



Guideline for Professional Member as a Witness

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The Association of Professional Engineers,
Geologists and Geophysicists of Alberta

FOREWORD

An APEGGA guideline presents procedures and practices that are recommended by APEGGA. In general, an APEGGA member should conform to the recommendations in order to be practising in accordance with what is deemed to be acceptable practice. Variations may be made to accommodate special circumstances if they do not detract from the intent of the guideline.

Guidelines use the word should to indicate that among several possibilities, one is recommended as particularly suitable without necessarily mentioning or excluding others; or that a certain course of action is preferred but not necessarily required; or that (in the negative form) a certain course of action is disapproved of but not prohibited (should equals is recommended that). The word shall is used to indicate requirements that must be followed (shall equals is required to). The word may is used to indicate a course of action permissible within the limits of the guideline (may equals is permitted).

This guideline is a new document developed by APEGGA in response to queries from members about the various issues surrounding the role of a professional engineer, geologist or geophysicist when faced with the prospect of serving as a witness in a professional capacity.

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1 OVERVIEW

Professional engineers, geologists and geophysicists are called upon by quasi-judicial bodies or courts of law to assist in the search for truth. Professionals called upon for the first time might react with trepidation. They likely have not received training regarding the procedures, obligations and risks associated with participation in legal and quasi-legal hearings. However, witnesses who are adequately prepared can and do leave the proceedings feeling satisfied that their efforts have assisted the court or administrative tribunal to make an informed decision. The key to successful performance is for professionals to understand the role that they have.

1.1 SCOPE

This guideline deals with the requirements of the expert witness in criminal and civil proceedings. It is also intended to assist members who might not be necessarily regarded as "expert" witnesses, but who simply give testimony on professional matters before a tribunal or court.

1.2 PURPOSE

The purpose of this document is to assist APEGGA members in preparing to appear as witnesses regarding professional matters by describing what is expected of them and offering some background as to the processes involved in giving testimony. This guideline should be regarded as an addition to, but not a substitute for, any specialized witness training that might be conducted by legal counsel.

1.3 DEFINITIONS

For the purposes of this guideline, the following terms and definitions apply.

Administrative Tribunal

An administrative tribunal is decision-making body created by legislation with the power to affect the legal rights of persons.

Affidavit

An out of court statement reduced to writing that is authorized by legislation and sworn under oath.

Applicant

One who requests something; a petitioner, such as a person who applies for letters of administration.

Civil Law

The law that deals with the competing rights as between individuals.

Criminal Law

That body of the law, which deals with conduct considered so harmful to society as a whole that it is prohibited by statute, prosecuted, and punished by the government. The law regulates how suspects are investigated, charged, and tried, and establishes punishments for convicted offenders.

Crown

The word refers specifically to the Queen of Canada (or the King of Canada, as the case may be). Prosecutions and civil cases taken (or defended) by either the Federal or provincial government are done so in the name of the sovereign as head of state (the Prime Minister being the head of government). That is why Canadian public prosecutors are referred to as "Crown prosecutors", and criminal cases are styled: "Her Majesty the Queen v. John Doe", or "Regina v. John Doe" (Regina being Latin for "The Queen"), or "Rex v. John Doe" (if the Sovereign is male; Rex being Latin for "The King"). The common abbreviation is "R. v. John Doe".

Cross-Examination

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

Discovery

Within the civil law, discovery refers to the pretrial disclosure of pertinent facts or documents by one or both parties to a civil action or proceeding. The primary discovery devices are interrogatories, depositions, requests for admissions, and requests for production.

Evidence

Proof of fact(s) presented at a trial.

Examination in Chief

Questions asked by the party calling the witness.

Expert Witness

An expert witness is qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or specialized opinion about the evidence or an issue of fact. Only the expert witness is entitled to offer opinion evidence; the testimony of all other witnesses is limited to their personal knowledge and observation. Expert evidence is not allowed for issues within everyone's normal experience (i.e. describing the symptoms of a person who is intoxicated, describing a scene, or reporting what a person said).

Intervener

One who voluntarily intervenes as a third party in a legal proceeding, who may be supporting or opposing the applicant's case.

Litigant

A party to a lawsuit.

Panel

A group of people selected for some service as investigation or arbitration.

Professional Member

A professional engineer, professional geologist, professional geophysicist, registered professional technologist (engineering), registered professional technologist (geological), registered professional technologist (geophysical) or licensee entitled to engage in the practice of engineering, geology and geophysics under the Act.

