Expert Opinions: What Needs to be Disclosed?

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In *Edwards v. McCarthy*, 2019 ONSC 3925, Justice Stinson overturned the decision of a Master, in which the Master made the following order in relation to a defendant's expert report:

- Production of documents or disclosure of information that demonstrate the instructions on which the expert proceeded
- Production of documents or disclosure of information that demonstrate the assumptions the expert was asked to make
- Production of documents or disclosure of information that evidence the facts the expert relied upon
- Documents and materials given to the expert by the litigant or the litigant's counsel

Justice Stinson held that the documents in issue were protected by litigation privilege, and privilege was not waived by the defendant's service of the expert's report.

He stated that a party is entitled to continue to maintain litigation privilege through to trial where, by calling a witness or otherwise taking a particular position, the privilege may be deemed to be waived.

At the pre-trial stage, a party's right to disclosure of information from an expert is governed by rule 31.06(3) and rule 53.03(2.1) of the *Rules of Civil Procedure*.

Rule 31.06(3) indicates that a party may obtain on an examination for discovery disclosure of the findings, opinions and conclusions of an expert.

However, the findings, opinions and conclusions of an expert, and even the expert's name, do not have to be disclosed if: (i) the findings, opinions and conclusions were made or formed in preparation for contemplated or pending litigation, and (ii) the party being examined undertakes not to call the expert as a witness at trial.

Rule 53.03(2.1) requires an expert's report to contain certain information, including the expert's qualifications, the instructions provided to the expert, the nature of the opinion being sought, the expert's reasons for his or her opinion, and a list of every document relied on in forming the opinion.

Justice Stinson indicated that the expert's report in issue contained the information prescribed by rule 53.03(2.1) and disclosed the foundational information required by rules 31.06(3) and 53.03(2.1).

Litigation privilege continued to attach to the communications and documents in question. Justice Stinson stated it does not automatically follow that the defence expert will testify at trial. Rather, that decision can only be made by defence counsel once the plaintiff's case is closed and the defendant can properly assess the case that must be met.

It should also be noted that, absent exceptional circumstances, draft reports of experts, along with notes and records of consultations between experts and counsel, do not have to be produced, either before trial or during the course of trial.

In *Moore v. Getahun*, 2015 ONCA 55, the Court of Appeal indicated that "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".

Moreover, the Court of Appeal stated that compelling production of draft reports would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports.

The Court of Appeal held that, 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.

In conclusion, the *Rules of Civil Procedure* mandate the documentation and information related to an expert that need to be disclosed. Litigation privilege creates a zone of privacy which attaches to draft expert reports and many communications between an expert and counsel. This helps to ensure the efficacy of the adversarial process.