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Expert Evidence In the Wake of *Moore v. Gehahun*

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Estate litigation often involves the use of expert evidence on such questions as whether a person had "testamentary capacity" when he or she made their Will. In 2010, the law respecting the use of expert evidence was the subject of changes to the *Rules of Civil Procedure* - experts would now explicitly owe an obligation of neutrality directly to the Court and a Certificate from the expert acknowledging the nature and content of the expert's obligations was mandatory.

One question that has lingered is to what extent the party hiring the expert could interact with him or her after the retainer and before the conclusion of the expert's final report and what sort of documentation was counsel required to generate to record contact with the expert. Opinions varied. Certainly if the expert is biased, his or her evidence cannot be adduced; *Alfano v. Piersanti*, 2012 ONCA 297 (Ont. C.A.). Beyond that, however, the cases have provided mixed guidance – for example, dicta noted that communications between counsel and the expert are compellable and are not privileged once the decision to call the expert has been made; *Bailey v. Barbour*, 2013 ONSC 4731 (Ont. S.C.J.). As a result, counsel has had to be quite circumspect in ensuring that the expert is objective and seen as objective if the evidence is to be adduced and relied upon by the trial judge.

In ***Moore v. Getahun*, 2015 ONCA 55 (Ont. C.A.)**, released on January 29, 2015, the Court of Appeal provides broad guidance respecting the preparation and use of expert evidence. Sharpe J.A. for the Court of Appeal held that the following are correct propositions of law:

1. The test for whether an expert is properly qualified to opine remains the criteria set out by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 23: "[t]he expert evidence exception [to the hearsay rule] operates where specialized knowledge is required to determine the implications of the bare facts and where the trier of fact is not competent to draw the necessary inferences unaided": para. 33.

2. The 2010 amendments to the *Rules of Civil Procedure* are important – "**Rule 53.03 establishes the framework that parties must follow when they intend to call an expert witness at trial**": para. 36.

3. Rule 53.03, however, has not changed the nature of expert evidence. Rather, "these changes represent a restatement of the basic common law principle that it is the duty of an expert witness "to provide opinion evidence that is fair, objective and non- partisan": para. 52, citing *Henderson v. Risi*, 2012 ONSC 3459 (Ont. S.C.J.).

4. "While some judges have expressed concern that the impartiality of expert evidence may be tainted by discussions with counsel... banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority...": para. 55. Indeed some areas of law are so notoriously complex that a high level of instruction and consultation between the expert and counsel is required.

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5. "[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": para. 62.

6. "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": para. 64.

7. One must remember that there are adequate safeguards to preserve the objectivity and neutrality of the expert:
a. "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 witnesses": para 57.
b. "the ethical standards of other professional bodies place an obligation upon their members to be independent and impartial when giving expert evidence": para. 60.
c. "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.

8. Litigation privilege attaches to communications between counsel and expert as a matter of principle. "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**": para. 70. The rationale is a simple one: "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": para. 71.

9. The privilege that attaches is qualified. The Rules provide for disclosure of reports before trial and opposing parties are entitled to examine the expert for discovery. The "foundational information" for the opinion must be disclosed. "[C]aution 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": paras. 73-75.

10. Another qualification is that **"litigation privilege [is not a] shield for improper conduct. ... 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' duties of independence and objectivity, the court can order disclosure of such discussions"**: para. 77. "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.

In terms of our own practices, it remains important for counsel to document their communications with experts as a matter of professional competence and prudent protection against future allegations that counsel failed to deal with an expert properly.

However, *Moore v. Getahun* returns the law to a principled position: these communications are litigation privileged provided that they are not part of the "foundational information" upon which the opinion is based. Thus, the initial retainer letter and updates of the evidence relevant to the expert's opinions must be prepared with disclosure in mind. Other than such documents, all other correspondence should be marked "Privileged" and counsel should resist any attempts by opposing counsel for disclosure.

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