EVIDENCE—EXPERT WITNESSES—PHYSICIAN MAY QUALIFY AS AN EXPERT IN MALPRACTICE ACTION AGAINST CHIROPRACTOR—*Rosenberg v. Cahill*, 99 N.J. 318, 492 A.2d 371 (1985).

The medical "malpractice crisis"[1] has captivated the attention and energy of the medical profession,[2] the legal profession,[3] insurance companies,[4] the public at large,[5] and our legislators.[6] Malpractice,[7] however, is not unique to physicians and surgeons. Case law has witnessed defendant professionals in the fields of law, architecture, accounting, dentistry, pharmacy, chiropractic, and many other professions and trades.[8] Although malpractice complaints may plead a variety of causes of action,[9] the great majority of suits are brought for professional negligence.[10]

In a negligence case, the plaintiff has the burden of proof.[11] Expert testimony is normally essential to the plaintiff's case in order to establish a professional's deviation from the requisite

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1 The medical malpractice crisis is a combination of increased malpractice claims, exorbitant awards and settlements of those claims, and "wildly escalating malpractice insurance premiums." Redlich, *Understanding the Medical Malpractice Crisis*, 57 N.Y. ST. B.J., Oct. 1985, at 38, 38; *see* Blodgett, *Malpractice Crisis?*, 71 A.B.A.J., June 1985, at 18, 18.

2 *See* Wyrick & Peracchio, *Malpractice: The Bitter Pill—The Insurance Industry: Cashing in on a 'Crisis'* (pt. 3), Newsday (Long Island, N.Y.), Oct. 29, 1985, at 5, col. 1.

3 *See* Blodgett, *supra* note 1; Redlich, *supra* note 1.

4 *See* Wyrick & Peracchio, *supra* note 2.

5 *See* Wyrick & Peracchio, *Malpractice: The Bitter Pill* (pts. 1, 2 & 3), Newsday (Long Island, N.Y.), Oct. 27, 1985, at 1, col. 1; Oct. 28, 1985, at 5, col. 1; Oct. 29, 1985, at 5, col. 1.

6 *See* SECRETARY'S COMM'N ON MEDICAL MALPRACTICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, MEDICAL MALPRACTICE (1973) [hereinafter cited as MEDICAL MALPRACTICE REPORT].

7 Malpractice is defined as "any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct." BLACK'S LAW DICTIONARY 1111 (5th ed. 1979).

8 *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 185-86 & nn.22-31 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

9 *See* Comment, *Medical Malpractice—The Necessity of Expert Testimony and the Use of a General Physician as an Expert Witness in a Malpractice Action Against a Specialist*, 10 OHIO N.U.L. REV. 37, 37 & n.2 (1983).

10 *Id.* The following four elements must be found to prove professional negligence: (1) the defendant was under a duty to conform to a particular standard of conduct; (2) the defendant's conduct failed to conform to this standard; (3) the defendant's conduct was the legal cause of the plaintiff's injury or damage; and (4) the plaintiff suffered actual damage. *See* PROSSER & KEETON, *supra* note 8, § 30, at 164-65.

11 Buckelew v. Grossbard, 87 N.J. 512, 525, 435 A.2d 1150, 1157 (1981); PROSSER & KEETON, *supra* note 8, § 38, at 239.

standard of care.[12] The general rule regarding expert testimony provides that the defendant is entitled to be judged according to the standards of the profession or school[13] of which he is a member.[14] The New Jersey Supreme Court recently carved out an exception to this general rule.[15] In *Rosenberg v. Cahill*,[16] the court held that a physician could qualify as an expert witness in a malpractice action against a chiropractor.[17]

Lawrence Rosenberg, a minor, sustained injuries while using a trampoline and subsequently experienced headaches and difficulty in moving his head.[18] Rosenberg sought relief from Bruce McElwain, a chiropractor.[19] Although the parties disputed the symptoms that Rosenberg related to McElwain,[20] it was clear that

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12 *See, e.g.*, Chamness v. Odum, 80 Ill. App. 3d 98, 108, 399 N.E.2d 238, 246 (1979); Sanzari v. Rosenfeld, 34 N.J. 128, 134, 167 A.2d 625, 628 (1961); Jones v. Stess, 111 N.J. Super. 283, 287, 268 A.2d 292, 294 (App. Div. 1970); Lewis v. Read, 80 N.J. Super. 148, 170, 193 A.2d 255, 267 (App. Div. 1963); Toy v. Rickert, 53 N.J. Super. 27, 32, 146 A.2d 510, 513 (App. Div. 1958); Steinke v. Bell, 32 N.J. Super. 67, 69, 107 A.2d 825, 826 (App. Div. 1954); *see also* Comment, *supra* note 9, at 38-39 (necessity of expert testimony).

13 One court has defined "school" as follows: "a) An institution of learning; b) the doctrine, tenets, philosophy or theories taught or principles for which the school stands; c) the standards, doctrines, or principles relating to a profession or occupation in a given locality." Walkenhorst v. Kesler, 92 Utah 312, 321, 67 P.2d 654, 658 (1937).

14 Sheppard v. Firth, 215 Or. 268, 271, 334 P.2d 190, 192 (1959).

15 *See* Rosenberg v. Cahill, 99 N.J. 318, 492 A.2d 371 (1985).

16 99 N.J. 318, 492 A.2d 371 (1985).

17 *Id.* at 335, 492 A.2d at 380.

18 *Id.* at 323, 492 A.2d at 373.

19 *See id.* Bruce McElwain first examined Rosenberg on August 22, 1980. *Id.* The defendant's chiropractic consultation commenced three-and-a-half months before a diagnosis of the plaintiff's medical problem was made. *See* Rosenberg v. Cahill, No. 1-44823-81MM, at 2 (N.J. Super. Ct. Law Div. May 6, 1983) (transcript of oral decision), *aff'd*, No. A-4697-82T5 (N.J. Super. Ct. App. Div. Dec. 1, 1983), *rev'd*, 99 N.J. 318, 492 A.2d 371 (1985).

