to almost any factual theory, no matter how unrealistic or frivolous). Some experts advertise their intellectual wares in legal magazines. *Id.* at 483 n.5. Others are affiliated with expert witness brokers with whom lawyers can shop for the expert of their choice through the use of such services. *Id.* at 483. An attorney who wants to file a medical malpractice claim, for example, can usually find an expert to back any causation theory through a medical-legal consulting firm. See Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 597–98 (1988). One such firm boldly promises: “[i]f the first doctor we refer doesn’t agree with your legal theory, we will provide you with the name of a second prospective expert.” See Menon, *supra* note 9, at 285 n.36.

159. See Black, *supra* note 158, at 595.

160. See Shuman, *supra* note 36, at 1244.

of credence to expert witnesses' explanations of complex processes, particularly in the school of medicine and surgery.¹⁶¹

2. Physician Critiquing

Prior to the explosion of medical malpractice litigation, it used to be quite difficult to find a physician who would testify against a peer.¹⁶² The liberalization of the locality rule¹⁶³ has created a field of national experts who travel to the jurisdictions of the attorneys who have retained them to testify against local health care providers. The rise in medical malpractice litigation has also caused physicians to become more critical of one another.¹⁶⁴

Academic expert witnesses are criticized by practicing professionals because the lack an appreciation of the unique circumstances surrounding the proper standards of care in a clinical setting within the communities where they are called to testify.¹⁶⁵ Additionally, arguments are made that academic medical physicians should, perhaps, not be considered "average physicians" with respect to their versions of the standards of care. Academic physicians may have higher standards beyond those that an "average physician" should be judged by.¹⁶⁶ These academic physicians may practice in a unique setting surrounded by some of the best, most decorated physicians in their respective fields.¹⁶⁷

There is often a difference between the medicine practiced in the community and medicine taught in a university. Nowhere is this difference more proliferated than in a hospital emergency room. Physicians working in the emergency department of a large hospital face stressful situations with critically ill or injured patients and they often must act with desperation in

161. *Id.* at 1243.

162. *See* Hubbard, *supra* note 1, at 311.

163. *See* Schwab v. Tolley, 345 So. 2d 747, 753–54 (Fla. 4th Dist. Ct. App. 1977); Couch v. Hutchinson, 135 So. 2d 18, 21 (Fla. 2d Dist. Ct. App. 1961). In the past, standards of care commonly required that the health care provider be judged based on the standard of care that a similar health care provider would normally employ in that particular community. This rule has been changed to abolish the "locality" aspects of the standard of care and now involves only the standard of care that a similar health care provider would employ when rendering the subject treatment. *Id.*

164. *See* Hubbard, *supra* note 1, at 346.

165. *Id.* at 310 n.63.

166. *Id.*

167. *Id.*

the quickest possible manner with a patient's life on the line.¹⁶⁸ Expert academic physicians may review the medical chart of a patient in the emergency room and cite numerous ways in which an emergency room physician fell below the best possible treatment standards. However, that same expert commonly fails to appreciate the anxiety and stress experienced by that physician during that moment in the emergency room.

3. Commercialization of the Expert Witness Industry

The sheer numbers of expert witnesses have increased dramatically over the past twenty years.¹⁶⁹ Some expert witnesses even attend seminars designed toward educating them regarding the legal system, depositions, and trial testimony.¹⁷⁰ These seminars, as described by one author, are "where scruffy academics and disheveled doctors learn how to speak, act, and handle themselves on the stand."¹⁷¹ Expert witnesses often advertise their services in bar journals and legal periodicals.¹⁷² Expert witness brokerage firms have emerged offering attorneys services in expert location and guaranteeing they can locate experts to support their case theories.¹⁷³ The American Trial Lawyer's Association advertises the names of winning plaintiff attorneys and their expert witnesses which gains notoriety for both, but especially the expert witnesses.¹⁷⁴ Experts have also invaded the internet, developing web-sites advertising their services, case experiences and directing prospective clients to victorious case references.¹⁷⁵

Several case opinions have identified problems with expert witnesses.¹⁷⁶ Experts are commonly described as being "hired guns" who will sacrifice

168. *Id.* (citing Feinstein, *Medical Negligence and the Tort System: What are the Opinions?*, 74 J. FLA. MED. A. 774, 777 (1987)).

