

EXPERTS BEWARE: THE RULES ARE CHANGING

We are witnessing an evolution in the responsibilities of an expert witness that will impact professionals engaged in property appraisal and assessment. New rules and guidelines that were developed in response to the actions of expert witnesses and legal professionals in the field of pediatric forensic pathology are spreading into other sectors. Those who advise, inform, and testify before the Assessment Review Board in Ontario and in similar tribunals, must be aware of the rigorous standards that will apply.

Learning From Past Mistakes

To a casual observer, the expert testimony of pediatric forensic pathologists and property assessors share little in common. Beyond the obvious differences, however, is a common duty in courts and tribunals to objectively and impartially inform and advise the “trier of fact”.

Although there may be differences in the mandate of experts from one jurisdiction to another, or within the same jurisdiction but subject to different procedures adopted by courts and tribunals, the standards that apply to the provision of opinion evidence and expert testimony are similar in all fields.

In 2008 an inquiry led by Justice Stephen Goudge in Ontario produced several recommendations regarding the role and obligations of experts as witnesses (refer to www.goudgeinquiry.ca). One of the key recommendations would require experts to confine their written evidence and sworn testimony to matters for which they have demonstrable expertise. By strengthening the relationship between an expert and the source of that expertise, the Goudge Inquiry sought to clearly differentiate between an opinion that flows from empirical research and advocacy that seeks to achieve a particular result.

Defining Roles & Responsibilities

Several key recommendations in the Goudge Inquiry report are making their way into public policy. In Ontario, the Rules of Civil Procedure will be revised in January 2010 to include Rule 4.1: Duty Of Expert, which is partially cited below.

“4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
(a) to provide opinion evidence that is fair, objective and non-partisan,
(b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise, and
(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.”

“4.1.01 (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged”.

The Assessment Review Board is free to exercise its prerogative to apply the Rules of Civil Procedure in hearings that fall within its jurisdiction. Accordingly, the manner in which these rules are interpreted and applied by appraisal and assessment experts in the course of their duties is of considerable interest to the entire profession. The following perspective is offered as a means to stimulate discussion; it is not held out as the only, or even the best means to fulfill the written and unwritten rules of an expert in matters that are governed by the Rules of Civil Procedure.

The Friction Between Opinion & Objectivity

An expert witness has a unique relationship to the process that unfolds at the Assessment Review Board, just as in any court or tribunal. It is the expert's evidence, and opinions formed with reference to that evidence, that often serve as the basis for resolution of a dispute.

It is important to acknowledge, therefore, that experts are not detached from the process in which their evidence and opinions will be weighed. Just as experts seek acceptance and approval of their research by peer reviewers prior to publication in a professional or trade journal, the experts who appear at a hearing or in court understand that their empirical research and analysis will also be "judged" and either accepted or rejected.

The process of competing for attention and acceptance from the court or tribunal introduces a considerable measure of risk for an expert witness. The process of having professional experience, subject-matter expertise, and specific services performed on a particular project, all subjected to close scrutiny infuses expert witnesses with more than a passive interest in the outcome. By swearing an oath or providing an affirmation to tell the truth, each expert witness acknowledges an obligation to serve as an independent source of advice. That independence, however, does not diminish their personal and professional interest in the relevance of their work and the reliance that may be placed upon it.

Running Versus Winning The Race

One of the best indicators of an expert's independence, and one of the first places to confirm that commitment, is in the letter of retainer or similar form of contract between the expert and client. A retainer will generally prescribe the scope of work including the research that will be conducted and logistics of the assignment including budget.

It was not by accident that the preceding sentence did not refer to the goals or results of the testimony and related litigation support that would be performed by the expert witness. The key to a good retainer is to articulate the tasks that will be performed rather than the evidence that will be offered. By setting out a research program and the means by which that effort will be directed to the issues in dispute at a hearing or in court, the expert witness commits to a process rather than a result. The expert's claim to

being both independent and objective is reinforced by a transparent focus on the analytical process and research methodology, rather than achieving a prescribed outcome.

One Retainer - Two Roles

A recurring theme in the report of the Goudge Inquiry is the need for experts to “provide opinion evidence that is fair, objective, and not partisan”.

Implementation of that guideline requires affirmative action by the expert witness. One of the great challenges for experts is the need to maintain that posture in both written evidence and oral testimony, while at the same time providing litigation support to counsel. In this context, litigation support involves the provision of advice regarding the strengths and weaknesses of opposing evidence and critique of the work of other expert witnesses.

As a resource to counsel acting on behalf of the client, expert witnesses are challenged to work at the margins of what might be considered a loss of objectivity. It is instructive in this regard to recall that experts in many fields, including the social sciences, are constantly subjected to scrutiny. Peer review and due diligence are valid and accepted processes for experts to “stress-test” and objectively challenge the work of others.

In the course of providing technical support to legal counsel prior to and during a hearing, it is appropriate for an expert witness to engage in a process of challenging the evidence of other witnesses including:

- Assumptions
- Errors
- Omissions
- Deficiencies
- Prejudice
- Alternative interpretation of data

It is legitimate for experts to clash over the relevance and interpretation of data, without appearing to be advocates for an outcome. It is up to the expert witness, however, to remain detached from the litigation process itself and, in the case of the Assessment Review Board, avoid crossing the line that separates a valuation expert from a proponent.

Conclusion

The definition of what constitutes the proper role for an expert witness, and the manner in which that role is expressed in both written and oral evidence that comprise expert testimony, are being reshaped.

Guidelines and standards for professional practice and the provision of expert testimony in the field of property valuation will become more explicit in the near future. Those who provide expert testimony and are already acutely aware of the fine line between objectivity and advocacy must take deliberate steps to avoid blurring the distinction between them.

It is also essential that clients who retain valuation experts, and lawyers who must tailor the evidence to their cases, respect the higher standards that must be met by their expert witnesses. There is some irony in the fact that by preserving the independence of experts who are relied upon to testify at the Assessment Review Board and elsewhere, the self-interest of those who require their services will also be enhanced.

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