Tell-tell Signs that the Engagement is Risky

National Association of Certified Valuators and Analysts

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Hypothetical Chronology of Events

Late one Friday afternoon, you receive a phone call from Margaret Busch (Ms. Busch) who identifies herself as an associate at Dewey Cheatem & Howe. Ms. Busch explains she needs to hire quickly a talented forensic accountant and well-known economic damages expert to testify as to the lost lifetime earnings of Mr. Unlucky, a construction worker injured on the job. She explains the case has a wrinkle and that she has spoken to several other CPAs and economists who declined the assignment due to that wrinkle and the short engagement time period.

It seems that Mr. Unlucky was injured on The Untidy Company's job site in 2011 and then re-injured on The Unsafe Company's job site in 2013—two years later. As a result of these injuries, Mr. Unlucky is unable to work at all. In addition, it seems that while Mr. Unlucky apparently made a great deal of money, it was paid in cash (under the table) and he claims he has no income tax returns to prove his income.

You ask Ms. Busch a few questions regarding whether your deliverable will be in the form of schedules for settlement purposes only, schedules supporting expert disclosures, or a "full blown" expert report meeting all

Federal standards, and when the deliverable is due.

During the first conversation, you determine whether you are being retained as a non-testifying consultant or a testifying expert witness. The first renders your opinions and communications privileged; the latter does not.

Generally stated, an expert report is a report signed by an expert in the field that includes his or her findings, all opinions, and all the bases for all opinions. Schedules for settlement purposes only are, in this context, merely calculations of economic damages with or without an explanatory narrative and without a signed opinion that retaining counsel (say) can take to a mediation. Expert disclosures are a formal notification to opposing counsel and the Court that the matters stated in the disclosure will be testified to by the expert at trial.

Ms. Busch says she will inform you what type of deliverable she will need by end of next week and she will get back to you regarding due dates—but they are soon. She says she may yet get an extension, but you should not rely on that.

Before accepting Ms. Busch's engagement, you ask her for names of all parties involved in order to perform a conflict check. Ms. Busch provides you with the following names of people and companies: Mr. Unlucky, The Untidy Company, The Unsafe Company, Dewey Cheatem & Howe, Margaret Busch, Nancy Goose, and Goose Law.

You confirm with her there are no other parties involved, carefully record the names of all the parties involved, and thank Ms. Busch for contacting you. Within a few minutes of hanging up the phone, you complete the conflict check in accordance with your firm's standard guidelines.

Monday rolls around and you determine that you have no conflict with any party provided to you in the conflict check and decide to accept the engagement. You also searched for the case in online records and found other plaintiffs and other defendants were named in this action; you summarily dismissed these other plaintiffs and defendants without concern or a revised conflict check. You then send Ms. Busch an e-mail to inform her in writing that you have no conflict, you are qualified, willing, able and available to testify, and can meet any timeline she needs.

She e-mails back to ask about your billing rates and who will be working on your engagement team and their skillsets and applicable billing rates. Her e-mail asks if you have ever done this type of work before, can you do the work for a fixed fee, can you have your expert opinions ready by next week, can she get a discount on the fees, and how are you going to calculate the loss of household services and his multiple injuries.

You reply by e-mail to Ms. Busch, however, Ms. Busch never replies to those e-mails. Instead, when you and Ms. Busch next communicate, it is by telephone and she never addresses the issues you raised in your e-mails. Instead, when you talk to Ms. Busch by telephone, she clearly states that she only wishes to talk about Mr. Unlucky at this time as she is super busy; so you ask her when he was born, his race, his educational level, his marital status and the names and ages of his children, if any. Ms. Busch informs you that Mr. Unlucky is a married, 40-year-old man with two children.

You diligently record this information in your notes. You also make notes of your initial concerns regarding some issues in the case based on your understanding that those handwritten notes and e-mails are unlikely to be ultimately discoverable. You believe your written materials are not discoverable because Ms. Busch told you The Untidy Company and The Unsafe Company have such bad facts that they will not want to go to trial; in other words, they will seek to settle and will do so as soon as they see your expert report.

You remember that Ms. Busch has not yet told you what kind of report she needs and/or when she needs it—but you forget to follow up on that issue.

