

## EVALUATING AN EXPERT WITNESS FOR SCHOOL SAFETY CASES

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### **Abstract**

This document is designed to help legal risk management practitioners who must evaluate the match between an expert and a school safety court case. Court cases involving school safety issues are extremely important because they can at times involve not only millions of dollars, but also have a major impact on the lives of victims, surviving family members as well as the people and organizations named as defendants. For example, a student who incurs serious permanent injury may require millions of dollars in future medical care over a lifetime. At the same time, serious allegations of misconduct or negligence can affect the lives and reputations of school officials, public safety officials and school organizations named as defendants<sup>1</sup>.

This article provides a list of questions attorneys may want to ask an expert witness before deciding to retain the expert as well as tips for evaluating an expert witness retained by opposing counsel. This information should be helpful to insurance professionals and judges who are tasked with determining if an expert is properly qualified for a particular case. As a non-profit school safety center, the goal of Safe Havens International is to help make schools safer, more effective places to learn and to work. Efficient and fair resolution of legal disputes relating to school safety situations supports these goals.

### **Introduction**

There has been a dramatic increase in the number of people who work in the field of school safety, security and emergency preparedness since the tragic Columbine High School attack on April 20, 1999. Many practitioners are highly skilled and qualified. Some experts are properly qualified to work in some areas, but have no relevant background in other areas. This has led to a significant problem with school safety experts who work outside their areas of expertise. As with other disciplines, school safety expert witnesses who work outside their specialties can have a significant impact on court cases. For example, school safety experts have incurred

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<sup>1</sup> John T. Wolohan, *Catastrophic Football Injury Leads to \$8M Settlement*, <http://www.athleticbusiness.com/articles/article.aspx?articleid=3666&zoneid=33> (December, 2010).

financial liability for allegedly working beyond their areas of expertise as was the case in the deadly Red Lake Reservation school shooting<sup>2</sup>.

Problems in addition to experts working beyond their field of expertise should be considered. For example, in a civil action brought against a public school system by the parents of a student murdered on campus, the school system settled the case shortly after they withdrew one of their expert witnesses prior to his deposition. I had been asked by plaintiff's counsel to evaluate the defense's expert witness to help counsel prepare to depose him. Though this expert witness had been interviewed by national media organizations, had many years of experience as a school safety consultant, had served previously as an expert witness in school safety cases, and had what could at first glance appear to be seemingly impressive credentials, I had questions about his suitability to serve as an expert witness.

A careful reading of his expert witness resume showed a lack of advanced and relevant formal training and work experience for some of the key issues in the case. There were also questions about some serious issues in his past, such as a reported termination from a position as a school security director, allegations of involvement in unethical bidding practices, a reputation for frequently harassing school systems and government agencies that would not hire him by filing open records requests, and lodging complaints and making derogatory statements about the organizations in press releases and media interviews. I felt this expert witness would likely not withstand a thorough and skilled examination by a competent and properly prepared attorney<sup>3</sup>. The attorney who retained this expert for the defense apparently missed these potential problem areas in the expert's background. When plaintiff's counsel prepared to vigorously challenge the qualifications of the defense expert at deposition, the defense withdrew the expert, and soon thereafter settled the case on terms suitable to the plaintiff. While the defense had other problems with their case, losing what they thought was a top caliber expert witness well into the court proceedings certainly did not help.

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<sup>2</sup> Amy Forliti, *Settlement in Red Lake School Shooting*, [http://www.startribune.com/templates/Print\\_This\\_Story?sid=30573769](http://www.startribune.com/templates/Print_This_Story?sid=30573769) (October 7, 2008).

<sup>3</sup> Steven Babitsky, Esq., James J. Mangraviti, Jr., Esq., and Alex Babitsky, MBA, *The A – Z Guide to Expert Witnessing* (Massachusetts: SEAK, Inc., 2006).

## **The Need to Evaluate an Expert Witness before Hiring**

Whether an attorney advocates for the defense or the plaintiff, few things can be as damaging to a civil or criminal case as finding out during a deposition or trial that an expert witness has serious skeletons in their closet, such as:

- Having been arrested or indicted for a felony
- Being terminated for serious criminal conduct in a work setting
- Being caught embezzling funds from an employer
- Being arrested for drunk driving while driving a fake police car
- Violating government regulations on grant applications and bidding processes
- Falsifying work experience
- Falsifying professional credentials
- Listing a degree on a resume which has never been earned (i.e. associates, bachelors, masters, law degrees, PhDs, etc.)
- Arriving to perform consulting work while intoxicated and attempting to bill a client for a bar tab
- Filing formal protests when a bid is lost in an attempt to pressure prospective clients
- Filing serial open records requests to harass school officials and government school safety centers that would not hire the expert or that offer free services that compete with the expert's for fee services
- Threatening to sue clients who have tried to terminate contracts because of unsatisfactory work
- Publishing works that plagiarize the writing and research of other experts
- Engaging in a regular practice of accepting and performing work beyond the expert's level of expertise<sup>4</sup>