Chiropractic diagnostic and treatment techniques vary according to the tenets of the individual practitioner's school of training. *See* Note, *Malpractice and the Healing Arts—Naturopathy, Osteopathy, Chiropractic*, 9 UTAH L. REV. 705, 713 (1965). Chiropractic theory is the basic philosophy that all diseases and maladies stem from a subluxation (a displacement that is less than a dislocation) of a single vertebra or several vertebrae. *Id.* These subluxated vertebrae create pressure upon the nerves that originate from the spinal cord. *Id.* Such pressure prevents normal nerve function and results in disease. *Id.* There are two schools of chiropractic thought. *Id.* The straight or conservative school advocates examination and treatment of the spine by manual manipulation. *Id.* The more progressive school incorporates additional forms of examination and treatment such as light, electricity, heat, vitamins, and water. *Id.* Defendant McElwain contended that he embraced the philosophies of the "straight" school. *Rosenberg*, 99 N.J. at 323, 492 A.2d at 373.

20 *Rosenberg*, 99 N.J. at 323, 492 A.2d at 373. The plaintiffs contended that Lawrence Rosenberg had complained of symptoms related to Hodgkin's Disease. *See*

McElwain treated Rosenberg and that the initial visit included X rays.[21]

After the chiropractor read the X rays, treatments of "adjustments" to the spine were commenced to relieve a subluxated vertebra.[22] In addition, the X rays revealed soft-tissue abnormalities, which were undetected by McElwain.[23] Because McElwain did not recognize the soft-tissue problem, he failed to refer Rosenberg to a medical doctor.[24] McElwain's chiropractic treatments ended on November 28, 1980,[25] and subsequently, Rosenberg discovered he had Hodgkin's disease.[26]

Lawrence Rosenberg and his father Glenn brought a malpractice action against McElwain.[27] The plaintiffs alleged that

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id. The defendant argued that Rosenberg's only complaints were of intermittent headaches and range-of-motion difficulties in the use of his head, which had been caused by an injury while trampolining. *See id.*

The plaintiffs further contended that Lawrence Rosenberg had consistently complained of the Hodgkin's Disease symptoms for a year and one-half before his illness was finally discovered. *See id.* at 322, 492 A.2d at 373. Nonetheless, Rosenberg's condition was not diagnosed until December 9, 1980. Rosenberg v. Cahill, No. 1-44823-81MM, at 2 (N.J. Super. Ct. Law Div. May 6, 1983) (transcript of oral decision), *aff'd*, No. A-4697-82T5 (N.J. Super. Ct. App. Div. Dec. 1, 1983), *rev'd*, 99 N.J. 318, 492 A.2d 371 (1985).

21 *Rosenberg*, 99 N.J. at 323, 492 A.2d at 373. The use of X rays is an essential tool in the field of chiropractic. J. LANGONE, CHIROPRACTORS: A CONSUMER'S GUIDE 72 (1982). They serve as a basis for diagnosis and provide documentary records of improvement throughout the course of treatment. *Id.* Competent X-ray technique and film interpretation are crucial in chiropractic treatment because the determination of which components of the spinal column require realignment is made through the X-ray readings. *Id.*

22 *Rosenberg*, 99 N.J. at 323, 492 A.2d at 373. An adjustment involves manipulation of the spine to eliminate deficient nerve transmissions. *See* J. LANGONE, *supra* note 21, at 78-79. Misaligned vertebrae are forced back into place by positioning a portion of the hand against the appropriate poriton of the spine. *See id.* at 80. A thrusting force in the proper direction is used to change the position of the vertebrae. *Id.* Following the initial "adjustment," Rosenberg visited McElwain on five subsequent occasions. *Rosenberg*, 99 N.J. at 323, 492 A.2d at 374.

23 *See Rosenberg*, 99 N.J. at 323-24, 492 A.2d at 373-74.

24 *Id.*, 492 A.2d at 374.

25 *Id.* at 323, 492 A.2d at 374.

26 *Id.* at 322, 492 A.2d at 373.

27 *Id.* The two plaintiffs in this case brought separate actions. *See* Complaint at 3-4, Rosenberg v. Cahill, No. 1-44823-81MM (N.J. Super. Ct. Law Div. May 6, 1983), *aff'd*, No. A-4697-82T5 (N.J. Super. Ct. App. Div. Dec. 1, 1983), *rev'd*, 99 N.J. 318, 492 A.2d 371 (1985). Lawrence Rosenberg, the infant plaintiff, demanded damages for the pain and suffering he had endured as a result of the late diagnosis of his condition. *Id.* at 2. Glenn Rosenberg sought recovery for the monetary and emotional damages he had sustained. *Id.* at 3.

The complaint also named as defendants two medical doctors, Michael J. Cahill and Richard McCarthy. *Id.* at 1. Dr. Cahill w s granted summary judgment in March of 1983. Brief and Appendix for Plaintiff-Appellant at 1, Rosenberg v. Ca-

the chiropractor, after examining the X rays, negligently failed to recognize the tissue abnormality that was later diagnosed as Hodgkin's disease.[28] The defendant countered that because he subscribed to the "straight chiropractic" school,[29] he reviewed the X rays "chiropractically" and was not duty bound to notice tissue abnormalities.[30]

The plaintiffs' expert witness, Dr. Knapp, testified that the defendant had failed to use reasonable care in reading the X rays.[31] The trial court, however, determined that this medical expert was unqualified to testify about a chiropractor's standard of care.[32] Thus, the court granted summary judgment in favor of

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hill, 99 N.J. 318, 492 A.2d 371 (1985) [hereinafter cited as Plaintiff's Brief]. A pretrial order entered on May 13, 1983, after summary judgment was granted to defendant McElwain by the court, involved only Dr. McCarthy. *Id.* at 1-2.

28 *See Rosenberg*, 99 N.J. at 322, 492 A.2d at 373. Hodgkin's Disease is

> a malignant disorder characterized by painless, progressive enlargement of lymphoid tissue, usually first evident in cervical lymph nodes. . . . Symptoms include anorexia, weight loss, generalized pruritus [a symptom of itching], low-grade fever, night sweats, anemia, and leukocytosis [an abnormal increase in the number of circulating white blood cells]. . . . The diagnosis is established by blood studies, x rays, lymphangiograms, lymph node biopsies, and ultrasonic and computerized tomographic scans.

MOSBY'S MEDICAL AND NURSING DICTIONARY 514 (1983).

