Nine Case-Retention `Red Flags' Spelling W-A-R-N-I-N-G for Expert Witnesses

By Kevin Quinley, *CPCU, ARM, AIC, AIM, ARe*

Living without warnings may work for rock and rollers, but can be perilous for expert witnesses. Unfortunately, no expert witness engagement comes with a black box warning, like prescription drugs with potentially serious side-effects. However, accepting some expert witness engagements *can* have serious side-effects: insufficient time to do a quality job, superficial opinions due to "rush job" mentality, potential witness disqualification, slow-pay engagements, or losing credibility that reverberates throughout your expert witness practice.

While most engagements proceed smoothly and problem-free, expert witnesses need to hone a sixth sense to detect potential red light warning signs on new case overtures. These red lights are often subtle, but savvy expert witnesses should be attuned to them. Let's look at nine such signs that expert witnesses should be wary of during initial exchanges with prospective retaining counsel:

#1. "I need your [disclosure/report] by this Monday." Rush jobs are rarely quality jobs. Unfortunately, eleventh-hour fire drills for assigning experts seems to be more the norm than the exception. Tread carefully. Avoid over-committing. Do you have enough time, given your other commitments – – both personal and professional – – to do a quality job on the case? It takes but one superficial opinion, testimony or having to defend a hastily prepared opinion to torpedo your expert witness practice.

In a perfect world, experts would have months to prepare. Admittedly, in the real world, to paraphrase a popular bumper stickers, "Stuff happens." Being a good expert includes being able to deliver quality work on a tight deadline. Still, there are tight deadlines and then there are *really* tight deadlines. In fairness, often, the problem is not retaining counsel's, but the client's reluctance to incur the expense of hiring experts until and unless the client is certain that such a retention is absolutely necessary. Before committing to compressed timelines, ask yourself, "Will I have the time to do a *quality* job?"

Do I look like a short-order cook?
"I'd like 7000 pages of documents reviewed and analyzed, plus a Rule 26 report, to go, please."
"Yessir, – coming right up! Would you like fries with that?"

Are you tired being treated like an expert witness version of McDonald's Drive-Thru lane? Yes, rush jobs can arise due to factors totally outside the control of clients and counsel. That, though, should be the exception, not the rule. In fairness to retaining counsel, often the fire-drill is due to clients waiting to the last minute before incurring the cost of hiring an expert. But they tarry and now, *you* face a predicament. Of course, you control your fate here. You could, (then) First Lady Nancy Reagan suggested during the War on Drugs, "Just. Say. No."

No one makes you accept rush-job assignments. There are diplomatic, and legitimate, ways to beg off. You have a choice. But, anything you say "yes" means saying "no" to something else. That "something else" may be work on other cases, a conference you pledged to attend, your son's Pinewood Derby contest or your daughter's soccer game. Maybe the cost is having a free weekend or holiday to spend time with family and unwind. (One expert charges "rush rates," higher than his usual hourly fee. In most business realms, rush jobs cost more.)

#2. "This is a `rush,' because my last expert bailed on me." Why did the last expert drop out? Sometimes, there are legitimate reasons. I've had situations where the prior expert faced a health problem or an injury from an accident. However, is it because the expert could not support the prospective client's position? Maybe you can't either. Is it

Nine Case-Retention `Red Flags' Spelling W-A-R-N-I-N-G for Expert Witnesses (continued)

because the expert wasn't getting paid and "fired" the client? There may be a perfectly reasonable explanation, but this red flag merits exploration. Diplomatically ask *why* the prior expert left.

#3. "Don't worry about the disclosure or report. I'll save you time by writing it and will send it to you for your signature." Another red flag. An expert's disclosure or report should be in his or her own words, representing his or her ideas. Resist attempts to spoon-feed you an opinion or to have retaining counsel ghostwrite the report. You – – not retaining counsel – – will be in the videographer's camera cross-hairs testifying, at deposition, and later in front of the jury at trial. You – – not retaining counsel – – must be comfortable with the opinions and how they are worded. Do not leave yourself vulnerable to the innuendo (or reality) that the opinion was written by a retaining attorney and you just signed off at the end.

