Simon Says Experts Should Collaborate

Several years ago Columbia Law School's William H. Simon published an essay that was what one legal academic called "the blockbuster legal ethics article of the year." In addition to discussing the ethical practices of attorneys and the professional standards for experts, Simon wrote that there should be greater candor between opposing experts.

Simon's essay was received with incredulity, skepticism and several legitimate concerns, however his point is valid. Although the notion of greater openness among experts may seem foreign to U.S. attorneys, this is not necessarily the case elsewhere. In Australia, for example, court rules authorize judges to bring opposing experts together in pretrial conferences.

At these meetings, the experts are expected to attempt to reach agreement about the matters on which they will provide opinions. If they are not able to agree, they must explain why.

Not only does this encourage greater openness among experts, it also promotes settlement of the underlying dispute because, once the experts reach agreement on material points of the case, there is often no further reason to litigate.

The United Kingdom takes it one step further, suggesting that only one expert is needed to present the facts in civil litigation. The introduction to Part 35 of the Civil Procedure Rules states that "Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by only one expert."

The Rules later list more than ten criteria to consider if a single expert is appropriate including concerns of practicality and complexity. Based on these criteria, most complex commercial litigation will involve multiple experts but the intent for collaboration is evident in the language.

If truth and justice are indeed the goals of litigation, then why shouldn't experts collaborate rather than compete? It's happening in foreign courts. Why not here?

In response to Simon's essay, law professor Bruce Green wrote a similar article that was published in the same law journal. Defending current legal practices, he wrote that our adversarial system solves the issue of biased expert testimony.

> "While Simon is surely right that clients sometimes welcome erroneous expert opinions, existing procedural rules take account of this… Rules of procedure require expert witnesses to disclose their opinions through reports or in depositions in advance of trial, and expert opinions are tested through the adversary process. Before juries or judges accept them, expert opinions are critiqued by opposing experts and examined in depositions and at trial."

While many other countries encourage collaboration between experts, they still exist within an adversarial framework that allows both sides to present their case. The United States simply

ensures this system continues unhindered. Between the judge's gatekeeper role, discovery and cross-examination, only applicable expert testimony proceeds to trial where it is still analyzed by both sides.

Tell us: Do you think expert collaboration would be beneficial in the United States?

This post is an updated version of an article Robert Ambrogi wrote for the BullsEye Newsletter in April of 2008. It was posted on BullsEye, a legal blog published by IMS ExpertServices.