To establish some general background information, you inform Ms. Busch that you will need all of Mr. Unlucky's Federal income tax returns for the past five to ten years including any W-2s and 1099s, medical records, depositions related to this matter, relevant interrogatories and responses, the complaint and other court filings filed in this matter,

document request responses, any vocational expert reports and reports of independent medical examiners, and any opposing expert reports.

You also inform Ms. Busch that you need additional employment information such as Mr. Unlucky's personnel file including job position at the times of disability, employer's name and address, employer-paid fringe benefits including health insurance, retirement benefits, vacation pay, history of positions held and compensation, expected date of return to work, expected job upon return to work, and expected wages and benefits upon return to work.

In general, a damages expert should inquire of retaining counsel as to what additional data might become available in the future, which may be used to supplement the expert's opinion. The Federal Rules of Civil Procedure, as well as most state court rules of civil procedure, provide that expert witnesses are to seasonably supplement their opinions and the bases for their opinions as information becomes available.

The need to supplement the expert's opinion commonly occurs when the expert is asked to review the opinions or testimony of an opposing expert and provide retaining counsel with rebuttal opinions. For example, the Illinois Supreme Court Rule 213(i) provides that, "A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party."

To establish an understanding of Mr. Unlucky's medical background, you ask Ms. Busch for information regarding medical treatment resulting from the injury/injuries, continuing medical consequences because of the injury/injuries, any medical expenses incurred to date because of the injury/injuries, and any medical expenses expected to be incurred in the future.

Furthermore, you ask Ms. Busch to identify Mr. Unlucky's expected retirement age before and after the injury/injuries and what activities of daily living he did before and after the injury/injuries. You ultimately want to know what activities Mr. Unlucky performed before the job site accident(s) and which of these activities he cannot now do after those accident(s).

You inquire what experts, if any have already rendered opinions on the case and whether Ms. Busch has engaged a vocational expert and one or more medical professionals to opine as to the extent of Mr. Unlucky's injuries and disability, as well as a life care plan. In order to encourage Ms. Busch to inform you of everything you need to know, you keep asking her open-ended questions, but she tells you she does not have that information and/or does not think you need that information.

Ms. Busch says she will provide you with some of the information you just requested (she just does not believe she has all that you have asked for and she questions if you really need all of that information) and would like you to send over an engagement letter with the appropriate scope of work and billing information.

Ms. Busch is very impressed by your preparedness and forward thinking actions and continuing willingness to talk to her. In fact, she was so impressed with your skills and abilities that she already prepared and submitted to the Court and opposing counsel the required disclosures. She was also so impressed with her own math skills that, given the short time frame, she already sent those disclosures to opposing counsel with the damages amount contained therein.

Controlling Engagement Risk

Experienced experts in economic damages (and other experts) should have no difficulty in identifying all the engagement risks presented by the above hypothetical scenario. It should be as easy as finding all the differences in a "spot the difference" game. It is important for an expert witness to recognize fully engagement risks and to either address them sufficiently to reduce such risk to acceptable levels, or to timely and professionally withdraw from the engagement.

Here are some, but not all (astute readers will find more), of the engagement risks arising in the hypothetical

scenario and some suggestions (experienced expert witnesses will find more) to address those risks—short of withdrawing from the engagement:

- The fact that prospective retaining counsel is in a rush (and has left hiring an expert to the last minute) clearly poses a risk that the engagement itself will be rushed and the expert may not be provided all the requested documentation and/or information, or have time to complete all procedures.If no extension is possible, this risk still can be addressed if the expert has the time available to do the work and/or has sufficient staff with the requisite skills available. The expert should be clear that the reduced period is only acceptable and possible if retaining counsel already possesses all the requisite information and/or documentation. Accepting the engagement could be made conditional upon that.

- The fact that other experts have already turned Ms. Busch down is also a “red flag” and should give the expert pause.The expert should ask probing questions of Ms. Busch as to all the reasons why other experts declined to accept the engagement—possibly even asking for their names. The expert should evaluate all the reasons why other experts turned the case down.