Any attorney's well-meaning plan to "save you time" is offset by reputational risk and suggests overreaching. The report should be *yours*, not retaining counsel's. That said, before the report is finalized, expect some give-and-take between retaining counsel and the expert. That differs from retaining counsel essentially dictating the report, or writing it and asking the expert to put his or her name on it.

#4. "I need a report saying…" Another red flag. Good attorneys do not shop around for "reports saying," but rather want a subject matter expert to provide an objective, independent, neutral assessment on certain issues, in my context, insurance claim issues. Any attorney who expects to order up a report like a room service has unrealistic expectations and may misunderstand the legitimate role of an expert in litigation. Accommodating this request buttresses opposing counsel's attempt to depict the expert as an opinion for hirer, and advocate an — not a dispassionate authority on the issues before the trier of fact.

This request may also foreshadow over-controlling clients who may try to push the expert into opinion areas beyond the bounds of the expert's specialty. That is a recipe for disaster at deposition or trial. Accepting such terms can hurt the future viability of your expert witness practice. Remedy: politely but firmly draw boundaries, defining your scope of expertise.

#5. "I don't want to refer the case to you unless I *know* that you can help us support our case." An attorney from a large, nationally prominent, law firm told me this on a disability insurance bad faith claim. I explained that I could not commit to an opinion until and unless I received and reviewed the case materials. Her reply: the client did not want to go to the time and expense of hiring an expert, only to find out that the expert cannot support the insurance companies position.

Goodbye (and good riddance)! Promising a favorable opinion before even reviewing the case materials smacked of intellectual dishonesty.

#6. "The client is on a budget and wants to handle this as economically as possible." This often portends collection problems. Many, if not most, expert witnesses are small practices. Many are sole practitioners. Cash flow is important in terms of not only getting paid, but getting paid timely.

Faced with such delays, retaining counsel will often try to soothe the expert with, "Company X is a large company; they're good for it and you will get paid in time." Unfortunately, mortgage companies, insurance companies and grocery stores do not accept promises of future payment in exchange for goods and services. Listening between the lines, an expert should be wary of any retaining attorney who raises the issue of a prospective client's financial status.

Such comments often translate into "slow pay." Proceed with caution. This isn't to say that any expert should over-bill. Bill the time spent to read materials, analyze documents, draft reports, prepare for depositions and trials. Any client looking to get a quality expert "on the cheap" should look elsewhere.

In litigation, there is no second place. No expert wants to answer a question at deposition or trial with, "I didn't review that material or analyze that issue because of retaining counsel's cost constraints." Insist on upfront retainers. Stipulate that the retainer will apply to the *final* bill. Include in retention letters a clause stating that, in the event of late

Nine Case-Retention `Red Flags' Spelling W-A-R-N-I-N-G for Expert Witnesses (continued)

payment, you reserve the right to cease work on the case.

#7. "We need a budget forecasting the amount of time you will be spending." This sounds reasonable, but is often difficult. During the presidency of tall Abraham Lincoln, a little girl looked up at him and asked, "How long should a man's legs be?" His reply: "Long enough to reach the ground." How much time should an expert engagement take? Answer: sufficient time to develop a quality product, which includes carefully reading and rereading materials, analyzing issues and materials, developing meticulous reports and disclosures, meeting with counsel, preparing for and attending depositions and trials, etc.

Many factors outside an expert's control will drive case costs and budgets. For example, a substantial number of new documents are produced either by the retaining side or by the opposition. Surprise! The expert cannot give these short shrift. If counsel sends the materials to the expert, the latter has a reasonable expectation that counsel expects for the expert to review these. Experts can hazard a ballpark guess as to the amount of time the assignment will take, but should always caveat projections by emphasizing that this is simply a good faith estimate and not a warranty, nor a "not to exceed" guarantee.

Expert referral services sometimes ask an expert to project the number of hours he or she will bill. The same reservations apply. Resist attempts to limit the quality and thoroughness of your efforts as an expert due to cost constraints. This doesn't mean that the expert should "break the bank" in billing, only that experts are knowledge workers. They are not tightening widgets on an assembly line, a process where one can readily forecast the amount of work in hours.

