Nine Case-Retention Red Flags for Insurance Expert Witnesses

by Kevin Quinley

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Many mid-career, late-career or retired insurance professionals launch second careers as expert witnesses. Insurance being a hotbed of litigation, there is strong market demand for insurance professionals with specialized expertise who can opine on issues at controversy in court. Regardless of what insurance subspecialty the practitioner occupies, every engagement starts with a phone call from a retaining attorney. This article examines nine "warning signs" for insurance experts to be aware of at the beginning of any engagement. Heating these warning signs can serve as a filter for avoiding problematic engagements, sparing the insurance expert the risks of fee disputes, substandard work product due to compressed timelines, or even disqualification as an expert due to inadequate preparation.

An ardent rock music fan, I recently attended a live concert of Green Day, one of my favorite bands. Their set featured the song, "Warning," with the refrain "Warning: live without warning..."

Many mid-career, late-career or retired insurance professionals find themselves embarking on a second career as an expert witness. This allows practitioners to continue to be involved in the insurance profession, albeit from a slightly different angle and find new ways to monetize their expertise. The sad but true reality is that insurance is a litigation hotbed. Resolving such disputes often revolves around retention of experts with specialized knowledge in different segments of the industry. Insurance experts run the entire spectrum of the property and casualty spectrum, including specialists in actuarial science, ratemaking, agent/broker standard-of-care, underwriting, workers compensation premium auditing, claim handling or surety bonding.

Insurance experts may fulfill consulting roles or also prepare to testify at depositions or trials. This article's focus will be primarily on insurance specialists serving as "testifying" experts on property/casualty issues. What all experts have in common, however, is that the

engagement typically starts with a phone call from an attorney representing either an insurer or an aggrieved party (e.g. an individual, a company or another insurer) pursuing recovery against an insurance company.

Living without warnings may work for rock and rollers living in the fast lane, but can be perilous for insurance professionals serving as 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 an 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?"

Tired being treated like a staffer at McDonald's Drive-Thru lane? Yes, rush jobs can arise due to factors totally outside clients' and counsel's control. That, though, should be the exception, not the rule. (In fairness to retaining counsel, often the fire-drill is due to clients waiting till the last minute before incurring the cost of hiring an expert.) But they dither and now, *you* face a predicament. Of course, you control your fate here. You could, as (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" to means saying "no" to something else. That "something else" may be work on other cases, a business conference for which you registered, your son's Cub Scout Pinewood Derby or your daughter's soccer game. Maybe the price is having a free weekend or a holiday for time with family and for unwinding. (One expert I know 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 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 is overreaching. The report should be *yours*, not retaining counsel's. That said, before the report is finalized, expect 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 an insurance subject-matter expert to provide an objective, independent, neutral assessment on certain issues. In my wheelhouse, those are insurance claim topics. Any attorney expecting to order up a report like a room service breakfast has unrealistic expectations and misunderstands the legitimate role of an expert in litigation. Accommodating this request buttresses opposing counsel's inevitable attempt to depict the expert as an opinion for hire, and advocate — not a dispassionate authority on the issues before the triers 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 bear expense of hiring a specialist, 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 smacks 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 vital for not only getting paid, but getting paid timely.

Faced with such delays, retaining counsel will often try to soothe the expert with, "Company XYZ 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 attorney raising the topic of a 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, though.

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 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 Abraham Lincoln presidency, a little girl looked up and asked him, "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 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 these are simply good faith estimates, not warranties, nor are they "not to exceed" guarantees.

Expert referral services sometimes ask experts 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 prompt 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 a 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 remind "slow-pay" clients that they falling short of the very promises that they made when they retained me and agreed to in the written engagement letter.

#9. "We'll prep for your deposition on the morning of …" Uh, no thanks. There are usually meaty issues — questions and soft spots in any case — requiring advance discussion, pre-deposition, with retaining counsel. I don't want to address these on the eve of deposition. No more will I do that than I would start studying for an important college or grad school exam the day before the test. Make no mistake — deposition or trial testimony *is* a test. 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 testimony 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 colloquy should be 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 circulated lists of humorous real-life warnings from other product realms. Example,

* a warning on a laser printer cartridge saying, "Do not eat toner;"

* a Korean kitchen knife — perhaps losing meaning in translation — that cautioned, “Warning – Keep out of children;”

* Warning on a Vidal Sassoon hair-blower: “Do not use while sleeping.”

Malapropisms provoke laughter, but red flags in expert witness engagements bring frustration, tension, and even disqualification. Be aware of warning signs lurking beneath the alluring surface of prospective engagements. Prepare to diplomatically demur or “just say no.”

View the preceding practice tips as a Public Service Announcement for insurance expert witnesses. Each prospective engagement is a test. The test starts with the first phone call between retaining counsel and the insurance expert. Knowing potential landmines and spotting them in advance helps experts pass the "test" and succeed in knowing when to say "yes," knowing when to say "no thanks" and to address potential problems up-front.