

Expert Witness Quarterly, April 2018



An Interview with Brett A. Sokolow, Esq., President and CEO, The NCHERM Group, LLC

EWQ: Tell us about your Expert Witness work?

Brett A. Sokolow: Thanks for the opportunity to talk about my work and the work of The NCHERM Group in the expert witness space. Our firm has thirty experts in various areas of preK-12 and postsecondary education, but none of us are professional expert witnesses, in the sense of making expert witness work a full-time role. The NCHERM Group is a full-time law and consulting firm, but our leadership on many legal issues impacting the education field has made us a go-to source for trial lawyers who need testifying experts. Most of our experts take one or two cases at a time, because our full-time roles as consultants and legal counsel don't allow for heavy caseloads.

EWQ: Is that true of your caseload as well?

Brett A. Sokolow: I'm called upon pretty frequently to serve as an expert, especially now that trial lawyers are learning to use expert witnesses more and more often in Title IX litigation. That's a relatively new trend, but we see tons of cases now that focus on teacher/student abuse and relationships that are litigated as Title IX issues, and a more common desire to use experts on such cases now. The same is true for Title IX litigation by students who have been suspended or expelled from schools. That's a new trend. For many years, I maintained an expert caseload of 4-6 cases at any one time. It was part of my work, but not the bulk of it. But, in the last 2-3 years, litigation has exploded in our field, and I now have 28 cases where I am serving as an expert witness. That's really unprecedented. It's gone from being 5% of my work to being 20% in a very short time.

EWQ: What kinds of cases do you take on?

Brett A. Sokolow: We take cases in areas that mirror our expertise: First Amendment, hazing, organizational risk management, safety & security, administrative supervision, training, sexual misconduct (Title IX), discrimination, civil rights, due process, behavioral intervention, threat assessment, and negligence.

EWQ: How does it work to have a lawyer as an expert?

Brett A. Sokolow: That's been a really interesting learning curve as our work as expert witnesses has deepened. At first, lawyers considering us seemed leery of the lawyer-as-expert notion, but we are experts who happen to be lawyers, not experts because we are lawyers. That makes a huge difference, and has led to greater and greater willingness to consider us. It also helps that there aren't many others out there who do this work, so choices are limited. Our publications tend to focus on best practices

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rather than legal compliance, which has put us in an ideal situation to serve as experts. As an expert witness, my goal has always been to help the judge and jury understand what the standard of care is, what the industry customs are, and how the defendant has either upheld or deviated from those standards. In some ways, the precision of a law background makes us more ideal for that role than someone without legal training. Our value is in being able to teach a jury in an approachable way, much like we do every day as consultants for schools and colleges across the country. Impressing a jury with credentials isn't nearly as valuable as connecting with them. That said, for any litigation firms who prefer not to use attorney-experts, we have a number of non-attorney experts on staff as well.

EWQ: What is your value-added to the cases on which you work?

Brett A. Sokolow: I think there are many benefits we bring to litigation. As general counsel, we quarterback a lot of litigation for our clients, so many people seek us out as litigation consultants. Sometimes that leads to an expert engagement, and other times not. I'd say we also have the advantage of consistency. There are a lot of expert witnesses who get tripped up by previous opinions that run contrary to current opinions they are taking, and seem to be willing to testify to whatever is asked of them. We refuse a lot of cases, and we're frequently offered both sides of each case we take, allowing us to take the principled side or the side with the most merit. As a result, we don't get tripped up by our body of writings, our prior reports, or conflicting testimony. And the attorneys who engage us appreciate that we take cases on all sides. When it comes to litigation, we're Switzerland. We take cases defending schools and colleges, and plaintiff's side cases against schools and colleges, but not against our own clients, obviously. When we work for plaintiffs, we sometimes work on behalf of victims or their families, and sometimes on behalf of those who are accused. The merits of the case are what causes us to get involved, and because we are offered far more cases than we accept, we try to take on those significant cases that will help or teach the field an important lesson.

EWQ: Have you ever been Court-qualified or disqualified from offering testimony?

Brett A. Sokolow: I work in education, and like many fields, cases rarely go to court. I've taken on expert witness work in 50 cases in the last twenty years, but I've probably been deposed no more than a dozen times. I've been to trial as an expert twice, once in state court and once in federal court. In both cases, my qualifications were challenged, and in both cases I was qualified to testify. Both cases resulted in a jury verdict for the client who had engaged me. I've never been disqualified, nor has anyone in our firm.

EWQ: Anything else you'd like EQ readers to know?

Brett A. Sokolow: I was deposed earlier this week in a state court negligence action, and the opposing counsel asked me the question, "Isn't it the case that what you are telling us here is that something is an industry standard if you say it is?" I replied, "No, I've never suggested that it's my way or the highway. Instead, I just think have a unique vantage point on the field that allows me to understand industry customs and standards in a way that few can. I serve as general counsel to 70+ schools and colleges, I oversee a team of 16 professional investigators, I represent students in the disciplinary process, my firm serves over 400 education clients a year, and as President of ATIXA, I interact with dozens of Title IX administrators every day and have trained and certified 11,000 professionals in the field. So, when I say that something is a widely adopted industry standard or custom, or opine on whether something is consistent with the standard of care, it's because I have a bead on the pulse of the field that is simply unparalleled."