You may have to play catch-up, but you can play it to win.

DEFENSE LAWYERS must be adept at playing catch-up. In most cases the other side will have had ample time to work up their case long before you come into the picture. Federal Rule of Civil Procedure 11 requires as much. Moreover, many jurisdictions have enacted tort reform measures requiring a plaintiff to file a “certificate of merit” as a prerequisite to bringing a medical malpractice suit. The certificates must be supported by a qualified medical expert stating his or her belief that a physician’s conduct fell below the standard of care. As a consequence, defense attorneys must now double down on efforts to come up to speed once a suit is filed. Effective selection and utilization of medical experts can help level the playing field.

1. Selecting Medical Experts

One of the most important decisions a defense attorney will make is choosing an expert. The following are factors to consider when selecting defense experts:

• **Is the expert a good witness?** The fact that someone is knowledgeable in a discipline does not make him or her a “good witness.” Keep in mind experts are expected to possess specialized knowledge, skill, or training that will assist the trier of fact to understand evidence or determine a fact in issue. Fed. R. Evid.
702. Make the most of this opportunity by retaining experts skilled at the art of communication, e.g., adjunct faculty members or experts with trial experience;

- **Does the expert maintain a medical practice or “litigation practice”?** While an expert with trial experience is preferable, be cognizant of the “hired gun” perception. Plaintiff’s lawyers will often attempt to quantify what portion of your expert’s income is derived from the “litigation business” as opposed to practicing medicine. Plaintiffs have the option of designating treating physicians as experts, understanding that jurors may assign more credibility to the opinions of treating physicians as opposed to “hired guns.” A defense expert with an active medical practice may help bridge this potential credibility divide;

- **Consult with peers and colleagues.** Consulting with peer lawyers or local defense organizations are good starting points for selecting an expert;

- **Do your own background research.** State boards of health typically maintain disciplinary information on physicians that is available to the public. A little research up front may prevent headaches down the road. Hearing about your expert’s fraudulent billing practices for the first time on cross-examination can be devastating to your case.

2. **Expert Materials**

    Anything you give an expert should be considered fair game in discovery. Whenever you send documents to an expert you should do so with the understanding that the other side is entitled to review your expert’s notes, files, records or anything your expert will rely upon in formulating his or her opinion. Be diligent in making sure you do not send work product or other privileged materials to your experts such as document summaries, notes containing your mental impressions, or seemingly benign attorney-client communications. Records forwarded to experts typically include the following:

    - **Pre- and post-incident medical records.** Pre-incident records will play a vital role in cases where causation is at issue. (Pre- and post-incident records should at a minimum include intake documents, chart notes, lab reports, prescriptions, pertinent imaging reports and film, and financial responsibility agreements including doctors’ liens.) For example, in cases involving orthopedic conditions and injuries, pre-incident imaging and radiological reports will allow your expert to perform a baseline comparison to discern whether the pathology at issue was pre-existing. In many instances, treating physicians doubling as plaintiff experts will have already reached conclusions on causation without having the benefit of the plaintiff’s prior medical records. In such cases, you can make that physician appear “trigger happy” by rendering a causation finding without the plaintiff’s entire clinical history, which is best obtained by reviewing prior medical records. By that same token, you can make your expert look thorough and deliberate;

    - **Plaintiff’s deposition transcript.** Experts may also benefit from the plaintiff’s deposition transcript, particularly those portions of the transcript relating to medical history and current level of function;

    - **Other expert reports and deposition transcripts.** Provide your experts with copies of deposition transcripts and reports prepared by other associate experts, e.g., occupational medicine physicians, vocational rehabilitation specialists, etc. The logic is to ensure your experts are aware of each others’ opinions. Deposition transcripts and reports of opposing experts should also be provided to your expert.
3. Expert Disclosures

It is very important to know what has to be disclosed and what can be protected:

- **Expert reports under Fed. R. Civ. P. 26.** Under Rule 26(a)(2) an expert’s written report must be disclosed within the time order by the court, or 90 days before trial. The federal rule is quite specific as to what must be included in an expert’s report: 1) the expert’s opinion; 2) data and all information considered by the expert; 3) exhibits that will be used to summarize the expert’s opinion; 4) the expert’s qualification, including publications authored over the last 10 years; 5) a list of other cases in which the expert has given deposition or at trial testimony over the last 4 years; and 6) the fees to be paid to the expert for his or her testimony;

- **Written discovery requests.** Expert disclosures may also be obtained through interrogatories, requests for production or pursuant to Rule 35 (governing independent medical examinations);

- **Perils of premature drafts and loose handwritten notes.** It is good practice to have your expert orally communicate his or her findings and opinions with you before finalizing a written report. This will allow you to ensure that the report is compliant with Rule 26 or Rule 35 governing independent medical examinations. In-person or phone conferences with your experts will also afford you a chance to ensure that they have focused on the right issues. You should also caution your experts not to generate excessive loose notes or preliminary drafts of the report in hard copy. Such materials become part of your expert’s file and may be deemed discoverable under Rule 26. Preliminary drafts and loose handwritten notes may also expose potential weaknesses in your expert’s methodology and opinion.

