FROM “AMUSEMENT PARKS” TO “ZOOLOGY,” the Technical Advisory Service for Attorneys (TASA) Web site lists more than 9,500 categories of experts. Large accounting firms and other forensic firms perform litigation support services. And the Martindale-Hubbell directory contains more than 4,000 experts, services, suppliers, and consultants. In just a few decades, expert witnesses in litigation have gone from a rarity to the commonplace, for both trial preparation and for actual trial testimony. Often, the expert testimony, especially on damages, is the main event of the case. As one court has noted, “[o]ften they play as great a role in

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Expert witnesses have historically enjoyed broad-ranging immunities. But the picture is changing.

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the organization and shaping and evaluation of their client’s case, as do the lawyers.” Murphy v. A.A. Mathews, 841 S.W.2d 671, 682 (Mo. 1992). The amount of time and money expended in this area is substantial; and as every litigator knows, an expert can make or break a case.

But what do you do if that expert performs his or her litigation services work negligently and it results in a poor outcome for your client? What liability does the expert face? What, if any, liability does the attorney who selected and retained the expert face? Yes, it is true that an expert can make or break the case. This article addresses the “break” side of the equation.

THE EROSION OF THE COMMON LAW DOCTRINE OF WITNESS IMMUNITY •
Testimonial experts have traditionally been protected from lawsuits arising out of their work by the doctrine of witness immunity. However, a theory of expert witness liability is emerging and several states have ruled that a retained expert witness, the so-called friendly expert witness who testifies voluntarily and who is compensated for his or her services, is no longer shielded from negligence in providing pretrial litigation services or trial testimony. Compare Murphy v. A.A. Matheus, supra, at 680, n.7 (limiting holding to pretrial litigation support services rather than trial testimony) with Marrogi v. Howard, 805 So.2d 1118, 1131 (La. 2002) (holding that there was no immunity for either pretrial work or trial testimony). These cases do not contemplate an action in which a party sues an adverse expert witness hired by an opposing party.

The Traditional Rule
Experts who participated in judicial proceedings traditionally were rewarded with the broad protection of an absolute immunity privilege from subsequent liability for communications related to the action. A longstanding doctrine, it aimed at allowing witnesses to be forthright and candid in their opinions in judicial proceedings without threat of a future defamation suit by an aggrieved party. The privilege applied to any communication “(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that had some connection or logical relation to the action.” Mattco Forge, Inc. v. Arthur Young & Co., 6 Cal. Rptr. 2d 781, 787 (Cal. Ct. App. 1992) (“Mattco I”). See also Restatement (Second) of Torts §588 cmt. a (1977) (“[t]he function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation”). The policy of absolute witness immunity is grounded in concerns that without such protection, witnesses might be fearful of testifying and conform the content of their testimony to protect themselves from future suit.

Although the doctrine originally arose in the context of protecting an expert witness from subsequent defamation claims arising out of the expert’s testimony, some states, either by statute or common law, articulated broad pronouncements of the privilege. The situation of a negligent “friendly” expert was not addressed. Thus, actions by the parties who had retained the expert rarely were pursued. Now, however, that rule is beginning to meet resistance from several courts, a pattern that will be discussed below. See Eric G. Jensen, When “Hired Guns” Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness, 62 UMKC L. Rev. 185, 194-95 (1993), for a helpful discussion of the evolution of witness immunity.

Professional Liability Standards
A discussion of expert witness malpractice requires reference to the general negligence
standard to which professionals are held. In California, for example, “[t]he elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.” Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1997) (“Mattco III”) (citations omitted); see also Murphy v. A.A. Mathews, supra; LLMD of Michigan, Inc. v. Jackson-Cross Co., 740 A.2d 186, 191 (Pa. 1999) (“[t]he judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession”).

Legal and Policy Rationales

The reasons for not extending traditional witness immunity to expert witnesses are generally succinct: experts should not be given special protection; if they make a mistake that causes damage they should be held responsible as are other professionals. (For a discussion of arguments for and against see Randall K. Hanson, Witness Immunity Under Attack: Disarming “Hired Guns,” 31 Wake Forest L. Rev. 497, 508-509 (1996)). In addition, it has been argued that permitting malpractice suits against expert witnesses will enhance the integrity of their testimony and of the judicial system as a whole. See Carol Henderson Garcia, Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness, 12 Miss. C. L. Rev. 39, 71-72 (1991).

