Lift the Shroud from Expert Secrecy?

A prominent legal-ethics professor has ignited a firestorm of controversy with his accusation that three equally prominent legal-ethics professors gave bad legal advice while serving as paid experts in a major employment litigation.

But obscured by the firestorm was the professor's underlying proposition that challenges a core assumption of our litigation system: The secrecy that shrouds the use of expert witnesses is dysfunctional and contrary to the public interest.

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?

The controversy arose after the professor, Columbia Law School's William H. Simon, published a working draft of what one legal academic called "the blockbuster legal ethics article of the year."

The essay, "The Market for Bad Legal Advice," set to be published in the *Stanford Law Review*, focuses on legal experts who provide what Simon calls "quasi-third-party opinions" – purportedly objective opinions, given in order to influence public conduct or attitudes for the benefit of private clients.

To illustrate his point, Simon hones in on a case in which Nextel Corp. retained three legal-ethics experts to OK a tentative agreement settling employment discrimination litigation.

Simon singles out the opinion of one of those experts, University of Pennsylvania Law Professor Geoffrey Hazard, as "patently wrong on nearly every issue it addresses." The other experts, he contends, accepted and built on Hazard's mistakes.

While the accusation has created controversy among academics and bloggers, Simon says that was not his aim in writing the essay. Rather, his intent was to demonstrate "that academic expertise can be quite influential in high-stakes situations and that the form it takes and the circumstances under which it is delivered are often not conducive to reliability."

Secrecy is Unwarranted

Simon's point about the influence of expert opinions in litigation seems beyond debate. Given that influence, their reliability becomes essential. And the key to ensuring their reliability, Simon would argue, is to make them more open to public consideration and review.

Secrecy among experts stems from the misperception of them as partisans for one side or another, he believes, when in fact they should be speaking sincerely and disinterestedly.

"The tacit norm is that opposing experts can't talk to each other," Simon said in a recent telephone interview. "There is no authority for that norm. It is inconsistent with the idea that the expert is disinterested."

It is also inconsistent with the academic worlds that many experts call home. "[The expert] invokes the authority of her role and institution as emblems of both acuity and impartiality; yet she forswears the norms of openness that the academic world regards as essential to such claims."

The solution lies in redefining the norms under which expert witnesses and consultants operate, Simon believes. He suggests a set of six principles to which experts should adhere:

- Candor. The expert must explain her role and disclose any interest she may have in the matter.
- Clarity. The expert should be clear about the issue on which she is opining and about the strength of her conclusion.
- Due diligence. The expert should not accept the client's characterizations or conclusions without inquiring into the underlying facts.
- Analytical support. Opinions should be reasoned, not supported merely by reputation and credentials.
- Reasonable framing. The expert should not unreasonably exclude issues that are material to the client's purpose and within the expert's expertise.
- Updating and correction. An expert should have a duty to update in light of new information where there is continuing reliance on the opinion.

In addition, Simon would make experts' full written reports available to the public, perhaps by posting them on the Web.

"You would think that at some point the opinion would become publicly accessible, but this is often not the case," he explains. "Since discovery materials are rarely filed before trial and most cases do not reach trial, the expert's report and deposition often do not become part of the case record.

"Even when there is a trial and the expert testifies, the record is often accessible only at considerable expense and inconvenience. And many settlements provide for the record to be sealed. Thus, as a practical matter, the expert's opinions are often inaccessible."

This secrecy removes a layer of accountability from expert opinions, making what the expert says "generally invisible and inaudible in her own professional field."

That is not to say that confidentiality is never called for. Only when the client decides to make some part of the opinion public would Simon say it should be made fully public. And there may be cases where the need for confidentiality continues beyond that point. But those cases could be accommodated while still making most of the opinion accessible, he contends.

Radical and Unnecessary

One of the professors targeted in Simon's essay, Fordham Law's Bruce Green, is writing a response that will be published in the same issue of the *Stanford Law Review*.

He sees Simon's call for greater candor among experts as radical and unnecessary. A former federal prosecutor, Green says lawyers would not accept a practice that allowed their experts to speak with experts on the other side.

The process is sufficiently transparent already, he says, given the ability to depose and thoroughly question an opponent's experts.

"If there is abuse of the process, the better way to develop the law is not through ethics rules, but through sanctions," Green says. "These are the kinds of issues that are better addressed through case law."

Although the notion of greater openness among experts may seem foreign to U.S. lawyers, that 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. As a recent article about Australia's practice pointed out, once the experts reach agreement on a material aspect of the case, there may be no further reason to litigate.

If it is working Down Under, perhaps it could work here. Should U.S. courts adopt standards promoting greater candor among experts? Or would this ignite a firestorm of its own?

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