29 *See supra* note 19 (defining the "straight chiropractic" school).

30 *Rosenberg*, 99 N.J. at 323, 492 A.2d at 373. Reading an X ray "chiropractically" means to look solely for alterations in the vertebrae, not to detect soft tissue irregularities or make any other medical diagnoses. *See* Brief and Appendix for Defendant-Respondent at 2, Rosenberg v. Cahill, 99 N.J. 318, 492 A.2d 371 (1985); *see also infra* note 132 (discussing the "straight chiropractic" school).

31 *See Rosenberg*, 99 N.J. at 324, 492 A.2d at 374. Dr. Knapp, a medical doctor, admitted he was not a trained radiologist (a physician with specialized training in reading X rays) and was unfamiliar with chiropractic education and practice. *See* Plaintiff's Brief, *supra* note 27, at 8. He testified that a chiropractor " 'should be able to recognize an abnormal X-ray if he's taking them, he might not diagnose a condition, but he should recognize that it's abnormal and put it into the hands of someone who can diagnose.' " *Id.* at 4 (citation omitted).

32 *Rosenberg*, 99 N.J. at 324, 492 A.2d at 374. Judge Marshall Selikoff delivered the opinion of the trial court. *See* Rosenberg v. Cahill, No. 1-44823-81MM (N.J. Super. Ct. Law Div. May 6, 1983) (transcript of oral decision), *aff'd*, No. A-4697-82T5 (N.J. Super. Ct. App. Div. Dec. 1, 1983), *rev'd*, 99 N.J. 318, 492 A.2d 371 (1985). He determined that defendant McElwain was "not competent to read X-rays for medical purposes." *Id.* at 3. Because McElwain espoused tenets of the straight chiropractic school, he analyzed the plaintiff's X rays and examined the spine only to locate vertebral subluxations. *Id.* at 4. Therefore, the lower court concluded, his diagnosis and treatment of the plaintiff could not be proven to have fallen below the established and recognized standard of care of his profession. *Id.* The court thus held that the plaintiff had failed to prove by Dr. Knapp's expert testimony that defendant McElwain had deviated from the requisite standard of care. *Rosenberg*, 99 N.J. at 324, 492 A.2d at 374.

the defendant McElwain.[33]

The appellate division affirmed the trial court's decision.[34] The New Jersey Supreme Court then granted certification[35] and reversed the appellate court's decision.[36] The supreme court unanimously held that a licensed medical doctor is competent to testify as an expert witness concerning a chiropractor's standard of care when such testimony pertains to matters that both chiropractic and medicine "share in common in terms of education, training and licensure."[37]

The general rule of law concerning expert witnesses is that a physician is entitled to be judged according to the philosophies of the school to which he belongs.[38] The term "school" has been defined as the theories and standards adopted by a particular, specialized profession.[39] The law has been cognizant of the existence of various schools of medicine with their different tenets and methodologies.[40] One court has stated that "[e]ach school of medicine is entitled to practice in its own way, and because one does not use the methods of the other is no reason for holding the one for malpractice."[41] Similarly, courts have held that drugless healers[42] are also entitled to be judged according to the standards of the school to which they belong.[43]

The "same school" rule has made it more difficult for a litigant to obtain an expert witness who will testify to a defendant's deviation from the accepted professional standards of his medical profession.[44] This is because professionals are often reluctant to testify against one another.[45] This reluctance has been termed

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33 *Rosenberg*, 99 N.J. at 324, 492 A.2d at 374.

34 *Id.*

35 *Id.*

36 *Id.* at 335, 492 A.2d at 380.

37 *Id.* at 334, 492 A.2d at 379.

38 *See* Ison v. McFall, 55 Tenn. App. 326, 355, 400 S.W.2d 243, 256 (1964).

39 *See supra* note 13 (defining "school").

40 *See* Comment, *supra* note 9, at 58-59 & n.111.

41 Kelly v. Carroll, 36 Wash. 2d 482, 495, 219 P.2d 79, 87, *cert. denied*, 340 U.S. 892 (1950).

42 Drugless healers include allopaths, homeopaths, osteopaths, naturopaths, physiotherapists, and chiropractors. *See generally* Note, *supra* note 19 (discussing growth of healing arts and concomitant malpractice law).

43 *E.g.*, Janssen v. Mulder, 232 Mich. 183, 190-91, 205 N.W. 159, 161 (1925) (chiropractors judged by standards of chiropractic school); Sheppard v. Firth, 215 Or. 268, 272, 334 P.2d 190, 192 (1959) (same).

44 *See infra* notes 45-48 and accompanying text.

45 *See* Crain v. Allison, 443 A.2d 558, 561-62 (D.C. 1982); Carbone v. Warburton, 11 N.J. 418, 427, 94 A.2d 680, 684 (1953) ("there is a 'well known reluctance of the members of the medical profession to testify against a fellow prac-

the "conspiracy of silence."[46] The judiciary has recognized the existence of this phenomenon and the handicaps it has presented for innocent victims who have received no relief because of their inability to procure expert witnesses.[47] To alleviate this injustice, courts have created innovative techniques that eliminate the requirement of expert testimony in appropriate cases.[48]

One such technique is the "common knowledge doctrine."[49] New Jersey law is replete with cases that embrace this doctrine, which obviates the need for a plaintiff to obtain an expert to testify concerning a defendant's professional negligence.[50] In *Klimko v. Rose*,[51] an expert witness was not needed to allow a jury to find a chiropractor guilty of malpractice when his patient suffered a stroke and temporary paralysis as a result of the chiropractic treatments.[52] The patient experienced dizziness and sweatiness, which common knowledge and experience suggested

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titioner' and . . . this reluctance confronts the plaintiff in a malpractice case with a serious 'problem of proof' "). *See generally* Markus, *Conspiracy of Silence*, 14 CLEV.-MAR. L. REV. 520 (1965) (discussing problems posed by reluctance of physicians to testify against one another); Seidelson, *Medical Malpractice Cases and the Reluctant Expert*, 16 CATH. U.L. REV. 158 (1966) (same).

46 *See* Seidelson, *supra* note 45, at 159. The author defines conspiracy of silence as "the refusal on the part of members of the profession to testify against one of their own for fear that one day they, too, may be defendants in a malpractice case." *Id.* (footnote omitted).

