

# **Professional Practice Guideline Licensed Professional as an Expert Witness**

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**The Association of Professional  
Engineers and Geoscientists of Alberta**

**Please be advised this document is only a draft.**

## DOCUMENT HISTORY

DATE	VERSION	REVISION DESCRIPTION
October 2003	V1.0	Released for use.
Month Day, Year	V2.0	Substantive changes (overall content condensed and streamlined; expanded some content for additional information; licensing requirements provided for non-APEGA licensed professionals; guidance on <i>administrative tribunal</i> and court processes combined).

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## 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force until a practice standard or guideline on the subject is developed or revised, or until the practice bulletin is repealed.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, 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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## Definitions

For the purposes of this guideline, the terms and definitions 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 accepts 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 peculiar 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**

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**

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 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* to provide information that is beyond the decision maker's knowledge and experience. In court or at an *administrative tribunal*,

the role of an *expert witness* is to help find the truth in situations where the court or *administrative tribunal* may benefit from opinion *evidence* about engineering or geoscience matters.

The key to successful *testimony* as an *expert witness* is for the *licensed professional* to understand their role. An *expert witness* is not an advocate for the party who hired them. Their primary obligation is to assist the court of law or *administrative tribunal* with technical knowledge and opinions, acting with integrity, honesty, fairness, and objectivity.

## 1.1 Purpose and Scope

The purpose of this document is to help *licensed professionals* prepare to appear as an *expert witness* by describing what is generally expected of them and providing some background on the processes involved in testifying as an *expert witness*. If the *licensed professional* is acting as an *expert witness* outside of Alberta, they must follow the requirements for exporting *professional work products* from Alberta as defined in the *Authenticating Professional Work Products* practice standard.

This guideline should be regarded as an addition to, but not a substitute for, any procedural training that might be conducted by legal counsel. Legal counsel may educate and 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*.

This guideline presents 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. The information represents the most common expectations and procedures; however, as each court and *administrative tribunal* proceeding is unique, actual proceedings could deviate from the content presented in this guideline.

## 1.2 References

This guideline references the following publications. The latest versions are available at [apega.ca/practice-standards](http://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* guideline

The following external reference is cited in this guideline:

- Government of Canada Federal Courts Rules, Schedule Code of Conduct for Expert Witnesses (available at [laws-lois.justice.gc.ca/eng/regulations](http://laws-lois.justice.gc.ca/eng/regulations))



## 2.0 Role of the Licensed Professional as an Expert Witness

The role of an *expert witness* is to help the court or *administrative tribunal* understand the issues and determine facts in situations where the court or *administrative tribunal* lacks the *expert witness's* specialized expertise and may benefit from opinion *evidence* on engineering or geoscience matters. A lay witness is an ordinary witness who has been called to give *evidence* based on their personal knowledge about the matter before the court or *administrative tribunal*, regardless of their profession. Lay witnesses testify about what they saw, heard, or did, whereas *expert witnesses* are allowed to offer 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.

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 who hired them, nor to their clients, 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 before a court or *administrative tribunal*. Acting as an *expert witness* is considered practising the professions, and the Code of Ethics applies.

### 2.1 Role Misconceptions

A *licensed professional* serving as an *expert witness* should be aware of two fundamental misconceptions about the role of an *expert witness*.

**Misconception #1:** The *expert witness* believes they should be an advocate for the party who called them.

An *expert witness* should not engage in advocacy for three main reasons.

First, the *expert witness's* 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 facts. If the *expert witness* advances only the position of the party who called them, the *testimony* will be viewed as unreliable by the court or *administrative tribunal* and the *expert witness* will not be of assistance .

The *expert witness* will be also be viewed as unreliable by the court if they are unclear in their answers, and if, instead of fully answering the question, they edit the answer so that it becomes misleading because of what it does not include, thereby advancing the position of the party who called them. 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, and it is inappropriate for the *licensed professional* to advocate for the party who called them. Additionally, an overt display of advocacy is detrimental to the credibility of the *expert witness* before the court or *administrative tribunal*.