Subpoena

An order of a court, which requires a person to be present at a certain time and place or suffer a penalty (subpoena being Latin for "under penalty"). This is the traditional tool used by lawyers to ensure that witnesses present themselves at a given place, date, and time to make themselves available to testify.

Testimony

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

2 ROLE OF THE PROFESSIONAL SERVING AS A WITNESS

A fair question to ask is why should the APEGGA member be concerned about procedural rules when appearing before administrative tribunals or when the member is not providing expert evidence.

While the administrative tribunal does relax these rules as is appropriate to the greater informality of such proceedings, the role of the expert witness is the same whether the court is a judge and jury or a disciplinary hearing panel.

An APEGGA member should conduct himself or herself according to the highest standards at all times. That standard should not be relaxed regardless of the prestige of the tribunal before which they are appearing or the status of the witness. The phrase "professional witness" better describes that high standard of conduct.

It is natural that the professional member wants to do well when he or she testifies before any tribunal. Yet, stories of unsatisfactory experiences for both the professional and the tribunal are common. Many tribunals express a lack of confidence in the testimony being offered by APEGGA members – causing frustration for the tribunals and a great deal of stress for the members. The tribunal assumes that the witness "knows his or her function" and may be surprised, and even insulted when they do not.

This frustration on the part of the member and the lack of confidence by the tribunal arises because of a profound misunderstanding of the role of the professional witness; it is not a reflection on the personal integrity of the witness at all.

2.1 FUNDAMENTAL MISCONCEPTIONS

The lack of faith in the professional serving as a witness arises from two fundamental misconceptions.

Misconception #1: The professional witness believes that he or she should be an advocate for the party who called him or her.

This is the most common misconception and the one most easily exploited by lawyers. The misconception is hardly new:

*"Partly because of their tendency to espouse the cause of the party by whom they are called, the value to the expert witness has been doubted from time to time during the 19th and 20th centuries."*¹

1 Byrne, D. and J.D. Heydon (1991) *Cross on Evidence*, p. 785. Butterworths.

This fatal flaw was also recognized in *Engineering Law*, a publication which has been circulated to APEGGA members to assist them in preparing for court:

"The weakness of opinion evidence lies in the fact that an expert usually goes to court with a bias to become zealous for his employer."²

Why is it so wrong to be an advocate for the client's cause?

There are several reasons against advocacy. First the decision maker, whether a court composed of a judge and jury or a disciplinary hearing, is concerned with the search for the truth. The decision maker, not the witness must hear all of the evidence and make a determination. The only basis upon which the APEGGA member is entitled to appear in his or her professional capacity arises in those circumstances where the Court needs his or her experience and knowledge to understand the facts. If the evidence were such that an ordinary person could draw the appropriate conclusions, the professional would not be required and would not be entitled to testify at all. The professional witness is in reality the Court's witness because it is the Court that requires his or her services.

If the professional witness only advances the position of the party who called him or her, the Court cannot rely upon the testimony, and the witness is of no assistance to the Court. The Court expects that the professional witness understand his or her role in the proceedings and is surprised and insulted if the witness does not, whether the fault is innocent or not.

The second reason that it is inappropriate to act as advocate is that the job is already taken. That is the role of counsel. It is also insulting to the lawyers to have witness try to do their job for them.

Why does this misconception persist?

There are a number of reasons why this misconception persists. First, television perpetuates the myth that witnesses are like members of a team and that they are there to see that "their side" wins. This makes for entertaining TV and a disastrous performance in real life. Second, very few professional members have any experience testifying before a court or tribunal.

Third, if the member has any experience with the judicial system, it is more likely in the context of the examination for discovery in a civil case. The examination for discovery is the formal process by which the litigants investigate the issue that is under dispute. The evidence at an examination for discovery is under oath and recorded by a court reporter, but there is no judge present and there is no final determination of any issue. In that context, the APEGGA member may have accessed published excerpts from publications and papers dealing with civil proceedings to this effect:

"He should be cooperative, avoid volunteering information not specifically requested, and avoid revealing any item that might prove embarrassing to either himself or his attorney."³

Such advice is appropriate in the examination for discovery because the whole point of the proceeding is a formal investigation by the litigants. Admissions in that context may form part of the evidence at trial. Not surprisingly, the professional serving as a witness

2 Laidlaw, R.E., C.R. Young and A.R. Dick (1981) *Engineering Law, Fifth Edition*, p. 168. University of Toronto Press.

3 Crawford, Robert J. (2001) *The Expert Witness – A Manual for Experts*, p. 87. 1st Books Library.

in that context is cautioned not to assist the other side voluntarily. The legal counsel who has engaged the witness will advance the counsel's interests.