47 *See generally* Stutt, *Negligence of Drugless Healers: Chiropractors*, WIS. B. BULL., July 1985, at 22, 24 ("Justice is denied to an injured patient if his rights can not be vindicated because of proof standards which fail to account for the realities of the marketplace.").

48 *See* Seidelson, *supra* note 45, at 160. Courts have used res ipsa loquitur and "the newer doctrines of 'common knowledge,' 'ulterior act,' 'mechanical instrument,' or 'informed consent' " to eliminate the necessity of expert testimony in many cases. *Id.* (footnote omitted).

49 *See* Jones v. Stess, 111 N.J. Super. 283, 287, 268 A.2d 292, 295 (App. Div. 1970). The common knowledge doctrine is the well-recognized exception to the need for expert testimony "where the facts are such that it may be said, looking at [the matter] in the light of the 'common knowledge and experience' of laymen, that there has been a lapse from the standard." *Id.*

50 *See, e.g.*, Buckelew v. Grossbard, 87 N.J. 512, 527, 435 A.2d 1150, 1157-58 (1981); Klimko v. Rose, 84 N.J. 496, 503-04, 422 A.2d 418, 422 (1980); Sanzari v. Rosenfeld, 34 N.J. 128, 141-42, 167 A.2d 625, 632 (1961); Jones v. Stess, 111 N.J. Super. 283, 287, 268 A.2d 292, 295 (App. Div. 1970); Lewis v. Read, 80 N.J. Super. 148, 170-71, 193 A.2d 255, 267 (App. Div. 1963); Becker v. Eisenstodt, 60 N.J. Super. 240, 246, 158 A.2d 706, 710 (App. Div. 1960); Steinke v. Bell, 32 N.J. Super. 67, 69, 107 A.2d 825, 826 (App. Div. 1954); Gould v. Winokur, 98 N.J. Super. 554, 565, 237 A.2d 916, 922 (Law Div. 1968), *aff'd*, 104 N.J. Super. 329, 250 A.2d 38 (App. Div. 1969).

51 84 N.J. 496, 422 A.2d 418 (1980).

52 *See id.* at 497, 505, 422 A.2d at 418, 422.

were potentially dangerous symptoms.[53] The court held that technical knowledge was unnecessary for the jury to find that a reasonably prudent chiropractor should have terminated the patient's neck adjustment treatments when confronted with these symptoms.[54] The court explained that knowledge is common when, "whether technical or not, it is . . . possessed by untrained laymen of ordinary experience and intelligence."[55] The common knowledge doctrine has therefore been germane only in cases where a professional's negligence has been readily apparent to the average lay juror.[56]

Another way courts have eased the plaintiff's burden of procuring an expert witness has been through recognition of exceptions to the general rule of law that a physician from one school is ineligible to testify in a malpractice case against a physician from another school.[57] One exception to the general rule of expert testimony has been termed "overlapping."[58] Overlapping exists when technical knowledge or clinical experience is common to two or more medical specialties.[59]

The decision in *Hilgedorf v. Bertschinger*[60] illustrates the overlap exception. Following a surgical procedure to alleviate a patient's irregular menstruation, a naturopath packed the patient's vagina with unsterilized lamb's wool.[61] This procedure resulted in an infection and required surgical removal of the packing.[62] The court admitted a regular physician's testimony in the malpractice action against the naturopath because the testimony of the physician related to philosophies of sterilization common to both schools of training.[63] Accordingly, the court held that where the method of treatment in the defendant's school was the same as the expert witness's school, the plaintiff's expert witness

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53 *Id.* at 505, 422 A.2d at 422.

54 *See id.*

55 *Id.* at 504, 422 A.2d at 422.

56 *See supra* note 50 (cases explaining common knowledge doctrine).

57 *See generally* Comment, *supra* note 9, at 52-69 (discussing qualifications of expert witnesses in medical malpractice cases).

58 *Klimko*, 84 N.J. at 506 n.5, 422 A.2d at 423 n.5.

59 *See* Sanzari v. Rosenfeld, 34 N.J. 128, 136, 167 A.2d 625, 629 (1961) ("some facets of professional practice fall within the province of more than one profession"); Kelly v. Carroll, 36 Wash. 2d 482, 491, 219 P.2d 79, 85 ("some subjects taught in medical schools are also taught in the drugless healing schools"), *cert. denied*, 340 U.S. 892 (1950).

60 132 Or. 641, 285 P. 819 (1930).

61 *Id.* at 645, 285 P. at 821.

62 *Id.*

63 *Id.* at 646, 285 P. at 821.

was not restricted to the defendant's specialty or school of thought.[64]

The courts have recognized a second exception to the "same school" rule when a physician departs from the tenets of his licensed specialty and treats a disorder that is within the scope of another specialty.[65] For example, in *Kelly v. Carroll*,[66] the court admitted a surgeon's testimony in a malpractice suit against a chiropractor whose patient died from untreated appendicitis.[67] The chiropractor attempted to alleviate the patient's abdominal pains by prescribing laxatives and enemas, which were regarded to be within the province of medical treatments.[68] The court held that the chiropractor should have recognized the symptoms of appendicitis and should have terminated his prescribed treatments upon observing the patient's rapidly deteriorating condition.[69] Furthermore, the court found that the chiropractor failed to refer his patient to a medical doctor when the situation obviously warranted such referral.[70] The chiropractor was therefore held to the recognized medical standard of care because of his use of medical treatments.[71]

Various other exceptions to the "same school" rule have been developed by the courts.[72] One exception has been applied when the methods of treatment in the defendant's school should have been the same as that of the witness's school,[73] or when the defendant attempted to substantiate his method of treatment by the standards of another school.[74] Another exception to the "same school" rule has been used in cases employing X rays because the field of radiology has been deemed a subject.common

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64 *See id.* at 646-47, 285 P. at 821.

65 *See, e.g.*, Kelly v. Carroll, 36 Wash. 2d 482, 219 P.2d 79, *cert. denied*, 340 U.S. 892 (1950).

66 36 Wash. 2d 482, 219 P.2d 79, *cert. denied*, 340 U.S. 892 (1950).

67 *See id.* at 493, 219 P.2d at 85-86.

68 *See id.* at 484-85, 219 P.2d at 81.

