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Licensed Professional as an Expert Witness

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CONTENTS

Preface	5
Contributors.....	5
Definitions.....	6
1.0 Overview.....	9
1.1 PURPOSE AND SCOPE.....	9
1.2 REFERENCES	10
2.0 Role of an Expert Witness.....	11
2.1 LEGAL AND ETHICAL DUTY.....	11
2.2 REFRAINING FROM ADVOCACY.....	11
2.3 RESPECTING THE LEGAL DECISION MAKER.....	12
3.0 Ethical Considerations for Licensed Professionals.....	12
3.1 BEING COMPETENT	12
3.2 CONFLICTS OF INTEREST.....	13
3.3 CONFIDENTIALITY	13
3.4 OTHER ETHICAL RESTRICTIONS.....	14
3.5 APEGA LICENSING REQUIREMENTS	14
4.0 Acting as an Expert Witness.....	15
4.1 FEES AND AGREEMENTS	15
4.1.1 Administrative Tribunals and Civil Court	15
4.1.2 Criminal Court	15
4.1.3 General Terms	16

4.2	INVESTIGATION AND DOCUMENTATION	16
4.2.1	Thoroughness	17
4.2.2	Site Examination and Physical Evidence Considerations	17
4.2.3	Preparation of Information.....	18
4.2.4	Preservation of Evidence.....	19
4.3	APPEARING BEFORE A COURT OR ADMINISTRATIVE TRIBUNAL	19
4.3.1	Preparation for a Trial or Hearing	20
4.3.2	Format of the Trial or Hearing	21
4.3.3	Qualification of Expert Witnesses	21
4.3.4	Presentation of Evidence	22
4.3.5	Practical Advice for Serving as an Expert Witness.....	24

Preface

An APEGA professional practice guideline describes the level of performance expected of *permit holders* and *licensed professionals*. Part 8 of the *General Regulation* under sections 58 and 59 allows APEGA to publish guides that define and promote the expectations of APEGA *permit holders* and *licensed professionals*.

The differences between a professional practice standard, a practice bulletin, and a practice guideline are as follows.

- An APEGA professional practice standard sets the minimum standard of practice *permit holders* and *licensed professionals* must meet. It is the standard against which a *permit holder's* or *licensed professional's* practice and conduct will be assessed by APEGA's statutory boards.
- An APEGA professional practice bulletin provides clarity on a specific subject related to professional practice. Bulletins remain in force until a practice standard or guideline on the subject is developed or revised, or until the practice bulletin is repealed.
- An APEGA professional practice guideline provides professional practice advice and best practice recommendations to help *permit holders* and *licensed professionals* meet their professional obligations. APEGA statutory boards may assess a *permit holder's* or *licensed professional's* practice and conduct against practice guidelines.

Practice standards, bulletins, and guidelines should be read in conjunction with the *Engineering and Geoscience Professions Act*, the *General Regulation*, APEGA's bylaws, and any other applicable legislation, codes, or standards.

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Visit apega.ca/practice-standards for more information.

Definitions

For the purposes of this guideline, the terms and definitions listed below apply. These terms are italicized throughout the text.

Administrative Tribunal

A quasi-judicial decision-making body created by legislation with the power to affect the legal rights of persons. The decision maker could be a single individual or a panel composed of a group of individuals, depending on the authorizing legislation.

Authentication

The act of applying the required *authentication* components to a *professional work product (PWP)*. *Authentication* must be performed in accordance with the practice standard *Authenticating Professional Work Products*. When a *licensed professional* authenticates a *PWP*, this means they have completed, performed a thorough review of, or directly supervised and controlled the engineering or geoscience work and accept professional responsibility for the engineering or geoscience involved.

Contract

An agreement entered into between two or more parties that may give rise to obligations the courts can enforce.

Cross-Examination

Questions asked by the party who did not call the witness.

Direct Supervision and Control

The high degree of guidance a *licensed professional* provides to one or more individuals. The *licensed professional* accepts professional responsibility for engineering or geoscience tasks performed under their guidance. *Direct supervision and control* includes directing, monitoring, and controlling the engineering and geoscience work performed, including making all the decisions related to the practices of engineering and geoscience.

Direct supervision and control requirements are detailed in the practice standard *Relying on the Work of Others and Outsourcing*.

Evidence

Witness testimony, documents, photographs, video and audio recordings, and any other things that are introduced at a hearing or trial in order to prove or disprove relevant facts.

Examination-in-Chief

Questions asked by the party calling the witness. This is also sometimes called "direct examination."

Expert Witness

A witness who is accepted by the judge or *administrative tribunal* to have acquired special or particular knowledge through experience, training, study, or education in the matters on which they are proposed to testify. Only the *expert witness* is entitled to offer objective, unbiased opinion evidence.

Licensed Professional

A professional engineer, professional geoscientist, professional licensee (engineering), professional licensee (geoscience), licensee (engineering), or licensee (geoscience) entitled by the *Engineering and Geoscience Professions Act* to practise engineering or geoscience in Alberta.

Permit Holder

A partnership or other association of persons, or a corporation that holds a *Permit to Practice* under the *Engineering and Geoscience Professions (EGP) Act*. The Association of Science and Engineering Technology Professionals of Alberta (ASET) permit holders, as defined in Section 86(4) of the EGP Act, are not included.

Permit to Practice

An APEGA certificate given to permit holders to practise engineering or geoscience in Alberta.

Person

An individual or business entity.

Professional Practice Management Plan (PPMP)

A permit holder's written corporate policies, procedures, and systems describing the quality control and assurance measures in place to ensure appropriate standards of professional practice are maintained as described in Section 48(1)(d) of the *General Regulation*.

Professional Services

Services that involve the practice of engineering as defined in Section 1(q) of the *Engineering and Geoscience Professions (EGP) Act* or the practice of geoscience as defined in Section 1(r) of the EGP Act. The products of professional services are called *outputs*.

Professional Services Output (or Output)

Any product—physical, electronic, or digital—resulting from a *professional service*. Not all *outputs* require authentication and validation.

Professional Work Product (PWP)

A professional services *output* that requires authentication and validation as described in the practice standard *Authenticating Professional Work Products*. Defined in the *General Regulation* as "...plans, specifications, reports, or documents of a professional nature," a *professional work product (PWP)* is any *professional services output* with *technical information* that is complete and final for its intended purpose, and which is relied upon by others, internally or externally. A *PWP* can be physical (e.g., paper, plastic film), electronic (e.g., electronic document, image), or digital (e.g., code, software, modelling, simulation, or any other computer application that cannot be reproduced in a physical or electronic format). See the *authentication* test in the practice standard *Authenticating Professional Work Products* when assessing whether an *output* is a *PWP*.