Third, advocacy ignores facts or makes favourable assumptions that are 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.

**Misconception #2:** The *expert witness* believes they are the ultimate decision maker on the issue for which their professional opinion is being sought.

*Licensed professionals* should not assume that they are the decision maker because they have been called upon as an *expert witness* and know the technical details of the matter. The court or *administrative tribunal* is the ultimate decision maker, and *expert witnesses* are merely providing 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 that they have been asked to assume. Their *testimony* will also only be a part of the case presented to the decision maker. They should be aware that both 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 the facts they have been asked to assume, they will also need to consider how their opinion may change with a different set of facts.

## 3.0 Ethical Considerations

*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. Before accepting an assignment, the *licensed professional* should make it clear with 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. Refer to APEGA's *Ethical Practice* guideline for more information on giving opinions, including providing opinions as an *expert witness*.

### 3.1 Competence

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 have the competence 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 competence 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 to the party and legal counsel that they will not provide expert opinions outside of their area of competency and should ensure the *contract* for services includes this condition.

Before an *expert witness* testifies, the court or tribunal must accept the witness as an expert in the proposed area of knowledge and expertise. See Section 5.3 Qualification of Expert Witnesses for more information.

## 3.2 Conflict 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 large corporation, 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* working for a large corporation to verify that other *licensed professionals* working at the same corporation have not been hired by another party for the same action. 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 and must answer.

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. *Licensed professionals serving as expert witnesses* should understand that if their expert opinions will be used at trial or at an *administrative tribunal* hearing, then that legal privilege will be waived and all the aforementioned material 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 *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." 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 rely upon 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 trial or at 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*. *Licensed professionals* should discuss any concerns with the legal counsel who retained them or with their own legal advisors.

### 3.4 Other Ethical Restrictions

*Licensed professionals* 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 *licensed professionals* judge to be outside their professional capabilities and that will require outside expert assistance. The *licensed professional's* investigation of the facts may steer their *testimony* in a direction not in keeping with the wishes of the party who hired them. In such circumstances, the *licensed professional* has an immediate ethical obligation to advise the party and their legal counsel of the situation.

*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. *Licensed professionals* should discuss anticipated timelines and extent of involvement in the first conversation with the party and legal counsel wishing to retain them. 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 Non-APEGA Licensed Professional as an Expert Witness

As *expert witnesses*, individuals who provide opinion *evidence* on the subjects of engineering and geoscience in Alberta 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 expert engineering or geoscience *evidence*, the *expert witness* should ensure they comply with APEGA licensure requirements. This includes engineering or geoscience professionals who are licensed with other jurisdictions. An *expert witness* should consult with their own legal counsel in a timely manner to ensure that registration requirements for practising in Alberta do 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 are required to resume active practising status to act as an *expert witness*.

### 4.0 Investigations, Reviews, and Field Work

Before *licensed professionals* can act as *expert witnesses* or give expert opinion *evidence*, they are expected to conduct a thorough examination of the matter in dispute before the court or *administrative tribunal*. This may include reviewing documents and conducting site investigations and site visits, as needed. 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 analysis 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*

All *licensed professionals* acting as *expert witnesses* and employed by a *permit holder* must ensure they are following the policy and procedures documented in their *permit holder's Professional Practice Management Plan*. Refer to the practice standard *Professional Practice Management Plan*.

### 4.1 Thoroughness

*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 available documents related to the case. They should inform the party who retained them of the need for any specific tests, calculations,

analyses, or other assessments necessary to arrive at their expert opinion and then conduct the necessary reviews and investigations to gather the required information. They should draw on their own skills and knowledge derived from study, readings, and analysis to develop their expert opinion. *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.

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. Please 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 have knowledge of any tests or analyses that were conducted. If another employee has completed work that the *expert witness* relies on, it is expected that they have completed 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.

Although *licensed professionals* must remain objective and only address matters within their areas of competence, 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 upon the information they were asked to review.

## 4.2 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 physical *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 physical *evidence*.

