GUIDANCE FROM THE COURT OF APPEAL ON WORKING WITH EXPERT WITNESSES

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Concern about the impartiality of expert evidence seized the spotlight when a trial decision issued last year in *Moore* v. *Getahun*[1] criticized legal counsel for getting too involved in the preparation of an expert's written report. The trial judge concluded that the need for an expert witness to be impartial required that legal counsel not participate in the drafting of an expert report and further that the drafts, notes and communications created by an expert while forming his or her opinion be provided to the opposing party and court. The decision sent shockwaves through the legal community and among those who provide expert testimony. Fortunately, the Court of Appeal for Ontario[2] has restored relative calm in a decision released this week.

The Trial Decision in *Moore* v. *Getahun*

Expert evidence is routinely required to assist the court with specialized issues. The case in question involved allegations of medical malpractice resulting in permanent injury to the plaintiff. Both he and the defendant proffered expert evidence (from other physicians) as to whether the defendant physician had met the required standard of care.

In hearing the expert evidence, and trying to determine which opinion was more helpful, the trial judge grew concerned when it came to light, through cross-examination, that the defendant's expert had spent approximately an hour and a half on the phone with legal counsel reviewing the expert's draft report:

> …the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.

The trial judge was so concerned she also ordered the expert to produce all of his drafts, notes and communications with legal counsel. Ultimately, the trial judge preferred the evidence of the plaintiff's expert and the defendant lost the trial.

The Appeal

The case drew widespread attention in legal circles due to the comments of the trial judge regarding counsel's involvement in the preparation of the expert report. It had been generally understood that such assistance was not improper so long as the opinion was truly held by the expert. Several interested groups sought and were granted intervener status to make submissions to the Court of Appeal for Ontario regarding the propriety of counsel working with an expert in drafting an expert report.

The Court of Appeal considered the issue and disagreed with the trial judge on two major conclusions.

i. **Communication during the formation of the opinion**

While careful not to diminish the fundamental importance of an expert's duty "to provide opinion evidence that is fair, objective and non-partisan"[3], the appeal court recognized the benefit in having counsel participate in the preparation of an expert report. Specifically, counsel can and should help ensure the report is responsive to the legal issues, understandable, and does not contain extraneous, irrelevant information. Said Justice Sharpe, writing for the court (Laskin J.A., Simmons J.A.):

> I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.
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> …
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> Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.[4]

ii. **Disclosure of drafts, notes and communications**

The second significant area where the Court of Appeal disagreed with the trial judge was with respect to the disclosure of consultations regarding draft reports. The court disagreed that consultations between counsel and an expert witness need to be documented and disclosed to an opposing party. Reiterating the importance of preserving litigation privilege - which protects communications between counsel and a third party where the dominant purpose of the communication is preparation for litigation- the court held these communications were protected from disclosure.

There is, however, an important *caveat*. Where there is a factual foundation to support a reasonable suspicion counsel has improperly influenced an expert or interfered with an expert's duties of independence and objectivity, the court may order disclosure of consultations between them. [5] In the words of Justice Sharpe:

> In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. As I have already mentioned, it is common ground on this appeal that it is wrong for counsel to interfere with an expert's duties of independence and objectivity. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel

> communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions….
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> Absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness. Evidence of an hour and a half conference call plainly does not meet the threshold of constituting a factual foundation for an allegation of improper influence. In my view, the trial judge erred in law by stating that all changes in the reports of expert witnesses should be routinely documented and disclosed. She should not have ordered the production of Dr. Taylor's drafts and notes.

Lessons Learned

The decision in *Moore* v. *Getahun* will be studied for years to come in both the courtroom and classroom. Although the trial decision appeared to have gone too far, and was the source of strong reaction and condemnation by both counsel and the expert community, the decision and appeal that followed, have served as an important reminder of the appropriate relationship between counsel and an expert witness. For that we should all be grateful.

About the Author

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[1] 2014 ONSC 237 (Wilson J.)

[2] *Moore* v. *Getahun*, 2015 ONCA 55

[3] *ibid*, at para 52

[4] *ibid*, at paras 62-64

[5] Although the appeal court disagreed with the trial judge regarding the handling of the expert evidence, it held the trial decision was not affected by those errors and a new trial was not in the best interests of justice. The appeal was dismissed.