169. *See* Forinash, *supra* note 32, at 251.

170. *Id.*

171. *See* Huber, *supra* note 26, at 19.

172. *See* Forinash, *supra* note 32, at 251; *see also* Lee, *supra* note 153, at 483.

173. *See* Sanders, *supra* note 17, at 358 n.23 (discussing expert witness brokerage firms such as Technical Advisory Service For Attorneys (TASA) which locate experts for attorneys for a fee).

174. *Id.*

175. *See* Findlaw expert witness databank, available at http://marketcenter.findlaw.com/experts_consultants.html.

176. *See* Virginia Tech. Found. v. Family Group, Ltd., 666 F. Supp. 856, 858 (W.D. Va. 1987) (describing how expert witnesses can play the role of a "hired gun"); Lander v. Higgins, Inc., 71 So. 2d 242, 244 (La. App. 1954) (noticing that witness' testimony would change if witness had been hired by the opposing party).

true scientific methodology to present opinions that favor causation theories for cases in which they are employed. Some experts, such as medical physicians, may even derive the majority of their income from serving as expert witnesses.¹⁷⁷ As one appellate judge stated in an opinion, “the only review the plaintiffs’ experts’ work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters.”¹⁷⁸

4. Attacking Expert Witnesses

As stated, juries often give a level of infallibility to expert witnesses and even go so far as being awed by experts.¹⁷⁹ It is very difficult for judges and jurors to move beyond the credentials of these experts and critically assess the scientific reliability and validity of their opinions.¹⁸⁰ Judges and jurors both have their chances to disregard junk science. Judges are faced with making a decision regarding admissibility of the scientific evidence.¹⁸¹ Jurors are faced with making a decision as to the credibility regarding the scientific evidence.¹⁸² Based on the facts that expert witnesses are testifying in courtrooms today using unverified, untruthful, and, in some cases, fraudulent science, neither judges nor juries are appropriately performing these decision-making duties. It is argued that the judicial system in place today, offers no real assistance to judges and juries in “sorting the scientific sheep from the unscientific goats.”¹⁸³ Attorneys often attack these “hired gun” experts by bringing forth their experience in serving as an expert witness and illustrating a usually lop-sided percentage of cases that they testify for the plaintiff or for the defendant. Expert witnesses commonly testify for one side, plaintiff or defendant, on an almost exclusive basis. This type of testimony is brought out to illustrate the possibility for bias and partisanship by the expert, particularly due to who is paying the expert for their opinions.

177. See Jacobs, *supra* note 27, at 1089 (discussing the fact that our adversary system has spawned a large and highly specialized industry of full-time expert witnesses, many of whom are arcane pseudo-scientists who are willing, if not eager, to testify to whatever is necessary to assure the success of their clients).

178. See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).

179. See Sanders, *supra* note 17, at 364.

180. See Shuman, *supra* note 36, at 1227.

181. *Id.* at 1233.

182. *Id.*

183. See Jacobs, *supra* note 27, at 1084.

IV. RECOMMENDATIONS FOR REFORM

Reform of the complex litigation system is necessary. Just what steps are necessary depends heavily upon whom you are asking. Medical malpractice reform movements have two sides. On one side you have medical malpractice insurance companies and physicians who want tort reform to be a quashing movement limiting plaintiffs' access to the courts.¹⁸⁴ On the other side, plaintiffs' attorneys and consumer organizations fight for more liberal access to the courts for "victims" of torts.¹⁸⁵ For the purposes of this discussion, two principle areas of reform measures will be illustrated, jury reform and expert witness reform.

