

# Negligence Law Section

## *Negligence Law Section Quarterly*

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### **“Young Lawyer Section Update”**

#### **“Everyone’s (Got) An Expert”**

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Expert discovery is an essential aspect of almost every case you’ll litigate. Many cases ultimately come down to a “battle of the experts.” So before you ride off to do to battle in the trial arena, make sure you’re well-equipped and that you’ve prepared your experts as well as possible. Doing so requires preparation from the very beginning of litigation, if not sooner. Here are some things to consider as you formulate your expert discovery strategy:

#### 1. Know Exactly What Kind of Expert You Need

Identifying the issue(s) in controversy is essential. Before retaining an expert to analyze an issue, make sure you’ve chosen the right expert. If you’re defending a case involving an injured party claiming mental health issues as a result of an accident, that could mean retaining a psychiatrist, a psychologist, or a neuropsychologist, among others.

Investigate and identify exactly what symptoms the party’s claiming and the alleged causes of those symptoms. Depression issues since the accident? Perhaps an expert in psychology is appropriate. But if those depression issues are linked to a closed head injury, a neuropsychologist is likely the better choice. Retaining the right expert to assess an issue they’re qualified and trained to evaluate is critical.

#### 2. Check Your Expert’s Credentials

You want to make sure your expert has the credentials to back up their opinions. Let’s say you’re involved in a case where an individual has undergone spinal surgery as a result of an accident. Your opposing counsel will assuredly be calling the surgeon who performed the surgery as an expert in their case. If you retain an orthopedic surgery expert to offer an opinion as to whether the surgery was related to the accident, research that expert’s educational, professional, and practical history.

The last thing you want is to pit an expert who has never performed the surgery, or hasn’t performed the surgery in more than a decade, against opposing counsel’s expert who has the

procedure hundreds of times. That's not to say your expert doesn't possess the knowledge or ability to review records, examine the individual, and offer an opinion regarding the surgery's relatedness to the accident. But when it comes time for a jury to weigh competing experts' opinions, chances are they're more likely to side with the expert who has the credentials and the experience to back up their opinions.

### 3. Get Your Expert On Board Early

The earlier you can retain and involve your expert in your case the better. But that doesn't mean you should rush to retain an expert just so you can check that box. Move expeditiously to hire the right expert so that you can take the magical journey through the entire litigation process together.

It's much easier to provide your expert with documents and evidence as they develop during a case's progression than it is to bombard them with a mountain of records you obtained five months before you hired your expert. And, your expert will be able to provide feedback and guidance as you go. Your expert will also be able to follow the "story" of the case from the beginning. As facts develop and surface, your expert will be able to analyze them in the context of the case as a whole.

### 4. Feed Your Expert Early and Often

Once you've retained your expert, you've got to keep them in the loop. Take a party's deposition? Provide the transcript to your expert. Opposing counsel's expert produces a report? Provide it to your expert. Receive medical records? Provide them to your expert. Now this doesn't mean you have to give your expert every single document you receive during litigation, or that your expert has to author a supplement report every time they review something.

If there's any question as to whether something's relevant to the issues you've retained your expert to investigate, provide it to them. If they review it and tell you it doesn't have any bearing on the issue or their opinion, no harm done. But what you don't want is to run into a situation where opposing counsel's expert has reviewed an important document or record that your expert was never even aware of.

### 5. Consult With Your Expert

There's often a temptation to simply provide experts with documents and wait for them to provide an opinion. Good experts are great resources, so use them. Say a party's claiming a medical condition you've never dealt with before. Reach out to your expert and ask them to explain it to you. Now you'll have context in which to better view that condition. Your expert will also be able to tell you what information to look out for as you move through the discovery process.

Ask your expert what facts, information, and records would be beneficial for them to have in order to develop their opinion. There may be records out there that you never would've thought to obtain. Your expert knows what information is critical and necessary to analyze an issue. The more you involve your expert in your case, the more prepared you both will be.

