Navigating through Legal Issues Impacting Appraisers

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Panel of Speakers

- Patrick Bourk (Game Show Host)
  Integro Insurance Brokers

- Darrell Thorvaldson, AACI, P.App
  VerraGroup Valuations Inc.

- Antoine Haucault
  Thompson Dorfman Sweatman, LLP
REALITY CHECK....IT’S HARD

Always Managing Pressures......(AMG)

- Business Pressures.....$$$$ to pay bills
- Competition – fee compression
- Time Pressures – infinite types
- Administration Demands
- Larger Firm – a dynamic
- Got to get it out.....
- Balancing all the different mindsets.....
- Interests and values CAN dovetail
Key Contract Deficiencies

- Flow from the **Engagement Letter**
  - Contract specs not followed

- Ambiguous instructions = problems

- Do what you say you’re going to do

- Assumption Disclosure - Critical
WHERE IT ALL STARTS

Appraisers complete contracts!

• Established in **Engagement Letters**
  • ID the Property – no dispute in rights appraised!
  • ID Party Requesting the Report
  • ID Client for whom services are provided
  • ID Intended User(s)
  • ID Intended Use, and no other use
• Confirm Scope of Work & Expectations!
  • Confirm details for Transfer of Ownership
  • Separate from Litigation / Complex Work
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Specific Legal Topics of Concern

- Retainer
- Proportionality
- E-discovery
- Court / Tribunal mediation
- Hot tubbing
Moore v. Getahun, 2015 ONCA 55

- January 29, 2015 decision re preparation and use of expert reports in the context of a medical malpractice action.

- Expert evidence constitutes an exception to the rule that witnesses may only testify as to facts, not opinions, and that it is the exclusive prerogative of the trier of fact to draw inferences from proven facts.

- The expert evidence exception operates where specialized knowledge is required to determine the implications of the bare facts and where the trier of fact is not competent to draw the necessary inferences unaided.

- **QUESTION:** How do we ensure that expert witnesses offer an unbiased scientific or technical opinion based upon their training and expertise, rather than act as “hired guns” who present unbalanced opinions unduly favouring the party that retains them?
Is it appropriate for counsel to review draft expert reports?

Common Law principle:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise [citation omitted]. An expert witness… should never assume the role of an advocate. (para. 52)

Main principles are:

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. 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.
The trial judge considered but ultimately rejected substantially all of the appraiser’s conclusions regarding the valuation of the plaintiffs' shares and made adverse comments regarding his lack of objectivity.

The client sues his own appraiser alleging that he has been negligent, has breached the terms of his engagement as well as the terms of the CUSPAP in failing to provide an unbiased and professional technical review report.
Paul v. Sasso et al. 2016 ONSC 7488

- The appraiser was also alleged to have lied to the trial judge about the extent of his discussions with the plaintiffs. Does he have a defence?

- The policy of the common law is to ensure that all witnesses are able to give their evidence free of fear of retaliatory law suits. This is not diminished when considered from the perspective of a party's own expert witness. To the contrary, the very strong policy of the common law has been that a party's own expert must be objective and not become a "hired gun".
Does this mean the client has to pay invoices for the testimony? Not necessarily so…

The alleged breach of contract and duty may well sustain a defence to the appraiser’s claim for fees. It does not follow that the appraiser’s immunity from civil suit confers upon him a question-free right to be paid for his services in all circumstances.

The expert evidence of Mr. Lansink was clearly rejected by Nolan J., but she did not do so in consequence of any conclusion that he had lied to her. This allegation is exceptionally serious and grave but of absolutely no relevance to the matters at hand.
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CUSPAP 2016 – Day to Day

• Proper and Respectful Communications
  • Upset clients drive liability – e.g. late delivery – communicate!!
  • Reinforces Ethics Standard Rule 4.2.1 requirement for Members to maintain communication with:
    • integrity,
    • impartiality,
    • objectivity,
    • independent judgement, and
    • ethical conduct

These are words with real meaning – ATTRACT A CLAIM
When the dust settles.....this comes out as the reason
CUSPAP 2016 – Day to Day

- Hypothetical Conditions & Extraordinary Assumptions
  - Make sure ANYONE who reads report CAN understand it
  - Disclosure now CUSPAP 2016 requirement with Value Statements
  - CUSPAP Real Property Appraisal Standard 7.9.2
    - Wherever an opinion or conclusion is stated within a report, the extraordinary assumption must be either stated in its entirety or reference provided to its exact location in the report

- Clear, Detailed & Understandable Reporting – Checklists
  - THE BEST claim prevention technique!
  - CUSPAP Real Property Appraisal Standard 7.14
    - Describe and Analyze All Data Relevant to the Assignment
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The Saviour: $600
Your Professional Liability Insurance Policy

The **Insurer** shall pay on behalf of the **Insured** all **Claim Expenses** and **Damages**, in excess of the Deductible, which the **Insured** is legally obligated to pay on account of a **Claim** first made against the **Insured** during the **Policy Period** or **Discovery Period**, if exercised, and reported to the **Insurer** during the **Policy Period** or Discovery Period, if exercised, for a **Wrongful Act** in rendering, or failing to render, **Professional Services** for others.