Responsible Member

A licensed professional who is responsible for providing oversight of the practice of engineering or geoscience by the permit holder and meets the specification in Part 7, Section 48(1)(c) of the *General Regulation*. A *Responsible Member* must be qualified by education and experience in the profession of engineering or geoscience in which the partnership, corporation, or other entity intends to engage; designated in writing by the permit holder; and registered with APEGA as a *Responsible Member*.

The Responsible Member must have a sufficiently close relationship with the permit holder to undertake the roles and responsibilities associated with acting as a Responsible Member. The role of Responsible Member may not be delegated to other *licensed professionals* who are not Responsible Members.

A Responsible Member can be:

- a full-time, permanent employee of the permit holder
- a member of the permit holder
- a sole practitioner
- an individual providing professional services to the permit holder through a contractual arrangement or as a part-time employee

The *permit holder's* Responsible Members direct, supervise, and control all or part of a *permit holder's* professional practice in accordance with the *permit holder's* Professional Practice Management Plan and all relevant legislation, regulations, and codes.

Sole Practitioner

Within Alberta, an individual who practises engineering or geoscience as an incorporated entity. A *sole practitioner* must hold a *Permit to Practice*.

Technical Information

A term for content or data derived from the practice of engineering or geoscience as defined by the *Engineering and Geoscience Professions Act*, including advice, analyses, assessments, calculations, designs, evaluations, inputs (e.g., to planning or to modelling and simulation), interpretations, notes, opinions, recommendations, and process descriptions.

Testimony

Evidence that a competent witness under oath or affirmation gives at a trial or in an affidavit or deposition.

Thorough Review

An evaluation of the *outputs of professional services* prepared by others to verify their reliability, validity, and technical accuracy. Thorough review requirements are detailed in the practice standard *Relying on the Work of Others and Outsourcing*.

Validation

The act of applying the required validation components to a professional work product (PWP). Validation must be performed in accordance with the practice standard *Authenticating Professional Work Products*. When a *permit holder's* Responsible Member validates a PWP, this means they have reviewed the PWP to ensure it meets the quality control and assurance measures described in the *permit holder's* Professional Practice Management Plan.

1.0 Overview

During a preliminary investigation or before courts of law or quasi-judicial bodies (i.e., *administrative tribunals*), a licensed professional may be called upon to act as an *expert witness*. The role of an *expert witness* is to provide specialized knowledge and opinion evidence on matters within their field of expertise in order to help the court or *administrative tribunal* understand complex issues.

The key to successful testimony as an *expert witness* is for the *licensed professional* to understand this role. An *expert witness* is not an advocate for the party who hired them, nor are they the decision maker on the issues at hand. Their primary obligation is to assist the court of law or *administrative tribunal* by providing technical knowledge and opinions, and by doing so with integrity, honesty, fairness, and objectivity.

Licensed professionals acting as *expert witnesses* are considered to be practising the professions, whether in Alberta or elsewhere, and must fulfil the requirements of the *Engineering and Geoscience Professions Act*, the *General Regulation*, and APEGA's bylaws and practice standards. *Licensed professionals* acting as *expert witnesses* and employed by a *permit holder* must also ensure they are following the policy and procedures documented in their *permit holder's* *Professional Practice Management Plan*.

1.1 PURPOSE AND SCOPE

The purpose of this document is to help *licensed professionals* prepare to appear as *expert witnesses* by describing what is generally expected of them and providing some background on the processes involved in testifying as an *expert witness*.

This guideline provides information about the *expert witness* in civil and criminal court proceedings and in *administrative tribunal* proceedings, such as professional disciplinary hearings, public inquiries, royal commissions, or proceedings of boards or committees established under other provincial or federal legislation. This information includes the most common expectations and procedures; however, as each court and *administrative tribunal* proceeding is unique, actual proceedings could deviate from what is described in this guideline.

This guideline should be regarded as an addition to, but not a substitute for, any procedural training that might be conducted by legal counsel. Counsel may instruct the *licensed professional* on legal procedures associated with providing expert opinion evidence and the differences between colloquial language and legal terminology. However, the onus is on the *licensed professional* to seek guidance and ensure they are prepared to act as an *expert witness*.

NOTE ON TERMINOLOGY: FACTS AND ASSUMPTIONS

The terms "fact" and "assumption" can have different meanings depending on if they are being used in an engineering and science context or in a legal context. The terms "fact" and "assumption" may each be divided into two types. A "fact" can be a scientific fact or a legal fact. An "assumption" can be a technical assumption or a factual assumption.

A **scientific fact** is a fact that is measurable, can be verified by repeatable observations, and is indisputable, such as the boiling point of pure water at standard atmospheric pressure.

A **legal fact** is a fact that is accepted to be true by the parties or the decision maker, and it may or may not involve engineering or science. For example, in a case about the failure of a concrete slab, the parties may have an agreed statement of facts that says the slab was six inches thick. The thickness of the concrete slab is a legal fact.

A **technical assumption** is a scientific or engineering assumption made by the expert witness within the scope of their expertise to facilitate their technical analysis, such as the friction between objects in contact under certain conditions. The assumptions made must be reasonable, objective, and unbiased.

A **factual assumption** is an assumption provided to the expert witness by the party or legal counsel who called them. The expert witness will be asked to base their opinion on the assumption. It will be up to the party or legal counsel who called the expert witness to prove to the decision maker that the assumption is true using other evidence. If the assumption is within the scope of the expert witness's expertise, the expert witness should evaluate the validity of the assumption before using it as the basis of their expert opinion. For example, in a motor vehicle accident case, an expert witness may be asked to base their opinion on an assumption that the motor vehicle's brakes were in good working condition prior to the accident. It would then be up to the party or their legal counsel to prove to the decision maker that the brakes had been checked and serviced regularly.

1.2 REFERENCES

This guideline references the following publications. The latest versions are available at apega.ca/practice-standards.

- Engineering and Geosciences Professions Act, General Regulation, and APEGA's bylaws
- Authenticating Professional Work Products practice standard
- Professional Practice Management Plan practice standard
- Relying on the Work of Others and Outsourcing practice standard
- Ethical Practice practice guideline

The following external references are cited in this guideline.

- Alberta Rules of Court, Alberta Regulation 124/2010 (available at open.alberta.ca/publications)
- Government of Canada Federal Courts Rules, Schedule Code of Conduct for Expert Witnesses (available at laws-lois.justice.gc.ca/eng/regulations)

2.0 Role of an Expert Witness

At a trial or hearing, the court or *administrative tribunal* is the decision maker, and the role of an *expert witness* is to help the decision maker understand the issues at hand. In certain cases, opinion evidence on engineering or geoscience matters from an *expert witness* with specialized expertise may help the decision maker to determine the facts, thereby enabling it to render a decision.

