
2015

Legal Counsel Communications with Expert Witnesses

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The role of the expert witness continues to be a hot topic of discussion. Two recent decisions in the Ontario Superior Court highlighted the controversy that exists regarding the role of the expert witness. The decisions in *Bailey v. Barbour* and *Moore v. Getahun* challenged two very common practices between legal counsel and their experts and the impact these practices can have on the perceived independence of an expert; namely, communication between the expert and legal counsel, and the provision of draft expert reports.

BAILEY V. BARBOUR

The first case of *Bailey v. Barbour*, a decision by the Honourable Madam Justice Healey, is an unusual case highlighting the distinctly different roles and behavioural expectations of lawyers and expert witnesses, and the dangers that exist when experts are perceived to be an extension of the advocacy team. Justice Healey made a personal cost order against the lawyer, after concluding that he placed an expert witness on the stand with a known bias. The applicant had requested the release of all electronic communication between the respondent's lawyer and his expert, and the Court found that the e-mails established that the expert's behaviour was that of an advocate rather than an independent and objective expert. In this case, the subject communication included direct and discourteous remarks pertaining to another expert witness' report in addition to evidence that the expert provided questions to the lawyer to challenge the applicant's position. The decision called into question the appropriate level of communication between legal counsel and an expert.

MOORE V. GETAHUN

The second case of *Moore v. Getahun* has garnered national attention for certain conclusions within the Ontario Superior Court decision with respect to the conduct of experts in the preparation of their reports. The Honourable Madam Justice Wilson concluded that *"it is improper for counsel and experts to discuss the expert's draft report for the purpose of reviewing and shaping,"* and 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."* The judge also stated that, *"The practice formerly may have been for counsel to meet with experts to review and shape expert reports and opinions. However, I conclude that the changes in Rule 53.03 preclude such a meeting to avoid perceptions of bias or actual bias. Such a practice puts counsel in a position of conflict as a potential witness, and undermines the independence of the expert. If counsel seeks clarification or amplification after receipt of an expert's final report, all communication should be in writing, and any communication should be disclosed to the opposing party."* As evidenced by Justice Wilson's decision, there appears to be a prevailing concern that lawyers, upon reviewing a draft report, could unduly influence an expert's opinion.

CICBV FACTUM

As CBVs, we often act as expert witnesses, working closely with legal counsel throughout all aspects of our engagement and often issuing draft reports. As a result, the above-mentioned decisions had the potential to significantly impact our generally accepted practices. In response to the *Moore v. Getahun* case specifically, the CICBV formed a taskforce, sought and was granted leave to intervene as a friend of the court before the Court of Appeal, along with five other parties, including the Advocates' Society, the Criminal Lawyers' Association, the Ontario Trial Lawyers' Association, the Holland Group, and the Canadian Defence Lawyers' Association.

In its Factum, the CICBV, along with the other interveners, requested that the Learned Trial Judge's statements be reversed, citing the following concerns:

- a) Prohibition of interactions between counsel and the expert may inhibit the expert from properly and effectively performing their role, which is to assist the trier of fact in understanding evidence outside their range of expertise;
- b) Prohibition of interactions is impractical and could result in unintended consequences such as unnecessary cost and delay; and
- c) Prohibition of interactions and absolute disclosure of the expert's file could result in a decrease of two primary purposes of the Rules of Civil Procedure, (i) access to justice and (ii) the early resolution of proceedings.

The Factum also stated that, *"The common law has evolved to strike the appropriate balance between ensuring an expert's impartiality and affording protection to the communications between counsel and an expert. The statements of the Learned Trial Judge, which in its result, prohibits interactions between counsel and an expert and requires absolute disclosure of all communications between the expert and counsel, is contrary to the common law and the amended Rules [in Ontario]."*

The appeal was heard during the week of 22 September 2014. Aird & Berlis LLP acted as external counsel for the CICBV on this matter.

Decision of the Ontario Court of Appeal (*Moore v. Getahun*)

The Ontario Court of Appeal released its decision on 29 January 2015, unanimously rejecting the decision of the trial court judge in the matter of *Moore v. Getahun* with respect to communications between legal counsel and experts regarding draft reports.

