The Relationship between Counsel and the Expert Witness

or

Rules for Playing in the Sandbox

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Introduction:

In 2010 two significant changes were made to the *Rules of Civil Procedure* (the **"***Rules***"**) relating to expert witnesses. The changes flowed from the recommendations of the Honourable Coulter Osborne contained in his report, *Civil Justice Reform Project: Summary of Findings and Recommendations.*[1] The amendments were intended to deal with a common complaint that "too many experts are no more than hired guns who tailor their reports and evidence to suit the client's needs".[2]

Expert opinion evidence constitutes an exception to the rule that witnesses may only testify to facts, not opinions. The expert evidence exception is permitted where specialized knowledge is required to determine the implications of the facts where the trier of fact is not competent to draw the necessary inferences unaided.[3] At the center of the issue is how does the judicial system ensure that expert witnesses offer unbiased opinions based upon their training and expertise and not become mere "hired guns" or advocates for their client's case?

The duty of the expert witness is now specifically articulated in Rule 4.1.01(1) as follows:

> 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*,
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> (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

[1] Ontario Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings and Recommendations*, by the Honourable Coulter Osborne (Toronto, 2007), online <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp>.
[2] *Ibid* at 71.
[3] *R v Mohan* [1994] 2 SCR 9 at 23, [*Mohan*].

(c) To provide such additional assistance as the court may reasonably require to determine a matter in issue.

In addition to defining the role of the expert witness, *Rule* 53.03(2.1) sets out the requirements that must be contained in an expert report as follows:

> **53.03 Expert Witnesses - Expert Reports** (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
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> 1. The expert's name, address and area of expertise.
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
> 3. The instructions provided to the expert in relation to the proceeding.
> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
> 6. The expert's reasons for his or her opinion, including,
>   i. a description of the factual assumptions on which the opinion is based,
>   ii. a description of any research conducted by the expert that led him or her to form the opinion, and
>   iii. a list of every document, if any, relied on by the expert in forming the opinion.
> 7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Rules 4.1.01(1) and 53.03(2.1) are very similar to Rule 21.01 of the *Ontario Municipal Board Rules of Practice and Procedure* made under section 91 of the *Ontario Municipal Board Act* and section 25.1 of the *Statutory Powers Procedure Act* (the "OMB Rules").

> 21.01 **Duty of the Expert Witness:** It is the duty of every expert engaged by or on behalf of a party who is to provide opinion evidence at a proceeding under these *Rules* to acknowledge, either prior to (by executing the acknowledgement form attached to the *Rules*) or at the proceeding, that they are to,
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> a) provide opinion evidence that is fair, objective and non-partisan;
> b) provide opinion evidence that is related only to the matters that are within the expert's area of expertise; and
> c) to provide such additional assistance as the Board may reasonably require to determine a matter in issue.
> d) These duties prevail over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

The Acknowledgement of Expert's Duty Form attached to the OMB Rules and the certificate mandated by Rule 53.03(2.1) are identical.

As a result of the introduction of the amendments to the *Rules* governing expert witnesses many wondered whether the amendments were intended as a fundamental change in the roles played by not only the expert witness, but also the role of legal counsel in preparing an expert witness for trial/hearing. This paper will review recent case law dealing with the interpretation of *Rules* 4.1.01(1) and 54.03(2.1) and OMB Rule 21.01 and its impact on the legal profession and their interaction with expert witnesses.

Anarchy in the Sandbox

While much of the province of Ontario found itself in the grips of an unrelenting polar vortex in January of 2014, a greater chill swept over the legal profession with the release of Madame Justice Wilson's decision in the case of *Moore v Getahun.*[4] The case concerned a medical malpractice lawsuit against an orthopedic surgeon related to treatment the plaintiff received following a motorcycle accident. During the trial the defense called an expert witness to testify.

[4] *Moore v Getahun*, 2014 ONSC 237, (CanLII) [Moore 2014].