Only an *expert witness* is allowed to offer opinion evidence. The evidence given by an ordinary witness, also known as a *lay witness*, is limited to their personal knowledge about the matter and their observations, regardless of their profession. *Lay witnesses* testify about what they saw, heard, or did, whereas *expert witnesses* can provide opinion evidence because of their specialized knowledge or proficiency in a particular field. If the evidence were such that an ordinary individual could draw the appropriate conclusions, the *licensed professional as an expert witness* would not be required.

2.1 LEGAL AND ETHICAL DUTY

As an *expert witness*, the *licensed professional* is to provide an independent, objective assessment of engineering or geoscience issues to assist the court or *administrative tribunal*, regardless of the contractual relationship between the *expert witness* and the party who hired them. The *expert witness*'s first duty is not to the counsel or party who hired them, but to the court or *administrative tribunal*, and this duty is in parallel with their duty to the profession. *Licensed professionals* should conduct themselves with diligence, integrity, honesty, fairness, and objectivity when providing expert opinions. Acting as an *expert witness* is considered practising the professions, and the Code of Ethics applies.

2.2 REFRAINING FROM ADVOCACY

An *expert witness* should neither be an advocate for the party who called them nor engage in advocacy in any way for three main reasons.

First, even though the *expert witness* may be hired by a party in the dispute, their true role is to assist the court or *administrative tribunal*, because it is the court or *administrative tribunal* that needs their professional experience and knowledge to help it understand the issues. If the *expert witness* advances only the position of the party who called them, their *testimony* will be viewed as unreliable by the court or *administrative tribunal* and their credibility will be damaged, thereby rendering their assistance ineffective.

The *expert witness* will be also be viewed as unreliable if they are unclear when they provide their opinion evidence, and if they tailor an opinion so that it becomes misleading because of what it does not include, thereby advancing the position of the party who hired them. This applies to both the *expert report* and *testifying*. In extreme cases, the court could sanction such conduct by a finding of contempt with all its possible consequences.

Second, advocacy is the role of legal counsel, not of *expert witnesses*. It is inappropriate for an *expert witness* to overstep their role by advocating for the party who called them.

Third, advocacy is not impartial and contradicts Rule 3 of the Code of Ethics, which states that professional engineers and geoscientists shall conduct themselves with integrity, honesty, fairness, and objectivity in their professional activities. Advocacy, or conscious bias, is unobjective and therefore unprofessional. Refer to the practice guideline *Ethical Practice* for further details.

2.3 RESPECTING THE LEGAL DECISION MAKER

Although a *licensed professional* acting as an *expert witness* knows the technical details of the matter, they need to recognize that they are not the decision maker. The court or *administrative tribunal* is the ultimate decision maker, and *expert witnesses* merely provide their opinions on the subject matter to assist the decision maker.

Court and *administrative tribunal* proceedings may involve *testimony* from more than one *expert witness*, and different *expert witnesses* may express different opinions based on different sets of assumptions. However, the use of different sets of assumptions does not necessarily mean that one set is wrong or that the *expert witness* using them is wrong or acting improperly. It is up to the court or *administrative tribunal* to determine which *expert opinion* it accepts or gives more weight to.

An *expert witness* needs to be mindful their *testimony* is only based upon a set of facts and a set of assumptions. Their *testimony* will also only be a part of the case presented to the decision maker. They should be aware these factors will limit what they can provide their opinion on, and they should not assume that their position is the only opinion on the matter. As their opinion is based upon a set of facts and assumptions, they will also need to consider how their opinion may change with different information.

3.0 Ethical Considerations for Licensed Professionals

Licensed professionals must examine their ethical position in relation to any possible involvement in proceedings. Acting as an *expert witness* is considered practising engineering and geoscience in the province of Alberta, and APEGA's Code of Ethics, as set out in the *General Regulation*, applies. The Code of Ethics addresses the considerations described in sections 3.1 through 3.5 and governs a *licensed professional*'s behaviour. Refer to APEGA's *Ethical Practice* guideline for more information on giving opinions, including providing opinions as an *expert witness*.

3.1 BEING COMPETENT

To comply with the Code of Ethics, when deciding whether to accept an assignment as an *expert witness*, a *licensed professional* must consider whether they are competent to provide an opinion on the topic in question. A *licensed professional* is considered competent when they have the combined education, experience, knowledge, skills, proficiency, attitudes, and judgement to complete the work.

A *licensed professional* must ensure that the party who hired them understands that some situations may demand particular expertise they do not have and that, in these situations, other experts will need to be retained to provide an opinion. The *licensed professional* should make it clear that they will not provide expert opinions outside of their area of expertise and should ensure the contract for services includes this condition. See Section 4.1 Fees and Agreements for more information on contracts for *expert witnesses*.

Before an *expert witness* testifies, the court or *administrative tribunal* must accept the witness as an *expert* in the proposed area of knowledge and expertise. See Section 4.3.3 Qualification of Expert Witnesses for more information.

3.2 CONFLICTS OF INTEREST

Before agreeing to act as an *expert witness*, a *licensed professional* should conduct a conflict-of-interest check to ensure there is no real or perceived conflict of interest. *Licensed professionals* should consider whether they have any personal or professional relationships or interests with any of the parties in the legal proceeding that may give rise to a potential conflict of interest. Even though these relationships or interests may not prejudice their expert opinions, *licensed professionals* should be aware of situations that might cause someone to question the independence of their opinions. If there appears to be any conflict of interest, *licensed professionals* should immediately advise both the party who called them and their legal counsel. If the *licensed professional* has a personal or financial stake in the outcome, a conflict of interest exists.

Unless there is an agreement between parties, a *licensed professional* should not be retained to act as an *expert witness* for more than one party in any legal proceeding. If a *licensed professional* works at a larger organization, a professional conflict of interest may not be obvious, and it will be especially important to conduct a conflict of interest check before accepting an assignment. It is crucial for a *licensed professional* to verify that other *licensed professionals* working at the same organization have not been hired by another party for the same action. This also applies to *sole practitioners* working on *contract* with an organization. When undertaking an assignment, the *licensed professional* should thoroughly understand the implications it may have on other work by other professionals who work at the same organization.

Refer to the practice guideline *Ethical Practice* for further details on conflicts of interest.

3.3 CONFIDENTIALITY

The rules about confidentiality and non-disclosure are different when *licensed professionals* are acting as *expert witnesses* than when they are engaging in their day-to-day practice.

In their day-to-day practice, *licensed professionals* have an ethical and often a contractual obligation to keep confidential any information, designs, or conclusions derived during an assignment for an employer or hiring party, unless the *contract* provides otherwise or there is a risk to public safety. However, no legal privilege is created by that relationship alone, and if a regulator under their legislation or the court orders the *licensed professional* to disclose the information, they must do so.