4. Deposition Preparation

Here are some tips for preparing for the deposition:

- **Pre-deposition conference.** Ample time should be spent beforehand making sure your expert has a sufficient command of the facts. This is particularly important if your expert maintains a busy practice. Chances are your expert will have forgotten specific facts if there is a considerable time lapse between his initial report and the deposition;

- **Prepare your expert for “divide and conquer” tactics.** Lawyers will often attempt to exploit contradicting opinions of experts working on the same side. In cases where it is necessary to retain multiple experts to testify on separate but overlapping issues, be sure that each expert is aware of the others’ opinions and potential conflicts on overlapping issues have been considered and reconciled before reports are finalized or depositions are taken. Another practical way to avoid a “divide and conquer” strategy is to advise your experts to stick to their disciplines and not be baited into testifying on matters beyond their areas of expertise. Experienced experts will always employ the magic words when confronted with this strategy — “I will need to defer to Doctor A on that issue”;

- **Survey the opposing expert’s office.** Opposing medical experts are oftentimes deposed in their office locations as this is the best way to avert costs and fees associated with having an expert travel to your office. There is a substantial benefit to deposing an expert at his or her office. Medical offices and clinics are often overflowing with marketing materials, educational brochures, information regarding new procedures, and other medical tidbits. Occasionally you may come across materials relating to an issue in dispute. They are ripe for the picking, so arrive early enough to review them.
The look of an expert who has been discredited with his own office brochure is priceless;

- **Fee information.** Find out how much the opposing expert is being paid for his or her testimony assuming that information has not already been provided. You should also consider having an opposing expert quantify his or her annual compensation relating to litigation consulting. Your expert should be prepared for this inquiry as well;

- **Focus on the facts and foundation.** A deposition is not the time or place to be macho or “squeeze” an opposing expert. Save that for cross-examination. Your time will be better spent asking questions that will help you understand the expert’s opinion, the basis for that opinion, and how he or she went about formulating the same. Focusing your depositions accordingly will afford you the best chance of discrediting the expert at trial or excluding the opinion altogether under Daubert.

5. **Trial Preparation**

   It is a good idea to break down your trial preparation into the following areas:

   - **Direct examination of experts.** Begin with foundational questions regarding your expert’s educational background, practice area and expertise. This will help establish the expert’s credibility with the jury at the outset. Encourage the use of anatomy models and illustrations. Some jurisdictions allow jurors to ask questions of experts after cross-examination and redirect. See, e.g., Wash. Super. Ct. Civ. R. 43(k). Opinions differ widely on the benefits and risks of this practice. From a practical standpoint, juror questions are a good way to gauge your expert’s effectiveness with the jury. It also affords your expert the opportunity to establish rapport and interact directly with the jury;

   - **Redirect.** Redirect should be short, sweet, and to the point. Do not repeat previous testimony and address only issues of consequence raised on cross-examination. In some cases it may be necessary to briefly devote time to restoring your expert’s credibility. For example, opposing counsel might point out that your expert’s practice is exclusively devoted to performing independent medical evaluations at the behest of defense lawyers. You might consider having your expert clarify that he or she has never allowed a defense attorney, or anyone for that matter, to influence their findings. Your expert should also point out that they have often rendered findings not favorable to defendants;

   - **Cross-examining opposing experts.** Try to obtain transcripts of depositions given by an opposing expert in previous cases. These can be obtained through local bar organizations or from colleagues. Advanced searches of social networking sites may also prove worthwhile. Attack the facts underlying the expert’s opinions and, if possible, point out instances when the expert failed to consider key facts bearing on the plaintiff’s claim or gave testimony inconsistent with or contrary to his or her present testimony. Look for opportunities to make opposing experts your witness by having them corroborate facts or findings favorable to your case.

**CONCLUSION** • Let there be no mistake about it: The plaintiff can be at a distinct advantage in cases that call for medical experts. The obvious advantage is that plaintiff’s counsel will have had a substantial amount of lead time to think about possible theories, review the plaintiff’s records, have experts review the facts, and get a clear understanding of the strengths and weaknesses of the claim. The plaintiff’s lawyer will know which aspects of the medical proof are strong and which aren’t — and how to deal with the latter.
But none of this means that the defense has no choice but to be caught off-guard. The idea is to know what will happen and in what order. Keeping in mind some of the most important points about how to choose experts, knowing what records to ask for, and knowing how to prepare for depositions and for trial will put you in a good position to defend your client.

**PRACTICE CHECKLIST FOR**

**The Defense Lawyer’s Tool Kit For Working With Medical Experts**

- In choosing a medical expert:
  - Ask whether the expert is a good witness;
  - Find out if the expert does more testifying that practicing medicine;
  - Consult with peers and colleagues. Consulting with peer lawyers or local defense organizations are good starting points for selecting an expert;
  - Do your own background research.

- With respect to expert materials:
  - Obtain pre- and post incident medical records;
  - Get the plaintiff’s deposition transcript;
  - Obtain other expert reports and deposition transcripts.

- Know how to handle expert disclosures:
  - Review the rules applicable to expert reports under Fed. R. Civ. P. 26;
  - Obtain expert disclosures through interrogatories and requests for production or pursuant to Rule 35 (governing independent medical examinations);
  - Be careful about the perils of premature drafts and loose handwritten notes. It is good practice to have your expert orally communicate his or her findings and opinions with you before finalizing a written report.

- Here are some tips for preparing for the deposition:
  - Have a pre-deposition conference with the expert to make sure that he or she has a sufficient command of the facts;
  - Prepare your expert for “divide and conquer” tactics;
  - Survey the opposing expert’s office. Opposing medical experts are oftentimes deposed in their office locations as this is the best way to avert costs and fees associated with having an expert travel to your office;
  - Find out how much the opposing expert is being paid for his or her testimony assuming that information has not already been provided;
  - Focus on the facts and foundation. Ask questions that will help you understand the expert’s opinion, the basis for that opinion, and how he or she went about formulating the same.

- Break down your trial preparation into the following areas:
  - Direct examination of experts;
  - Redirect;
  - Cross-examining opposing experts.