These examples are all based on allegations of misconduct of school safety consultants and/or expert witnesses in school safety cases. If it can be shown by opposing counsel that these types of allegations have merit, it can cast doubt on the expert's viability and in some instances could result in disqualification. Thus it is logical for an attorney to make a reasonable effort to vet potential expert witnesses for school safety cases. Solid cases are heavily dependent upon competent, relevant, articulate, qualified expert witnesses who have a demonstrated track record of integrity. Unfortunately, it can be a challenge for attorneys, insurance industry

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<sup>4</sup> Steven Babitsky, Esq. and James J. Mangraviti, Jr. Esq., *How to Become a Dangerous Expert Witness* (Massachusetts: SEAK, Inc., 2005)

personnel and judges to accurately evaluate potential expert witnesses for school safety cases because of a lack of licensing standards.

A short time spent on internet search engines will demonstrate that almost anyone can become a school safety consultant simply by printing a business card. While there are many talented and qualified school safety experts, the field is populated with people of widely varying backgrounds. Although school safety consultants must register online before working in the State of Texas, there are no minimum standards and any U.S. citizen can register as a school safety consultant in just a few minutes. Unlike Texas, most states lack any minimum requirements for school safety consultants. Fortunately, qualified experts can often be identified with thoughtful and informed inquiries.

### **Areas to Explore when Evaluating an Expert Witness**

There are many important considerations for evaluating an expert witness. The larger and more complex the case, the more important these factors are. As with other types of expert witnesses, factors that may be relevant for school safety expert witnesses include:

- Availability
- Cost of services
- Relevance of work experience
- Formal education
- Professional qualifications such as training and certifications
- Reputation in the field
- Track record of integrity
- Ability to communicate effectively
- Appropriate attention to detail
- Ability to understand and comply with the requirements of serving as an expert witness
- A history of working for both plaintiff and defense counsel
- Absence of bias<sup>5</sup>

In addition, a school safety expert's education, professional vocational training, research background and work experience should be carefully considered to evaluate if the expert is properly qualified for a particular case. As an example, a top expert in school security might not be a suitable expert witness for a case involving death, injury or trauma resulting from crisis planning and other preparedness efforts. Many school security experts lack substantive

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<sup>5</sup> Babitsky et. al, 2006

qualifications in the unique field of emergency management. Though people from many backgrounds regularly perform consulting work in the area of school emergency preparedness, not all of them have an appropriate formal background in emergency management. Emergency management is a distinct discipline noticeably different from other public safety areas such as law enforcement, criminal investigation and fire service. Though many emergency managers move into the emergency management field from other public safety disciplines, they typically complete extensive formal training in emergency management when they do so.

As this example shows, care should be taken to determine a proper match between a school safety expert and a particular case. Some of the more common and distinct areas of expertise that can be appropriate for specific school safety cases include:

- School security
- Security lighting
- School violence prevention
- Specific security technologies such as metal detectors, security cameras and access control systems
- Cyber security
- School emergency management
- Bullying prevention
- Use of force in restraining students/self defense
- School safety, security and emergency preparedness assessments
- School safety consulting negligence
- School search and seizure
- Student threat assessment and evaluation
- Safe school design features such as crime prevention through environmental design (CPTED)
- School mental health recovery
- Workplace safety practices
- Traffic engineering
- School bus security
- Operational school bus safety
- Mechanical school bus safety
- Student supervision

It is common for an expert to be called upon to evaluate and address a number of different issues in a single case. Student supervision, school climate, hazard and vulnerability assessments, student threat assessments, the use of metal detectors, school crisis planning and emergency management were all key issues in the case of the school homicide mentioned

earlier. Though it is not unusual to find a top school safety expert who can properly address multiple issues in a case, it will require a witness with an extensive background. Attorneys should consider whether one expert can address all of the issues in a case properly or whether multiple experts will be needed. This evaluation process can be incorporated into a series of questions designed to help determine whether an expert who is under consideration is a good fit for the case<sup>6</sup>.

### **Questions to Ask a Potential Expert Witness for School Safety Cases**

Time and money spent up front to carefully evaluate an expert's suitability for a particular case can save considerable time and money and prevent major problems down the road. Though attorneys and school safety experts are busy professionals, both should be prepared to take the time necessary to ensure the expert is a proper fit for the issues to be evaluated in the case.

An attorney should tactfully tell a prospective expert that as a professional, the attorney has an obligation to the client and the court to make sure any expert retained is likely to withstand the intense scrutiny of opposing counsel. For example, an attorney might say something like:

"I am seeking a properly qualified expert witness for an important case. An expert witness may be disqualified for a variety of reasons relating to her suitability to serve as an expert witness. Your disqualification in this case would be a major problem for both of us now and in the future. Because of my obligation to my client and the court, I have to screen an expert witness thoughtfully before I retain her. Would you mind if I ask you a few questions to determine if you are a good match for this case who can qualify as an expert witness even when aggressively challenged by opposing counsel?"