### 6. Take Opposing Experts' Discovery Depositions

Questioning an expert about a subject they've devoted their professional life to can be intimidating. But deposing your opposing counsel's experts is an essential task if you're going to be well-prepared to take your case to trial. And it's a great opportunity to learn about the opposing party's position.

Think of an expert discovery deposition as an exhibition game: there's less people watching, less pressure, and less on the line than a real game (trial). Ask anything you're wondering about or are unsure of regarding the expert's opinion. If there's a concept or a term you don't fully understand, ask the expert to explain it to you the way they'd explain it to a jury.

At trial, you won't want to ask the expert any questions you don't already know the answer to. The opposite is true at their discovery deposition: you absolutely want to ask questions you don't know the answer to. The last thing you want happening at trial is to hear an opinion or evidence from an expert witness for the very first time in the case.

The goal of the discovery deposition is to find out what the expert's opinion is, how they arrived at it, and all of the facts and evidence they rely on in support of it. You're not there to "score points" by trying to impress the expert with your new-found knowledge on the issue or by confronting them with a document they may not have seen before. There's a time and place for all of that (trial), but the discovery deposition isn't it.

A successful discovery deposition of an expert is one where you've gotten answers to all of your questions, fully explored the expert's opinion, and walk out of the deposition knowing exactly what the expert is going to testify to at trial. And if the expert deviates or offers testimony at trial that's inconsistent with their discovery deposition testimony, you've earned yourself a great impeachment opportunity.

## 7. Identify and Rectify Your Expert's Weaknesses

Sports teams watch hours upon hours of their opponents' game film to find weaknesses of the teams they'll be facing. They do this to help formulate a gameplan they think will give them the best chance to win. But they also "self scout." This means they watch film of themselves to identify weaknesses, tendencies, and aspects of their game their opponents may try to exploit. Do the same with your expert. Review their credentials and reports with a skeptical eye (you can be sure your opposing counsel is).

Identifying issues with your expert and their opinions before they take the stand at trial is critical. Is your expert's report missing a key document your opposing counsel's expert refers to in their report? Provide that document to your expert. Is there an alternative theory your expert hasn't considered? Discuss it with them so they can address it and why they agree or disagree with it.

## 8. It's Showtime: Expert Testimony at Trial

There's many different ways to help your expert prepare to testify at trial. Offering their own opinions is the easy part; defending those opinions on cross-examination is where most of your preparation should be focused. A good place to start is by examining the opposing expert's opinions and making sure your expert understands not only what those opinions are, but how the opposing expert arrived at them.

Cross-examining an expert witness is one of the most important aspects of a trial. Spoiler alert: you are not going to change the expert's opinion. No matter how much evidence or information you throw at them to try and debunk their opinions, they are going to stick to their guns.

Your focus should be to land a few punches by offering alternative explanations, presenting holes in the expert's opinion, and presenting facts that are inconsistent with the expert's opinion. Keep in mind that the jury is (hopefully) listening to your questions, so even if the expert doesn't give you the answers you want (they won't), the implications of your questions you pose can still be effective.

Whether you're directing your expert or cross-examining the opposing expert, be as brief as possible while still eliciting all the essential information and testimony you need. If you're lucky, you'll have the jury's full attention for maybe ten to fifteen minutes (especially if it's a video deposition). So be prepared, be direct, be succinct, and be done.

## Conclusion

Like almost every aspect of the practice of law, there are very absolutes when it comes to expert witness strategies. And like almost every aspect of the practice of law, you'll only find out what works and what doesn't through trial and error. The more expert witness depositions and discovery you conduct, the less intimidating it becomes.

For younger lawyers, there may not be many opportunities early on to engage in expert depositions or discovery. If you're fortunate to have experienced attorneys in your office, reach out to them and ask if you can accompany them to their next expert witness meeting or deposition. Review deposition transcripts other attorneys have taken of expert witnesses. The more experience you can obtain the better, and you'll be a better lawyer for it.

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