

Qualifying Security/Loss Control Negligence Experts

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Opinion experts can often prove beneficial, even essential, in litigation matters. In many cases, attorneys may employ such experts in a consulting role for the purpose of evaluating the matter at hand and educating the attorney in that specific field. This expertise and input can greatly assist the development of a successful case strategy.

However, more frequently, experts will be expected to testify in regard to allegations made in complaints, and at that point credentials and qualifications will be closely scrutinized by opposing counsel.

Frequently, when an attorney takes on a security/loss control negligence matter, it will be his or her first exposure to a case of this nature. For this reason, choosing an appropriate and credible opinion expert can prove difficult. However, the selection of an inappropriate or unqualified expert can prove disastrous, particularly in light of *Daubert v Merrell Dow Pharmaceuticals* which has affected most venues by giving broad discretion to trial judges in determining the relevance and reliability of testimony before allowing testimony to be made to a jury by such an expert.

(SIDEBAR) Police officers and government agents, regardless of their tenure or rank, seldom have any more knowledge or expertise regarding security than an airline pilot, a shepherd--or an attorney.

Unqualified "Security Experts"

The most common misconception shared by attorneys inexperienced in security related litigation is the assumption that public sector law enforcement experience is synonymous with private sector security experience. Police officers and government agents, regardless of their tenure or rank, seldom have any more knowledge or expertise regarding security than an airline pilot, a shepherd--or an attorney.

Probably the next most frequent error made by the uninitiated, involves seeking a security expert from the halls of academia. University professors, in most cases, are professional teachers and lecturers, not security practitioners, and whatever knowledge and expertise they may possess typically comes from books and theoretical assumptions, not from the real world.

In recent years, psychologists, business managers, criminologists, sociologists and a wide range of general business consultants have spuriously billed themselves as security experts. In one case, a self-styled security expert turned

out to be a law clerk. In another, the "expert's" only real security experience was obtained while employed as a contract security officer, a position which he held for a few months twenty years in the past.

Unqualified Security Expert Testimony

While testimony from such unqualified experts can be expected to contribute to adverse jury decisions, it can often prove amusing:

One "security expert," a police commander, testified that an unarmed security officer was negligent for not leaving his post and making a "citizen's arrest" of persons assaulting a plaintiff, a willing participant in a street riot involving 100 - 200 disorderly persons. He discounted the fact that police officers who were present refrained from responding until adequate back up had arrived to ensure their safety and that it took the response of every police officer on duty in that city to restore order.

Another claimed that a factory had inadequate security because it lacked a moat, although, ironically the incident occurred during subzero weather when such a moat would have been iced over--and ancillary alligators, which might well have been endorsed by this "expert," would have been dormant.

Many spurious security experts have testified that all shrubbery and trees should have been removed from the grounds of apartment complexes in low crime areas, since such growth provides places of concealment. In fact in one case, the sole basis for a premises liability suit against an apartment complex was that an assailant had concealed himself behind a tenant's vehicle, which was parked in the parking lot, ergo, the complex was negligent by allowing the vehicle to park there. (Defense counsel pointed out that the building itself offered identical exposure and questioned whether, perhaps, the apartment building should have also been removed for the safety of the tenants.)

In one case involving lounge security, a "security expert" quoted from the completely irrelevant perimeter patrol section of an industrial security training manual and interpreted this to be a "standard," meaning that lounge security personnel should always be making exterior perimeter patrols.

In other cases, pseudo experts have alleged that a chain link fence would have prevented an intruder from entering onto property if it had met recommended security standards. (While such standards do exist, even intruders who are too frugal to purchase wire cutters can quickly scale fences which meet these standards.)

In some cases, "experts" have testified that apartment complexes were negligent when tenants' locks were malfunctioning, although the tenants had failed to report the problems. Others have alleged the proximate cause of a home invasion was an inadequate locking device, even when the device was unlocked at the time of the event.

Others have evaluated the adequacy of security lighting at high noon.

Although absurdities such as these would seem to be readily apparent, other claims by unqualified experts are often accepted by opposing attorneys because of their limited exposure to this field. For instance, in one so-called racial profiling case, the plaintiff's "security expert" alleged that minorities monitored on a store surveillance tape were "targeted" for no reason whatsoever. In fact, this would appear to be the case to anyone watching the video and who had no background in retail loss prevention.