When *licensed professionals* act as *expert witnesses*, their expert reports, working papers, source materials, draft reports, notes, communications with others (e.g., colleagues), and communications with the legal counsel who retained them may be subject to legal privilege and thus exempt from disclosure. However, this legal privilege has limits, and *licensed professionals* serving as *expert witnesses* should understand that if their expert opinions will be used at a trial or an *administrative tribunal* hearing, then legal privilege will be waived and all materials may be subject to disclosure.

An *expert witness*'s reports, and in some cases their working papers, source materials, draft reports, notes, and communications, may become exhibits at a trial or an *administrative tribunal* hearing and may therefore be accessible to the other parties and to the public. It is not possible to maintain confidentiality just by marking documents or information as "confidential" or "privileged."

Because a *licensed professional* acting as an *expert witness* has a duty to be objective and provide a complete report, they cannot exclude any relevant information even if the party wishes to keep it confidential. A *licensed professional* who serves as an *expert witness* should therefore consider whether any of the information they rely

upon to form their expert opinion is proprietary, includes trade secrets, or should otherwise remain confidential. The *licensed professional* should identify all of the information they will need to form their expert opinion and discuss this with the legal counsel who retained them. The *licensed professional* may also discuss concerns with their own legal advisor.

When a *licensed professional*'s expert report is used at a trial or an *administrative tribunal* hearing, the *licensed professional* should be mindful that they may be examined and cross-examined on any aspect of their file.

According to APEGA's *Ethical Practice* guideline, typically when a *licensed professional* reviews the work of another *licensed professional*, it is normal courtesy and an obligation to contact and advise that individual. This is not required when reviewing another *licensed professional*'s work for the purposes of acting as an *expert witness*. The *licensed professional* should discuss any concerns with the legal counsel who retained them or with their own legal advisors.

3.4 OTHER ETHICAL RESTRICTIONS

A *licensed professional* should understand that full and timely discharge of their proposed service as an *expert witness* may be limited, restricted, or delayed by a number of factors. The party who called the *licensed professional* may impose restrictions relating to monetary matters, confidentiality, access to essential information, and certain directions that an investigation might take. Situations may arise that the *licensed professional* judges to be outside their professional capabilities and that will require outside expert assistance. The *licensed professional*'s investigation may steer their *testimony* in a direction that conflicts with the wishes of the party who hired them. In such circumstances, the *licensed professional* has an immediate ethical obligation to inform the party and their legal counsel.

Licensed professionals who are considering acting as an *expert witness* must remember they have an ethical obligation to their existing clients as well as to the party wishing to retain them as an *expert witness*. A *licensed professional* should consider the time commitment involved in acting as an *expert witness* and how this could affect their ability to meet their commitments to other clients. Court attendance, for example, typically overrides all other commitments. Most proceedings will require intermittent involvement by the *licensed professional* over an extended period, and the *licensed professional* will have limited control over the timing and scheduling.

3.5 APEGA LICENSING REQUIREMENTS

Licensed professionals acting as *expert witnesses* are considered to be practising the professions in accordance with the *Engineering and Geoscience Professions (EGP) Act*. Though a court or *administrative tribunal* can at its sole discretion determine who can provide engineering or geoscience opinion evidence, it is the responsibility of *expert witnesses*—including engineering or geoscience professionals licensed with other jurisdictions—to ensure they comply with APEGA licensing requirements. An *expert witness* should consult with their own legal counsel in a timely manner to ensure that fulfilling the requirements for practising in Alberta does not interfere with the court's or *administrative tribunal*'s schedule. As the engineering and geoscience regulator in Alberta, if APEGA determines that an unlicensed individual is providing engineering or geoscience services, APEGA may take action against the individual as allowed under the *EGP Act*.

Similar considerations also apply to retired professionals who intend to act as an *expert witness*. Retired professionals, including APEGA life members, are not *licensed professionals* in Alberta and must resume active practising status to act as an *expert witness*.

4.0 Acting as an Expert Witness

Before accepting an assignment, the *licensed professional* should ensure they have considered the ethical implications of acting as an *expert witness* and understand what their role will be. They should also make it clear to the party who hired them that they must remain objective and cannot act as an advocate. The *licensed professional*'s primary obligation is to the court or *administrative tribunal*, not to the party who hired them.

A *licensed professional* retained as an *expert witness* may carry out the following activities as part of the assignment:

- visiting the scene and conducting field work
- reviewing documentation, statements, materials gathered from others, and analyses from others
- analyzing, drawing conclusions, and forming an *expert opinion*
- preparing an *expert report*
- reviewing and responding to the other party's *expert reports*
- responding to questions about the *licensed professional*'s original report or the other party's reports
- preparing to appear before a court or an *administrative tribunal*
- appearing before a court or an *administrative tribunal*

4.1 FEES AND AGREEMENTS

The *licensed professional* should speak with the party who retained them to settle the issue of adequate compensation for their *professional services* before undertaking the assignment. A *licensed professional* must not work on a contingency basis whereby compensation is dependent on the outcome of their *testimony*, as this would not be aligned with their obligations under the Code of Ethics. All financial arrangements, including an agreement on fee and payment schedules and the type of *professional services* that will be provided, should be established before the start of any work.

4.1.1 Administrative Tribunals and Civil Court

Licensed professionals as *expert witnesses* cannot be forced to give an opinion without compensation. An *expert's* skill and knowledge are regarded as their personal property, and property may not be taken for public use without compensation. It is not practical to obtain *expert professional services* through the payment of ordinary witness fees since this impedes the ability of the *licensed professional* to thoroughly investigate the problem, and the *expert witness* cannot be expected to risk an opinion without performing a thorough investigation. When discussing fees with the party who hired them, it is important for the *licensed professional* to have a proper compensation arrangement that will cover the unexpected duration of their *testimony*.

4.1.2 Criminal Court

In criminal courts, there is no right to compensation for any witness, including *expert witnesses*. However, there is a system in place to compensate *expert witnesses*, and these arrangements should be discussed with the prosecutor or defence counsel in advance of the trial. Lack of compensation is not a defence for failing to appear as a witness.

On the other hand, if a *licensed professional* is being asked to provide an opinion in advance of a trial as part of the investigation or pre-trial preparation, the *expert witness* is entitled to receive the same level of compensation as they would for any *professional service*, even in criminal courts.

