

## The Role of Expert Witnesses in Campus Hearings

By: *Brett A. Sokolow, J.D. and Linda P. Rowe, Ed.D.*

Is it me, or is the subject matter of campus hearings becoming more sophisticated, rapidly? I find myself learning about Facebook.com only to realize that Xanga.com is different, and I need to learn about it, too. In hearings, my clients are facing questions like:

- What are the recognized side effects of Adderol?
- Are Rohypnol and GHB both central nervous system depressants?
- Can you really take video with a cellphone? Is the video admissible as evidence?
- Does your liver process one alcoholic drink per hour?
- Is changing your story a symptom of rape trauma syndrome?
- Is rape trauma syndrome a medically validated experience?
- Can you save an IM exchange? Can you falsify an IM exchange?
- Is a campus security camera's footage a possible invasion of privacy?
- If a roommate conducts a search, does the exclusionary rule apply?
- Etcetera

With this seeming increase in the sophistication of complaints and/or the issues within them, campus conduct administrators and conduct boards are being asked to make decisions that frequently require us to look outside of our own knowledge bases. We are not all subject matter experts on alcohol, rape drugs, psychology or pharmacology.

### *First, we need to recognize when we will need expertise outside our knowledge bases*

Where an investigation or hearing will put in play concepts that are beyond our depth, we have a decision to make. Will we simply process the complaint within the limits of common knowledge, or do we look outside for expertise. I strongly encourage my clients not to rely on the limited knowledge we have, and to open the hearing to expert information. One of the reasons I do so is that while we all have limits on our expertise and knowledge base, some of us actually have incorrect information. I have seen time and again situations in which a conduct board made false assumptions, or made decisions on the basis of mythology, rather than fact. For example, some rape drugs are amnesiacs, others are sedatives, and still others are hallucinogens. In a complaint, I had a board come to the conclusion that because the complainant could physically operate, move about, and react, she was not drugged. They believed all drugs were sedatives, and did not even consider that a person on whom an amnesiac was used would be able to walk and talk and operate, but not remember a thing. They came to the wrong conclusion because they were less informed than they needed to be. They needed expertise. So, first we need to identify those situations where our limited knowledge needs to be augmented. Then, we need to arrange to augment that knowledge by arranging before the hearing for more sophisticated information to be presented at the hearing.

### *Don't Mimic the Courts*

I have served as an expert witness in eight cases, and am currently serving in three. I have seen enough of how expert witnesses are used in courtrooms to be able to strongly recommend that you do not mimic that system. A college hires me, and I get dressed up in my best suit, and tell the jury what I think. Then, a man or woman from the other side, dressed in his or her best suit, tries to impress the jury by saying exactly the opposite. At best, we cancel each other out. At worst, we cost our clients a lot of money, and the jury just sees us as hired mouthpieces (which I am not, as I frequently turn down cases in which I do not agree with the litigation strategy). Why replicate this system in the campus hearing process? Instead, I suggest that you envision expertise as a means to inform your hearing board or administrative decisionmakers. Avoid making expertise partisan. If you feel you need more information on alcohol, drugs, technology or whatever it might be, identify the best way for you to become informed on the subject, rather than resorting to a dueling-experts model that will just confuse rather than elucidate the issues. And, don't feel a need to involve the parties to the complaint in identifying expertise. The sources they pick may not be neutral.

### *You Don't Always Need a Human Witness*

Expertise comes in many forms. My favorite experts are authoritative texts and studies. Let [www.projectghb.com](http://www.projectghb.com) tell you all about rape drugs. Let a toxicology text's multivariate chart or online calculator approximate blood-alcohol levels for you. Let a book on rape trauma syndrome explain why a victim may delay reporting, or change his/her story. Once you identify the source of expertise, and notify the parties in advance what you will be using, they can research the sources themselves, and prepare to respond to them at the hearing. In some situations, you may need a human expert. Luckily, college campuses are logical places to find psychologists, IT specialists, doctors, and others who may have a grasp of the body of knowledge you need. If not, the local community may have such resources.

