

FINDING THE RIGHT EXPERT AT THE RIGHT PRICE

I. Introduction

You have a medical negligence case. It probably falls into one of three types:

- It looks good and sounds good, and you can understand enough about it on the face;
- It might be good, but you don't know anything about the medicine or applicable field of medical expertise; or
- It looks complicated and messy, and probably isn't very good.

In any event, medical negligence cases are expert-driven cases, and in order to determine if the case has potential merit, you are well-advised (and now required as a threshold to filing suits alleging medical negligence in Washington¹) to consult an expert with a specialized working knowledge in the relevant medical field of skill and practice. So where and how do you begin?

II. Locating the Right Expert

Experts are everywhere. They come in all shapes and sizes, all levels of skill, objectivity, credibility, price, and pedigree. Some have experience working with lawyers and in the legal setting and are comfortable in that arena, and others, decidedly, are not at all comfortable in our realm. Still, accounting for those many differences, they all have these things in common: they are living, breathing, thinking, and above all, feeling human beings. Like you, they have families, clients, colleagues, egos, fears, obligations, likes and dislikes.

¹ See RCW 7.70.150 Actions alleging violation of accepted standard of care – Certificate of merit required.

When it comes to finding an expert in a medical negligence case, you are only limited by your own creativity, determination, deep pockets, and persuasive ability. You might consider some or all of the following as possible sources of reliable expert information:

- The treating doctor(s);
- Experienced colleagues;
- Friends (and friends of friends) in the medical profession;
- Fee-based expert witness locator services;
- Peer literature and published treatises and texts (consult and befriend the librarian at the UWMC Medical School Library);
- Expert witness directories from WSTLA, WDTL or other groups;
- ATLA (litigation groups); and, of course,
- The Internet.

Among these sources, my experienced colleagues have provided the most reliable referrals. And I let my colleagues know at the outset that I will treat the referred expert with absolute professionalism. It would be an embarrassment if word got back to your colleague that you were anything but professional in dealings with the expert, and you can be certain your colleague will think twice about helping out next time.

I have used fee-based expert witness services in the past, and on those occasions, I made it understood at the outset that my expert must be reasonably objective, suitably qualified and well-respected. There is typically a flat fee for the initial review and “referral” to the expert, after which time you are put in direct contact with the expert. Think of these as “matchmaking” services between lawyer and expert.

One advantage of this kind of service is that the referred experts are already willing to review the materials. Also, (in my limited experience) the referred experts have tended to

be reasonably well-qualified individuals. At the very least, these services exist for you as a potential resource.

I have also contacted experts directly when coming across their names in peer literature, a professional journal, a treatise, a chapter in a textbook, or atlas that is relevant to my case. That takes a little bit of courage because it is akin to a cold call. But typically I ask to speak to the expert's scheduling secretary or personal assistant, and first make a polite inquiry if the expert 1) does offer opinion testimony in cases of potential medical negligence, and 2) is willing or available to do so in this instance. It never hurts to ask politely, and all they can say is yes or no. If the answer is no, I might ask for a referral to a qualified other colleague the expert knows who might be willing to look over the case materials, and can I have that individual's contact information. I can't over-emphasize the importance of the human element, and the advantages of being respectful, genuine, and caring.

PRACTICE TIP: You also need to consider that in the medical negligence case you will typically need experts on liability (negligence), causation, and damages. Understand, at the outset, how your respective experts' opinions need to complement one another. You will do well to locate and retain credible experts separately for each of the elements. Also, you should consider retaining additional experts to testify as rebuttal witnesses. Finally, be certain, if litigating, that you have located, retained, named and identified a backup expert. You never know how your expert will do at his or her deposition until the time comes. Even good experts can have a bad day.

PRACTICE TIP: Do not overlook causation as an element to be proved in medical negligence cases. Even with a decent liability case, you can expect your opponent to mount a vigorous causation defense. Again, understand what elements you need to prove, and be sure to have capable experts who can offer credible testimony in support.

III. Interviewing Tactics

You've located an expert. You've made contact. It went well. He or she is willing to review the case. Initially, in my experience, there is little need for much more than providing your expert with all of the relevant medical records, and a check for his or her fee (or a portion), if asked, in advance.

Avoid the temptation to write a lengthy cover letter. Your expert probably doesn't need one, and it may only serve to confuse, complicate or raise suspicion. Anything in writing that you provide your expert (or vice versa) is potentially subject to discovery. Always consider how your letter or communication might be perceived by a juror. Keep it brief.

PRACTICE TIP: Thank the doctor for his or her time, objectivity and professional expertise. These folks worked hard to get where they are. They appreciate recognition and respect as much as you do.