4.1.3 General Terms

A *licensed professional* should discuss anticipated timelines and extent of involvement in the first conversation with the party and legal counsel wishing to retain them. As soon as possible, the *licensed professional* should provide the party or legal counsel with an estimate of the costs of retaining the *licensed professional* to act as an *expert witness*. Hourly or per diem rates should be quoted for consultations and court appearances. This will enable the party and legal counsel to consider alternatives, if appropriate.

When a *licensed professional* agrees to act as an *expert witness*, a written *contract* is preferable. The *licensed professional* may want to seek their own legal advice when developing the assignment terms, and they should consider potential risks of liability and loss. In addition, the *licensed professional* may want to consider obtaining errors-and-omissions or other professional liability insurance. If a formal *contract* cannot be drawn up, then a detailed letter of advice, outlining the *licensed professional's* understanding of the assignment, should be prepared by the *licensed professional* and provided to the party and legal counsel as soon as possible. Any agreement should clearly set out services to be provided, services that are excluded from the scope of work, rates of payment for the various services, and schedules and terms of payment. As there may be a long period of time between providing an *expert report* and testifying, the *licensed professional* should include preparatory time to review relevant materials before their *testimony*.

Any agreement should make clear that the *licensed professional* must remain objective and impartial and is to be reimbursed for *professional services*, regardless of the outcome of the trial or hearing. Fees must not be based on the outcome of the legal proceeding or whether the *expert evidence* is accepted, as such fee arrangements could be viewed as a contingency payment resulting in a lack of objectivity. A specific statement, such as "payment to the *licensed professional* is to be made without delay and is not contingent upon the results of any legal action, *administrative tribunal* proceeding, arbitration, or out-of-court settlement," should be included in the agreement.

In the agreement, it should be possible to describe the full scope of the foreseen services, at least up to the actual court or *administrative tribunal* appearance, at which time control passes out of the hands of the *licensed professional*. It is normal for changes and additions to the original terms of the *contract* to occur, initiated by the party, legal counsel, or the *licensed professional*. Careful documentation and accounting should be kept for all changes and additions.

In some cases, the party or legal counsel may choose to terminate a *contract* before all stages are complete. Contracts should include arrangements for payment for all work done by a *licensed professional* in these circumstances.

4.2 INVESTIGATION AND DOCUMENTATION

Before a *licensed professional* can act as an *expert witness* or give *expert opinion evidence*, they are expected to conduct a thorough examination of the matter in dispute within the defined scope of their work as instructed by their hiring party. This may include reviewing documents and conducting site investigations and site visits, as needed. Additionally, the *licensed professional* may be required to prepare an *expert report* of their findings, as stipulated in the terms of their *contract* or agreement.

4.2.1 Thoroughness

Licensed professionals are ethically bound only to express opinions based on adequate knowledge of the subject, review of relevant materials, and reasonable justification of their opinion. They should draw on their own skills and knowledge derived from study, readings, and analysis to develop their expert opinion. Although licensed professionals must remain objective and only address matters within their areas of expertise, they should also understand the general approach being taken by the party's legal counsel. All materials foundational to the basis of examination should be clearly identified to enable the licensed professional to frame their opinion based on the information and scope provided by legal counsel.

Licensed professionals should assess how much information needs to be gathered to enable them to reach a supportable, documented conclusion and form an opinion. To ensure they have all the relevant information, and because unanticipated technical questions might arise, licensed professionals should inform the party who retained them of the need to examine all relevant and available documents related to the case. They should inform the party of the need for any specific tests, calculations, analyses, or other assessments necessary to arrive at their expert opinion and then conduct those reviews and investigations to gather the required information.

Depending on the circumstances, site attendance and direct evidence examination may not always be possible and limited information may be available to the licensed professional. It is up to the licensed professional to exercise judgement about whether there is sufficient information to render an opinion, and it is important to clearly state the basis for their opinion and its limitations. With engineering and geoscience work, in many cases licensed professionals rely upon the work of others and it is important for the testifying expert to be aware of all the material that was relevant to their opinion and the sources of that material. Refer to the practice standard *Relying on the Work of Others and Outsourcing* for more information.

A licensed professional serving as an expert witness may be called upon to interpret data, whether the data were collected by the expert witness or provided by others, and they should know about any tests or analyses that were conducted. If another individual has completed work that the expert witness relies on, it is expected that the expert witness complete a thorough review and take responsibility for that work. This can be an issue when it comes to the review of physical evidence. If possible, it is very useful for all expert witnesses to have reviewed the location, scene, or physical remains relevant to the action.

4.2.2 Site Examination and Physical Evidence Considerations

Licensed professionals may need to conduct a site investigation and first-hand review of local conditions in certain cases, such as those involving accidents, hazards, working conditions, or project locations and features. Access to property, both private and public, is possible only if expressly permitted by the owner or with the agreement of the involved parties, unless there is a statutory provision allowing access for a specific purpose. Licensed professionals do not have the right to trespass to obtain data.

At the time of inspection, licensed professionals should take detailed notes. Licensed professionals should record all details that might be pertinent to the proceeding and, when necessary, support them with photographs, videos, and audio recordings. Any changes that might have occurred between the time of the incident and the examination should be noted and, if needed, the site should be restored to the condition it was in at the time of the incident to assist the investigation. It may also be important to note the time of examination and weather conditions. Licensed professionals should be aware that the notes might be producible to all parties in an action.

If a particular piece of physical evidence is critical to their opinion and will be relevant to other parties, the *licensed professional* may want to seek guidance from their client regarding the securement of that evidence. The physical evidence may technically belong to another party, in which case the *licensed professional* can only advise their client that it is important for someone to secure the evidence.

If a *licensed professional* needs to conduct destructive testing or alter physical evidence to support their investigation and arrive at an expert conclusion, they cannot proceed without the involvement of all other parties involved in the action. “Destructive testing” is when testing destroys a specimen, preventing other parties from conducting their own testing and arriving at their own independent conclusions. If physical evidence is altered, the entire process of the alteration must be properly documented to enable another party to observe all that has happened to that physical evidence.

4.2.3 Preparation of Information

Though it is not always required, it is common for *licensed professionals* to prepare a written report setting out their evidence, analysis, conclusions, and expert opinion. The Alberta Rules of Court and the Government of Canada Federal Courts Rules list the requirements for expert reports (see Section 1.2 References). At a minimum, an expert report should clearly set out the substance of the *expert witness*’s proposed *testimony*, a list of all the materials the expert relied on, a list of facts, and a list of assumptions made by the expert when they formed their opinion. The materials the *expert witness* relied on should be made available to all parties. It is important that the parties, legal counsel, and the court or *administrative tribunal* are not misled by a report that overstates the party’s position or that fails to give proper emphasis to adverse or competing considerations.