A. *Reform of the Jury System in Complex Scientific/Medical Cases*

The jury system in the United States was founded on the basis that juries are the most capable fact-finders and the best-suited tribunal for arriving at the most accurate and just outcomes.¹⁸⁶ This is not the case with respect to juries in most medical malpractice cases and other types of complex litigation. The need for significant change of the jury system has come, yet there remain questions as to how extreme the changes need to be. Recommendations for reform of the jury system range from the extreme step of abolishing the use of the civil lay jury in complex cases involving highly technical or scientific evidence, to taking simple steps such as allowing jurors to take notes during trial, in an attempt to help juries better understand and memorialize the evidence presented to them.¹⁸⁷ Other recommendations include requiring a certain number of college educated members to be placed on a jury, educating the jurors on the law and the subject matter, and using special juries of professionals in the respective fields of practice involved in the lawsuit.¹⁸⁸ Changes need to be made, whether minimal or extreme, to make the ancient jury system an "efficient instrument in the administration of justice" particularly with respect to complex litigation.¹⁸⁹

184. See Hubbard, *supra* note 1, at 298.

185. *Id.*

186. Menon, *supra* note 9, at 281 (citing U.S. CONST. amend. VII).

187. Broyles, *supra* note 21, at 738.

188. *Id.*

189. *Id.* at 735.

1. Jury Selection

One of these changes concerns the way we, as a society, select juries. A jury is supposed to be a “cross-section” of the community.¹⁹⁰ As a means of achieving this cross-section, many states select jurors at random through use of the driver’s licensing registration.¹⁹¹ Jurors used to be predominately selected from those who had registered to vote in their communities.¹⁹² It can be argued that juror selection through registered voters, albeit a smaller portion of society, gives the court system a sampling of citizens who are more prone to recognize and appreciate their civic duty. Jury service is a civic duty. Driving an automobile, on the other hand, is a privilege widely used by most Americans. While it is not fair to “punish” those who exercise their right to vote with exclusively selecting them to serve as jurors, it may possibly be that these citizens have more compassion for the civic duty of serving as jurors and will take this role more seriously.¹⁹³

Compensation for jurors is another serious problem. Compensation is pathetically low for jurors who are called out of their jobs and away from their families, often for several days or weeks.¹⁹⁴ On average, a worker making a meager \$15,000 per year would require \$60 per day just to be compensated for his or her lost wages for serving on a jury panel.¹⁹⁵ Increasing the financial compensation for jury duty would relieve one of, if not the highest, hardships associated with jury duty.¹⁹⁶ It has been suggested that the increase in juror compensation could come from three sources: the state, the juror’s employer, or the litigants.¹⁹⁷ Currently, Massachusetts,

190. See The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (2000); see also *Duren v. Missouri*, 439 U.S. 357 (1979).

191. 28 U.S.C. § 1861.

192. *Id.*

193. See Lilly, *supra* note 62, at 61 n.24 (discussing a poll from the L.A. TIMES where fifty-seven percent of respondents thought of jury duty as a personal choice rather than a civic duty. *Id.* Only one-third of respondents were amenable to being called for jury duty. *Id.* Almost fifty percent of the respondents thought that jury duty should be optional, not mandatory; see also Maura Dolan, *The Times Poll: Jury System is Held in Low Regard by Most*, L.A. TIMES, Sept. 27, 1994, at A1).

194. See Strier, *supra* note 33, at 73.

195. *Id.*

196. See Lilly, *supra* note 62, at 62 n.27 (quoting Joe Sharkey, *Primary Seats at Democracy Still Only \$5*, N.Y. TIMES, Sept. 21, 1997, 13NJ, at 1 who described how a New York juror questioned the judge’s “no-excuses” policy, noting that jurors only were paid five dollars per day. *Id.* The juror commented that if the trial he was assigned to lasted more than one week, he could not afford to pay his rent). *Id.*

197. See Strier, *supra* note 33, at 73.

Colorado, and Connecticut require employers to pay their employee's wages for the first three days of jury service and then each state begins paying thereafter at a considerably higher rate than most states.¹⁹⁸ One possible solution might be to provide tax incentives or other financial benefits for employers who continue to compensate their employees when they are called to serve as jurors.