If a *licensed professional* needs to conduct destructive testing or alter physical *evidence* to support their investigation, they cannot proceed without the involvement of all other parties involved in the action. Destructive testing occurs when the testing is necessary to arrive at an expert conclusion, and the consequential destruction of the specimen prevents 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 allow another party to observe all that has happened to that physical *evidence*.

### 4.3 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 Government of Canada Federal Courts Rules, Schedule Code of Conduct for Expert Witnesses, provides a list of the requirements for expert reports (see Section 1.2 References). 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 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. Expert reports are considered *professional work products* and must be authenticated and validated accordingly. Please refer to the *Authenticating Professional Work Products* practice standard for more information on *authentication* and *validation*.

When considering all available information, *licensed professionals* should be careful not to confuse facts with assumptions, nor to confuse assumptions with opinions. Facts should be agreed upon by all involved parties and not be in dispute. Quantitative measurements, if properly recorded or from published data, can usually be considered fact, if provable and repeatable beyond dispute. Assumptions may be used for factual matters that are expected to be proven in court or before the *administrative tribunal*. Assumptions should be reasonable and objective, and if competing assumptions are equally reasonable and objective, then the *licensed professional* should also indicate their alternative opinion using the alternate set of objective reasonable assumptions. Legal counsel can assist with identifying facts and assumptions. Similarly, the *licensed professional* should take great care not to confuse assumptions with opinion. 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. 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 fact and what is not. In court cases, only information entered as *evidence* by counsel at trial may be used to form an opinion. If counsel neglects to include relevant information, that *evidence* may not be available for the *expert witness* to form their opinion.

*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. They should advise the party who retained them of the desirability of preparing exhibits or demonstrations, when appropriate, 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.

#### 4.4 Preservation of Evidence

It is the responsibility of the *licensed professional* 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 that the *expert witness* remember 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 *professional work products* and to the *Professional Practice Management Plan (PPMP)* practice standard for information on setting a retention policy. A *permit holder's PPMP* should describe what is considered 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.

#### 5.0 Appearing Before a Court or Administrative Tribunal

After completing an engineering or geoscience report in the form of a *professional work product*, 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. In all cases, once the *licensed professional* has testified at trial, this usually completes their involvement in the matter.



## 5.1 Preparation for a Court or Administrative Tribunal Hearing

As part of the preparation for a court or *administrative tribunal* hearing, a *licensed professional* should insist on a preparatory meeting with legal counsel for the party who retained them. This will enable legal counsel to properly brief them on procedure. It will also enable them to review their opinion *evidence* with counsel so that counsel not only knows what *evidence* the *expert witness* will give, but also understands what that *evidence* means, and the facts and assumptions upon which it is based. Lawyers are not likely to be experts in the practices of engineering and geoscience, and it may be necessary for the *expert witness* to educate legal counsel on the technical engineering or geoscience aspects of their *testimony*.

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 numerous 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, it is the *licensed professional's* role 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 obligation to an *expert witness*. *Licensed professionals* should be aware 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 assumptions.

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. Although it is sometimes necessary for a *licensed professional* to provide an opinion based on an assumed set of facts, because unanticipated technical questions might arise, *licensed professionals* should examine all relevant documents and materials related to the case, establish all facts that can be derived from those materials, and ascertain all reasonable assumptions that can be made from those materials and facts. The examined materials should include correspondence, documents, and materials supplied by other witnesses, including the other party's witnesses. The *licensed professional* shall be prepared to alter their opinion during their *testimony* if they are asked how additional facts would affect their opinion.

Opposing counsel may ask questions the *licensed professional* does not anticipate. 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 assumptions they chose, how they extracted 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.

## 5.2 Court and Administrative Tribunal Opening

Hearing processes usually differ only slightly from one *administrative tribunal* to another, with only 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.

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.