However, typically, in retail environments, suspicious activity is first detected by a loss prevention officer observing 20 - 40 monitors. By the time the subject is switched to a recording monitor, the suspicious activity, or theft, has been completed. Additionally, there are probably 50 other reasons a person would be monitored in retail situations. For instance, a person could have been previously arrested in the store, could be a former employee with a grudge, a suspected stalker of a store employee, or could match a description provided in a crime watch bulletin. Forming an opinion in a situation like this based exclusively on videotape is virtually impossible and an attorney relying on an "expert's" analysis and opinion of such a tape will look foolish in court, assuming the defense is adequately prepared and utilizes a legitimate security expert who is capable of educating the jury in regard to retail loss prevention.

The use of an unqualified or unethical security expert can prove exceptionally costly to attorneys. For instance, in one case an attorney working on a contingency arrangement spent hundreds of hours on a plaintiff's security related premises liability case relying on the erroneous opinions and factual distortions of such an expert. After an eight-day jury trial, the plaintiff was awarded nothing.

The Qualified Security Expert

There is only one credible certification in the security/loss control field, this being the Certified Protection Professional (CPP) designation awarded by the American Society for Industrial Security International (ASIS). This is similar to CPA programs, in that candidates are required to document several years of security management experience/education before they can sit for the examination. Following successful completion of the exam, documented continuing education is required to retain certification. It should be noted, however, that over 20% of the persons holding this designation today obtained their initial certification under a grandfather provision thus avoiding the examination.

The CPP credential is generally a prerequisite for persons applying for security management positions in large corporations. Considering an uncertified security expert in litigation matters is always ill-advised because of the credibility issue.

Although there are several legitimate certifications in related fields, such as fraud examination (CFE) and investigations (CII, CLI, MIPI, FIPI), these have little relevance to security. Additionally, there are many questionable organizations

that issue "certifications" of little value based on correspondence courses, or in appreciation of a membership fee. These enterprises are not true industry associations that hold conventions, seminars and workshops, but are simply in business to make a profit.

The most beneficial opinion expert on security related premises liability and security/loss control negligence matters is a real world security practitioner, a person who earns his or her living in this field on a full time basis. This is a relatively new profession and few seasoned practitioners hold related degrees since such curriculums were not offered until recently. Most security experts obtained their relevant education through industry symposiums, seminars and workshops.

The curriculum vitae of most ethical security experts disclose other cases where they have acted as opinion experts. Attorneys should be exceptionally wary of experts claiming this information is confidential. In most cases, this is public record and failing to identify the cases can be an indication the expert may be what is commonly known as a "prostitute" and that research of previous testimony will disclose conflicting or inconsistent opinions--or even opposing views on similar cases.

Experts who readily agree with all the attorney's initial conclusions and analysis of foreseeability, particularly on complex matters, should be viewed with caution. A capable and ethical security expert may initially confirm the general merits of the case, but after a complete evaluation may find flaws in some of the presuppositions, particularly in regard to an uninitiated attorney's assumptions concerning industry standards. Experts who simply parrot an attorney's desires are not only acting in an unethical manner, but are also providing a disservice to their client.

For example, although an attorney representing a plaintiff may believe that one annual crime per forty residents suggests a high crime environment, the security expert should explain that in the U. S., this actually signifies exceptionally *low* crime and therefore the use of statistics should be avoided. Assuming the defense has engaged a competent security expert, the introduction of such statistics in support of a claim would weaken the case and destroy the credibility of the plaintiff's security expert.

The right security expert can often make a substantial contribution in these cases and improve the chances of the attorney prevailing in trial. However, in other circumstances their value lies in minimizing costs by being honest enough to recommend negotiating a settlement when the foundation of the case--or the defense--lacks significant merit.

Unlike many opinion experts, the fees of most security experts are quite reasonable, usually in the \$200 per hour range. Additionally, most security experts put reasonable caps on travel time, or negotiate low flat charges for travel. Thus, obtaining the right security expert for a case can result in a good

return on investment, even if this expert is based on the other side of the country.

Perhaps the most informative resource for attorneys handling their first case involving security related litigation is "Security/Loss Control Negligence" by Norman Bottom, Jr., Ph.D. (Hanrow Press "Nuts & Bolts" Series in Personal Litigation.) This book provides a good basic overview of litigation of this type. Additionally, it provides insight into the selection of the right security expert.

The general public has many misconceptions in regard to security and the duties and responsibilities of personnel working in this growing industry. A competent security expert can prove valuable in many ways as a case progresses. However, the most substantial contribution is usually the credible expert testimony provided in court, which is based on valid industry standards and real world experience; and which is presented in a understandable manner that makes sense to the jury.

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