The APEGGA member will only be involved in discoveries if they were party to the lawsuit, a designated officer of a corporate party, or a current or former employee of a party. Witnesses who do not fall into one of those categories are not examined at the discovery stage (at least not in Alberta, there is a different regime in Ontario).

The experience of examination for discovery does not assist the witness in preparing to testify before a court or tribunal - the rules of engagement are very different. In the trial situation, the court is preoccupied with the search for the truth, and the witnesses are under oath and compelled to testify fully. The witness who is coy about his or her answers, and, instead of fully answering the question, edits the answer so that it becomes misleading because of what it does not include, will be viewed as unreliable by the Court. In extreme cases, the Court could sanction such conduct by a finding of contempt with all its possible consequences.

The overt display of client advocacy is not only fatal to the credibility of the professional witness on the trial in which he or she has been called, but may tarnish the professional member's reputation in the legal community. The legal community is very small in Alberta (there are only 107 judges of the Provincial Court, 78 justices of the Court of Queen's Bench, and 150 prosecutors in the province), and reputations become widely known. The measure of any witness's reputation is the degree to which he or she fulfills the mandate to assist the court in its inquiry into the truth.

Misconception #2: The professional witness believes that he or she is the ultimate decision-maker on the issue for which his or her evidence is being sought.

The second pervasive, although less common, misconception is that the professional witness assumes that because he or she been asked for an opinion, the professional is the ultimate decision-maker, rather than just an assistant to the court. Regardless of whether the tribunal is a court composed of a judge and jury or an APEGGA disciplinary hearing, the tribunal will make the decision, not the parties appearing before it. It is offensive to the decision-maker to have a witness attempt to usurp that responsibility.

2.2 UNDERSTANDING THE ROLE OF THE PROFESSIONAL WITNESS TO ASSIST IN PREPARATION FOR COURT

There is a great fear among APEGGA members that when they testify they will fall victim to the games that lawyers play with witnesses and much of the American publications that are available to APEGGA members focus on techniques to avoid this.

In reality though, these "games" have a simple purpose, they are designed to reveal that the witness' first interest is the promotion of either of his or her client's position or his or her own position as the font of all knowledge. Lawyers are not experts in science; they are experts in exploiting human weaknesses, but the professional witness who understands that his or her role is to assist the tribunal in the finding of fact will never commit the most common errors:

- going outside his or her expertise or knowledge,

- being argumentative,
- failing to listen,
- failing to accept any proposition that might favour the other side, or
- becoming defensive.

No person is perfect and no witness infallible. A court will forgive less than perfect recall, nervousness, and a less than polished performance, but no court will forgive a professional witness who acts as the cheerleader for one side or tries to usurp the decision-making power of the court or tribunal.

2.3 DUTY TO ACT AS A WITNESS

Many people assume that involvement in a judicial proceeding is a matter of choice for the professional. This is not necessarily the case. Professionals may be subpoenaed as involuntary witnesses for criminal and civil courts. Sections 705 and 706 of the Criminal Code provide as follows:

(705) Where a person who has been served with a subpoena to give evidence in a proceeding does not attend or remain in attendance, the court, judge, justice or provincial court judge before whom that person was required to attend may, if it is established that:

- (a) the subpoena has been served in accordance with this part and*
- (b) that the person is likely to give material evidence issue or caused to be issued a warrant in Form 17 for the arrest of that person.*

(706) Where a person is brought before a court, judge, justice or provincial court judge under a warrant issued pursuant to Section 705, the court, judge, justice, or provincial court judge may order that the person:

- (a) be detained in custody or*
- (b) be released on recognizance in Form 32 with or without securities to appear and give evidence when required.*

These subpoena powers of the Criminal Court apply equally to administrative tribunals and the appointed commissioner(s) by virtue of Section 5 of the Public Inquiries Act R.S.A. 2000, ch. P-39:

Evidence

4 *The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.*

RSA 1980 cP-29 s3

Attendance of witnesses

5 *The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.*

RSA 1980 cP-29 s4

Contempt

6(1) When a judge of the Court of Queen's Bench is appointed as a commissioner or as one of several commissioners, the commissioner or commissioners so appointed have the same power of committal for contempts of the commissioner or commissioners as a judge of the Court of Queen's Bench has in respect of that Court.