As discussed, the jurors who are normally the most qualified to serve on complex litigation panels are commonly stricken from the panel for the reasons previously described. The reasons these jurors are not empanelled, range from extreme financial hardship to the fact that many plaintiff attorneys do not want highly qualified, highly educated people serving on panels.¹⁹⁹ The fact that these individuals are commonly excluded from jury panels throws into question the constitutionality of having a jury panel with little to no representation of a large portion of society, the educated citizenry. Is it a fair cross section of a neurosurgeon's or an oncologist's community if he or she is being sued by a plaintiff, and there is not one person on the jury panel with an education above that of a high school diploma? It would seem that the Constitution is interpreted to answer this question in the negative.²⁰⁰ Equally unconstitutional, seemingly, is the fact that a jury's make-up may be significantly affected when incentives to evade jury duty are strong and there are permissible reasons for jury avoidance that are disproportionately available to only a select portion of society.²⁰¹

2. Special "Blue Ribbon" Juries

Another suggestion with respect to jury selection concerns developing a jury profile system.²⁰² Jurors are normally asked to fill out questionnaires when they are first called to service. Why not include a question regarding the juror's life experiences, educational level, interests, hobbies, work experience, and professions?²⁰³ With even the most basic of profiling formats, the courts would be able to steer jurors to cases where they most likely would be able to ascertain the subject matter more than a juror who has never been exposed to such material. Matching the strengths of jurors with

198. *Id.*

199. *Id.* at 72-73.

200. *See Taylor v. La.*, 419 U.S. 522, 530 (1975) (mandating that a litigant has a right to an impartial and rational jury drawn from a cross-section of the community).

201. *See Lilly, supra* note 62, at 61.

202. *Id.* at 78.

203. *Id.*

cases that are scheduled for trial would enhance the performance of the jury during trial.²⁰⁴

The next major reform area involves mandatory participation of college educated jurors on civil panels. If the courts are faced with a case that is obviously going to contain complex scientific or technological information, it would be preferable, as well as constitutionally sound, to require a certain level of highly educated, experienced, and/or trained jurors consistent with the subject matter of the case.²⁰⁵ While finding jurors that are familiar with the subject matter of the case through work experience or education may be a stretch, requiring a modest percentage of jurors with at least some level of advanced education is not. These "special juries" would presumably be better equipped to deal with the complex subject matter involved in these types of cases and accurately apply the judge's instructions to render a more just verdict.²⁰⁶ While the law absolutely does not permit exclusion of jurors because of race or sex, it does appear that exclusions based on educational level or expertise with the subject matter are permissible.²⁰⁷ Furthermore, exclusion of jurors based upon educational attainment is not specifically prohibited by the plain language of the Jury Selection and Services Act of 1968, therefore, the act could be interpreted to permit this exclusion by the courts.²⁰⁸

3. Abolishing the Lay Jury in Complex Civil Litigation

The most extreme reform discussion concerns abolishment of the civil jury in complex litigation. It is argued that, because of the frustrations, difficulties, and the lack of understanding associated with complex litigation, juries should not be permitted to hear such cases.²⁰⁹ The first possible way to accomplish this extreme step is to have the cases heard before special

204. *Id.* at 83.

205. *Id.*

206. *See Lilly, supra* note 62, at 84.

207. *See Carmical v. Craven*, 547 F.2d 1380 (9th Cir. 1977) (holding that states may remain free to confine the selection of jurors to citizens meeting specified qualifications such as educational attainment).

208. 28 U.S.C. § 1861; *see also Lilly, supra* note 62, at 89; *accord Strier, supra* note 33, at 63 (commenting that "the college-educated juror should not run afoul of the cross-section requirement [of the 1968 Jury Selection and Service Act]"); *Broyles, supra* note 21, at 718 (discussing ambiguities in the Seventh Amendment right to a jury trial which fail to determine whether or not the framer's intended the courts to be able to adapt the jury system to changes in society).

209. *See Lilly, supra* note 62, at 79.

judges or expert panels. Allowing judges to preside over complex trials will save time and money.²¹⁰ Additionally, it is argued that professional decision makers can do a much better job than lay jurors because their legal education and training makes them less susceptible to legally irrelevant emotional factors.²¹¹ Furthermore, a trial court judge's knowledge and experience with presiding over cases on a daily basis makes him or her approach the controversy at hand with a much more realistic perspective.²¹² Judges who are specialized in specific areas of the law would make an even better suited decision maker for complex cases. Courts are, in fact, authorized to appoint judges with special expertise or "special masters" when a case involves complex subject matter.²¹³