When giving his evidence, the expert acknowledged that during a one and a half hour phone conversation the defence counsel reviewed his draft report and suggested changes for the final report. The expert confirmed he was happy with his draft report, but defence counsel made suggestions and he made the corrections.[5]

Madame Justice Wilson strongly criticized the practice of counsel reviewing draft expert reports and stated:

> "The purpose of Rule 53.03 is to ensure the independence and integrity of the expert witness. The expert's primary duty is to the court. In light of this change in the role of the expert witness under the new rule, I conclude that counsel's prior practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions or clarifications to ensure transparency in the process and to ensure that the expert is neutral."[6]

She also stated later in her decision that "the practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality".[7]

Another interesting aspect of this case concerns the use of expert witness reports. The reports were not entered into evidence and instead the parties proceeded to call *viva voce* evidence from all the expert witnesses. Madame Justice Wilson asked that the expert reports, together with any drafts, copies of the instructing letters and records of any conference calls be made available to her as an *aide memoire.* She then took into account what she perceived to be contradictions between the experts' oral evidence and the written reports when assessing the expert's creditability.[8]

Ultimately the matter was decided at trial in favour of the plaintiff. The defendants appealed the decision to the Court of Appeal.

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[5] *Ibid* at paras 289, 293.
[6] *Ibid* at para 520.
[7] *Ibid* at para 52.
[8] *Moore v Getahun*, 2015 ONCA 55 at para 7, online: Ontario Courts <http://www.ontariocourts.on.ca/decisions/2015/2015ONCA0055.pdf> [Moore 2015].

The rulings regarding expert reports caused a great deal of concern amongst the legal profession, particularly with respect to the review by counsel of draft expert reports. To the legal profession, this was a major game changer. Clearly if Madame Justice Wilson's ruling regarding the purpose of Rule 53.03 was correct, the rules of the sandbox had dramatically shifted causing many lawyers wondering what role, if any, they had regarding the preparation of expert reports.

As a result of this uncertainty, four lawyers' associations - the Advocates' Society, the Criminal Lawyers Association, the Canadian Defence Lawyers Association and the Ontario Trial Lawyers Association all sought and were granted standing in the Court of Appeal proceedings.

Calm Returns to the Sandbox

With the release of the January 2015 *Moore v Getahun* Court of Appeal decision calm has returned to the sandbox[9]. Mr. Justice Sharpe, writing for the Court concluded that the trial judge erred in holding that it was unacceptable for counsel to review and discuss draft expert reports. He further held that she erred in using the written expert reports that were neither entered into evidence, nor the subject of cross-examination, to contradict and discredit aspects of the *viva voce* evidence of the appellant's expert witnesses. He did, however, rule that these errors did not affect the outcome of the trial as no substantial wrong or miscarriage of justice flowed from the errors.[10]

The Court of Appeal directly commented on the submissions of the parties and the interveners by acknowledging their joint concern that "if accepted, the trial judge's ruling would represent a major change in practice".[11] Mr. Justice Sharpe stated "[i]t is widely accepted that consultation between counsel and expert witnesses in preparation of Rule 53.03 reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims"[12].

[9] *Ibid*.
[10] *Ibid* at para 7.
[11] *Ibid* at para 49.
[12] *Ibid* at para 49.

The Court of Appeal confirmed that the amendments to the *Rules* and the Osborne Report recommendations were intended to clarify and emphasize the existing common law duties of expert witnesses to provide opinion evidence that is fair, objective and non-partisan.[13] The court further confirmed that the "changes suggested by the trial judge find no support in the various reviews and studies on civil justice reform..."[14]

Justice Sharpe explained that the ethical and professional standards of the legal profession forbid counsel from engaging in practices that would interfere with the independence and objectivity of expert witnesses. He then referenced a quote from the Holland Group's position paper "that it is inappropriate for counsel to persuade or attempt to persuade experts to articulate opinions that they do not genuinely hold, and that it is of paramount importance that the expert genuinely believes the opinion that he or she articulates both in the expert report and in the witness stand."[15]

He also noted that the ethical standards of other professional bodies place obligations upon their members to be independent and impartial when giving expert evidence.[16] By way of example, the Ontario Professional Planners Institutes' Professional Code of Practice fully articulates for its members their ethical responsibilities. Section 1.2 of this Code requires that a Registered Professional Planner (RPP) "*provide full, clear and accurate information on planning matters to decision makers and members of the public*". As well, Section 2.1 of the Code requires that an RPP "*impart independent professional opinion to clients, employers, the public and tribunals*".

In fact, the Ontario Municipal Board ("OMB") significantly relies on the professional standards of OPPI 's Registered Professional Planners and their independent advice brought to a Hearing. In J.A. Fraser's 1991 decision *Green Road v The City of Stoney Creek*, where the municipal planner (under summons) was being expressly directed by the municipal lawyer, the Board reflected that:

[13] *Ibid* at para 52.
[14] *Ibid* at para 53.
[15] *Ibid* at para 58.
[16] *Ibid* at para 60.