69 *See id.* at 485, 494, 219 P.2d at 82, 86.

70 *See id.* at 485-86, 219 P.2d at 81-82.

71 *See id.* at 493, 219 P.2d at 86.

72 *See infra* notes 73-76 and accompanying text.

73 *See, e.g.*, Foster v. Thornton, 125 Fla. 699, 170 S. 459 (1936); Wemett v. Mount, 134 Or. 305, 292 P. 93 (1930); Treptau v. Behrens Spa, Inc., 247 Wis. 438, 20 N.W.2d 108 (1945) (all holding that testimony of a physician whose school is different from defendant's is admissible when pertaining to precepts followed by both schools).

74 *See, e.g.*, James v. Falk, 226 Or. 535, 360 P.2d 546 (1961) (surgeon permitted to testify against osteopath when osteopath treated a patient in a medically prescribed manner).

to all schools of medicine.[75] A further exception in which a physician may testify against a defendant from a different school has occurred in situations where the defendant embraced tenets of an unrecognized school.[76]

Recently, the New Jersey Supreme Court recognized yet another exception to the "same school" rule when the testimony of the expert was based on his knowledge of the defendant's school.[77] In *Sanzari v. Rosenfeld*,[78] the court permitted a physician to testify in a malpractice action against a dentist[79] whose patient died from a stroke as a result of a contraindicated combination of an anesthetic and epinephrine.[80] Despite the fact that he never attended dental school, the physician's testimony was admitted because he possessed considerable knowledge of the dental field through his specialty in dental anesthesiology.[81]

Case law has not always required an expert witness to be as highly qualified as the *Sanzari* witness.[82] For instance, in *Sinz v. Owens*,[83] the California Supreme Court allowed a general practitioner to testify as an expert against an orthopedist.[84] In that case, the plaintiff had suffered a broken leg in a traffic accident, and the leg had been fitted with a cast before appropriate treatment was given, resulting in an improperly healed bone.[85] Because the expert was familiar with the medical care at issue through "occupational experience," the court held that he was a qualified witness.[86]

Other courts,[87] like the *Sinz* court, have allowed the general

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75 *See, e.g.*, Dorr, Gray & Johnston v. Headstream, 173 Ark. 1104, 295 S.W. 16 (1927); Shockley v. Tucker, 127 Iowa 456, 103 N.W. 360 (1905); Henslin v. Wheaton, 91 Minn. 219, 97 N.W. 882 (1904) (all holding that because X ray is a specific branch of science independent of any particular school, X-ray experts may testify against defendants from different schools).

76 *See, e.g.*, Longan v. Weltmer, 180 Mo. 322, 79 S.W. 655 (1904) (physician permitted to testify against magnetic healer who rendered unrecognized and unacceptable treatment); Hansen v. Pock, 57 Mont. 51, 187 P. 282 (1920) (physician permitted to testify against Chinese herb doctor who held himself out as a physician).

77 *See* Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961).

78 34 N.J. 128, 167 A.2d 625 (1961).

79 *See id.* at 138, 167 A.2d at 630.

80 *See id.* at 132-33, 167 A.2d at 627.

81 *See id.* at 137-38, 167 A.2d at 629-30.

82 *See, e.g.*, Sinz v. Owen, 33 Cal. 2d 749, 205 P.2d 3 (1949).

83 33 Cal. 2d 749, 205 P.2d 3 (1949).

84 *Id.* at 756, 205 P.2d at 7.

85 *See id.* at 752, 205 P.2d at 4.

86 *Id.* at 753, 205 P.2d at 5.

87 *See, e.g.*, Agnew v. City of Los Angeles, 97 Cal. App. 2d 557, 218 P.2d 66

physician to testify against the specialist in appropriate cases because both practitioners have had the same basic education.[88] These courts have held that the specialization of a witness bears on the weight of his testimony, rather than on the determination of whether the witness is qualified to testify as an expert.[89] The New Jersey Supreme Court has stated that a physician's training and experience show "sufficient qualifications to allow him to state his opinion, leaving to the jury the determination of its worth."[90]

Courts have also exercised considerable discretion in establishing the requisite degree of the expert's familiarity with the medical conduct at issue.[91] Some courts have concluded that the witness must have personally performed or carried out the treatment in question.[92] Other courts have held that mere familiarity with the disputed treatment, without experience through personal performance, is sufficient to qualify a witness as an expert.[93] Still other courts have determined that a witness's general medical training and experience constitute sufficient qualification for his testimony as an expert.[94] Furthermore, if a technique were rare or unique, some courts have determined that a witness need not have experience with the technique in order to qualify as an expert.[95]

In *Rosenberg v. Cahill*, the New Jersey Supreme Court examined both the "common knowledge" exception to the expert

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(1950); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953); Young v. Stevens, 132 N.J.L. 124, 39 A.2d 115 (1944).

88 *See* Comment, *supra* note 9, at 56. The specialist differs from the general physician because he possesses three to six additional years of training and clinical experience in a residency program in his chosen specialty. *See id.* The specialist is also held to a higher standard of care than the general physician. *Id.*

89 *See, e.g.*, Carbone v. Warburton, 11 N.J. 418, 426, 94 A.2d 680, 684 (1953); Ison v. McFall, 55 Tenn. App. 326, 362, 400 S.W.2d 243, 259 (1964).

90 Carbone v. Warburton, 11 N.J. 418, 426, 94 A.2d 680, 684 (1953).

91 *See infra* notes 92-95 and accompanying text.

92 *See, e.g.*, Dow v. Kaiser Found., 12 Cal. App. 3d 488, 499, 90 Cal. Rptr. 747, 753 (1970); Pearce v. Linde, 113 Cal. App. 2d 627, 629-30, 248 P.2d 506, 507-08 (1952); Swanson v. Chatterton, 281 Minn. 129, 135-36, 160 N.W.2d 662, 666-67 (1968).

93 *See, e.g.*, Gatson v. Hunter, 121 Ariz. 33, 44, 588 P.2d 326, 337 (1978); Pietrzyk v. City of Detroit, 123 Mich. App. 244, 248, 333 N.W.2d 236, 237-38 (1983); Carbone v. Warburton, 11 N.J. 418, 425, 94 A.2d 680, 683 (1953).

