# ***Moore v. Getahun*: Practical Questions About Expert Witness Interactions**

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## I. Introduction

In January 2015, the Court of Appeal released its highly-anticipated decision in *Moore v. Getahun*. The case was a medical malpractice action that occasioned great interest from the civil litigation bar because of its implications for the relationship between counsel and expert witnesses. The decision of the trial judge held that the 2010 Amendments to the Rules of Civil Procedure had fundamentally reshaped the way counsel was permitted to interact with experts, and specifically that counsel were forbidden to discuss draft reports with their experts. Moreover, it concluded that all discussions between counsel and experts must be documented and were subject to disclosure.

The Court of Appeal reversed the trial court on those issues. In doing so, it affirmed that existing practices regarding interactions with expert witnesses are both permissible and to be encouraged. But although the Court did not introduce significant new rules in this area, it did provide considerable guidance to the bar regarding the way in which counsel should interact with expert witnesses and the extent to which communications or drafts are subject to disclosure. This paper attempts to provide some practical advice to counsel who want to know what effect *Moore v. Getahun* will have on their day-to-day work with expert witnesses.

## II. The Court of Appeal's Decision

The decision is well-written and insightful, and I would encourage all counsel who have a civil litigation practice in which expert witnesses might be used to read it in its entirety. But if you are looking for a Cliff's Notes version, these are the most important paragraphs:

> [62] 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.

[63] 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 acknowledgment 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.

[64] 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.

[65] 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. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.

[66] For these reasons, I reject the trial judge's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end. However, as I will discuss below, the trial judge's unwarranted criticism of the appellant's counsel on this basis did not, in my view, affect the outcome of the trial.

. . .

[68] The starting point for analysis is that such consultations attract the protection of litigation privilege. Litigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation. As explained by the Supreme Court of Canada in Blank v. Canada (Minister of Justice), 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319, at para. 27, the object of litigation privilege "is to ensure the efficacy of the adversarial process", and "to achieve this purpose, parties to

litigation… must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure." These concerns are important in the context of the preparation of expert witnesses and their reports.

[69] In Blank, the court noted, at para. 34, that litigation privilege creates "a 'zone of privacy' in relation to pending or apprehended litigation." The careful and thorough preparation of a case for trial requires an umbrella of protection that allows counsel to work with third parties such as experts while they make notes, test hypotheses and write and edit draft reports.

[70] Pursuant to rule 31.06(3), the draft reports of experts the party does not intend to call are privileged and need not be disclosed. Under the protection of litigation privilege, the same holds for the draft reports, notes and records of any consultations between experts and counsel, even where the party intends to call the expert as a witness.

[71] Making preparatory discussions and drafts subject to automatic disclosure would, in my view, be contrary to existing doctrine and would inhibit careful preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings.

[72] I recognize that the wisdom of extending litigation privilege to the preparation of expert reports has been questioned by some judges: see Browne (Litigation Guardian of) v. Lavery, (2002) 2002 CanLII 49411 (ON SC), 58 O.R. (3d) 49 (S.C.), at paras. 65-71; Aviaco International Leasing Inc. v. Boeing Canada Inc., 2002 CanLII 21293 (ON SC), 2002 CanLII 21293, [2002] O.J. No. 3799 (S.C.), at para. 16. However, the law currently imposes no routine obligation to produce draft expert reports: Conceicao Farms Inc. v. Zeneca Corp. (2006), 2006 CanLII 31976 (ON CA), 83 O.R. (3d) 792 (C.A.), at para. 14; Mendlowitz v. Chaing, 2011 ONSC 2341 (CanLII), 2011 ONSC 2341 (S.C.), at paras. 20-24.

[73] It is important to note that the litigation privilege attaching to expert reports is qualified, and disclosure may be required in certain situations.

[74] The most obvious qualification is that the Rules of Civil Procedure require disclosure of the opinion of an expert witness before trial. If a party intends to call the expert as a witness at trial, rule 31.06(3) entitles the opposite party on oral discovery to "obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined".