- Unlucky was injured on two separate occasions on two separate job sites. That may result in the expert needing to make separate analyses and apportion damages, though ultimately, such allocation may be a legal, not a damages expert’s, opinion.Retaining counsel should provide a very clear and precise chronology of events regarding the injuries; clearly identifying the assumptions the damages expert may rely on regarding what injuries took place on which job site, and which of these injuries resulted in the assertion that Mr. Unlucky is permanently disabled and cannot work at all.

- The absence of suitable documents supporting Mr. Unlucky’s historical earnings is clearly problematic. It is possible some workers do not retain their pay documents, but receiving all or some earnings in cash is, of course, a problem of proof.Mr. Unlucky and/or Ms. Busch may be able to provide the damages expert with access to the person who prepared Mr. Unlucky’s income tax returns and (with sufficient time available, and Mr. Unlucky’s signed consent) such records could be sourced directly from the Internal Revenue Service.

- Communications between the damages expert and Ms. Bush were haphazard—some took place by e-mail while others were telephonically. This trail of communications may pose a risk to the expert if not controlled or organized. The continued conversations, over a long period, without ever signing an engagement letter, may have created the wrong impression that the expert had accepted the engagement when, in fact, he or she was still evaluating whether or not to accept it.The expert should have a systematic method for recording communications with retaining counsel; either by a series of e-mails specifically addressing each issue, by formal letters between the expert and retaining counsel, or, at a minimum, memorialized in retained and discoverable handwritten notes in the expert’s file. Irrespective of whether such communications are/may or are/may not be discoverable, experts should be mindful of the content and sequence of their letters, e-mails, and/or handwritten notes.

- The fact the expert found additional parties in the public records—which parties were not reported to the expert by the prospective retaining counsel—and which the expert did not follow up on creates engagement risk.The expert should address with retaining counsel all issues raised during the conflict check process. The existence of such other parties may affect the expert’s relationships with other unknown parties.

- Busch’s approach to the engagement expenses—especially the issues of payment—should give the expert pause.Generally, expert’s engagement letters specify that payment and other engagement terms are not conditioned upon the outcome of the litigation. The expert should tell prospective retaining counsel that an engagement agreement is necessary.

- The expert did not explain to retaining counsel the difference between disclosing the expert as a witness and the submission of a formal expert disclosures without having been engaged to do so.Notwithstanding the

issue of these disclosures, and the impact on expert/counsel relations, it is possible and may even be valid and proper for supplemental formal disclosures to be issued when or if the damages expert was properly engaged and has had the proper and adequate time to perform his or her work after receipt of all necessary information and/or documentation.

Summary and Conclusions

The above discussion presented some, but not all, of the engagement risks that arose in the hypothetical scenario and some, but not all, suggestions for controlling, reducing and/or eliminating engagement risks short of withdrawing from the engagement. However, based on the accumulation of all of the above engagement risk factors, taken as a whole, this expert, in this hypothetical scenario, would not have been able to have reduced engagement risk to an acceptable level and, accordingly, should have withdrawn from the engagement in a clear, formal, and timely manner.

An article by John P. McCahey in the Winter, 2007 edition of the *American Bar Association Expert Alert* noted, historically professionals retained as expert witnesses in litigation gave little thought that one of the litigants may later sue them. Suits against expert witnesses were rare and it was generally assumed that they, like other witnesses, were shielded from civil liability under the witness immunity doctrine. Since then, there has been an increasing number of lawsuits brought against expert witnesses.

These cases have included actions by plaintiffs who were adverse to the party who retained the expert (adverse experts), as well as those brought by the party who retained the expert (friendly experts). Generally, courts to date have agreed that the witness immunity doctrine bars those actions brought against adverse experts. A majority of courts have also concluded that the doctrine does not apply to those actions brought against friendly experts.

While only a handful of courts have yet to address the application of witness immunity to friendly experts, the majority of them have concluded that friendly experts are not entitled to immunity. The emerging majority view is that the policy considerations underlying the witness immunity doctrine are not served by immunizing a friendly expert from liability for his or her negligence or malpractice.

Accordingly, it is not inconceivable that, if everything went wrong with the hypothetical scenario described above, Mr. Unlucky could one day sue his friendly expert. It is, accordingly, vital for the expert to control his or her engagement risk through sound professional conduct.

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