94 *See, e.g.*, Ragan v. Steen, 229 Pa. Super. 515, 521-22, 331 A.2d 724, 728 (1974); Quinley v. Cocke, 183 Tenn. 428, 435-36, 192 S.W.2d 992, 996 (1946).

95 *See, e.g.*, Kershaw v. Tilbury, 214 Cal. 679, 691-92, 8 P.2d 109, 114 (1932); Valdez v. Percy, 35 Cal. App. 2d 485, 492, 96 P.2d 142, 145-46 (1939).

witness requirement[96] and the "same school" doctrine.[97] First, the court dispensed with the plaintiffs' contention that the defendant's negligence could have been determined by the "common knowledge" of the jurors.[98] Justice Handler, writing for a unanimous court, explained that the common knowledge doctrine would be suitably employed only when the chiropractor's failure to meet the applicable standard of care was "readily apparent."[99] The court, adopting the rule enunciated in the Washington Court of Appeals decision in *Mostrom v. Pettibon*,[100] defined the chiropractic standard of care as (1) distinguishing a medical problem from a chiropractic one, (2) refraining from chiropractic treatment that could cause possible injury to the patient given the existence of a medical problem, and (3) referring the patient to a physician when a medical problem is diagnosed.[101] The court stated that because the plaintiff testified that the abnormalities in the X rays had to be pointed out to him, the common knowledge doctrine could not be appropriately used in this case.[102] Therefore, the court held that expert testimony was necessary to establish the defendant's negligence.[103]

The court next addressed the predominant issue in the *Rosenberg* case—whether a licensed medical doctor could be competent to testify as to the chiropractic standard of care, which is not within the physician's field of expertise.[104] Justice Handler recognized the general rule that " 'the [expert] witness must be a licensed member of the profession whose standards he professes to know.' "[105] The court also embraced the overlap theory, however, and noted that one professional "who is 'familiar' with the situation in issue" could be a competent witness "to testify as to the 'accepted practice' " of another professional.[106]

The court then scrutinized the similarities and differences between chiropractors and medical doctors.[107] The court stated that while both professions are concerned with healing their pa-

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96 *See Rosenberg*, 99 N.J. at 324-27, 492 A.2d at 374-75.
97 *See id.* at 327-34, 492 A.2d at 375-79.
98 *Id.* at 324, 492 A.2d at 374.
99 *See id.* at 325, 492 A.2d at 374-75.
100 25 Wash. App. 158, 163, 607 P.2d 864, 867 (1980).
101 *See Rosenberg*, 99 N.J. at 332, 492 A.2d at 378.
102 *See id.* at 327, 492 A.2d at 375.
103 *Id.*
104 *Id.*, 492 A.2d at 375-76.
105 *Id.* at 328, 492 A.2d at 376 (quoting *Sanzari*, 34 N.J. at 136, 167 A.2d at 629).
106 *Id.* (quoting *Sanzari*, 34 N.J. at 136, 167 A.2d at 629).
107 *See id.* at 328-31, 492 A.2d at 376-78.

tients, chiropractors are limited to performing manual adjustments to the spine.[108] The court discerned a great deal of similarity between chiropractors and medical doctors, however, in their clinical and licensing requirements in the areas of X rays and diagnosis.[109] Furthermore, the court found a commonality of statutory educational requirements between chiropractors and doctors.[110] The court thus recognized the existence of "overlapping" between the two specialties.[111] Therefore, the supreme court held that a medical doctor qualified as an expert witness under the facts of this malpractice case because he was *familiar* with X-ray techniques common to both the medical and chiropractic fields.[112] Justice Handler limited this holding, however, to malpractice cases in which the chiropractor's standard of care

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108 *Id.* at 328-29, 492 A.2d at 376. The New Jersey statute defining and regulating the practice of chiropractic provides that

> the practice of chiropractic is defined as follows: "A system of adjusting the articulations of the spinal column by manipulation thereof." A licensed chiropractor shall have the right in the examination of patients to use the neurocalometer, X-ray, and other necessary instruments solely for the purpose of diagnosis or analysis. No licensed chiropractor shall use endoscopic or cutting instruments, or prescribe, administer, or dispense drugs or medicines for any purpose whatsoever, or perform surgical operations excepting adjustment of the articulations of the spinal column.
>
> No person licensed to practice chiropractic shall sign any certificate required by law or the State Sanitary Code concerning reportable diseases, or birth, marriage or death certificates.
>
> No person licensed to practice chiropractic shall use the title doctor or its abbreviation in the practice of chiropractic unless it be qualified by the word "chiropractic."
>
> It shall be unlawful for any person, not duly licensed in this State to practice chiropractic, to use terms, titles, words or letters which would designate or imply that he or she is qualified to practice chiropractic, or to hold himself or herself out as being able to practice chiropractic, or offer or attempt to practice chiropractic.

N.J. STAT. ANN. § 45:9-14.5 (West 1978).

109 *Rosenberg*, 99 N.J. at 331, 492 A.2d at 377-78.

110 *Id.* at 330, 492 A.2d at 377. The requirements for approval of colleges of chiropractic may be found in N.J. ADMIN. CODE tit. 13, § 35-2.4 (Supp. 1984). The required curriculum includes courses in anatomy, embryology, histology, physiology, diagnosis and symptomatology, pathology, bacteriology, laboratory technique, chemistry, neurology, hygiene, gynecology, obstetrics, spinography, endocrinology, dermatology, pediatrics, special senses, jurisprudence, and principles of chiroporactic. *Id.* § 35-2.4(j). These courses are similar to those required of doctors and surgeons. *Compare* N.J. STAT. ANN. § 45:9-41.5 (West 1978) (licensing requirements for chiropractors) *with* N.J. STAT. ANN. § 45:9-15 (West 1978) (licensing requirements for doctors and surgeons).

111 *Rosenberg*, 99 N.J. at 331, 492 A.2d at 378.

112 *See id.* at 331-32, 492 A.2d at 378.

was "within the doctor's field of expertise."[113]

The testimony of an expert may be the pivotal element in a jury's decision to award a patient a multi-million-dollar verdict. In addition, the testimony of a plaintiff's expert has the devastating potential of ruining a physician's reputation, career, and psychological well-being.[114] Likewise, a defendant's expert's testimony may have the ravaging effect of failing to compensate a patient for excruciating pain and suffering. Hence, the ostensible ruination of an individual's life is often contingent upon the credibility of an expert's testimony.