When considering all available information, *licensed professionals* should be careful not to confuse scientific facts with technical assumptions. Scientific facts should not be in dispute. These may include quantitative measurements, provided they are accurately recorded, or data from reputable published sources, as long as they are demonstrably repeatable and verifiable. In contrast, technical assumptions should be reasonable, objective, and clearly identified as such. Where multiple sets of equally reasonable and objective technical assumptions exist, the *licensed professional* should present their opinion based on each alternative, clearly indicating the technical assumptions underlying each conclusion. Legal counsel can assist with identifying facts and assumptions. A *licensed professional* should make it clear in their expert report that the opinion provided is based on available information and may change if new information is provided.

Similarly, the *licensed professional* should take great care not to confuse assumptions with opinions. Opinions not founded on the application of engineering and geoscience, or not based on facts and stated assumptions, should not be included in a *licensed professional*’s *expert testimony* or report.

While the *licensed professional* works to form their opinion, they should keep legal counsel informed of its development. The *licensed professional* should review their opinion evidence with counsel so that counsel understands what the evidence means, as well as the scientific facts and technical assumptions upon which it is based. Legal counsel are not likely to be experts in the practices of engineering and geoscience, and it may be necessary for the *expert witness* to educate counsel on the technical engineering or geoscience aspects of the evidence. If a *licensed professional*’s involvement proceeds to testifying in court or at an *administrative tribunal*, the judge or *administrative tribunal* will decide what is a proven legal fact and what is not. In court cases, only information entered as evidence by counsel at the trial may be used to form an opinion. If counsel neglects to include relevant information, the *expert witness* might not be permitted to use that evidence to form their opinion.

While preparing the expert report, *licensed professionals* should be mindful that in legal proceedings, certain words may have a specific meaning that is different from the everyday, colloquial usage. *Licensed professionals* should review the report and the intended meanings of words with legal counsel before finalizing. If a *licensed professional*'s involvement proceeds to court or an *administrative tribunal*, the *licensed professional* should prepare all data and documentary evidence from their report in such a way that it will help educate the non-expert court or *administrative tribunal*. Even the most competent expert witnesses are ineffective and of little help to the decision maker if the evidentiary basis of their expert opinion is not established.

Expert reports are considered *professional work products (PWP)*s and must be authenticated and validated accordingly. Sometimes a *licensed professional*'s findings are a part of a larger, comprehensive report that includes other disciplines. It is important for the *licensed professional* to clearly identify the portions of the report they take responsibility for. See the *Authenticating Professional Work Products* practice standard for more information on authentication requirements and taking responsibility for multi-discipline *PWP*s.

If a *licensed professional* submits a report for use outside of Alberta, this is considered an *exported PWP*. Refer to the *Authenticating Professional Work Products* practice standard for more information on authentication and validation requirements. The *licensed professional* should be mindful that the rules of court and report requirements can vary between jurisdictions, and they should check with legal counsel to ensure proper requirements are met. A declaration stating the *licensed professional*'s impartiality, and their obligations and duty to the court or *administrative tribunal*, may be required.

4.2.4 Preservation of Evidence

It is the *licensed professional*'s responsibility to preserve the data and materials they prepared for the proceedings, which may become evidence in court or at an *administrative tribunal*. The catalogued information should include all rough calculations, original data, preliminary drafts, communication records, notes of interviews with others connected to the case, and any other relevant information. It is important for the *expert witness* to remember that they may be called upon long after their initial involvement, and that all pertinent information should be properly identified, recorded, and catalogued for later legal use. It should be retained and protected until appropriate clearance or permission for destruction is given in accordance with relevant legal requirements. Refer to the *Authenticating Professional Work Products* practice standard for information on the retention of *PWP*s and to the *Professional Practice Management Plan* practice standard for information on setting a retention policy. A *permit holder*'s *Professional Practice Management Plan* should describe what is considered to be a draft and include a draft retention policy. Once an *expert witness* is asked to produce their file, the *expert witness* must provide the file in its entirety. Such records are subject to disclosure.

4.3 APPEARING BEFORE A COURT OR ADMINISTRATIVE TRIBUNAL

After completing an engineering or geoscience report in the form of a *PWP*, the *licensed professional* may be called upon to testify and present their findings in court or at an *administrative tribunal* hearing. Normally, the *licensed professional* is provided with advance notice of the date of their required appearance. It is important for the *licensed professional* to be properly prepared before their appearance, and they should ensure they have sufficient time to consult with the party who retained them.

In any legal proceeding, the *licensed professional*'s involvement could end at any time. Settlement discussions frequently take place before and during a civil trial, which could result in the trial ending and the *licensed professional*'s involvement no longer being required. In a criminal case, charges may be dropped when certain evidence is proffered, ending a *licensed professional*'s involvement. Once the *licensed professional* has testified at the trial, this usually completes their involvement in the matter. In some instances, involvement may still be required after the hearing if post-hearing submissions are permitted.

4.3.1 Preparation for a Trial or Hearing

Prior to the court or *administrative tribunal* hearing, the *licensed professional* should insist on a preparatory meeting with legal counsel for the party who retained them. This will enable counsel to properly brief them on procedure, and it will enable the *licensed professional* to review their opinion evidence with counsel once more so that counsel knows what evidence the *expert witness* will give. The *licensed professional* should also advise counsel and the party who retained them of any exhibits or demonstrations they will need to prepare for use in court or the hearing room, including virtual settings. These exhibits may include tables, diagrams, samples, drawings, maps, sketches, cross-sections, plans, reconstructions, photographs, video recordings, or other visual or audio aids to help the decision maker understand the evidentiary basis for the *expert opinion*.

It is important for counsel and the *licensed professional* to determine what key issues need to be brought to the court's or *administrative tribunal's* attention. Some cases involve many technical issues about which the *licensed professional* has provided a lengthy report with opinions that address many topics. Even though the submitted report may clearly state the *licensed professional's* analysis, the *licensed professional* must still take care to ensure the intended opinion is properly conveyed. This will require the *licensed professional* to advise counsel on the kinds of questions that should be asked during *examination-in-chief*. Since a *licensed professional* has knowledge and a technical vocabulary that differs from counsel's, it is also important for the *expert witness* to become familiar with the arc of counsel's questions beforehand, so that they understand the nature of the questions they will be asked. However, the *licensed professional* should refrain from rehearsing or following a scripted *testimony* during this preparation with counsel.

As advocates for their client, legal counsel has obligations to their client, but they do not have the same obligations to an *expert witness*. *Licensed professionals* should be mindful that counsel may not be fully transparent about their strategy. Counsel might advocate for favourable opinions, and it is the role of the *licensed professional* to refuse when such opinions are not objective, not based on facts, or not based on objective, technical assumptions that are within the scope of the *expert witness's* expertise.