[75] As well, the party who intends to call the expert witness is required to disclose the expert's report and the other information mandated by rule 53.03(2.1). The result is that what has been called "the foundational information" for the opinion must be disclosed: Conceicao Farms, at para. 14. Bryant, Lederman and Fuerst refer to this as an "implied waiver" of privilege over the facts underlying an expert's opinion that results from calling the expert as a witness: Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada, 2014), at para. 14.220. These authors favour restricting the implied waiver "to material relating to formulation of the expressed opinion" (at para. 14.224). They state that caution should be exercised before requiring "wide-ranging disclosure of all solicitor-expert communications and drafts of reports", as such a practice could encourage "a general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem" (at para. 14.226).

[76] The second qualification is that, as stated in Blank, at para. 37, "litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration." Litigation privilege yields where required to meet the ends of justice, and "[i]t is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day": Blank, at para. 44.

[77] 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. See, for example, Ebrahim v. Continental Precious Minerals Inc., 2012 ONSC 1123 (CanLII), 2012 ONSC 1123 (S.C.), at paras. 63-75, where the court ordered disclosure of draft reports and affidavits after an expert witness testified that he did not draft the report or affidavit containing his expert opinion and admitted that his firm had an ongoing commercial relationship with the party calling him.

[78] 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.

## IV. What Does That Mean in Practice?

Where does the Court of Appeal's decision leave lawyers who retain expert witnesses to assist with litigation? The decision provides guidance on at least three related issues: counsel's interactions with those witnesses, the need to document or preserve communications and drafts, and the extent to which disclosure of such materials may be compelled.

Interactions with Witnesses

With regard to counsel's communication with expert witnesses, the Court of Appeal made clear that:

- It is entirely proper for counsel to speak with an expert about both their opinion and their report, and to actively participate in the development of that opinion and the drafting of the report.
- In fact, counsel are strongly encouraged to engage in such communications, both to ensure the expert is aware of their duty to the court and to assist the expert in crafting a report that complies with applicable rules, is focused on the relevant issues, contains all of the necessary information, is reliable, and is clear and easily understood.
- The 2010 Amendments to the Rules of Civil Procedure did not impose any new limitations on counsel's communications with experts.

In general, then, counsel have significant latitude to work closely with an expert to develop and then articulate an opinion on the relevant issues. This is of particular importance when dealing with experts who are not experienced witnesses.

Of course, there are limits on the extent to which counsel can shape expert opinion. Throughout its decision, the Court emphasized that expert witnesses have a duty to provide opinion evidence that is fair, objective, and non-partisan. It also noted the ethical standards of the legal profession forbid counsel to engage in any practice likely to interfere with the

independence and objectivity of expert witnesses. But what does that mean for counsel with regard to how they may interact with their expert witnesses? The Court noted a few rules:

- Most importantly (in my view), counsel must not persuade or attempt to persuade an expert to give an opinion that the expert does not genuinely believe.
- Counsel must not communicate with an expert in a manner likely to interfere with the expert's independence or objectivity.
- At all times, counsel must remain alive to the expert's duty to remain objective and impartial.

Anyone seeking more specific guidance should direct their attention to The Advocates' Society's *Principles Governing Communications with Testifying Experts*, which was made an Appendix to the Court's decision. That documents sets out a number of professional standards relevant to interactions with experts, including:

- Counsel must ensure from the outset of the expert's retention that the expert is fully informed of the role of an expert, the duties he or she owes, and particularly the requirements of independence and impartiality.
- At or near the outset of their engagement, experts should be given any rules or forms that apply to the expert's conduct in the proceeding, counsel should explain those standards, and the expert's acknowledgement of those standards and undertaking to abide by them should be obtained. Counsel may wish to have the expert fill out Rule 4.1.01's expert certificate at the outset rather than waiting until the expert's report is complete.
- Counsel should explain to the expert the potential consequences if the expert is shown to lack independence or objectivity (including reduced or no weight being given to the evidence, or the evidence being excluded entirely). Counsel should also discuss some of

the indicia of a lack of independence or impartiality, such as selective use of information, giving opinions outside the witness' expertise, and the use of inflammatory or argumentative language.

- Counsel must ensure experts are given all of the relevant information necessary to form an independent and objective opinion, and should ensure experts understand they can and should question the information and assumptions that have been provided to them.

In general, counsel should take all necessary steps to ensure the expert is aware of his or her duties of objectivity and impartiality, has all of the necessary information, and is providing an opinion he or she genuinely holds.