While some might be concerned this question will offend a highly qualified expert, legitimate school safety experts should not be offended since they understand the judicial system and have nothing to hide. Top experts usually welcome and respect intelligent and careful clients who take the time to ensure the capabilities of the expert and the needs of the client are a good match. The most qualified experts know that the closer the prospective client looks, the better the expert witness will look compared to less qualified individuals. Though some experts might answer these questions untruthfully, an attorney might be able to recover damages from the expert if the case is lost due to the false claims of the expert<sup>7</sup>.

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<sup>6</sup> Babitsky et. al, 2005

<sup>7</sup> Babitsky et. al, 2006

Interviewing an expert with appropriate questions during the initial meeting can eliminate many potential problems. While most attorneys who contact a potential expert witness naturally focus on the case they have, it may be more productive to instead focus on whether the person is the right expert for the case. In most cases where I served as expert witness, the attorneys were referred to me by a third party and already knew about me and had vetted me to some degree. But there are things the attorneys would not be easily able to assess without asking me directly. For example, it would be hard for them to determine whether I have ever been withdrawn from a case or fired by an attorney unless they asked me directly. Though I have never experienced either, an attorney would likely not be able to determine this without inquiring.

Attorneys, judges and insurance professionals are typically already familiar with general questions that should be asked of an expert. Some specific questions that might help more accurately gauge an expert's suitability for a school safety case before the expert is retained and sent documents to review include:

- “The key issues so far are (insert the issues that need to be evaluated). Do you feel you are qualified to serve as an expert witness for these issues?” If the answer is yes, ask the prospective expert witness to elaborate on the relevant experience.
- “How many times have you served as an expert witness consultant in school safety cases?”
- “Have you served as an expert for both the plaintiff and the defense?”
- “Have you ever been disqualified as an expert? If so, why?”
- “Have you ever withdrawn from a case or been withdrawn from a case by an attorney? If so, why?”
- “Has an attorney ever terminated your services before a case was concluded? If so, why?”
- “Have you ever been arrested or indicted? If so, what were the charges, in what court were they brought, and what were the dispositions of the case(s)?”
- “Have you ever been terminated from a job or asked to resign? If so, please explain the circumstances.”
- “Have you ever had any certifications or professional licenses revoked or suspended? If so, what license or certification and for what reason?”

- “Have you or your firm ever been a party to a civil action including mediation or arbitration arising out of working as a consultant? If so, please explain.”
- “Have you or your firm ever filed an open records request with a school district, regulatory agency or government agency? If so, please explain when, why and how many times you or your firm did so.”
- “Have you or your firm ever filed a formal protest when you or your firm were not awarded a bid for a school safety project? If so, please explain when, why and how many times you or your firm did so.”
- “Have you ever had a client terminate or attempt to terminate a contract for professional services such as consulting, training, and assessment? If so, please explain when, why and how many times this has occurred.”
- “If asked to do so, could you provide college transcripts and copies of training certificates for the education and training you list in your materials?”<sup>8</sup>

If the answers provided and the way the expert has presented himself/herself are satisfactory, a few more questions that relate to the specifics of your case may help avoid pitfalls such as a conflict of interest or inability to testify at trial:

- “The case involves (defendant and plaintiff) and (insurance carrier or risk management firm) and will be filed in (name of court). Do you have any conflicts of interest that might prevent you from serving as an impartial expert in this case?”
- “The timeline for the case is (rough anticipated time frame for case review, incident site visit, deposition and trial). Will you be available to work on this case within this time frame if you are selected and agree to accept the case?”

These last questions can be especially important for top experts because of their extensive experience in the field. Most top school safety experts have worked with hundreds of school districts, non-public schools, government agencies and other clients. Asking about availability is also important because leading experts also often have very heavy travel schedules<sup>9</sup>.

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<sup>8</sup> Steven Babitsky, Esq. and James J. Mangraviti, Jr., Esq., *Writing and Defending your Expert Report – The Step-by-Step Guide with Models* (Massachusetts: SEAK, Inc., 2002).

<sup>9</sup> Babitsky et. al, 2005.



## **Conclusion**

The facts, size and complexity of the case and quality of counsel and expert witnesses may determine how many of these questions are appropriate to ask. This type of information exchange can help both the attorney evaluating a potential expert witness and the expert witness evaluating a potential case.

While some might feel this type of evaluation is too detailed, the school homicide case discussed earlier is a good example of the potential negative results of a lack of candid information sharing between the attorney and potential expert. I subjected myself to similar scrutiny before one of the nation's largest insurance companies retained me to keynote a series of state-wide school safety conferences. I did not find the evaluation to be offensive in the least. I gained and still have deep respect for this client organization.

Because the company was willing to take the time to consider and evaluate many experts for the conferences and because I was willing to submit to their careful scrutiny, the conferences were successful for the company, for me and most importantly for the people we were both trying to serve. If this level of vetting is appropriate for a conference speaker, it is equally appropriate for a criminal or civil case of considerable importance.

## **Caveat**

Safe Havens International does not employ any attorneys and does not provide legal advice. This document includes educational tips and viewpoints that may be helpful to attorneys and judges. For specific legal advice on expert witness issues, please consult an attorney.



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