## 5.3 Qualification of Expert Witnesses

*Licensed professionals* called upon to give expert or opinion *evidence* must first be “qualified” to do so by the court or *administrative tribunal* panel. As with all aspects of a trial, the rules of *evidence* are more strictly applied in court than at an *administrative tribunal* hearing. Only an *expert witness* is allowed to offer opinion *evidence*. The *testimony* of all other witnesses is limited to their personal knowledge and observations. However, the decision maker may, at their discretion, ask an ordinary witness to speak to something beyond their direct 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 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 issues 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. 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*.

Although an individual is not required to have formal education, publications, or standing in academic or professional associations to be qualified as an expert, 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

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 have the competence.

## 5.4 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 be mindful that similar words can have different meanings to technical individuals than to counsel, judges, or *administrative tribunals* members, and the *expert witness* should 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 assumption 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.

## 5.5 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 dress 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 are called "Justice." All judges may also be addressed as "Sir" or "Madam."
- *Administrative tribunal* members may also be referred to 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.
- When sworn-in in court, the witness stands in the witness box. Witnesses who would be more comfortable sitting may ask to do so. In *administrative tribunal* hearings, witnesses generally sit during their *testimony*.
- After being sworn in, the witness may not sit down unless and until permission is given from the court to do so.
- During virtual court and *administrative tribunal* hearings, all parties are generally seated.
- 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. 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.
- 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, this is almost impossible to do, and the *expert witness* may feel very awkward if they try. 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.
- 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. An *expert witness* (and witnesses in general) should have adequate lighting and be clearly visible on camera when giving *testimony* in a virtual setting.
- 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, it is still the *expert witness's* duty to try to assist. The *expert witness* may ask counsel for clarification or further information. If the *expert witness's* question is a sincere attempt to assist, it is perfectly acceptable. Problems occur when an *expert witness* starts to quarrel 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.
- Questioning often occurs slowly, with periods of time between questions. The *expert witness* should answer the question to the point and stop, rather than try to fill the pauses between questions and elaborate unnecessarily.
- 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 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 APEGA's *Ethical Practice* guideline.
- 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*, 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.

## 6.0 Fees and Agreements

Before undertaking an assignment, the *licensed professional* should speak with the party who retained them to settle the issue of adequate compensation for their *professional services*. A *licensed professional* must not work on a contingency basis where 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 prior to the start of any work.

## 6.1 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 proper coverage, particularly for contingent scenarios.

## 6.2 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.

## 6.3 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 agreeing to act as an *expert witness*, a written *contract* is preferable. A *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 understanding of the assignment, should be prepared by the *licensed professional* and directed to the party and legal counsel as soon as possible. The 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 take into account preparatory time that is required to review relevant materials for 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 and leading to bias of the *licensed professional*. 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.

## 7.0 General Misconceptions

Section 2.1 describes two common misconceptions about the role of an *expert witness*: (1) advocating for the party who hired them and (2) believing they are the ultimate decision maker on the issue for which their opinion is being sought. In addition to these misconceptions about the role of an *expert witness*, a *licensed professional* should be aware of the following common misconceptions during their assignment:

- After providing an expert report to the party who hired them, a *licensed professional's* involvement ends.
  - If a *licensed professional* has prepared an expert report, they may be required to testify in the future. Before accepting an assignment, the *licensed professional* should ensure an agreement is established that clearly outlines their involvement.
- An expert must never change their opinion.
  - As new information is discovered during the course of a trial or hearing, a *licensed professional* needs to be prepared to reconsider their opinion as facts change. A *licensed professional* needs to be honest and objective when considering all available information.
- Truth and truthfulness are the same.
  - Truthfulness is limited to the information that is available for consideration. An *expert witness* can be honest with what is available, but it may not reflect the whole truth.
- Another *expert witness's* review of a *licensed professional's* report is a personal attack.
  - Is it common practice for the opposing party to hire their own *expert witness* who will review and comment on a *licensed professional's* work.
- The *licensed professional's* expert report stands on its own and it does not matter what is stated in court.
  - A *licensed professional* cannot assume that a submitted report clearly states their findings and analysis, or that the court or *administrative tribunal* will be able to evaluate those findings. The onus is on the *licensed professional* to ensure their opinion has been conveyed.