Conversely there are numerous oft-cited policy reasons for not allowing such suits to proceed:

- Experts should be protected by the general rule of witness immunity because the threat of litigation would lead to skilled experts being unwilling to testify;
- The concern that the “one-time” university professor would be reluctant to testify as he or she would be unlikely to carry errors and omissions coverage;
- The idea that the threat of liability would cause experts to change their testimony for fear of subsequent litigation;
- The argument that the adversarial system, specifically the tool of cross-examination (as well as Daubert hearings) addresses, to some extent, these concerns.


CASE LAW REVIEW • Currently, eight state courts have decided cases involving lawsuits against “friendly” expert witnesses. The overwhelming majority of courts, albeit a handful overall, that have addressed the issue of negligent experts and witness immunity have found professional witness malpractice an actionable claim. These cases all involve “friendly” experts (with the exception of New Jersey which allowed a suit against a court appointed expert), rather than adverse party experts. (For a recent case addressing the adverse party issue in the context of a criminal defendant who sued the prosecutor’s expert witnesses for negligently performing tests, preparing for testimony and testifying, see Davis v. Wallace, 565 S.E.2d 386 (W. Va. 2002).)

Washington State: Witness Immunity Still Controls

In Washington, the immunity doctrine still
protects friendly experts from subsequent liability for negligent acts. The case of Bruce v. Byrne-Stevens & Assocs. Engineers Inc., 776 P.2d 666 (Wash. 1989) (en banc) is the most expansive statement yet of expert witness immunity. In the underlying action in Bruce, two parties sued an adjacent landowner to recover the cost of stabilizing their land due to a condition the landowner had allegedly caused. Plaintiffs hired an engineering expert to provide an opinion on damages and to testify at trial. Subsequent to that suit, the parties discovered that it would cost twice what the engineer had estimated and thereafter brought an action against the expert witness alleging that he negligently tendered an opinion on damages in prior litigation. The court below had held that as the engineer was a professional, with a financial motive for testifying, the traditional doctrine should not provide immunity to a party’s own expert who was negligent in preparing and providing testimony. The Washington Supreme Court disagreed and reversed holding that the engineer hired as an expert witness was entitled to immunity in a subsequent suit based on his testimony. The court below had held that as the engineer was a professional, with a financial motive for testifying, the traditional doctrine should not provide immunity to a party’s own expert who was negligent in preparing and providing testimony. The Washington Supreme Court disagreed and reversed holding that the engineer hired as an expert witness was entitled to immunity in a subsequent suit based on his testimony. The court extended absolute witness immunity to the expert’s courtroom testimony, as well as to acts and communications connected with the preparation of his testimony. The court rejected the plaintiffs’ argument that the witness immunity doctrine is narrow and should only apply to defamation cases brought against an expert. The court also held that the fact that an expert is compensated for his testimony did not deprive him of witness immunity. Id. at 668. Finally, the court held that witness immunity extended to actions forming the basis of the expert’s testimony reasoning “[a]n expert’s courtroom testimony is the last act in a long, complex process of evaluation and consultation with the litigant.” Id. at 672. The court distinguished the case where the expert’s work was prepared separate from and prior to the initiation of litigation in contrast to the case before it where the expert engineer was hired specifically for litigation purposes and the work performed formed the basis of the testimony. The court went on to hold that “the immunity of expert witnesses extends not only to their testimony, but also to acts and communications which occur in connection with the preparation of that testimony.” Id. at 673.

The Bruce court did not find the fact that an expert witness was compensated for his testimony to affect the rationale for witness immunity. The court set forth two reasons underlying its holding:

- First, the court noted a concern about a loss of objectivity if the threat of subsequent liability existed;
- Second, the court considered the practical problem that the threat of liability would discourage “the 1-time expert—the university professor” from testifying while encouraging the professional witness who could carry insurance to protect against liability. Id. at 670.

One justice vigorously dissented arguing that there was no legal authority for the extension of immunity to shield otherwise actionable professional malpractice. The dissent argued that “[i]n reality, a distinction must be drawn between defamation and acts of professional malpractice subsequently published in the courtroom. Despite the professed reliance upon the policies underlying immunity, in the end the majority holds that immunity stems merely from taking ‘part in judicial proceedings.’ A simple analogy demonstrates the invalidity of this holding: There is no question that an attorney’s defamatory statement during a judicial proceeding is shielded from subsequent attack under the doctrine of immunity. However, the same attorney remains liable to his or her own client for any acts of malpractice that occur in that very forum. Accordingly, from this day forward under the majority’s new rule, professionals, particularly attorneys, are provided with a