- Who is the “Insured”?
- “Claims Made and Reported” vs. “Occurrence-based” Policy Wording
- What is a “Wrongful Act”?
- What is the definition of “Professional Services”?

Section IV - Exclusions

- Claims covered under other insurance products (e.g. bodily injury or property damage)
- Uninsurable amounts (e.g. deliberate fraud, illegal profit or advantage)
- Claims outside the intent of the policy (e.g. claims made under a prior insurance policy)
- Loss mitigation exclusions (specific risks the insurer will not cover, e.g. nuclear hazard)
What is a “Claim” under your Professional Liability Insurance Policy?

✓ Specifically,
  • Any demand for monetary or non-monetary relief
  • A civil proceeding (e.g. statement of claim, writ of summons, etc.)
  • An arbitration proceeding
✓ If a disgruntled (former) client intends to seek compensation from you because they believe you made an error in the service you provided to them, report it!
✓ IF YOU ARE IN ANY DOUBT, REPORT IT!

Who are the key stakeholders in managing your Claim?

✓ Verity Claims Management (formerly Centra Claims Management)
  • Outsourced third-party adjuster – an extension of the Insurer, Trisura Guarantee Insurance Company
  • Responsible for document in-take, initial correspondence, conveying coverage position, introducing defence counsel
  • All Claims are reported to Verity – see the AIC website for the ‘Claim Incident Reporting Form’
✓ Trisura Guarantee Insurance Company
  • Trisura’s claims department makes the ultimate decision with respect to coverage
  • Involved in Litigation strategy – Trisura is kept apprised of the litigation by Verity
  • Responsible for managing loss reserves
✓ Integro Insurance Brokers
  • Advocate for AIC Members – If you have any questions or concerns with regard to how your Claim is being handled, we can assist in getting answers
✓ You should be involved in the adjudication of your Claim!
Legal Check In

Claims against appraisers are typical in their pattern

- Claims are typically brought by lenders looking to recoup loan shortfall
  - Lender is introduced to borrower, sometimes via mortgage broker
  - Lender requires appraisal report
  - Appraisal report is prepared and provided to lender who proceeds to supply borrower with funds
  - Borrower fails to make loan payments and lender forecloses
  - Lender then suits to recover whatever shortfall exists on the loan

Defences exist!
- Arguments of Reliance:
  - Reliance as it relates to the identity of the client
  - Reliance as it relates to the use of the report
- Defending the Content of the Report itself
  - The valuation was reasonable with a “tolerable variance” – it is an opinion after all
  - Methodology used was wrong but the end result was correct, or vice versa
- Lender has their own issues!
  - Lender failed to conduct proper due diligence into borrower
  - Lender unwisely lent too high a percentage of the appraised value
  - The appraiser cannot be blamed for the lender giving a bad loan!
CUSPAP 2016 – Day to Day

• Carelessness – Research and Documentation
  • Supervising Junior Staff – Oversights – Measurements

• Conflict of Interest and Disclosure
  • CUSPAP 5.11.2: direct, indirect, current or contemplated, personal interest in subject matter or outcome unless revealed in writing & acknowledged by client, AND revealed in report.

• Competence
  • CUSPAP 2.14: sufficient knowledge, skill and experience

• Interior Photographs (PIPEDA)
  • Office of Privacy Commissioner
### Appraisalardy

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### The Saviour
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### The Standards Are the Standards

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Hypothetical Situation

- Member receives threatening letter from client in November 2012 and phones the AIC in Ottawa for advice. They advise him to contact Centra but he doesn’t follow through.
- Member retires as of December 31st, 2012 and purchases “run-off” coverage
- In April 2013, Member is served with statement of claim and forwards it to Centra
- Insurer denies coverage due to the Member failing to report the matter within the Policy Period

Issues

- “Claims made and reported” policy wording vs. “occurrence-based”

Lessons Learned

- There is a proper protocol to reporting a claim – be familiar with it (see Section VII of the Policy and the member section of the AIC website)
- Be sure to document all actions taken and follow-up to ensure documents are properly received
Hypothetical Situation

- Members retained as independent appraisers by government authority to prepare an appraisal report of a property that is to be expropriated
- Members prepare appraisal report and provides it to government authority
- Property owner brings suit against the government and Members alleging that the government and the appraisers conspired to suppress the price of the subject property, this despite the expropriation not yet being finalized
- Motions to have the matter struck were unsuccessful. Appeals also failed.

Issues

- Despite evidence to suggest that the claim is completely without merit, the files remain open (since 2011)
- Defence Costs spent as of January 2016: $49,153.16 + $48,594.23 ($97,747.39) in legal fees and $5,814.56 + $4,043.35 ($9,857.91) in adjusting fees

Lesson Learned

- Even frivolous claims must be defended and any defence can be costly
Thank You