(2) When pursuant to an Act of the Legislature a person or group of persons is or may be vested with the power to inquire into any matter and that Act grants to that person or group of persons the powers of a commissioner under this Act, subsection (1) applies to those powers if the person so appointed or any of the persons composing the group appointed is a judge of the Court of Queen's Bench.

RSA 1980 cP-29 s5

3 ETHICAL CONSIDERATIONS IN ACCEPTING AN ASSIGNMENT

Professionals must examine their ethical position relative to any possible voluntary involvement in proceedings. The APEGGA Code of Ethics addresses the following areas and governs members' behaviour.

3.1 COMPETENCE

When deciding whether to appear before a hearing or a civil proceeding as an expert witness, professionals must consider whether they have the depth and range of experience to provide an opinion on the topic in question. There may be situations where they find themselves beyond their personal capabilities. The terms "qualifying" (as in "qualifying for membership in a professional body") and "competence" should not be confused. "Qualifying" means that a person has a quality or accomplishment suitable for some function or office. It is a one-time, static fact that cannot be lost or diminished by time. "Competence" is the "quality of having suitable skill, knowledge or experience for some purpose". It is dynamic and relates to the present task, assignment, or activity.

Professionals must carefully assess their competence to undertake a proposed assignment. This involves judging whether their theoretical knowledge, practical experience, and reputation in their field are of suitable pertinence, extent, and depth to enable them to put forward and to defend a position that would be helpful to the court.

Professionals must ensure that the client understands the possibility that some situations may demand particular skill or knowledge that they do not have and that the client must retain or pay for such specialist services. If the client is unwilling to retain or pay for necessary specialist services, the professional must decide whether this denial is sufficient for refusal of the assignment.

3.2 CONFLICT OF INTEREST

In the case of voluntary participation in proceedings, professionals must examine their personal involvement in the affairs of any of the parties to the action or inquiry to be able to assure their client that they have no conflict of interest and that others can show none. If there appears to be any conflict of interest, the professional should immediately advise both the client and legal counsel.

In addition, professionals should examine any relationships with other clients who are not directly involved and be certain that participation in the action or inquiry will not result in any disadvantage to them. Where one of the parties to the action or inquiry is a client

in other instances, professionals must judge whether participation would jeopardize their future relationships. Through appropriate inquiry, the professional must be satisfied as to the good faith of the parties to the dispute. If they are not able to find that satisfaction, they should seriously consider not becoming involved.

3.3 CONFIDENTIALITY

In their day-to-day practices, professionals have an ethical and often a contractual obligation to keep secret and confidential any conclusions reached during an assignment undertaken on behalf of a client. However, there is no legal privilege that is created by the relationship alone and if ordered to do so by the court, the professional must answer. "Privilege" is a rule of evidence, which permits a witness to refuse to answer a particular question or to produce particular documents. However, privilege arises in very limited circumstances, namely as between husband and wife and solicitor and client. For example, there is no legal privilege between a doctor and his patient or priest and his penitent.

Further, solicitor-client privilege will only apply to reports and documents prepared by non-legal professionals (employed or retained by a party) if the dominant purpose of the preparation of the report or document was to instruct legal counsel in respect of contemplated or anticipated litigation.

The fact that documents are prepared in the context of a confidential relationship between a professional and client or are marked "confidential" will not preclude disclosure in court. Thus, professionals may be called upon to reveal the source or nature of their information, even though they have given promises of confidentiality. In some instances, the court may impose terms upon the disclosure or take other measures to protect the confidentiality outside the courtroom. It will be up to the court or the tribunal involved to determine the hardship that would ensue should the professional members be forced to violate such promises of confidentiality and to decide if the members will be permitted to hold their promises.

The professionals who are asked to keep the source or the nature of secret information or trade secrets fully confidential and protected must understand that they cannot make that promise unconditionally.

Finally, it is important to emphasize that privilege is a matter that should be raised by the lawyers in the case and not the witness. Therefore it is important to raise any concerns with respect to privilege with counsel before the trial.

