

## The ACFI Annual Fraud Conference 2024

Tuesday, Sept 10th | 2:00 pm to 2:45 pm

### Building the Expert Team

**Speakers:** John Hollander & Kas Rehman

## How the Courts Protect the Privacy of Expert-Counsel Collaboration

### Overview

Expert witnesses in civil litigation have a duty to assist the court by providing a fair, objective and nonpartisan opinion within their area of expertise.<sup>1</sup>

To comply with this duty, it is essential for the expert to collaborate with counsel. Counsel will specify the issues and furnish the key facts and documents the expert needs to form their opinion. Counsel may also review draft reports and provide feedback to promote clarity and cogency.

Confidentiality is essential to this lawyer-expert relationship. The “zone of privacy” covering lawyer-expert communications promotes careful preparation of a case for trial. Experts are generally free to test hypotheses and reduce preliminary views to writing without fear of automatic disclosure to the opposing party. These are essential steps in developing a thorough opinion. Therefore, an expert’s notes, drafts, and correspondence with counsel are not to be disclosed unless there are reasonable grounds to question the expert’s independence or impartiality.

The case of *Moore v Getahun* highlights the importance of appropriate lawyer-expert collaboration in maintaining this zone of privacy and promoting compliance with the expert’s duty.

### A. The Trial Decision of *Moore v Getahun*, [2014 ONSC 237](#)

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<sup>1</sup> Ontario *Rules of Civil Procedure*, [RRO 1990, Reg 194](#), Rule [4.1.01\(1\)](#).

The plaintiff suffered a wrist fracture requiring surgery. The issue at trial was whether the defendant, an orthopedic surgeon, had negligently treated the plaintiff. The defendant retained a medical expert to prepare a report and give evidence to support the theory that the defendant had met the standard of care.

At trial, the defendant's expert testified that he had revised certain elements of his draft report at counsel's suggestion after a phone call with defence counsel. The plaintiff objected, arguing that this interaction compromised the expert's objectivity.

The trial judge agreed with the plaintiff. She held that it is improper for counsel to review draft reports or meet with an expert to provide input. She concluded that any input whatsoever from counsel should be in writing and must be disclosed to opposing counsel.

### **B. The Court of Appeal Decision of *Moore v Getahun*, [2015 ONCA 55](#)**

The defendant appealed. The Court of Appeal for Ontario disagreed with the trial judge on two key points:

1. It is improper for counsel to assist in preparing an expert report.
2. Records of lawyer-expert consultations and draft reports must be automatically disclosed.

On the first point, collaboration between experts and lawyers is not contrary to the expert's duty to provide objective evidence. Feedback from counsel is not only appropriate but essential to ensure that the report:

1. Complies with relevant legal rules,
2. Responds to the live legal issues, and
3. Is intelligible and concise.

Therefore, collaboration between lawyers and experts is to be encouraged, subject to the safeguards already in place to encourage independence and impartiality (namely, the ethical standards of the legal profession and other bodies governing individuals who provide expert evidence, as well as the adversarial process, through cross-examination of experts).

On the second point, obliging parties to produce records of lawyer-expert communications in all circumstances would undermine the zone of privacy known as "litigation privilege," which is fundamental to civil litigation. The Court cautioned that making any records of lawyer-expert consultation subject to

automatic disclosure would inhibit careful preparation and discourage parties from engaging experts in the first place. This would be harmful to the administration of justice.

Presumptive confidentiality of lawyer-expert consultations is also consistent with the rule that draft reports from an expert a party does not intend to call are privileged. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide impartial opinions and would instead encourage partisan and unbalanced reports. Litigation privilege, therefore, attaches to all communications between lawyers and experts unless the evidence supports a reasonable suspicion that the expert has become an advocate for one side against the other.

### **Takeaways from *Moore v Getahun* for Certified Forensic Investigators (CFIs)**

The Court of Appeal's guidance in *Moore v Getahun*, a medical negligence case, applies equally to CFIs retained as expert witnesses. All CFIs engaged as experts should follow a strict protocol when interacting with counsel to protect the zone of lawyer-expert privacy and uphold the integrity of the litigation process. When collaborating with counsel, CFI experts should, at a minimum:

- i. *Always keep the duties of independence and impartiality at the forefront of your mind*

The duties of independence and impartiality lie at the centre of the expert's role. CFIs engaged as experts should be mindful of these duties throughout their engagement. When collaborating with counsel, they should ensure that their report remains nonpartisan, reflects their professional opinion, and is free of influence.

- ii. *Review, understand, and follow the ACFI Standards and Code of Conduct and any other applicable professional standards*

CFIs should be familiar with professional standards to ensure their opinion is balanced and ethical. The ACFI standards promote accountability, fairness, and objectivity. By following these standards, CFI experts can better address the legal issue and assist the decision-maker.

- iii. *Consult with counsel to better understand the issues, facts, and procedural requirements*

Expert evidence must be responsive to the live issue before the court. Before beginning to draft the report, CFIs should consult with counsel to better

understand the scope of their role and responsibilities. This can help CFIs grasp the key issues, relevant facts, and specific legal standards for their expert report. CFIs should communicate early and often to ensure their report accords with formal and substantive requirements in the jurisdiction.

- iv. *If a question posed by counsel falls outside a CFI's scope of expertise, they should advise counsel promptly and discuss how it might be reframed*

It is recommended that CFIs and lawyers maintain an open line of communication. CFIs engaged as experts should not misrepresent their aptitude. It is crucial to inform counsel when they are unsure how to respond to a question. CFIs should work with counsel to frame the report in a way that properly reflects their area of expertise.

- v. *Review all documents provided by counsel and advise if anything critical to your opinion is missing*

While preparing the expert report, CFIs should review carefully the documents they are provided. If any details or documents seem incomplete, they should request clarification to be as accurate as possible.

- vi. *Draft their own report whenever possible, and incorporate feedback from counsel only to the extent it does not interfere with their substantive opinion*

It is important to ensure that revisions from counsel do not compromise the integrity of the CFI's report. They should only incorporate feedback consistent with the CFI's professional opinion. Evidence that is biased or unfairly advocates for one side should be avoided.

- vii. *Resist and, if necessary, terminate the engagement if counsel attempts to persuade the CFI to articulate an opinion they do not genuinely hold*

CFI experts must be wary of persuasive efforts from counsel. They should resist revisions that are inconsistent with their professional opinion and be prepared to withdraw as an expert if necessary. They should always prioritize their duties of independence and impartiality when assisting the Court.

- viii. *Retain all records relevant to the engagement, including correspondence with counsel*

Keeping thorough records ensures an accurate and complete account of a CFI's work. Retaining these documents serves two purposes. First, it provides a point of reference for consultation throughout the engagement. Second, the CFI may

need to disclose these records to opposing counsel and the court. If disclosure is ordered, the CFI must verify the scope of dealings with counsel through notes, correspondence, and other related records.

- ix. Understand that the contents of the CFI's file may be disclosed to the opposing parties and the court

It is recommended that CFIs manage their records with potential disclosure in mind. Specifically, ensure the file is accessible and organized. Ideally, the record should indicate that the CFI has remained independent and impartial throughout the engagement.

## **Conclusion**

An expert who fails to collaborate with counsel properly jeopardizes the administration of justice and risks undermining their professional reputation. Following these takeaways and guidance from the Court will help ensure CFI experts remain independent and impartial while enhancing the utility of their evidence in achieving the just resolution of complex civil disputes.

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