The Court of Appeal stated that, *"it is widely accepted that consultation between counsel and expert witnesses in the preparation of [expert] reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims"* (para. 49). The decision went on to say that, *"consultation and collaboration between counsel and expert witnesses is essential"* (para. 63) and that in some highly technical areas, *"expert witnesses require a high level of instruction by the lawyers which may necessitate a high degree of consultation involving an iterative process through a number of drafts"* (para. 55). The Decision references a document presented to the court by the Advocates' Society, entitled, [Principles Governing Communications with Testifying Experts](#), saying that *"ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witnesses"* (para. 57). The Court of Appeal further held that draft reports and notes and communications between an expert and a lawyer are not required to be produced unless *"a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert"* can be established (para. 78).

Principles

In response to requests for clarity and guidance around proper communication between legal counsel and experts, the Advocates' Society developed nine principles to help guide members of the profession. As mentioned previously, the document was referenced in and attached to the Court of Appeal decision, and is also attached to this article. In our opinion, the three key principles relating to the two issues raised in this article are summarized as follows:

- PRINCIPLE 1 states that *"An appropriate degree of consultation with testifying experts is essential to fulfilling this duty in many cases. An advocate can have appropriate input into the*

format and content of an expert's report before it is finalized and delivered." It goes on to state that the advocate must *"ensure that the expert's report is focused, intelligible and properly responsive to the questions posed, and that any stated factual premises or assumptions are accurate."* In our experience, and as acknowledged by the Advocates' Society, it is unlikely this outcome could be achieved without ongoing consultation between the expert and counsel prior to the release of a final report.

- PRINCIPLE 6 advises advocates to take reasonable steps to protect an expert witness from unnecessary criticism as it relates to the disclosure of draft reports and any communications between the advocate and the expert. It states, *"advocates should generally err on the side of caution and proceed on the basis that disclosure of this nature will be required. The advocate should take reasonable steps to reduce the risk that extensive changes will have to be made to draft reports."* The onus is also on the expert to ensure that they fully understand the issue at hand, that they understand and agree with the facts and assumptions upon which their opinion will be based, that they have requested and been provided with all relevant documents, and that they don't offer analysis or opinions on matters that lie outside the expert's area of expertise.
- PRINCIPLE 9 states that, *"an advocate should consider an agreement with opposing counsel related to the non-disclosure of draft expert reports and communications with experts."* While production of the files of the expert may be important in certain cases where a lack of objectivity or independence is suspected, in most cases, it is a time-consuming process that, in the end, does not benefit either party or the court.

The nine principles were developed to address the conduct of advocates in their dealings with experts to ensure that advocates can fulfill their duties to their clients and to courts without compromising the independence or objectivity of testifying experts or impairing the quality of their evidence.

Impact on CBVs

The Court of Appeal's decision really did not change the way we, as CBVs, perceive our role as expert. The CICBV has long-established practice standards, educational requirements and ethical guidelines, which support and promote the integrity of the CBV profession and provide a framework for CBVs to act independently and objectively in preparing expert reports. However, there is now greater clarity around the subject with the Advocates' Society's [Principles Governing Communications with Testifying Experts](#) (which we strongly encourage CBVs to read) in addition to comments from the Court of Appeal decision supporting the Advocates' Society's principles, explicitly discouraging requests to produce draft reports and even going so far as to suggest legal counsel consider agreements with opposing counsel to prevent it from occurring.

However, it is important to reiterate that under certain circumstances, CBVs may be compelled to disclose a draft report. As the Court of Appeal's decision stated, *"if a party seeking production of draft reports or notes of discussions between counsel and an expert can establish reasonable grounds to suspect that counsel interfered with the expert's duties of independence and objectivity, the court can order disclosure"* (para. 77). So we as a profession have to ensure that our draft reports are of the highest quality and provided to legal counsel with the objective of confirming the facts and assumptions we have relied upon and ensuring that our report is clear and concise, particularly to someone who is not a CBV.

In our experience, ongoing communication with legal counsel is integral to the process of providing an independent opinion on value or losses and this does not impede on our ability to act independently. To restrict the highly effective processes through which an opinion is reached, namely, ongoing communication between legal counsel and the expert, and the issuance of draft reports, would have undermined the process of obtaining a sound, clearly communicated, independent opinion. One thing is certain, Justice Wilson's decision and subsequent judgment by the Court of Appeal led to a meaningful discussion among litigation professionals, both the experts and legal counsel. This has resulted in an increased awareness of the role of experts in litigation matters, which should prove to strengthen the processes, and in the end, the validity, of expert opinions.

ABOUT THE AUTHORS

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