4. Specialization of Judges, Juries, and Courts

Another use for a special master could be to serve as an advisor to the judge and jury involved in a complex trial should the court choose not to appoint a presiding special master. In Florida, special masters can be any members of the Florida Bar.²¹⁴ These members could be selected because of their expertise in a specific field of litigation, for instance medical malpractice or products liability. The special master could review complex medical malpractice testimony and provide confused jurors with a specialized analysis to assist them with decision-making.²¹⁵ Of course, difficult issues such as who should serve on a special master committee and the manner in which the special master would address the judge and jury would need to be decided upon.²¹⁶

Another radical yet promising specialization of the courts would be the division of the civil courts by area of practice. For instance, specific courts for medical malpractice, products liability, patent law, toxic torts, or environmental law could be developed using expert judges to preside over areas of law in which they exhibit a command for that area's subject matter.²¹⁷ This would ensure that the judge involved in the court would have at least some command, education, and experience in dealing with the

210. See Menon, *supra* note 9, at 289.

211. *Id.* at 289 n.73.

212. *Id.*

213. See FED. R. CIV. P. 53; see also FLA. R. CIV. P. 1.490(b).

214. See FLA. R. CIV. P. 1.490.

215. See Menon, *supra* note 9, at 293.

216. *Id.*

217. *Id.*

specific complex subject matter. Furthermore, he or she would be better equipped to rule on a case or instruct a jury on how to better do so.

Also, “special juries” may be a solution to the problems associated with complex litigation.²¹⁸ Professionals who work in the fields, such as the health care industry, are certainly familiar with most of the issues, terminology and concepts that they are confronted with in their professions. This familiarity with the health care industry would make them better-suited jurors to be empanelled for a case involving medical malpractice. Another example would be empanelling a group of scientists or technicians with backgrounds identical, or at least similar, to a defendant within their professions.²¹⁹ One author argued that empanelling an “expert jury” would best represent a balance between the litigants’ right to a jury trial and their equally important right to a fair trial.²²⁰

5. Complexity Exception

The complexity exception recognized by a few of the federal district courts, allows especially complex cases to be removed from the jury and tried by a judge or special panel of judges.²²¹ Unusually complex subject matter confuses jurors to a point where they often guess on verdicts and, as a result, there should be an exception permitting courts to take such cases away from jurors in the interest of justice.²²² The controversy present with respect to whether or not a “complexity exception” does, in fact, exist requires further direction from the United States Supreme Court. The further development of the complexity exception, of course, begins with and depends upon the trial court’s use of it. The balance between just when a case is too complex for a lay jury and when the issues set forth are well within the confines of the jury, must also be preferably established by judicial precedent. This balance will lie somewhere between the type of case where the situation at hand is so easily decipherable that a person with

218. See Lilly, *supra* note 62, at 84.

219. *Id.*

220. *Id.*

221. See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084–86 (1980) (noting that when a jury is unable to perform its decision-making task with a reasonable understanding of the evidence and legal rules, it undermines the ability of a district court to render basic justice. The loss of the right to a jury trial in a suit found too complex for a jury does not implicate the same fundamental concerns); see also *Ross v. Bernard*, 396 U.S. 531, 538 n.10 (1970); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978).

222. See Jacobs, *supra* note 27, at 1087.

even a meager amount education would understand whether or not the defendant was, in fact, negligent.²²³ For example, a number of less complicated medical malpractice cases, such as lawsuits over retained surgical equipment, are well within the lay juries' decision making ability.²²⁴

6. Miscellaneous Recommendations for Change

Other less radical changes recommended for the jury system are aimed at giving juries more tools to better assist them in understanding the evidence presented. Central to these recommendations is permitting jurors to take notes during trial.²²⁵ It is argued that taking notes during trial, particularly long trials, may enhance a juror's ability to recall certain critical information.²²⁶ Along the lines of notebooks, other recommendations include: providing the jury a list of witness names, photographs, copies of relevant documents, a glossary of legal and case-specific terms, and a copy of the jury instructions.²²⁷

Lastly, if copies of the jury instructions are not provided to the jury, they need to be simplified down to a level where the average juror can comprehend what exactly they mean.²²⁸ The jury instructions are, perhaps, the most fundamental element of the trial with respect to the jury. Criticism of complicated jury instructions is widespread.²²⁹ All the wisdom of the law is to no avail if the jury cannot understand the court's instructions and how to apply to them.²³⁰ The easy solution to this problem is to simplify the jury instructions for better understanding by the average person.