3.4 OTHER ETHICAL RESTRICTIONS

Professionals must understand that full and timely discharge of the proposed service may be limited, restricted, or delayed by a number of factors. The client may impose restrictions relating to monetary matters, confidentiality, access to essential information, and certain directions that an investigation might take. Situations may arise that professionals judge to be outside their personal capabilities and that will require outside expert assistance. The professionals' investigation of the facts may suggest that their testimony may take a direction not in keeping with the wishes of the client. In such circumstances, the professionals have an immediate obligation to advise the client and counsel of the situation.

Where the involvement in legal proceedings is on a voluntary basis, professionals should ensure that their normal business activities are not put at risk because of unexpected or unreasonable demands on their time. They should advise their other obligations and make arrangements to meet time constraints. They should also ensure that informal or personal short-term commitments do not lock them into unwanted longer-term involvement that could prevent the discharge of regular commitments or participation in new business. Court attendance, for example, typically overrides all other commitments. The witness must be there when the court is ready.

4 CONDUCTING AN INVESTIGATION

Before professionals can act as witnesses or give testimony, they must conduct a thorough examination of the matter in dispute before the tribunal for review and adjudication. The role of professional witness is to assist the judicial process.

Expert testimony must meet several criteria:

- The findings must be based on the scientific methodology, not on the fact that a professional is presenting it.
- The findings must fit the case technically, conforming to known scientific, physical, or engineering principles and be supported by a documented trail of reasoning that links the evidence to the case. Science or engineering should not be applied to situations that are not subject to scientific analysis or to an area about which there is no scientific knowledge.
- The witness must be an expert in the field relevant to the case.

4.1 THOROUGHNESS

Professionals are ethically bound to express opinions only based on adequate knowledge and sound conviction. To reach a conclusion or to form an opinion, professionals must assess how much information must be gathered to reach a supportable, documented conclusion and how much evidence will be required to prove an assertion. They should also understand the general approach being taken by the client's legal counsel to be able to support it appropriately. The professionals however, should address only those areas within their areas of competence and avoid extraneous investigation.

Because unanticipated technical questions might arise, professionals should examine all documents related to the case, including correspondence, tests, plans, logs, sections, maps, and materials supplied by other witnesses. They should draw on their special skills and knowledge derived from study, readings and analysis to develop their expert testimony. Professionals must co-operate with all investigators involved and be prepared to share matters of fact. All parties should be starting with the same facts.

4.2 EXAMINATION OF A SITE

The professional may have to conduct a personal inspection of local conditions in cases such as those involving accidents, hazards, working conditions, or project location and features. At the time of inspection, the professional should take detailed notes before the facts fade from memory. The professional must be aware that notes taken might be producible to all parties in an action.

The professional should record all details that might be pertinent in the proceeding and, where appropriate, support them with photographs. Any changes that might have occurred between the time of the incident and the examination should be noted and, if possible, the site should be restored to its condition at the time of the incident. It may also be important to note the time of examination and weather conditions.

Professionals do not have the right to trespass to obtain data. Access to property, both private and public, is possible only if expressly permitted by the owner or with the agreement of the parties involved, unless there is a statutory provision allowing access for a specific purpose.

4.3 PREPARATION OF DATA

Professionals should prepare all data and documentary evidence in a way, which will help educate the non-expert tribunal. Even the most honest witnesses are ineffective if the evidentiary basis of their opinion is not established. They should inform the client of the need for any specific tests, calculations, analyses or other assessments necessary to arrive at their professional opinion. They should also advise the client of the desirability of preparing exhibits or demonstrations, where appropriate, for use in hearing room. These exhibits may include tables, diagrams, samples, drawings, maps, sketches, cross-sections, plans, reconstructions, photographs, etc.

Professionals serving as witnesses do not testify in the abstract, but are called upon to interpret data, whether they collected data themselves or others provided it. Hence, they should have personal knowledge of any tests or analyses to ensure compliance to technical specifications.

4.4 PRESERVATION OF EVIDENCE

In criminal prosecutions, preservation of evidence is the responsibility of the investigator and the Crown. However, there are situations where the witness is called upon long after the initial involvement. All pertinent information should be properly identified, recorded, and catalogued for later legal use.

The catalogued information should include all rough calculations, original data, preliminary drafts, telephone records, and notes of interviews and of any conferences with others connected with the case. In the criminal context, such records are subject to disclosure.

