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Marmer Penner Inc. Newsletter

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Legal Counsel Communications with Expert Witnesses: What is Acceptable Practice?

Following the Court's decisions in *Moore v Getahun* and *Bailey v Barbour*, the Canadian Institute of Chartered Business Valuators ("CICBV") released a communiqué to its members in a special supplement last month. The communiqué was meant to assist Chartered Business Valuators ("CBVs") with how to properly communicate with legal counsel and with the provision of expert evidence. As CBVs, we are occasionally called on to draft reports and act as expert witnesses. More frequently however, we work closely with legal counsel during a dispute, which may or may not culminate with the completion of an expert report or the provision of expert witness testimony. Whereas the findings in *Moore v Getahun* (which we dealt with in prior newsletters – See Vol. 18 No. 1 from February 2015 – Draft Reports are O.K., Again) dealt only with the provision of draft reports, *Bailey v Barbour* dealt with the conduct and behaviour of an expert throughout the litigation process, and specifically, what constitutes acceptable communication between expert and counsel throughout the litigation process.

In the *Barbour* decision, the Court referred to behaviour exhibited by the expert on behalf of Mr. Barbour, who was the "objector" in relation to a dispute over a cottage property under the *Land Titles Act*:

1. The expert had attended Court for all ten of the trial days (up to the point of the expert's cross-examination), except for one half-day;

2. The expert had more than 50 and possibly a hundred or more email exchanges in his file with counsel since the trial began;

3. The expert passed handwritten notes to counsel during the trial in assisting with the questioning of witnesses;

4. He was present during prior proceedings and was seated with counsel at earlier hearings in relation to the same matter;

5. During the trial in question, he was seated at counsel table behind counsel;

6. The expert suggested questions to counsel to be put to witnesses, even witnesses who were not experts, and suggested exhibits to be relied upon during questioning;

7. He had a familiarity with the location and content of certain key documents and exhibits during the trial and had assisted counsel in that regard;

8. He was critical of another expert's opinion; and

9. He described his role as an expert (in this case a land surveyor), to be that of a "quasi-judicial function", in that, the opinions given had to be based upon evidence and case law precedent.

Certain of the behaviours, in isolation, may not have been enough to disqualify the expert, but the aggregate of all of them (and perhaps some were worse than others), combined with a review of the emails that were exchanged during the litigation (discussed below) were enough to cause the Court to view this expert as an extension of counsel, i.e. as an advocate. As a result, this expert was disqualified. Also, in an unusual step, the Court made a personal cost order against counsel after concluding that the expert was put on the witness stand with a known bias.

Following the expert's cross-examination, the Court ordered that the 50 to 100 emails referred to above and any notes, if available, were to be brought to Court so they could be reviewed. A motion to exclude the evidence of the expert was brought by Bailey's counsel and was then to be heard. Following

the Court's review of the emails, it determined that the expert did not understand his duty, even though the expert had signed the now requisite Form 53, and that "he had radically departed from the arena of impartial professional. He has become an advocate for [his client's] cause". Several of the emails were found to be unprofessional by the Court, but a few in particular seemed to catch the attention of the Court: in one of the emails, the expert speaks about "litigation strategy" and what should or should not be done for purposes of furthering his client's cause. There were also several emails where legal advice and legal opinions are provided by the expert, for example, what should or should not be admissible in the other expert's reports and the appropriateness of legal claims made by the opposing party. According to the Court, the expert's comments about the other side's legal claim and his "strategizing in the litigation" was evidence that he was functioning as an advocate and not as an expert.

The findings of *Bailey v Barbour* is a clear warning to all experts that the maintenance of impartiality and neutrality starts when you get the initial call from your retaining counsel and not when you first put pen to paper on a draft report. Communications and behaviour throughout the litigation can come under scrutiny. Although the Court's decision in both *Moore* and *Bailey* did not change the way CBVs perceive their roles as experts, they serve as important reminders on how this role should be fulfilled. In order to reaffirm the importance of maintaining an expert's independence, the Advocates' Society published its own communiqué in June 2014 entitled *Principles Governing Communications with Testifying Experts*. This document contains nine principles that are meant to serve as guidance for advocates in dealing with experts. The communiqués of the CICBV and the Advocates' Society should be read in conjunction with each other in order to help lawyers and experts keep their roles separate and preserve the neutrality and objectivity that our Courts require from experts. In a later newsletter, we will explore the principles in the communiqué of the Advocates' Society.