The Court of Appeal's Decision in *Moore v Getahun*

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On January 29, 2015, the Ontario Court of Appeal held that counsel and their experts are permitted to confer in a way that does not interfere with an expert's impartiality and meets the standards of conduct prescribed by both the expert's and counsel's respective professional regulating bodies. These communications do not need to be committed to writing to avoid increased delay and cost.

Counsel is to ensure that the expert: (1) understands its legal duty to the court; (2) complies with applicable rules of procedure and evidence; (3) produces an opinion that is relevant to the issues in dispute; and (4) prepares a report that is comprehensible for and useful to the court.

Communications between counsel and the expert will have the protection of litigation privilege unless there are reasonable grounds to suspect that counsel communicated with the expert in a way that is likely to interfere with the expert's duties of independence and objectively. Only "the foundational information" that supports and underpins the opinion must be disclosed along with the expert's report to be relied on at trial.

Moore v Getahun – On Appeal

On January 29, 2015, the Ontario Court of Appeal released its decision [2015 ONCA 55] on appeal of Justice Wilson's Reasons for Decision dated January 14, 2014 in *Moore v Getahun* [2014 ONSC 237].

There is a discussion of *Moore v Getahun* in my conference paper titled "Experts in Environmental Litigation". This addendum supplements the paper in light of this recent Ontario Court of Appeal ruling.

Background

Mr. Moore, then 21, was performing tricks on his motorcycle when he broke his arm. He visited a hospital seeking medical attention for his injury. The emergency room doctor attempted to realign Mr. Moore arm and applied a full circumferential cast to Mr. Moore's arm. The next day, in pain, Mr. Moore attended at a second hospital where the attending doctor diagnosed that Mr. Moore had compartment syndrome. Surgery averted further damage to Mr. Moore's arm. Mr. Moore brought a medical malpractice suit against Dr. Getahun, the initial emergency room attending doctor.

The Decision at Trial

The matter went to trial. In her trial decision, Justice Wilson noted that one of the medical experts and counsel conferred about the experts' report. In fact, there was a telephone call that lasted about 90 minutes during which the expert doctor and counsel discussed the doctor's draft report.

Justice Wilson declared that it was inappropriate for counsel to review draft expert reports. She wrote:

> 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 report are no longer acceptable. [para. 50-52].

The Decision of the Ontario Court of Appeal

The Ontario Court of Appeal summarized its view of Justice Wilson's finding:

> The trial judge was obviously of the view that the then current practice and the ethical rules and standards of the legal profession were inadequate to deal with the "hired gun" problem. Her solution was to strictly control discussions between expert witnesses and counsel and to require that all discussions be documented and subject to disclosure and production. [para. 45]

In disagreeing with the trial judge, Justice Sharpe, writing for the Court of Appeal, cited three ways in which expert witness objectivity is fostered in the law and in practice:

> First, the ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witness. [para 59]
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> Second, the ethical standards of other professional bodies place an obligation upon their members to be independent and impartial when giving expert evidence. [para 60]
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> Third, 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. [para 61]

In commenting on Justice Wilson's dictum about communications between expert witnesses and counsel, Justice Sharpe disagreed with the trial judge:

> 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 (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 comprehensible. 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's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues. [para 63]
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> Counsel plays a crucial mediating role by explaining the legal issues to the expert witness and then by pressing 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. [para 64]

> Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. [para 65]

The Court of Appeal proceeded to assess: (1) if there is an obligation to make production of communications between counsel and expert witnesses, or (2) if such communications have the protection of litigation privilege.

The Court stated the basic principle from *Blank v Canada (Ministry of Justice)*, 2006 SCC 39, that "[l]itigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation" [para 68]. The court in *Blank* refers to this principle as the "zone of privacy".

Justice Sharpe wrote:

> 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 witnesses's duties of independence and objectivity, the court can order disclosure of such discussions. [para 77]
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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. [para 78]

The Court of Appeal affirmed that the expert's report to be relied on at trial and other information mandated by Rule 53.03(2.1) must be disclosed in the litigation. This other information has been called "the foundation information" for the expert's opinion as referred to in *Conceicao Farms Inc v Zeneca Corp.* (2006), 83 O.R. (3d) 792 (C.A.).

Ontario's Rule 53.03(2.1) states:

> (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,
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> 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. O. Reg. 438/08, s. 48.

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