5 HEARING AND INQUIRY PROCESS

The hearing and inquiry process for most quasi-judicial regulatory boards is quite similar, with only minor variations from one to another. There are also many similarities to the court trial process. Every witness, whether an expert or not, should insist upon meeting with counsel in advance of the tribunal for a proper briefing of procedure. The confidence of a witness can be easily undermined by confusion over seemingly minor procedural matters, such as standing during the giving of evidence and asking for permission to read from notes. In advance of the tribunal session, counsel can easily address these matters.

5.1 INTRODUCTORY REMARKS AND THE OPENING OF THE HEARING OR INQUIRY

Commonly, a panel of three board members or commissioners sits at a hearing, with one member designated as the chair or presiding member. Most often, a court reporter is present to take a verbatim record of the proceedings. After opening comments about the purpose of the hearing, the presiding member will register the participants.

5.2 PRESENTATION OF EVIDENCE

The presiding member will first ask the applicant to present its application. If counsel represents the applicant, they will ask the presiding member to mark the application and supporting documents as exhibits to the proceeding, including any reports to be provided by witnesses. All of this material will have been provided to the panel and the other participants much earlier. The counsel will then introduce the people who will speak to the applicant's evidence, including representatives from the company and other professionals serving as witnesses. The counsel will qualify the witnesses by describing their background, education and experience, including any special qualifications they may have related to their evidence. Most often, counsel will submit the witnesses' curriculum vitae to be marked as exhibits and become part of the hearing record. Other parties have the right to challenge the qualifications through cross-examination. Most tribunals will ask the reporter to swear in the witnesses, although some do not. Those that do not still expect witnesses to tell the truth.

The witnesses rarely read their evidence into the record because it is already documented, but most often they will highlight the major points and identify any possible errors in their written material. Once all of the witnesses have gone through this process, they are open for questions from the interveners (other participants in the hearing who may be supporting or opposing the applicant's case), the board staff and the members of the panel.

If after cross-examination of the applicant's witnesses, counsel for the applicant decides that some matters need further clarification; the counsel may ask more questions of the witnesses. This testimony is also subject to questions, from the intervener although that seldom occurs.

Interveners who intend to submit evidence to the panel must provide that evidence to the panel, the applicant, and other interveners by the deadline prescribed in the notice of hearing. At the hearing, the presiding panel member will ask to present the intervener's case. The same steps are then followed as in the case of the applicant: marking of interventions and supporting documents as exhibits to the hearing, qualification of the witnesses, swearing in of the witnesses (if required), examination-in-chief, cross-examination, and re-examination. This process is repeated for each intervener. It is possible that some interveners will not present evidence but will participate in the hearing for the purposes of cross-examination and argument only.

The applicant may wish to rebut or dispute some of the evidence presented by interveners. The applicant may ask the assistance of its witnesses in this process. In such cases, it is necessary to have the witnesses take the table again to answer any questions that the rebuttal evidence raises.

5.3 CLOSING ARGUMENTS OR SUMMARY STATEMENTS

In the last step in the hearing process, the presiding member will invite the applicant and each intervener to make a closing statement. This is an opportunity for each participant to summarize its case, and the issues that have been raised and present the reasons why its case ought to be accepted by the panel. Counsel, not a witness, provides a closing argument.

5.4 CLOSE OF THE HEARING AND UNDERTAKINGS

Most often, the presiding member will close the hearing, advising the parties that the evidence will be carefully considered and a written decision issued in due course.

It is possible that any one of the parties will have made an undertaking to provide additional information or answers to questions during or after the close of the hearing. In rare cases, these undertakings might raise substantial questions, necessitating the re-opening of the hearing.

6 TRIAL PROCESS**6.1 OPENING OF THE TRIAL**

The court trial process is similar to but stricter than a hearing or tribunal. A civil trial (with the rarest of exceptions) is presided over by a Judge. The Judge or jury weighs the evidence and makes the final decision. A criminal trial may be held before a Judge of the Provincial Court or a Judge of the Court of Queen's Bench sitting alone or with a jury. A court reporter or court recording device is present to take a verbatim record of the proceedings.

6.2 QUALIFICATION OF EXPERT WITNESSES

Professionals called upon to give expert or opinion evidence must first be qualified by the court to do so. As with all aspects of a trial, the rules of evidence are more strictly applied than in a hearing. Only the expert witness is entitled to offer opinion evidence. The testimony of all other witnesses is limited to their personal knowledge and observation.