The ancient concept that juries are the best fact finder is no longer acceptable faced with the complexity so common in modern litigation. The judicial system's faith and insistence upon the jury system still relies upon the notion that jurors understand the subject matter that they are empanelled to render judgment upon.²³¹ The ability to apply this principle rests largely in the hands of the United States Supreme Court. Some definitive ruling,

223. See Menon, *supra* note 9, at 297.

224. *Id.*

225. See Broyles, *supra* note 21, at 732-33.

226. *Id.*

227. *Id.* at 733.

228. See Lilly, *supra* note 62, at 60 n.23; see also *id.* at 721 n.48 (citing studies that indicate jurors understand less than fifty-percent of the judge's instructions).

229. *Id.* at 68; accord Strier, *supra* note 33, at 51-52.

230. See Strier, *supra* note 33, at 52.

231. See Broyles, *supra* note 21, at 721.

other than a footnote,²³² is needed to assist litigants in obtaining accurate, fair trials in complex litigation.

B. *Stricter Standards for Expert Witnesses in Complex Scientific/Medical Cases*

The other major area of reform is focused on the expert witness industry. The expert witness industry is arguably motivated by partisan greed. Reform efforts with respect to science in the courtrooms are diverse.²³³ Similar to the reform measures discussed for the jury system, scientific reform measures range from minimal changes to radical reconstruction of the way complex litigation operates in America's courts.²³⁴ Those measures that are considered minimal include enhancing judicial authority to keep junk science out of the courtroom and scientific education for judges.²³⁵ More drastic reform measures include mandating the use of court-appointed, non-partisan expert witnesses and dividing courts into specialty courts with judges who are particularly specialized in the related areas of law such as medical malpractice or toxic torts.²³⁶

1. Stricter Standards for Admission of Scientific Evidence

The federal court system has liberalized the use of professional expert witnesses and junk science by abolishing the *Frye* general acceptance test in the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²³⁷ The State of Florida still relies upon the *Frye* ruling with respect to the admissibility of scientific evidence.²³⁸ Florida courts confirm their reliance on the more stringent admissibility standards set forth in *Frye* because, as the Supreme Court of Florida asserts, "a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use."²³⁹

232. See *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

233. See *Sanders*, *supra* note 17, at 355.

234. *Id.*

235. *Id.* at 366.

236. *Id.*

237. 509 U.S. 579 (1993).

238. See *Poulin v. Fleming*, 782 So. 2d 452 (Fla. 5th Dist. Ct. App 2001).

239. *Id.* (citing *Stokes v. State*, 548 So. 2d 188, 193-94 (Fla. 1989)).

2. Judicial Awareness of Expert Biases

The use of expert witnesses and science have two principle problems in the legal system. First, the expert witness industry, it is argued, is motivated by the courtroom dollar and is often eagerly willing to sacrifice true science for partisan-biased scientific theories.²⁴⁰ The courts must develop a standard by which the reliability and validity of the parties' scientific evidence are the product of sound scientific theory.²⁴¹ The courts must also develop a greater awareness and distaste for the fact that scientific evidence can be manipulated by an expert witness and misconstrued by the trier of fact.²⁴² The goal of the courts should be to ensure that the expert witnesses are behaving the same in the courtroom as they would if they were in professional their environments.²⁴³

One suggestion for improving the veracity of an expert may be to subject the expert to peer review for their sworn testimony should it be established that they presented fraudulent scientific testimony to the court. For medical doctors, these disciplinary measures could then be reported to the National Practitioner Data Bank ("NPDB") which reports a physician's entire educational, work and disciplinary histories to a number of entities.²⁴⁴ Physicians take seriously the information comprised on their NPDB reports and reporting fraudulent testimony may serve as a deterrent to stretching the truth on the witness stand.