> "In our democratic system of municipal government, Council has the right and discretion to accept or reject the advice of staff and to vote accordingly. Council does not, however, have the right to order an employee to tailor his evidence before any tribunal, whether the Board or a court..... The Board finds that the role of Mr. Plant, whether or not it was carried out pursuant to instructions received from his client, the City of Stoney Creek, in attempting to curtail the planner's evidence before the Board was improper and was an attempt to impair the Board's ability to carry out its function mandated by the legislature in the Planning Act in that the Board must rely on good, sound and frank evidence from all witnesses, including and perhaps specially that of the municipal planner, to make decisions in the public interest."[17]

The Board then also awarded costs against the municipal lawyer for frustrating that independent advice.

In Mr. J.R. McKenzie's 2013 decision in *Preservation of Agricultural Lands Society (PALS) v Town of Fort Erie*, in considering a Section 43 Motion challenging the Board's (separately constituted) ruling concerning the denied status of PALS' planning witness Dr. H. Gayler, the Board reflected on the rules and considerations in accepting an expert witness and noted that:

> ". . . those who were professional planners were Members of the Ontario Professional Planners Institute ("OPPI" or "Profession") and held the Registered Professional Planner ("RPP") designation. Given that RPPs appear regularly before the Board, judicial notice is taken of the Profession's Code of Practice and Standards of Practice which require a primary duty to the public interest and the principles of sound planning, including an obligation to exercise independent professional judgment. The Profession is ever vigilant about ensuring that its members are independent, seen as independent, not beholden to the organization whose name appears on their remuneration cheque. It is for that reason that a professional planner seeking expert qualification will only accept a retainer or support a proposal after an independent exercise of due diligence. Indeed, that exercise is often the first thing queried when the witness is presented for qualification because it goes directly to undermining independence and satisfying that component of qualification confirmed by Vice-Chair

[17] *Green Road Developments Ltd.v Stoney Creek (City)*, File Nos. O 900071, Z 890221, 27 OMBR 327, [1991] OMBD No. 2225, Fraser JA [Green Road Developments].

> Schiller. Such professional obligations and practices have been ignored by PALS in its suggestion that Dr. Gayler, who is neither a member of the OPPI nor an RPP, should have been accorded the same status as the planners proffered by the Town, Region, and Proponent. That Vice-Chair Schiller treated those planners differently is not evidence of bias against PALS because those planners started with a different status than Dr. Gayler." [18]

Lastly, returning to the 2015 Court of Appeal decision, Justice Sharpe states that the "adversarial process, particularly through cross-examination, provides an effective tool to deal with cases where there is an air of reality to the suggestion that counsel improperly influenced an expert witness."[19]

At paragraph 63, Justice Sharpe explains the importance of consultation between the expert witness and legal counsel as follows:

> "Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by Rule 4.1.01 and contained in the Form 53 acknowledgement of expert's duty. Reviewing a draft report enables counsel to ensure that the report,
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> i. Complies with the *Rules of Civil Procedure* and the rules of evidence,
> ii. Addresses and is restricted to the relevant issues, and
> iii. Is written in a manner and style that is accessible and comprehensive.
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> Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness' area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues."

[18] *Citizens Coalition of Greater Fort Erie v. Niagara (Regional Municipality)* 77 OMBR 76 at para 37, 11 MPLR (5th) 157 [Citizens Coalition].
[19] *Moore 2015, supra* note 8 at para 61.

Rules of the Sandbox

It is interesting to note that the Court of Appeal attached to its decision the Advocates' Societys' *Principles Governing Communications with Testifying Experts* ("Principles") on the basis that it provides a "thorough and thoughtful statement of the professional standard pertaining to the preparation of expert witnesses."[20] The introduction states that the document was developed by the Advocates' Society to provide guidance to members of the profession. It cautions that the *Principles* are "not intended to address all aspects of the retention and preparation of expert witnesses, rather they are intended to address the conduct of advocates in their dealings with experts with a view to ensuring that advocates can fulfil their important duties to their clients and to the courts and tribunals without compromising the independence or objectivity of testifying experts or impairing the quality of their evidence."[21]

There are nine Principles in total and each provides a brief commentary for assistance. The nine Principles are as follows:

1. An advocate has a duty to present expert evidence that is: (i) relevant to the matters at issue in the proceeding in question; (ii) reliable; and (iii) clear and comprehensible. An appropriate degree of consultation with testifying experts is essential to fulfilling this duty in many cases. An advocate may therefore consult with experts, including at the stage of preparing expert reports or affidavits, and in preparing experts to testify during trials or hearings.4 An advocate is not required to abandon the preparation of an expert report or affidavit entirely to an expert witness, and instead can have appropriate input into the format and content of an expert's report or affidavit before it is finalized and delivered.