The essence of expert testimony is cloaked with doctrines of uncertain scope. One problem that manifests itself in conjunction with expert witnesses is that the standards and the qualifications of experts have not been clearly delineated. With the recognition of the "overlap phenomenon,"[115] physicians often testify about issues outside their specialties. Clarification and uniformity, however, must be infused into the concept of the expert witness by clearly stipulating the expert's qualifications. Direct, reliable, and unambiguous criteria are crucial. Such standards must "be defined in terms that are judicially manageable and reviewable."[116] One commentator has proposed that comprehensive state statutes be enacted to set forth the qualifications of medical witnesses.[117] Such legislation would create uniform criteria within the court system,[118] facilitate both parties' case preparation, and eliminate the need for the court's discretion in admitting an expert's testimony.

A second problem related to expert witnesses is evidenced once the expert testimony is admitted. It is then within the realm of the jury to determine the competency and inadequacies of the expert's opinion. This determination will ascertain the weight and value to be given to the testimony.[119] To help alleviate the jury's incertitude concerning the competency of the expert, it has been suggested that juries award verdicts based solely on "clear

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113 *Id.* at 332, 492 A.2d at 378.

114 *See generally* MEDICAL MALPRACTICE REPORT, *supra* note 6, at 20 (discussing impact on physicians).

115 *See supra* notes 57-64 (discussing "overlapping").

116 *See* Rogers v. Lodge, 458 U.S. 613, 630 (1982) (Powell, J., dissenting) (discussing standard to be used in identifying racial discrimination).

117 *See* Comment, *supra* note 9, at 70.

118 *Id.*

119 *See* Sanzari v. Rosenfeld, 34 N.J. 128, 138, 167 A.2d 625, 630 (1961); Carbone v. Warburton, 11 N.J. 418, 426, 94 A.2d 680, 684 (1953).

and convincing evidence."[120] Presently, the standard juries most often use for awarding damages in malpractice cases is much easier to meet—a "fair preponderance" of the evidence.[121] The United States Supreme Court recently noted in *Santosky v. Kramer*[122] that the "fair preponderance" test is usually applied because society has only a minimal stake in the outcome.[123] Society's interest in the results of an increasing number of malpractice lawsuits[124] is more than de minimis, however. A "clear and convincing" standard is preferable because it would reduce the number of suits by eliminating frivolous claims and yet fully compensate the innocent injured plaintiff.[125]

The evolution of cases with skewed sympathies for the plaintiffs has contributed to the pervasive medical malpractice crisis.[126] Many doctors have retired early to avoid the pain and trauma of a potential suit.[127] Others have raised their fees to cover their increasing malpractice insurance premiums and have refused to manage risky cases.[128] Still others have practiced defensive medicine.[129] As a result, growing numbers of people have sought chiropractic treatment.[130] The field of chiropractic, however, is a part of the medical malpractice crisis.[131]

The defendant in *Rosenberg* referred to himself as a disciple of "straight chiropractic."[132] Although the public is generally

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120 Redlich, *supra* note 1, at 42.

121 *See id.* at 39.

122 455 U.S. 745 (1982).

123 *See id.* at 755.

124 *See* Blodgett, *supra* note 1, at 18 (malpractice suits have tripled in volume in the last decade).

125 Redlich, *supra* note 1, at 56.

126 *See supra* notes 48 & 57-58 and accompanying text (showing relaxed standard of expert testimony makes it easier for plaintiffs to prove their case).

127 *See* Wyrick & Peracchio (pt. 1), *supra* note 5, Oct. 27, 1985, at 29, col. 1.

128 *See id.*

129 *See infra* note 151 (defining defensive medicine).

130 *See* Stutt, *supra* note 47, at 22. The evident profusion in chiropractic treatments has manifested a corresponding increase in the number of chiropractic lawsuits. *Id.*

131 *See supra* note 8 and accompanying text.

132 *See Rosenberg*, 99 N.J. at 323, 492 A.2d at 373. In a 1979 case, a New Jersey court enunciated the philosophies of the "straight" chiropractic school as follows:

> The "straight" chiropractor is concerned with analyzing the spinal column for the detection and elimination of nervous system interferences known as vertebral subluxations. . . . The practice of "straight" chiropractic requires an exacting scientific spinal analysis for the location of vertebral subluxations, and the application of the most advanced techniques available for the subsequent correction of the vertebral subluxations. Medical procedures including, but not limited to, the diagnosis,

aware of different approaches, techniques, and philosophies between medicine and chiropractic, there is scant public awareness of the various techniques and approaches within chiropractic. The divergence occurs with differing opinions concerning the character of a subluxation and the importance it should be accorded as an etiological factor in disease.[133] The adopted theory of the chiropractor controls a patient's treatment.[134] The difference in philosophies is substantial and can be a crucial factor in a person's health care. Summarily, the "straight" chiropractor is unconcerned with medical diagnosis whereas "[t]he 'mixing' chiropractor is concerned with full body (internal and external) examination, diagnosis, prognosis and treatment of disease through a wide range of procedures."[135] Most importantly, because the "straight" chiropractor is unconcerned with medical diagnosis, there is no referral to a physician when the problem is medical rather than chiropractic, whereas the "mixing" chiropractor will refer cases that he is unable to treat.[136]

Historically, courts have been unconcerned with the merits of the various systems of health care.[137] Rather, the law has concentrated on the competency of those rendering health care in order to protect public health, safety, and welfare. A patient consults either a doctor or a chiropractor because of his belief that the practitioner "has special knowledge and skill in diagnosing and treating diseases and disorders."[138] State licensing laws govern the required knowledge and skill of doctors and other drugless healers such as chiropractors. The purpose of such laws is to banish incompetents from treating the public, thereby protecting patients from potential harm.[139] For example, a licensed chiro-

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> prognosis and treatment of disease add nothing to "straight" chiropractic. The "straight" chiropractor has no interest, professionally or legislatively, in adding medical procedures or services to his practice.