In preparation for appearing before a court or *administrative tribunal*, the *expert witness* should ensure they have a comprehensive understanding of the case and the basis for their *expert opinion* within the defined scope provided by legal counsel. Although it is commonly necessary for a *licensed professional* to provide an opinion based on a set of assumptions, because unanticipated technical questions might arise, the *licensed professional* should prepare by examining all relevant and available documents and materials related to the case. The examined materials could include correspondence, documents, and materials supplied by other witnesses, including the other party's witnesses. The *licensed professional* should be prepared to alter their opinion during their *testimony* if they are asked how additional information would affect their opinion.

If permitted, during preparation it may be beneficial for legal counsel to conduct a mock cross-examination of the licensed professional to help them prepare by thinking about the answers they might give. During this preparation, the licensed professional should consider the perspective of the opposing party, including the opposing party's perspective on the licensed professional's opinion. The licensed professional should be prepared to objectively justify the technical assumptions they chose, how they extracted scientific facts from the materials they reviewed and analyzed, and how they determined that the compiled materials are an exhaustive list of all relevant information pertinent to the matter. The licensed professional should be prepared to explain in detail how they applied engineering or geoscience principles and theory to the facts and assumptions in order to arrive at the opinions they presented.

4.3.2 Format of the Trial or Hearing

Hearing processes usually differ only slightly from one *administrative tribunal* to another, with minor variations in process and rules. The processes and rules of procedure and evidence in court are similar to but generally stricter than those of an *administrative tribunal*. Licensed professionals should ask legal counsel to explain the process and rules that will apply to the proceedings at which they are testifying. Licensed professionals appearing as expert witnesses at an APEGA discipline hearing should refer to Appendix B of the *Ethical Practice* guideline for information on the APEGA discipline process.

At an *administrative tribunal* hearing, it is common for a panel of three or more adjudicators to sit in the hearing, with one designated as the chair or presiding adjudicator. At a civil trial, with the rarest of exceptions, a judge presides over the proceedings. A criminal trial may be held before a judge sitting alone or before a judge and jury. Both in court and at an *administrative tribunal* hearing, a court reporter or court recording device takes a verbatim record of the proceedings.

4.3.3 Qualification of Expert Witnesses

Before qualifying and testifying in court, licensed professionals will be asked to either take the oath or make an affirmation to tell the truth. Some *administrative tribunals* may not formally require an oath or affirmation, but it is still expected that licensed professionals tell the truth.

Licensed professionals called upon to give expert or opinion evidence must first be qualified to do so by the court or the *administrative tribunal* panel. The procedure by which a witness is qualified as an expert is called a *voir dire*, which can be described as a trial within a trial. During the *voir dire*, the court or *administrative tribunal* will hear evidence relating to the witness's qualifications and determine whether they may testify in that capacity. The legal counsel seeking to have the witness qualified as an expert will define the area of expertise very specifically and then ask questions about the witness's background to show why the witness is capable of helping the court or *administrative tribunal* understand matters within that area of specialization.

The question before the court or *administrative tribunal* is essentially whether this potential expert witness has the specialized knowledge or experience that would enable the court or *administrative tribunal* to have confidence in their ability to assist. The licensed professional should have a detailed and factual curriculum vitae, highlighting their professional and academic history. This curriculum vitae should be the same as the curriculum vitae submitted with the expert report. If there are changes to the licensed professional's curriculum vitae, the licensed professional

should let their legal counsel know. This is important if an extended period of time has lapsed between expert report submission and *testimony*. Because an *expert witness*'s curriculum vitae can be challenged by opposing counsel, curriculum vitae used for marketing purposes or résumés used for job applications should not be used, as they tend to have a different objective. Any overrepresentation may discredit the *licensed professional* against being qualified as an *expert witness*.

An individual is not required to have formal education, publications, or standing in academic or professional associations to be qualified as an expert, but the counsel presenting a professional as an *expert witness* is likely to ask questions about the following areas:

- academic qualifications
- professional background and experience
- membership in professional or academic associations
- published and unpublished reports and papers
- teaching experience

However, although the court or *administrative tribunal* may not have specific requirements for professional membership, an *expert witness* providing opinion evidence on engineering- or geoscience-related matters in Alberta is considered to be practising the professions and must be licensed with APEGA. See Section 3.5 APEGA Licensing Requirements for more information.

After the party seeking to have the witness qualified as an expert asks their questions, opposing counsel is entitled to cross-examine on those qualifications. Although the questions might seem insulting, the strategy of opposing counsel is often simply to limit the area of expertise to which the witness can testify. To discredit the *licensed professional*, opposing counsel may bring forth anything, including any past work the *licensed professional* has completed, that could demonstrate contradiction. At the conclusion of the questioning, the court or *administrative tribunal* will decide whether the individual can testify as an *expert witness*, and if so, to what extent. Their *testimony* is limited to matters within the strict definition of their area of expertise as allowed by the judge or *administrative tribunal*. The *expert witness* may not go beyond that expertise even if the *licensed professional* believes they are competent.

4.3.4 Presentation of Evidence

Once the witness has been qualified as an expert, their *testimony* proceeds. The counsel who called the *expert witness* goes first, questioning the *expert witness*. This is known as direct examination or *examination-in-chief*. Counsel calling the *expert witness* is generally not entitled to ask "leading questions," meaning questions that suggest answers. The information must come from the *expert witness*, not from counsel.

The *expert witness* should remember that other people do not have the same technical and specialized knowledge as them, and it is important for the *expert witness* to convey *technical information* in an understandable manner. The *expert witness* should also be mindful that similar words can have different meanings in different contexts. Someone with experience in a technical field may understand a term differently than counsel, judges, or *administrative tribunal* members, and the *expert witness* should therefore be cautious with their choice of words.

Following examination-in-chief, the opposing party is entitled to cross-examine the expert witness. Rules against leading questions do not apply to cross-examination because the aim is to challenge the evidence that was just given, whether based on its merits or by attacking the credibility of the expert witness. An attack on credibility may be offensive to an expert witness, but it is a necessary and accepted part of legal proceedings. An expert witness should not take challenges to their credibility by opposing counsel personally and should not respond emotionally. The expert witness who understands that their role is to assist the court or administrative tribunal in the finding of fact is unlikely to commit the most common errors:

- going outside their expertise or knowledge
- being argumentative
- failing to listen
- failing to consider any proposition that might favour the other side
- becoming defensive

Some expert witnesses expect the counsel who called them to rise to their defence when the cross-examination is particularly vigorous. The function of cross-examination is to challenge the expert witness, and there are very few legitimate objections to cross-examination questioning. Expert witnesses may be surprised when the counsel who called them remains quiet. The judge or administrative tribunal chair may rise to the defence of an expert witness if they believe that the expert witness is genuinely trying to help the court or administrative tribunal with the complicated facts of the case. However, what the expert witness perceives as an abusive attack by opposing counsel may not be perceived as such by the court or administrative tribunal.