2. At the outset of any expert engagement, an advocate should ensure that the expert witness is fully informed of the expert's role and of the nature and

[20] *Ibid* at para 57.
[21] Ontario, The Advocates' Society, *Principles Governing Communications with Testifying Experts*, Appendix in 2015 ONCA 55 (Toronto: The Advocates' Society, 2014) at 2.

content of the expert's duties, including the requirements of independence and objectivity.

3. In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.

4. The appropriate degree of consultation between an advocate and a testifying expert, and the appropriate degree of an advocate's involvement in the preparation of an expert's report or affidavit, will depend on the nature and complexity of the case in question, the level of experience of the expert, the nature of the witness's expertise and other relevant circumstances of the case.

5. An advocate should ensure that an expert has a clear understanding of the issue on which the expert has been asked to opine. An advocate should also ensure that the expert is provided with all documentation and information relevant to the issue they have been asked to opine on, regardless of whether that documentation or information is helpful or harmful to their client's case.

6. An advocate should take reasonable steps to protect a testifying expert witness from unnecessary criticism.

7. An advocate should inform the expert of the possibility that the expert's file will be disclosed, and should advise the expert witness not to destroy relevant records.

8. At the outset of the expert's engagement, an advocate should inform the expert of the applicable rules governing the confidentiality of documentation and information provided to the expert.

9. In appropriate cases, an advocate should consider an agreement with opposing counsel related to the non-disclosure of draft expert reports and communications with experts.

The nine Principles articulated by the Advocates' Society remind me affectionately of the rules for playing nice in the sandbox. The rules of the sandbox were basic and almost intuitive and intended to make sure that everyone in the sandbox played nicely. However, if the rules of play are not known or unclear, play in the sandbox turns into chaos and before you know it everyone is throwing sand. The trial judge's statements regarding the propriety of counsel reviewing expert reports in *Moore v Getahun* resulted in great uncertainty with respect to the interaction between counsel and their expert witnesses. The Principles articulated by the Advocates' Society and the Court of Appeal decision provide much needed clarity and certainty.

Cautionary Tales: What happens when you don't play by the Rules of the Sandbox

As discussed in the Court of Appeal decision the changes made to the *Rules* relating to expert witnesses is intended to ensure that expert witnesses provide opinion evidence that is fair, objective and non partisan. The amendments to the *Rules* were not intended to change the role of the expert witness, but rather are simply a restatement of the basic common law principles.[22] Justice Sharpe referenced the common law duties of an expert witness as articulated in *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd.*, as follows:

> "An expert witness should provide assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness....should never assume the role of an advocate."[23]

[22] *Moore 2015, supra* note 8 at para 52.
[23] *Ibid* at para 52.

Expert witnesses that cross the line and assume the role of an advocate are often disqualified from giving evidence and harshly criticized by both the courts and tribunals. The following are just a few recent examples of the consequences that flow from such grave transgressions.

1. *Jeff and Patricia Avery v The City of Sault St. Marie*

The applicants applied to amend the City of Sault St. Marie's Official Plan and Zoning By-law to create a 91 lot residential waterfront community. The applications were recommended for approval by the staff of the City of Sault St. Marie, but denied by Council. One of the parties to the proceeding was a ratepayers group known as the Pointes Protection Association ("PPA"). During the lengthy hearing two Motions were initiated by the Applicants to request that two of the PPA's witnesses not be qualified as experts to give opinion evidence.

The PPA presented Mr. Breen to the Board for qualification as an expert witness, in the field of hydrogeology. Mr. Breen has a Masters of Science from the University of Waterloo specializing in Contaminate Hydrogeology. In 2010 he was retained by the Conservation Authority to complete an independent review of the Applicant's application and supporting studies. The report was critical of the development application. In December of 2012 the Conservation Authority, notwithstanding Mr. Breen's report, issued a development permit to the Applicants.