PRACTICE TIP: Make a real effort to understand your case. Study the records. Read the literature. Learn about the relevant anatomy. It helps if you have an aptitude for this in the first place, but even without that, you can learn. The more you know about your case, the better you will communicate with your expert, and the better you communicate with your expert, the better will be the working relationship.

IV. Threshold for Qualification

Every case has a different set of facts and requirements for proof. But when it comes to expert testimony, there are threshold evidentiary considerations for qualification of the expert before he or she can offer an opinion in court.

Look to the Washington Rules of Evidence (ER) and more specifically ER 702 and 703.

ER 702. TESTIMONY BY EXPERTS

If 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.

ER 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Your expert must first be qualified to offer a professional opinion, meaning you must lay the proper foundation for the expert's qualification in the relevant area of expertise his or her testimony will address. A good starting point is your expert's resume and curriculum vitae. Typically (and particularly among academia) these will list your expert's educational accomplishments and degrees earned, professional and teaching positions held, honors conferred, publications authored or co-authored, research conducted, seminars attended, presentations, and professional memberships, along with the occasional bit of personal background.

PRACTICE TIP: Don't rush to sacrifice real world, hands on experience for ivory tower credentials. Marcus Welby may very well be a more persuasive witness for your jury than his more highly credentialed colleague in academia. Considerations of venue, case type, personalities, and more, may well dictate who will be the better witness. In that regard, focus groups, early and often, can help identify perceived strengths and weaknesses of your experts.

V. Avoiding Expert Bias

We all have biases, whether we are aware of them or not. Experts, being human, are no different. But even though experts are, presumably, earning a fee for services rendered, they can still be objective, especially if you encourage them to be. And if you are working with credible experts to begin with, then objectivity typically comes neatly wrapped in that package, and that's all the better for you. There's just no sense in relying on an expert that you know is going to be embarrassed or discredited later on. Consider that you will more than likely have summary judgment challenges, and you will absolutely be relying on your expert's background and experience, and the basis for his or professional opinions, to overcome any summary challenges.

VI. Dangers of Relying Too Heavily on Professional Testifiers

There are obvious dangers to relying exclusively on professional testifiers, foremost being the assertion to the jury that he or she is a hired-gun. There may also be a paper trail of deposition or in-court testimony that can be used to impeach the expert. Jurors today seem less suspicious of experts that earn a large percentage of their living doing forensic consultation, especially if the expert is otherwise well-credentialed, experienced, and thoroughly competent in his or her discussion of the relevant facts and issues. Remember, trials are battles of perceptions, and if your expert is perceived as the more credible witness, then you're well on your way to a good result.

One important factor in that matrix of credibility is going to be whether your expert is currently active in his or practice, or has been inactive for a long period of time. Jurors are likely to give the greatest weight to the testimony of treating doctors (whom they perceive as more credible), especially if the qualifications of the hired-gun professional expert are lacking in any meaningful way.

One of the potential problems with professional testifiers is lack of current real world experience. The expert may be a fine academic, and a brilliant mind, but no longer have an active practice. Much will depend on how long the expert has been out of practice, and the reasons and circumstances for retiring from practice..

PRACTICE TIP: It is important to be certain your expert does more than just review medical records in the case (unless that is all he or she needs). Your expert is going to be deposed on everything her or she has reviewed that supports his or her opinion. Give your expert all of the records needed, interrogatories, depositions, and access to your client. If you deliberately hold something back that is meaningful, and the expert is unexpectedly challenged on it (and embarrassed) later, you will almost certainly damage your own credibility, and the relationship with your expert will likely suffer.

PRACTICE TIP: If you are really getting into learning about your case, you may have compiled a body of literature on the relevant subject matter. Whether you do the research, or hire someone to do it for you, it probably doesn't hurt to make a copy of the research notebook for your expert too, or, at the very least, a list of citations he or she can call up on Medline. This shows you are invested, and care, and caring is contagious.

VII. Retaining the Expert

My initial letter typically follows a brief telephone conversation, and simply expresses sincere thanks and appreciation to the expert for his or her time, objectivity, and professional expertise in reviewing the materials provided. If I enclose funds, I will not make reference to them in my letter.

VII. Compensation Agreements

If your expert requires an advance fee, retainer, or compensation agreement, and you want or need the expert to properly develop your case, then you may have no other choice but to agree. If the price is too steep for you, then step back and consider your options. Understand this: even relatively straightforward medical negligence cases are going to be expensive to properly develop, especially as you move closer to trial. If you can't pay the freight then don't carry the weight. You will only add to your own stress if you are spending time worrying about the costs, and not enough time concentrating on the things you can do to make your case a winner.

VIII. Conclusion

There are no hard and fast answers. The world of medicine is developing at rapid speed. Research and technological advances are astounding. Much of what you need from an expert, and where you will find him or her, will depend on the nature of your case and the complexity of the issues. Tread carefully, and take only good cases.

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