In re Sherman College of Straight Chiropractic, 164 N.J. Super. 519, 524, 397 A.2d 362, 364-65 (App. Div. 1979) (quoting a letter from Sherman College to the president of the New Jersey State Board of Medical Examiners).

133 *See* J. LANGONE, *supra* note 21, at 27.

134 *See id.*

135 *In re* Sherman College of Straight Chiropractic, 164 N.J. Super. 519, 524, 397 A.2d 362, 365 (App. Div. 1979).

136 *See id.*

137 *See* Janssen v. Mulder, 232 Mich. 183, 190, 205 N.W. 159, 161 (1925); Sheppard v. Firth, 215 Or. 268, 272, 334 P.2d 190, 192 (1959); Walkenhorst v. Kesler, 92 Utah 312, 342, 67 P.2d 654, 666 (1937).

138 Kelly v. Carroll, 36 Wash. 2d 482, 498, 219 P.2d 79, 88 (citation omitted), *cert. denied*, 340 U.S. 892 (1950).

139 *See id.* at 502, 219 P.2d at 90.

practor in New Jersey is required to have completed four years at an accredited chiropractic college and to have passed an examination comprising anatomy, physiology, pathology, bacteriology, chemistry, hygiene, therapeutics of chiropractic, and nonsurgical diagnosis.[140] Not surprisingly, a patient relies on his chiropractor's qualifications. The chiropractor thus has a duty to advise his patient if he knows or should know that his treatments will not be beneficial.[141] In appropriate situations, he also has a duty to refer his patient to a physician who can render proper treatment.[142] A patient should be able to rely on the chiropractor's full adherence to these duties. A timely diagnosis may be a patient's last chance to make a full recovery or any recovery at all. Valuable time expended on futile treatments, which are harmless in and of themselves, may be irreversibly harmful or fatal if there is a delay of proper treatment.[143]

The difference between "straight" or "mixed" chiropractic theories can mean the difference between a timely and an untimely diagnosis. New Jersey law has not differentiated between these two theories and should continue to avoid recognizing any distinctions. The *Rosenberg* court circumvented the issue by discussing a physician's qualifications to attest to a chiropractor's deviant standard of care.[144] The court indulged in judicial creativity to accomplish its short-term goal of rendering justice to an injured plaintiff. A contrary verdict allowing the defendant to be judged according to the tenets of his own school would have triggered a response hastening effectuation of the long-term goal of eliminating the problematic discrepancy between the two chiropractic schools of thought. The remedy to this problem, however, lies not with the courts but with the legislature.

It can be argued that a patient assumes the risk when he seeks the care of a chiropractor because "any person who engages a chiropractor, knowing him to be such, is presumed to know to whom he is going and what his theory is."[145] Patients seeking the care of chiropractors, however, should assume only the risk consistent with a presumed conception that chiropractic is a "limited activity relating to a particularly limited kind of

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140 *See* N.J. STAT. ANN. § 45:9-41.5 (West 1978).

141 Kelly v. Carroll, 36 Wash. 2d 482, 497, 219 P.2d 79, 88 (citation omitted), *cert. denied*, 340 U.S. 892 (1950).

142 *Id.*

143 *Id.* at 498, 219 P.2d at 88.

144 *See Rosenberg*, 99 N.J. at 328-32, 492 A.2d at 376-78.

145 Walkenhorst v. Kesler, 92 Utah 312, 347, 67 P.2d 654, 670 (1937).

treatment."[146] Patients should be able to assume, without risk, that the chiropractor will make a differential diagnosis between a medical and chiropractic problem and will refer his patients to physicians when medically necessary. New Jersey law is consistent with this theory in requiring a chiropractor to be proficient in nonsurgical diagnosis.[147]

The field of chiropractic should be rid of the straight-mixed dichotomy. Such a division confuses patients who are generally ignorant as to the specific techniques of chiropractic.[148] Licensing statutes prescribe educational and clinical requirements for all chiropractors regardless of the philosophy one adopts. Therefore, because all New Jersey chiropractors must be trained in nonsurgical diagnosis,[149] there is no excuse for declining to make such a diagnosis. "Straight" chiropractic is potentially harmful, if not lethal, to a patient with a medical problem who is not expediently referred to a physician. To acknowledge the existence of "straight" chiropractic is to allow a chiropractor to deny liability upon his failure to refer a patient to a physician when such a referral is warranted. Veiling such negligence in the embodiment of a "philosophy" is unconscionable and dangerous to public health and safety.

Public discontent and outcry is needed to pressure legislators to change chiropractic licensing statutes to stipulate clearly the responsibilities of *all* chiropractors. As greater numbers of people seek chiropractic care, more stringent educational and clinical training requirements are needed in the licensing statutes. Currently, only seven and one-half percent of the four-year course of chiropractic study is devoted to diagnosis and symptomatology.[150] Clearly, this is inadequate when diagnosis of a medical problem by a chiropractor requires prompt referral to a physician. The public's health and safety mandates legislative scrutiny and the revamping of chiropractic licensing laws.

The malpractice crisis has penetrated every fiber of society. As medical costs rise and doctors begin practicing defensive medicine,[151] public health and safety lapses into precarious

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146 *Id.* at 338, 67 P.2d at 666.

147 *See* N.J. STAT. ANN. § 45:9-41.5 (West 1978).

148 J. LANGONE, *supra* note 21, at 28.

149 *See* text accompanying *supra* note 147.

150 *See* N.J. ADMIN. CODE tit. 13, § 35-2.4(j) (Supp. 1984).

151 The Federal Department of Health, Education, and Welfare defines defensive medicine as "the alteration of modes of medical practice, induced by the threat of liability, for the principal purposes of forestalling the possibility of lawsuits by pa-

chaos. Alternative health care systems such as chiropractic are problematic and are often inadequate in their provision of appropriate and vital medical care. The blame for this vexing state of affairs is shared by everyone.[152] The solution lies in the hands of doctors, lawyers, victims, insurance companies, legislators, and the courts. Society shares the common goal of protecting the public through an efficient, competent, and quality health care system.

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tients as well as providing a good legal defense in the event such lawsuits are instituted." MEDICAL MALPRACTICE REPORT, *supra* note 6, at 14.

[152] *See The Malpractice Mess*, NEWSWEEK, Feb. 17, 1986, at 74, 74-75.