Subsequent to the Conservation Authority issuing the permit, Mr. Breen wrote to the Conservation Authority setting out his outstanding concerns. Soon after on his own initiative and without permission by the Conservation Authority, he contacted and later met with the Algoma Health Unit and presented his report. In July 2013, without instructions from the Conservation Authority, he attended the public meeting for the application and raised his concerns with the application based upon his report.

The Board refused to qualify Mr. Breen as an expert witness on two grounds. After reviewing Mr. Breen's qualifications the Board determined that he was a hydrogeologist and not a coastal engineer and as such the Board was concerned that he had gone beyond his area of expertise in the opinions that he expressed in his expert witness report. Further, the Board was very critical of the activities undertaken by Mr. Breen and ruled that he had "engaged in a course of

conduct through his self-generated meeting with the Algoma Health Unit and subsequently his self-generated attendance and presentation to City Council that is indicative of one who is an advocate for a certain position."[24] The Board, in a strongly worded statement ruled as follows:

> "The case law is abundantly clear that a person can be an expert witness or an advocate but not both. It is clear to the Board that Mr. Breen has effectively through his course of conduct crossed the line from "expert witness" to "advocate" and to this Board it is clear he has lost the requisite objectivity that is required of an expert witness."[25]

The second Motion concerned whether Mr. Usher should be qualified to provide expert opinion evidence on behalf of the PPA, in the field of land use planning. The Board acknowledged that he was a member of the Canadian Institute of Planners, a Registered Professional Planner and a past president of the Ontario Professional Planners Institute. The Board states he is a very experienced land use planner with the necessary academic and work experience to qualify as an expert witness in land use planning. He represented the PPA at the first two Pre-hearings and although he did not attend the last Pre-hearing he made "after the fact" submissions to the Board regarding an issue on the issues list and specifically reviewed the six decisions that had been submitted by the Applicants on that point. He stated that he was providing these comments from a planning and not a legal perspective.

He portrayed himself not as an advocate on behalf of the PPA, but rather that his conduct was only to represent the PPA "in the way that planners regularly represent their clients."[26] He also approached a land use planner from the Ministry of Municipal Affairs and Housing to see if he agreed with the comments expressed and whether he would agree to appear as a witness at the hearing.

The Board ruled that it would not qualify him as an expert entitled to give opinion evidence in land use matters on the basis that he had gone beyond the "way that planners regularly represent clients" and "entered into the fray as an advocate actively seeking out witnesses that

[24] *Avery v Sault Ste. Marie (City)* OMB File No. PL130890 at para 52, [2015] OMBD No. 147 [Avery].
[25] *Ibid* at para 53.
[26] *Ibid* at para 67.

he believed would be of assistance to his client's case."[27] Although not allowed to provide expert opinion evidence, the Board ruled that it would treat his evidence as a fact witness.

2. *Eugene Knapik v Kiran Cheema & Damandeep Aujila*

The applicant applied to the City of Toronto to sever a property located in the South Long Branch area of the City into two lots with the intent of demolishing the existing home and constructing two new semi-detached dwellings with integral at-grade garages. A number of variances from the by-law were required to accommodate the proposed development. The Committee of Adjustment granted the severance and variances requested and the decision on the severance only was appealed to the OMB.

At the commencement of the hearing the Appellant, who was self-represented, informed the Board that it was his intent to call an expert planning witness, David Godley. Mr. Godley then spoke to the Board and informed the member that he had a preliminary issue which needed to be addressed prior to commencing the hearing. The Member explained to Mr. Godley that his opportunity to address the Board was in the course of giving his planning evidence. He insisted that the issue must be dealt with "now" as it relates to the "bias of the Member."[28]

The Member ruled that Mr. Godley's role in the hearing was that of a planning witness and that he did not have standing to raise this issue, however the Member would hear from the Appellant if he wished to raise the issue. The Appellant agreed to make submissions on the issue of bias and proceeded to assert to the Member that due to a statement she had made in the decision regarding 76 Ash Street, also located in the South Long Branch area, "they feel the member is biased" as they believe the statement reveals that the Member is in favour of severances in this neighbourhood.[29]

During the deliberations on the issue of bias the Member referenced correspondence Mr. Godley had sent to the Minister of Municipal Affairs and Housing which he later provided to