Documentation and Preservation of Communications or Drafts

The Court specifically stated that it was not necessary for counsel or experts to document all of their communications or changes to draft reports.

Beyond that finding, however, the Court did not provide any clear rules as to what (if anything) should be documented in writing, and what (if anything) must be preserved. We may nonetheless be able to extract some guidance on this point:

- Because it did not specifically opine on the question, any existing requirements that may apply regarding documentation or preservation of expert work and communications were not disturbed by the Court's decision. This is particularly relevant with regard to foundational information, which is discussed at greater length below in relation to disclosure.
- The Court noted that requiring wide-ranging disclosure could have the undesirable effect of encouraging counsel to destroy drafts to avoid disclosure. From this, we might assume

that once drafts or notes exist, failure to preserve those documents (and certainly intentional destruction of them) is a practice that should be avoided.

- The Advocate's Society *Principles* specifically address this issue, stating that experts should be instructed not to destroy relevant records, including those relating to the expert's retainer, analysis or evidence, and communications with counsel or the party. Such destruction, should any disclosure of the expert's file later be ordered, may adversely impact the expert's credibility or result in exclusion of their evidence.

Finally, it is worth noting as well that several counsel I spoke with stated that it was their practice to voluntarily document their communications with expert witnesses because they found it helpful as a defensive measure should any questions be raised about the expert's independence or counsel's involvement in the shaping of the expert's report.

Disclosure and Litigation Privilege

In perhaps the most controversial portion of its decision, the Court held that interactions between counsel and expert witnesses, and the expert's draft reports, are protected by litigation privilege *even after the expert is called to testify at trial*. That conclusion is notable because it is at odds with some case law from lower courts and other jurisdictions. On a practical level, the Court's decision has the following effect:

- Draft reports, notes, and records of communications between experts and counsel are protected from disclosure by litigation privilege. That privilege continues even if an expert is called to testify.
- The litigation privilege, however, is not absolute and certain types of disclosure may be required.

- Specifically, in all cases counsel must disclose before trial the opinion of any expert witness it intends to call, and must also disclose the "foundational information" for the opinion (that for which Rule 53.03(2.1) mandates disclosure).
- Additionally, litigation privilege can be overridden where necessary to meet the ends of justice. In this specific context, the Court found that where the opposing party can show that there is reasonable grounds to believe counsel improperly influenced a witness, the trial judge may order disclosure of draft reports or notes of discussions between counsel and the witness.

So where does that leave an opposing counsel seeking to expose the potential bias or partiality of an expert?

- If he or she can show there is a "reasonable suspicion that counsel improperly influenced the expert," then they can request the court order disclosure of communications or drafts.
    - The Court provided in paragraph 77 an example of when that standard might be met, taken from a 2012 Superior Court case: the expert witness testifies that he did not draft his report or his affidavit and that his firm had an ongoing commercial relationship with the party on whose behalf he was testifying.
    - Conversely, the Court's decision makes plain that it is not enough to simply show that counsel and the witness discussed—even at length—draft reports and that changes were made to the report as a result of those discussions.
    - Between two opposing poles, the Court did not attempt to set out with specificity the contours of the "reasonable suspicion" standard. Counsel looking for guidance on that issue will have to wait for the case law to develop through application in trial courts.

- Absent such a "reasonable suspicion" showing, counsel are left with that old standby: the adversarial process. Any concern that a witness was improperly influenced, did not approach the manner objectively, has assumed the role of an advocate, or has otherwise failed to remain independent and impartial should be explored in cross-examination. Where such questioning proves fruitful, judges can and do reject or limit the weight of the evidence provided by that witness.

**Conclusion**

Although it has occasioned considerable interest from the bar, *Moore v. Getahun* is significant not as a sea change in the law but rather as an affirmation of existing practice regarding the use of expert witnesses. Counsel should not hesitate to confer with their experts, test their opinions, and participate in the shaping of expert reports, so long as they ensure throughout that the experts understand their duties to the court and genuinely believe the opinions they give in their reports and testimony. Moreover, the Court has not imposed any new requirements regarding documentation of such interactions or (absent a showing of impropriety) production of communications and draft reports.