3. Court-Appointed Expert Witnesses

Another extreme, yet plausible, reform measure would be to mandate court-appointed expert witnesses.²⁴⁵ As noted, partisan experts tend to confuse jurors.²⁴⁶ Considering the amount of time and expense that is spent attempting to discredit expert witnesses by opposing parties, this radical change may be a welcome one.²⁴⁷ Expert witnesses, less tainted by partisan biases, may identify areas of common ground between the parties and would be subjected to less scrutiny with respect to how often they testify, how

240. See Lee, *supra* note 158, at 483.

241. See Black *supra* note 158, at 599.

242. See Forinash, *supra* note 32, at 256.

243. See Sanders, *supra* note 17, at 376.

244. National Practitioner Data Bank, at <http://www.npbd.com>.

245. See Sanders, *supra* note 17, at 378.

246. See Menon, *supra* note 9, at 285.

247. See Sanders, *supra* note 17, at 378.

much they are paid, and how one-sided their history of retention is.²⁴⁸ The cost of neutral, court-appointed expert witnesses could be borne by both sides who normally shell out a great deal of money on retaining their own experts and deposing their adversary's expert witnesses.²⁴⁹ Neutral experts could also cut down on the amount of time spent discussing and confirming various theories in the fields of study.²⁵⁰

Selecting a neutral expert witness could be done in a manner similar to the selection of mediators or arbitrators by the opposing parties. Courts could qualify expert witnesses in specialty areas such as hematology, oncology, emergency medicine, or obstetrics and then submit the names of these experts to the parties requesting the use of an expert witness in those particular fields. By most accounts, court-appointed experts would at least cut down on juror confusion and likely be more impartial than partisan expert witnesses.²⁵¹ It is also important to note that the *Federal Rules of Evidence* and United States Supreme Court support the use of court-appointed expert witnesses.²⁵²

V. CONCLUSION

Medical malpractice litigation is surging in the State of Florida as well as the rest of the United States. The blame for this social problem rests with the attorneys, the scientists and the general public.²⁵³ A general decline in personal responsibility and the improvements in medical technology have added fuel to the fire by creating a mentality amongst the American people that if they do not have miraculous cures from, even terminal, medical maladies, the first reaction is to sue the health care provider. Efforts to reduce the admission of junk science into the courtroom that can unjustly change the outcome of these cases, for the most part, have been inadequate or have completely failed.

The ancient institution of the lay jury is ill-equipped and unqualified to render judgment in most complex medical malpractice cases. Members of the both sides of the bar, appellate courts, trial judges, academics, and the legislature need to recognize the erosion of the jury system with respect to

248. *Id.*

249. *Id.* See also Menon, *supra* note 9, at 292–93.

250. See Sanders, *supra* note 17, at 378.

251. See Lilly, *supra* note 62, at 90.

252. See FED. R. EVID. 706; see also *Gen. Elec. v. Joiner*, 522 U.S. 136, 149–50 (1997).

253. See Forinash, *supra* note 32, at 248.

its performance in complex civil litigation.²⁵⁴ Not only recognition of this erosion is needed, but also efforts to change the jury system need to be examined, tested, and employed. However, keeping in mind the importance of the jury system as a foundation in our society, any changes need to be limited to those no greater than are absolutely necessary to protect the rights of both litigants.²⁵⁵

Partisan expert witnesses motivated by financial benefits manipulate scientific theory to sometimes inaccurately influence lay jurors who are commonly mesmerized by the complex, technical language spoken by expert witnesses. Recognition of the glaring differences between scientific truth and the level of truth required by the courts must occur. Courts are responsible for making sure that expert witnesses are adhering to the same standards and scrutiny of intellectual rigor that they face in their professional practices.²⁵⁶

The ideologies for changes are plentiful; however, the courage to effectuate them is minute. The United States Supreme Court would be the most ideal of the legal participants to take the raging bull, that is complex litigation, by the horns and implement measures to better reflect justice. Even a few of the subtle reform measures to the expert witness industry and the American jury system may serve to improve these two major problem areas presently hindering the field of medical malpractice litigation in Florida as well as the United States in general.

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254. See Lilly, *supra* note 62, at 54.

255. See Strier, *supra* note 33, at 78.

256. See Sanders, *supra* note 17, at 376.