[27] *Ibid* at para 73.
[28] *Knapik v Toronto (City)*, OMB File No PL130528 at para 10, 79 OMBR 328, [2013] OMBD No. 920, [Knapik].
[29] *Ibid* at para 12.

several Provincial and Municipal Officials including the Executive Chair and staff of the Environment and Land Tribunal of Ontario wherein Mr. Godley asserted that the decision on 76 Ash contained "a wild statement that there should be more severances in this area, thus showing prejudice."[30] She also referenced an e-mail Mr. Godley had sent to the Board's staff with respect to the present appeal wherein Mr. Godley asserted that he had "no confidence" that three-named Board members, one of whom was the sitting Member, would give this matter a fair hearing based on previous decisions. The Member noted that all three named Members had approved severance applications in the South Long Branch neighbourhood.[31]

The Member clarified that nowhere in the Ash Street decision does it state "that there should be more severances in the area."[32] The Member refused the request for recusal and the adjournment was denied.

The Appellant presented Mr. Godley to the Board to be qualified as an expert witness to provide opinion evidence in the area of land use planning. Mr. Godley provided the Board with an Acknowledgement of Experts Duty form and stated that he was a retired Member of the Royal Town Planning Institute in the United Kingdom, was a former Member of the City of Toronto Committee of Adjustment and held various planning positions in Ontario between 1977 and 2001. The Member qualified Mr. Godley to give expert opinion evidence in matters of land use planning and advised him that his planning experience would be taken into consideration.

During cross-examination Mr. Godley was asked if he felt he could "provide opinion evidence that is fair, objective and non-partisan" given that he was a resident of the neighbourhood. [33]

In granting the severance the Member found that Mr. Godley's opinion evidence and planning rationale was "lacking in its scope and objectivity."[34] She further ruled that his opinion evidence lacked independence on the basis that he lived in the area but also based on her

[30] *Ibid* at para 18.
[31] *Ibid* at para 20.
[32] *Ibid* at para 22.
[33] *Ibid* at para 53.
[34] *Ibid* at para 59.

review of his correspondence to the Board and others related to the file which showed that he was "entrenched in his position that severances should not be permitted in the South Long Branch area."[35]

It is interesting that the Member did not first disqualify Mr. Godley from providing expert opinion evidence knowing the full nature of the unusual correspondence he filed with the Board prior to the commencement of the hearing. As noted by Vice-Chair de Avellar Schiller in her March 2015 Decision, it seems that "the path of least resistance in matters before the Board is sometimes to qualify the witness as an expert, admit the evidence and simply deal with it in terms of weight."[36] However, she then cites the *Dulong v Merrill Lynch Canada Inc.* decision for the proposition that the trail judge should not abdicate its position and that it is the duty of the trial judge to take its role as the gatekeeper seriously.[37]

Ultimately the result is the same, once the witness crosses the line from expert to advocate they will either be disqualified or their evidence will be discredited and given no weight.

3. *Gino Fiorucci v City of Toronto*

Although Mr. Godley's evidence was seriously criticized for his lack of objectivity and independence in the 2014 decision discussed above, he once again returned to the Board with the objective of being qualified to provide expert opinion land use planning evidence on another severance application in the South Long Branch area. This matter concerned an application for severance and variances to create two residential lots to facilitate the construction of two new, two-storey detached homes at 20 St. James Street. In this case the severance and variances were denied by the Committee of Adjustment and appealed to the Board by the Applicant.

Mr. Godley attended at the hearing and was granted participant status as a resident of 401 Lake Promenade, being within the South Long Branch neighbourhood, but further south of the

[35] *Ibid* at para 60.
[36] *Grandoni v Niagara (Regional Municipality)*, OMB File No PL130395 at para 39, [2015] OMBD 233 [Grandoni].
[37] *Dulong v Merrill Lynch Canada Inc.*, 80 OR (3d) 378, 2006 CanLII 9146 [Dulong].

subject property. Mr. Godley sought to be qualified by the Board as an expert witness. The Member did not qualify Mr. Godley as an expert witness to provide opinion evidence in the area of land use planning. As set out in Member Rossi's reasons, he did not qualify Mr. Godley as a result of his "purported planning experience but because Mr. Godley has demonstrated previously and at this hearing that he lacks the impartiality and objectivity of an expert witness; qualities required of all experts appearing before the Board."[38] Member Rossi noted that it is not enough to simply sign an Acknowledgement of Expert's Duty Form to guarantee that someone will be qualified as an expert."[39] At paragraph 20 of the Decision Member Rossi discusses the responsibility of the Board in granting expert status as follows:

