

Ontario Superior Court Tightens Rules: 'Your' Expert Witness May Now Be Anything But

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A recent decision of the Ontario Superior Court of Justice sheds light on the law regarding expert-witness evidence in Ontario, with a focus on maintaining the independence of experts.

In her decision in *Moore v. Getahun*, Madam Justice Janet N. Wilson found that the practice of some Ontario lawyers of reviewing expert reports and providing comments before the reports are finalized is improper.

She also commented that a lawyer's instructions to his/her client's expert witness must be given in writing and must be disclosed to opposing counsel. Accordingly, all communications with that expert in preparing their report will be scrutinized at trial.

Background

Lawyers frequently recommend that their clients retain subject-matter experts to assist in litigation. In the commercial litigation context, we commonly advise clients to engage experts to prepare business valuation or accounting opinions. Often, these expert reports help the parties understand their case and reach a resolution of their matter before trial.

However, should the matter proceed to trial, the expert is expected to help the court understand matters outside the court's technical expertise – like financial accounting. The courts require experts to be fair, objective and non-partisan. To be sure, this requirement has been codified under Rules 4.1.01 (1) and 53 of the *Rules of Civil Procedure* which, among other things, require that experts sign a form acknowledging their duties to the court.

That being said, it is the client, and not the court (or the taxpayers of Ontario), who pays for the expert's time. Perhaps as a result, the practice has developed that lawyers review draft expert reports in advance and provide comments so as to help the expert clarify or amplify his or her evidence.

In some cases, lawyers were merely providing the expert with corrections on grammar and punctuation. In other cases, however, the integrity of the expert reports and testimony before the courts may have been affected.

In an effort to curb the trend and remove any doubt as to whether experts truly are “hired guns,” Madam Justice Wilson issued a lengthy decision on the role of experts in litigation in Ontario.

Decision in *Moore v. Getahun*

While *Moore v. Getahun* was a personal injury matter, the findings of the court will affect all civil litigation in the province. In her decision, Madam Justice Wilson stated as follows:

“...the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, 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 expert report are no longer acceptable.”

The court went on to state that where it is necessary for counsel to ‘clarify’ or ‘amplify’ a report, such input should be in writing and disclosed to opposing counsel. Presumably, these further comments from Madam Justice Wilson were aimed at addressing the practice of many counsel of providing experts only with oral instructions in order to avoid scrutiny by opposing counsel or the court at a later date.

The result of the *Moore v. Getahun* decision is that counsel in Ontario will have to reconsider how they provide instructions to experts. The decision makes it clear that all instructions to experts should be in writing, with the expectation that if the expert opinion is to be relied upon by a party at trial, opposing counsel will have an opportunity to review all communications between counsel and the expert.

Despite the temptation of both counsel and clients to view their expert as an “advocate,” it must be remembered that regardless of who pays the bill, your expert’s duty is ultimately to the court, not to you.

A notice of appeal from this decision has been filed and may result in further or different direction from the Ontario Court of Appeal regarding this important issue.