Following cross-examination, the original party may re-examine the expert witness and ask further questions to clarify new issues raised in cross-examination. After re-examination, on occasion the court or administrative tribunal panel might have its own questions of clarification for the expert witness. To save time, particularly during long legal proceedings, an expert report is sometimes submitted with no direct examination, but the expert witness is subject to cross-examination and re-examination.

Commonly, there is an order for the exclusion of witnesses, so that one witness cannot hear the evidence of another until they have completed testifying. The purpose of this is to prevent the evidence from being tainted or altered by what is heard in court or at the hearing. A frequent exception to this exclusion is the expert witness, who, for practical purposes, may need to hear the evidence that has been called in order to comment upon it. However, the decision to exclude or allow the expert witness is case dependent and is determined by the court or administrative tribunal, and the expert witness seldom has a say. Because of the traditional order for the exclusion of witnesses, it is absolutely critical that witnesses not discuss the case outside the legal proceeding, as this would undermine the exclusion order. It is especially important for the licensed professional serving as an expert witness not to be drawn into conversation with other witnesses on issues relevant to the case either before or after testifying.

4.3.5 Practical Advice for Serving as an Expert Witness

The following points will help prepare the *licensed professional* to serve as an expert witness.

- The best preparation to be an *expert witness* for a court or *administrative tribunal* hearing is to watch an unrelated hearing.
- The *expert witness* should insist upon being briefed by the legal counsel who called them.
- A *licensed professional* should present themselves in a professional manner, both physically and in conduct. A *licensed professional* should be groomed and dressed appropriately, and extend civility and respect to all involved parties.
- At hearings held in a virtual setting, while on camera, the *licensed professional* should be mindful of facial expressions and body language.
- Judges in the Alberta Court of Justice (formerly called the Alberta Provincial Court) and the Alberta Court of King's Bench may be called "Justice." All judges may also be addressed as "Sir" or "Madam."
- *Administrative tribunal* members may also be addressed as "Sir" or "Madam."
- Lawyers are required to bow when they cross the bar and when they enter or exit the courtroom, but this is not a requirement for witnesses.
- In court, the witness stands in the witness box when sworn in. Witnesses who would be more comfortable sitting may ask to do so.
- After being sworn in, the witness may not sit down unless and until permission is given from the court to do so. In *administrative tribunal* hearings, witnesses generally sit during their *testimony*. During virtual court and *administrative tribunal* hearings, all parties are generally seated.
- In a virtual setting, an *expert witness* (and witnesses in general) should have adequate lighting and be clearly visible on camera when giving *testimony*.
- It is highly desirable for the *expert witness* to provide graphs, maps, diagrams, or any other relevant visual aids that assist in the presentation of evidence and explanation of the *expert witness*'s opinion. The *licensed professional* should ensure the presentation content is the same as what is shared in the *expert report*. This should be discussed with counsel ahead of time as all such materials must be provided to the opposing side in advance. Counsel will assist in that process. If information technology equipment is needed, the *licensed professional* should test the equipment beforehand to ensure it works as expected.
- The *expert witness* must be granted permission before referencing notes. Counsel will usually look after this technicality for the *expert witness*. The *licensed professional* should be aware that the entire file taken to the stand is disclosable to opposing counsel.
- In theory, every answer to a question is directed to the judge or *administrative tribunal* panel, not the lawyer who asked the question. However, for in-person legal proceedings, in practical terms, the *expert witness* may feel awkward if they speak only to the judge or panel. As a compromise, from time to time the *expert witness* should turn and address the judge or panel, acknowledging them as they would in a three-way conversation. If possible, the *expert witness* should sit facing the judge or *administrative tribunal* panel and only turn to face opposing counsel to receive the question before turning back to the court or *administrative tribunal* panel to answer.

- The *expert witness* should speak slowly and clearly, and should never use technical terms without an explanation. The explanation should be clear and avoid technical jargon.
- The *expert witness* should spell difficult words to assist the court reporters.
- An *expert witness* does not have the right to object to a question or refuse to answer. If the questioning is offensive, irrelevant, or improper, counsel or the court or *administrative tribunal* will object.
- If an *expert witness* does not understand the question, it is their duty to say so. It is important for the *expert witness* to understand what is being asked before they answer.
- If counsel phrases a question poorly, the *expert witness* should ask counsel for clarification or further information but should not interpret the question beyond how it is phrased. If the *expert witness*'s question is a sincere attempt to assist, it is perfectly acceptable. Problems occur when an *expert witness* starts to argue with counsel.
- The *expert witness* should be mindful that only one person should be speaking at a time. They should not interrupt.
- Cross-examination can become vigorous. Opposing counsel may intentionally provoke *expert witnesses*. The *licensed professional* should stay calm and refrain from getting rattled if opposing counsel becomes sarcastic or disrespectful and undermines the *expert witness's testimony*. The *licensed professional* should remember that they have the technical and scientific knowledge and have conducted their work with diligence, integrity, honesty, fairness, and objectivity. In contrast, it is the opposing counsel's role to create doubt and undermine the *expert witness's* opinions and credibility.
- The pace of questioning can vary. It may occur slowly, with periods of time between questions. The *expert witness* should answer the question to the point and stop, rather than trying to fill the pauses between questions and elaborate unnecessarily. Conversely, questioning may occur rapidly, as a tactic by opposing counsel to disrupt the *expert witness*. The *expert witness* should take the time to consider the question and their answer and not rush to answer because the opposing counsel has intensified the pace.
- If the question is outside the *expert witness's* area of expertise, it is their duty to say so.
- If an *expert witness* makes a mistake, they must say so. If the *expert witness* realizes the mistake before or after they have testified, they must bring it to the attention of the counsel who called them. If the mistake is made in an *expert report* without going to trial, the *expert* must notify the party who hired them. In all circumstances, the *licensed professional* must follow the Code of Ethics and Rules of Conduct. Refer to APEGAA's *Ethical Practice* guideline for more information.
- The *expert witness* should remain separate from the other witnesses to prevent any possibility of discussing evidence before testifying. The *expert witness* should also be cautious about speaking to opposing counsel outside of the legal proceeding without their party's counsel.
- Once the *expert witness* is subject to cross-examination, they must not discuss their evidence with anyone, even with the counsel who called them, and including during a recess, until the *expert witness* has completed testifying. Depending on the progression of the proceeding, *testimony* can occur over an extended period, even over several days in some instances. The *expert witness* has completed testifying when they are excused by the court or *administrative tribunal*.