> "It is the responsibility of all Members to uphold rigorously and defend the Board's adjudicative processes to ensure that they are in receipt of the best and highest quality expert evidence at the hearing, and that such evidence is presented and evaluated and the principles of natural justice are adhered to. To accord expert qualifications to Mr. Godley in the face of what transpired at this hearing through his behavior and the nature of his evidence would serve to diminish the integrity of the Board's processes and would almost assuredly impact the quality of future expert evidence presented in Board hearings generally were the Board to relax its standards. The same rigorous standards for objective and impartial professional evidence and opinion apply to this local neighbourhood just as they do in other Ontario communities. Fortunately, Board adjudicators have been consistent in rejecting this particular participant's attempt to be qualified as an expert for the same reasons as this Member has recorded."[40]

4. Bailey v Barbour

The following is a review of decisions rendered by Madame Justice Healey concerning a trial in the Ontario Superior Court of Justice related to an appeal from a decision of the Deputy Director of Titles granting possessory title of certain lands joining Tiny Island to the mainland. Bailey was the registered owner of Tiny Island. Barbour was the registered owner of the

[38] *Fiorucci v Toronto (City),* OMB File No PL141217 at para 16, [2015] OMBD No 165 [Fiorucci].
[39] *Ibid* at para 18.
[40] *Ibid* at para 20.

mainland property opposite Tiny Island. The disputed land joined Tiny Island to the mainland when it was not under water and was used by the Bailey's to drive over part of the disputed land to reach their cabin on Tiny Island. Both parties provided expert evidence as to historical surveys and water levels in the area.

The court dismissed the appeal and ruled that Barbour's expert had demonstrated a lack of impartiality and had become an advocate for Barbour and therefore his evidence was rejected based on his clear bias. Justice Healey in her mid-trial ruling pertaining to e-mail communications and notes passing between Mr. Barbour's solicitor and Mr. Barbour's expert, during the trial, sets out the role of the expert witness at paragraph 18 as follows:

> "The most important thing for an expert to retain throughout the litigation process is a position of distance from the interests of the party who engages them, in order that his or her impartiality remains intact. By contrast, the worst thing for an expert to devolve into is advocating for his client's view, or to become a champion for his client's cause. It is only where the expert can reliably be seen by the Court to have reached his opinions through an objective and neutral lens that his evidence can have potential value to the Court. The evidence of an expert who advocates for a client's position, simply because it is his client's position, loses considerable value and will ultimately be a waste of the Court's time if rejected outright due to partisanship."[41]

During cross examination Mr. Barbour's expert acknowledged that he had attended court for all ten of the trial days and that he had more than 50 and possibly 100 or more e-mail exchanges on the file with Mr. Barbour's solicitor since the trial began. He also confirmed that he had passed handwritten notes to Mr. Barbour's solicitor during the trial. Madame Justice Healey ordered that the e-mails in question and the notes were to be made available to the court.[42] After reviewing the e-mails and notes Justice Healey concluded that Mr. Barbour's expert had prepared written questions to put to Bailey's witnesses and that he had engaged in strategic discussions with Mr. Barbour's solicitor.

[41] *Bailey v Barbour*, 2013 ONSC 4731 at para 18 (CanLII).
[42] *Ibid* at para 16.

She concluded that the evidence satisfied her that Mr. Barbour's expert was functioning at the trial as an advocate in concert with Mr. Barbour's solicitor. She ruled that Mr. Barbour's expert did not understand his duty to the Court, even though he had signed a Form 53. She further ruled that she was not satisfied that Barbour's solicitor had adequately explained such Acknowledgement to the witness "or if he did, I am led to the regretful conclusion that Mr. Barbour's solicitor thereafter allowed the witness to disregard that duty to the court."[43]

The trial judge concluded that Barbour's bias was so clear that she should and did reject his testimony outright as being of no probative value as it was tainted by bias and impartiality.[44]

The argument regarding costs was bifurcated. In a ruling from the first hearing Justice Healey determined entitlement and quantum of costs and that the payor of the costs would be determined in May of 2014. In a letter to Counsel dated March 10, 2014, Mr. Barbour's solicitor was alerted to the fact that the Court would be considering that this "may be an appropriate case for invoking Rule 57.07, due to costs wasted by Mr. Streisfield as a result of Mr. Stewart's involvement."[45]