The procedure by which a witness is qualified as an expert is called a voir dire, which has been described as a trial within a trial. During the voir dire, the court will hear evidence relating to the witness's qualifications and determine whether he or she may testify in that capacity. The lawyer seeking to have the witness qualified as an expert will define the area of expertise very specifically and then ask questions as to the witness's background to show why the witness is in a position to assist the court in wrestling with issues within that area of specialization.

Since expertise is based on experience, there is no requirement for formal education, publications, or standing in academic or professional associations. The question before the court is essentially whether this potential witness has the experience that would allow the court to have confidence in his or her ability to assist. However, when dealing with professionals, the counsel presenting the witness will canvass the following areas:

- academic qualifications
- professional background and experience

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

After the party seeking to have the witness qualified as an expert asks their questions, the opposite counsel is entitled to cross-examine on those qualifications. Although the questions might seem insulting, the strategy of the opposite counsel is often simply to limit the area of expertise that the witness can deal with. At the conclusion of the questioning, the judge will decide whether the person can testify as an expert witness, and if so, to what extent.

Once it is ruled that a witness may testify as an expert, the testimony is restricted to matters within the strict definition of their area of expertise; the witness may not stray beyond that expertise. The courts, and especially the criminal court, are very strict in enforcing the rule that an expert may not testify beyond his or her stated area of expertise.

6.3 PRESENTATION OF EVIDENCE

Once the witness has been qualified as an expert, the trial proceeds. The counsel who has called the witness goes first, questioning the witness. This “examination in chief” follows very strict rules. Counsel calling the witness is not entitled to suggest answers or to put words in the witness’s mouth. The information must come from the witness, not from counsel.

Thereafter, the opposite party is entitled to cross-examine the witness. Rules against leading questions do not apply to cross-examinations, because the point is to challenge the evidence just given, whether based on its merits or by attacking the credibility of the witness. An attack on credibility is most offensive to an inexperienced expert witness, yet it is a necessary and accepted part of the trial process. Witnesses, who react angrily or defensively to cross-examination, misunderstand their role in the judicial process. If witnesses remember that their only role is to assist the court, they will be invulnerable to personal attack. The Court will stop an abusive cross-examination, but perceptions of what is abusive may differ between the witness and the Court.

Many witnesses expect the counsel who called them to rise to their defense when the cross-examination is particularly vigorous. The function of cross-examination is to challenge the witness and there are very few legitimate objections to cross-examination questioning. So to the surprise of the witnesses, the counsel who called them may remain mute. However, the judge may rise to the defense of a witness if he or she believes that the witness is truly trying to help the Court with the complicated facts of the case.

Following cross-examination, the original party may ask further questions to clarify new issues raised in cross-examination. After re-examination, on occasion, the court might have its own questions of clarification for the expert witness.

In virtually every case, there is an order for exclusion of witnesses, so that one witness cannot hear the evidence of another until he or she has completed testifying. The purpose of this is to prevent the evidence from being tainted or altered by what is heard in court. The 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 made by the court, not the witness.

Because of the traditional order for exclusion of witnesses, it is absolutely critical that witnesses not discuss the case outside the courtroom, as this would obviously undermine the order of exclusion. It is especially important for the professional serving as a witness not to be drawn into conversation with other witnesses on issues relevant to the case either before or after court.

6.4 PRACTICAL ADVICE FOR SERVING AS A WITNESS IN CRIMINAL COURT

The following points will help prepare the professional serving as a witness in the criminal courts:

- The best preparation to be a witness for a trial is to watch an unrelated trial.
- The witness should insist upon being briefed by the lawyer who has called him or her.
- The Judge in Provincial Court is called “Your Honour”. The Judge in Court of Queen’s Bench is addressed as “My Lord” or “My Lady”. All judges may be addressed as “Sir” or “Madam”.
- When sworn in criminal court, the witness stands in the witness box.
- After being sworn in, the witness may not sit down unless and until permission is given from the Court to do so.
- The witness may not refer to notes unless and until given permission by the court to do so. Counsel will usually look after this technicality for the witness.
- 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.
- A witness does not have the right to refuse to answer or object to a question. If the questioning is offensive, irrelevant or improper, counsel or the court will object.
- At the same time, if a witness does not understand the question, it is his or her duty to say so.
- If the lawyer phrases a question poorly, it is still the witness’s duty to try to assist. The witness may ask the lawyer for clarification, further information, or further details. If the witness’s question is truly an attempt to assist, it is perfectly acceptable. Problems occur when a witness starts to argue with the lawyer.
- If the question is outside the witness’s area of expertise, it is his or her duty to say so.
- If a witness makes a mistake, he or she must say so. If the witness realizes the mistake after he or she has testified, it is to be brought to the attention of the lawyer who called him or her.
- It is highly desirable that the witness provides graphs, maps, diagrams or any other visual aids that assist in the presentation of evidence. However, all such materials must be provided to the opposite side in advance. Counsel will assist in that process.
- In theory, every answer to a question is directed to the Judge, not the lawyer who asked the question. However, in practical terms, this is almost impossible to do and

the witness will feel very awkward if he or she tries. As a compromise, from time to time, the witness should turn and address the judge.

- The witness should never use technical terms without an explanation.
- The witness should spell difficult words to assist the court reporters.
- It is best that the witness separate him or herself from the other witnesses prior to testifying so as to preclude any possibility of discussing evidence prior to testifying.
- Once the witness is subject to cross-examination, he or she must not discuss his or her evidence, even with the lawyer who called the expert until such time as the witness has completed testifying.
- It is best for the witness to leave the courtroom after he or she has testified.

7 FEES AND AGREEMENTS

7.1 CIVIL COURT

In the civil courts, the level of compensation mandated by law is minimal. Professionals who are subpoenaed as involuntary witnesses in any legal matter are entitled only to legal witness fees, as well as travel and living expenses, if warranted. But if an expert is called under such circumstances, the witness cannot be forced to give an opinion without extra compensation. The skill and knowledge of the expert 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 results in little investigation of the problem and the witness cannot be expected to risk an opinion on such an insecure basis. Therefore, the professional should speak with counsel prior to accepting a retainer to deal effectively with an issue.

7.2 CRIMINAL COURT

In the criminal courts, there is no right to compensation for any witness, including the expert witness. However, there is a system in place to compensate expert witnesses and these arrangements should be discussed with the prosecutor or defense counsel in advance of the trial. It is no defense to a charge of failing to appear as a witness to suggest that payment is required.

7.3 GENERAL TERMS

On the other hand if one is being asked to provide an opinion in advance of a trial as part of the investigation or pre-trial preparation, the professional witness is entitled to compensation on the same basis as for any professional service, even in the criminal courts.

It is useful and courteous to provide the client, as soon as possible, with an advance estimate of the investigative costs to be incurred by the professional serving as a witness. Professionals may refer to fee schedules established by APEGGA. Hourly or per diem rates should be quoted for consultations and court appearances. This will permit the client to consider alternatives, if appropriate.

The legal proceedings in which the professional is involved may be an adjunct to another commission for which fees have already been established. If preparation and

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appearance as a witness is a part of his or her normal duties, then the employer will address fees payable by an outside client, and no additional remuneration to the professional is warranted. On the other hand, if normal income from an employer is curtailed because of being a witness, then the professional may be justified in negotiating an appropriate fee for services.

For situations of minimal involvement and complexity, a formal written contract is unwarranted. It may be prudent, especially with a new client, to request a retainer in such situations to ensure that a commitment exists, which is sufficient to make the requested preliminary judgments.

For lengthy and complex commissions, a written contract is preferable. If a formal contract cannot be achieved, then a detailed letter of advice should be prepared by the professional and directed to the client as soon as possible outlining the understanding of the commission. The agreement should clearly set out the services to be provided, the rates of payment applicable to the various services, and the times and terms of payment. For extended periods of investigation or other activity, provision should be made for progress payments and escalation of rates, if appropriate.

Any agreement should make clear to the client that the professional must remain technically impartial and is to be reimbursed for professional services, regardless of outcome. A specific statement, such as "payment to the professional is to be made without delay, and is not contingent upon the results of any legal action, arbitration, or out of court settlement", should be included in the agreement.

In an agreement or contract, it should be possible to describe the full program envisaged, at least up to the actual court appearance, at which time control passes out of the hands of the professional. It is normal for changes and additions to the original terms of the contract to occur, initiated by the client, legal counsel, or the professional. Careful documentation and accounting should be kept for all extras.