### *Rent-a-Experts*

Last spring, one of my clients had a student who claimed to have falsified an academic assignment as a result of an adverse drug prescription ADD drug reaction. While the college was willing to consider this defense and examine its merits, the accused student found himself a doctor from Harvard who was willing to explain how the drug worked, and the effect that it had. I instantly suspected a rent-a-expert. In fact, the doctor was helpful to the conduct board in explaining the situation, but my preference would have been for the college to have identified its own expert source. How did we know the credentials of this fellow from Harvard? Was he a family friend of the accused student? Was he paid to make an excuse for this student? How were we supposed to assess whether he was disinterested and objective? Someone who worked for the college, or who was hired by the college would have allayed those fears more readily.

### *You Make the Conclusions*

One of the things that partisan experts often do is make conclusions. They tell you they believe the email was not forged, or that the young woman is suffering from rape trauma, or that the drug is responsible for academic dishonesty. I want campus administrators and hearing board members to be making conclusions, not experts. They should inform you of a body of knowledge, but then leave it to you to ask the right questions and draw the logical conclusions. They could explain to you how they might be able to tell if an email has been forged or not. They, you can look for the telltales signs, and decide for yourselves if the email in question is authentic or has been altered. They can tell you what rape trauma is and what the stages are. Then you can question the alleged victim to see if her symptomology is consistent, and decide whether you think she is suffering from that type of posttraumatic stress syndrome. If an expert tells you that Ritalin can cause a psychotic episode, ask the expert if loss of reality contact, or violence, or reckless behavior can result. Ask the student how he felt when he took the drug, and whether he was aware he was cheating and what he thought of his actions as he did it. Do the actions and symptoms match the potential side effects? How often do they occur? Are other drug interactions a predictor? Did the student experience other episodes? Has he reduced or changed the drug use since experiencing these problems? If so, why didn't he come forward to report his cheating on his own once he re-contacted with reality and propriety?

Maybe a Harvard doctor is impressive, but I'm more impressed with well-trained administrators and hearing officers using their acumen and common sense to sort through these sophisticated issues and reach their own conclusions, rather than having them spoon-fed to us by sources whose reliability may be questionable. On occasion, a student may want to counter the institution's chose source for expertise, so choosing this source carefully is wise. They will have a right to do so, but within certain controls. Their rebuttal source(s) needs to be authoritative, and you are welcome to determine that in advance of the hearing. Additionally, you may want to place limits on their ability to bring a human expert to the hearing, to avoid the dualing-experts scenario mentioned above. Any expert is welcome to submit a written report on behalf of a student, but I would try to avoid the actual presence of a partisan expert just as I would try to avoid the actual presence of partisan character witnesses.

### *What About Lie Detectors?*

Linda Rowe, Ed.D., submitted this thought-provoking piece on polygraphs, which I thought I would include here, because lie detectors certainly fall under the "expert" and "technology" categories we have been discussing. Here is Linda's advice.

If a complaining student has taken a lie detector test with the local law enforcement agency and the results have come back as "deceptive". How should this information be handled in a hearing? Can we ignore it? Can it be addressed?

Contemporary wisdom says that someone who fails a lie detector test is lying, but such tests are inadmissible in court for a reason. Most experts agree that a polygraph is only a tool to guide further questioning and investigation. There are other factors that could

contribute to the reading and we are not in the business of analyzing questionable forensic tests. I see absolutely no reason for a college to introduce the results of a lie detector test as evidence in a hearing. Yes, you can ignore it.

I don't know how you learned about the results of the test, but prior to holding a hearing I think you should try to address these test results with the complainant. He needs to know that if this is a he said/he said situation and real proof of deception is discovered, he will be held accountable. Explore with the complaint what he thinks the results mean? Would he like to rethink his complaint?

I recall a student who complained that her roommate's boyfriend had hit her. We didn't have a polygraph but there was something deceptive in her manner. Further prodding revealed that she had not been hit but had observed the roommate being hit. Because the real victim refused to complain, the student altered the story to try to bring the situation to our attention. Deception does not always signal complete fabrication.

And what about you? Do you have any doubts about the allegations that would spur you to do a little more investigation at this point? The lie detector issue gets trickier when one of the parties in the hearing WANTS to introduce results of a polygraph. If you cannot discourage the idea – for some of the reasons listed above – your only alternative may be to ask a campus law enforcement officer or criminal justice professor to come in to talk about lie detector tests, or to present printed research for the parties and panel to review.

Just remind students of the words of playwright David Mamet: “Always tell the truth -- it's the easiest thing to remember”.

Thanks to Brian Farber of Ball State University for his assistance with this question.

*All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.*

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