In order for the Court to invoke Rule 57.07 it must have made at least a preliminary assessment that there have been costs wasted by the type of conduct that may warrant a personal costs order against the solicitor. Justice Haley in awarding significant costs personally against Mr. Barbour's solicitor found that Mr. Barbour's expert was a biased witness and that Mr. Streisfield "proffered him to the court when he knew or should have known of his bias". She further states that "[i}t defies reason that Mr. Streisfield could fail to question Mr. Stewart's objectivity when one considers the evidence reviewed..."[46]

Justice Haley in her reasons states that the "decision to provide the Court with expert testimony is part of the role of the lawyer having carriage of the matter, and his or her professional expertise should include an understanding that it undermines the integrity of the

[43] *Bailey v Barbour,* 2013 ONSC 7397 at para 321 (CanLII).
[44] *Ibid* at para 324.
[45] *Bailey v Barbour,* 2014 ONSC 3698 at para 3 (CanLII).
[46] *Ibid* at para 44.

justice system to direct a biased expert to step into the witness box".[47] She opines that Mr. Streisfield's failure to prevent a biased witness from giving evidence demonstrates that the lawyer was derelict in his duties as an officer of the courts and by calling the witness acted in bad faith and caused the unnecessary waste of costs.[48] She concluded that a cost order against him personally was warranted and ordered him to pay 20% of the costs awarded Bailey.

Conclusions:

The amendment to the *Rules* concerning the duty of an expert witness and the contents of an expert witness' report were intended to clarify the role of the expert witness and to ensure that their opinions were unbiased, fair and objective. The release of the trial decision in *Moore v. Getahun* created a great deal of concern amongst the legal profession particularly with respect to the role of counsel in reviewing expert reports. If Madame Justice Wilson's ruling that the role of the expert witness had changed under *Rule* 53 and that counsel's prior practice of reviewing draft reports should stop, the rules of the sandbox had dramatically changed.

The release of the Court of Appeal decision in *Moore v. Getahun* has once again brought calm and order to the sandbox. The decision carefully reviews not only the role of the expert witness but also the role of counsel in their dealings with experts to ensure that advocates can fufil their duties to both their clients and the courts. The Court of Appeal decision endorses the Advocates' Society's Nine Principles as a thorough and thoughtful statement of the professional standards governing the interaction between counsel and the expert witness and should provide sage assistance to the legal profession.

The case reviews provided in this paper are but a few examples to use as cautionary tales for those experts that forget that the duty of every expert engaged by or on behalf of a party is provide opinion evidence that is fair, objective and non-partisan and that their opinion evidence is related only to matters that are within their area of expertise. The consequences of

[47] *Ibid* at para 46.
[48] *Ibid* at para 46.

crossing the line and becoming a “hired gun” or advocate are significant for both the expert and their client’s case.

The case of *Bailey v. Barbour* is presented to underscore that the duty to ensure that the expert opinion evidence is fair, objective and non-partisan is not simply the responsibility of the expert witness, but also that of the lawyer that calls the expert witness.

APPENDIX "A" – CITATIONS

1. *R v Mohan,* [1994] 2 SCR 9.
2. *Moore v Getahun*, 2014 ONSC 237.
3. *Moore v Getahun,* 2015 ONCA 55.
4. *Green Road Developments Ltd.v Stoney Creek (City)*, 27 OMBR 327, [1991] OMBD No. 2225.
5. *Citizens Coalition of Greater Fort Erie v. Niagara (Regional Municipality)* 77 OMBR 76, 11 MPLR (5^{th}) 157.
6. *Avery v Sault Ste. Marie (City)*, [2015] OMBD No. 147.
7. *Knapik v Toronto (City)*, 79 OMBR 328, (2013) OMBD No. 920.
8. *Grandoni v Niagara (Regional Municipality)*, [2015] OMBD 233.
9. *Dulong v Merrill Lynch Canada Inc.*, 80 OR (3d) 378, 2006 CanLII 9146.
10. *Fiorucci v Toronto (City),* [2015] OMBD No 165.
11. *Bailey v Barbour*, 2013 ONSC 4731.
12. *Bailey v Barbour,* 2013 ONSC 7397.
13. *Bailey v Barbour,* 2014 ONSC 3698.