Civil Litigation

# Moore v. Getahun has huge implications for the litigation bar

Toronto litigator and arbitrator Marvin J. Huberman says one of the more interesting aspects of the Ontario Court of Appeal's ruling in *Moore v. Getahun*, 2015 ONCA 55 (CanLII), is that it could signal a huge change to the way experts are cross-examined.

In *Moore*, the appellate court rejected a lower court's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end.

"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," wrote Justice Robert Sharpe.

The Court of Appeal went on to say that such a rule would encourage the hiring of "shadow experts" to advise counsel, which would be "an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay."

Huberman tells AdvocateDaily.com that while *Moore* involved a medical malpractice action, it will have implications for the civil litigation bar generally.

He says the Court of Appeal decision is comprised of three key issues: consultation and collaboration between counsel and an expert witness is proper; draft reports and notes of consultation between experts and counsel are subject to a qualified litigation privilege; and the court can ignore the qualified litigation privilege if the opposing party can show reasonable grounds to suspect that counsel communicated with an expert in a manner likely to interfere with the witness's duties of independence and objectivity.

However, Huberman says the bar to waive qualified privilege is quite high.

“You would need a factual foundation to support a reasonable suspicion. For example, if the other side tried to show evidence of a lengthy call between counsel and expert, that would not constitute the necessary factual foundation for allegations of improper influence. You would need more than that,” he says.

What’s significant about *Moore*, says Huberman, is a section of the decision where Sharpe sets out documentation and disclosure of consultations regarding draft reports.

"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," the decision states.

"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," it continues.

Huberman notes that the ruling does not explicitly state that that privilege is waived once the expert takes the stand.

"In this case, it would seem from the court's reasons that this is no longer the case. In fact, it says unconditionally that the draft reports and notes and consultations are subject to qualified litigation privilege unless you can show grounds that there's some problem that interferes with independent objectivity,” he says.

Huberman says a case could be made that the Court of Appeal has now established the law as being that the litigation privilege is not waived once the expert takes the stand.

"In the past, as soon as the opposing expert takes the stand you could then question him or her in cross-examination about the communications, the draft reports, the letters, etc.,” he says.

“If what the Court of Appeal is saying here is that the litigation privilege is not waived when the expert is put on the stand, then it takes away from a tremendous ability of opposing counsel to weaken the opposing side's case by precluding cross-examination of the expert on a whole

area that would otherwise be open."

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