#8. "The client balks at the retention letter requiring payment within [XX] days of receiving the bill." This is also a danger sign, portending "slow pay" situations. Recommendation: include in the retention letter a timeline or due date from the date of the expert's bill until the date the bill is due. Thirty days is a reasonable time-line. Some clients may balk due to internal bureaucracy and the amount of time that it takes to pay bills. Experts should be flexible on this.

If, for example, a client counters with a 45-day timeline instead of 30, consider that. Payment timetables should not, though, be open-ended. It is particularly galling on eleventh-hour retentions and last-minute "fire drills" where a client expects the expert to drop everything and "put the pedal to the metal" on a case, but the client feels it's reasonable to take three weeks to cut a retainer check. As an expert, if I'm going to treat this time sensitive case with a sense of urgency, I want reciprocity from the client. If, as an expert, I must review 5000 pages of documents and prepare a Rule 26 report within, say, seven days (as I have done in some cases), it is not too much to ask that an insurer or client cut a retainer check within that same ten-day time frame. Fair enough?

Often, I am retained to opine on whether or not an insurer fulfilled its promises. In the face of signed retention letters promising payment within 30 days, sometimes I must gently point out to "slow-pay" clients that they are not living up to the very promises that they made when they retained me. (In the words of Alanis Morissette, "Isn't it ironic — don't you think?")

#9. "We'll do deposition prep the morning of your deposition." Uh, no thanks. There are usually meaty issues, questions and soft spots in a case that merit advance discussion, pre-deposition, with retaining counsel. Call me compulsive, but I don't want to save these till the eve of deposition. No more than I would start studying for an important college or grad school exam the day before the test. Because a deposition or trial testimony *is* a test. Some very smart people (opposing counsel and his/her staff) prepare for weeks to make you look uniformed, inconsistent and lacking credibility. Every case has strong and weak points.

Politely but firmly insist with retaining counsel that he/she make time, by phone or in person, about ten days before the big event to meet to discuss (a) questions about the factual landscape, (b) areas of concern or topics meriting further discussion, in light of the deposition date and (c) mundane but essential issues, e.g., who will be taking your deposition or conducting cross-examination, how to handle payment of your deposition time, etc. This should be a

Nine Case-Retention `Red Flags' Spelling W-A-R-N-I-N-G for Expert Witnesses (continued)

colloquy IN ADDITION to the day before or day-of-deposition meeting. By the time Game Day arrives, you want zero open issues to cover in a pre-deposition meeting with retaining counsel.

For 20-plus years, I worked for an insurance company that wrote product liability coverage on medical devices. Failure-to-warn claims were among the most common and easiest for plaintiffs to make. Occasionally, adjusters would circulate a list of hilarious real-life warnings from other product sectors.

Example, a warning on a laser printer cartridge saying, "Do not eat toner." Or a Korean kitchen knife — perhaps losing something in translation — that read "Warning – Keep out of children." Such malapropisms provoked laughter, but red flags in expert witness engagements can bring frustration, tension, and even disqualification. Be aware of warning signs that lurk beneath the surface of prospective engagements. Be prepared at times to either diplomatically push back or "just say no."

Green Day's song "Warning" opens, "This is a public service announcement, this is only a test." View the preceding practice tips as a PSA for expert witnesses. Each prospective engagement is a test, and the test begins during the initial phone conference between retaining counsel and those practitioners with specialized knowledge. Knowing potential landmines and spotting them in advance help experts pass the "test" and succeed in knowing when to say "yes," knowing when to say "no thanks" or addressing potential problems up-front.

Kevin Quinley CPCU, ARM, AIC, AIM, ARe *is President of Quinley Risk Associates in the Richmond, VA area. A CLEW member and recent CLEW Committee member, he maintains an active nationwide expert witness practice on issues of claim-handling, bad faith, extracontractual liability and adjuster standard of care. You can reach him at kevin@kevinquinley.com.*

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