

EXPERT WITNESS

APEGBC PROFESSIONAL PRACTICE GUIDELINES

V1.1

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■ DEFINITIONS

The following definitions are specific to the practice guidelines for expert witnesses. All of these terms are italicized the first time they appear in the text.

APEGBC

The Association of Professional Engineers and Geoscientists of British Columbia.

APEGBC professional(s)

Professional engineers, professional geoscientists, and licensees, including limited licensees, licensed to practice by APEGBC.

Decision-maker

The person or persons who must make a decision in a legal proceeding.

Expert

An APEGBC professional with special knowledge of a subject beyond that of the average person.

Expert report

A report prepared by an expert and intended to be submitted as evidence in a legal proceeding.

Expert witness

An expert who provides oral testimony in a legal proceeding.

Legal proceeding

Includes proceedings in Supreme Court of Canada, Federal Court, Supreme Court of British Columbia, Court of Appeal, provincial courts (all divisions), small claims court, tribunals, judicial inquests, royal commissions, coroner's inquests, arbitration panels, professional disciplinary panels, and mediations.

Seal

Any physical or electronic seal applied by an APEGBC professional to a document to indicate that he or she is professionally responsible for the work so sealed.

■ PURPOSE AND SCOPE

The purpose of these guidelines is to provide guidance to *APEGBC professionals* when they are retained to act as *expert witnesses*.

The APEGBC Code of Ethics Section 14 (a) of the Bylaws of the Association, states, in part:

[...]Members and licensees shall act at all times with fairness, courtesy and good faith to their associates, employers, employees and clients, and with fidelity to the public needs. They shall uphold the values of truth, honesty and trustworthiness and safeguard human life and welfare and the environment. In keeping with these basic tenets, members and licensees shall:

[...]

2) Undertake and accept responsibility for professional assignments only when qualified by training or experience;

3) Provide an opinion on a professional subject only when it is founded upon adequate knowledge and honest conviction;

[...]

7) Conduct themselves with fairness, courtesy and good faith towards clients, colleagues and others, give credit where it is due and accept, as well as give, honest and fair professional comment [...].

In the course of their work, APEGBC professionals routinely provide opinions based on their training, experience, knowledge, and honest conviction which could be characterized as “expert” because the opinions given are beyond the capacity of the average person. In *legal proceedings*, however, the terms *expert* and *expert witness* refer to an individual with specialized knowledge who helps a *decision-maker* understand the area of specialized knowledge. These guidelines provide guidance for APEGBC professionals who undertake the role of expert witness.

■ GUIDELINES FOR PRACTICE

2.1 FUNCTION

The function of an expert witness is to assist a decision-maker in reaching a proper decision by giving an independent, objective assessment of the engineering or geoscience issues that are the subject of the expert opinion. An expert can also provide factual evidence, such as direct observations at a site. As decision-makers have repeatedly emphasized, an expert witness is not to serve as an advocate for either party.

Different experts may express different opinions. However, this does not necessarily mean that one of them is wrong, or that one of them is acting improperly. It is for the decision-maker to determine which expert opinion it accepts or gives more weight to.

2.2 QUALIFICATIONS

An expert must possess strong qualifications in the technical areas and issues that are the subject of the expert opinion. These qualifications must be set out in the *expert report*. To demonstrate expertise, an APEGBC professional should provide a detailed resumé of his or her experience, training, knowledge, and relevant publications.

An APEGBC professional may provide an opinion on a topic about which he or she has the requisite specialized knowledge to be an expert, but that is outside his or her usual field of practice. Generally speaking, the more qualified the expert, the more weight will be given to the expert's opinion by the decision-maker.

While previous experience as an expert is generally viewed favourably, experts who present evidence solely for or against a class of parties, or rigidly for or against a point of view, risk being branded as biased. APEGBC professionals should be aware that the evidence of “niche” experts may be rejected or given less weight if their evidence has previously been discarded in a legal proceeding because of bias.

The opinion of an expert must be the opinion of the expert, not the work of others. An expert must carefully consider how others contribute to the preparation of an expert report. Where others are involved in preparing parts of an expert report, their involvement must be clearly indicated, with their names and qualifications, their scope of work, and their contributions specified in the report. Experts should produce most of an expert report and the opinions it contains. Expert reports produced by others under the direct supervision of an expert likely will be given less weight by the decision-maker.

2.3 CONFLICT OF INTEREST

APEGBC professionals must consider whether they have any personal or business relationships with any of the parties in the legal proceeding that may give rise to a conflict of interest. APEGBC professionals also should consider whether any of their clients could be disadvantaged by their participation as an expert, even though the client is not involved in the legal proceeding.

If there is a possible conflict of interest, the APEGBC professional should immediately advise both the client and legal counsel so they can make an informed decision with respect to retaining the APEGBC professional as an expert. If an APEGBC professional cannot satisfactorily conclude that no conflict of interest exists, he or she should decline to act as an expert.

2.4 COMMUNICATION

Above all, the provision of expert evidence is an exercise in communication. A good expert has the ability to communicate persuasively, in a manner that is logical, balanced, and reasonable. At all times, the expert must remain objective and cannot allow himself or herself to become an advocate for a position or party. The expert must impart an opinion that is impartial, unbiased, and fair to all concerned.

A good expert will also possess the ability to support his or her opinion when it is tested, sometimes forcefully, through cross-examination by legal counsel for an opposing party.

A good expert will remember that the decision-maker will best be able to understand the expert opinion when clear and concise language is used, relying, where possible, on non-technical words and simple analogies to explain otherwise technical concepts.

2.5 CONFIDENTIALITY AND PRIVILEGE

An APEGBC professional should confirm, in writing, with the client or the client's legal counsel at the outset of an expert retainer whether the APEGBC professional has authorization to contact others in relation to the retainer. If authorization is not given, the expert should note this in his or her expert report, if one is prepared. An APEGBC professional should not provide an expert opinion with insufficient information.

When first retained as an expert, an APEGBC professional may be asked to keep the matter, including the fact of the retainer, confidential. When the retainer involves reviewing the work of another APEGBC professional, some APEGBC professionals have interpreted Bylaw 14(a) (7) as a requirement to contact the other APEGBC professional. Prior to contacting another APEGBC professional, the expert should discuss the issue with the client and confirm whether this course of action is acceptable.

It is acceptable not to contact the other APEGBC professional if so directed by the client or its legal counsel. However, if the inability to contact the other APEGBC professional affects or limits the expert's ability to give an opinion, the client and its legal counsel should be advised of this, and the limitation should be expressly stated in an expert report, if one is prepared.

When an expert is retained by legal counsel, the opinion of the expert will be considered part of the legal counsel's preparation work and, therefore, be covered by litigation privilege. To preserve this privilege, legal counsel will probably express much stricter requirements with respect to confidentiality and distribution of information.

2.6 PRACTICE STANDARDS

An expert generally will be asked to give an opinion as to the applicable practice standards at the relevant time and location. The expert may also be asked to give an opinion as to the adequacy or inadequacy of a design, assembly, or construction, or the processes, methods, and procedures used in relation to the applicable practice standards. While an expert may provide an opinion as to whether a course of practice met the applicable practice standards, it is inappropriate for an expert to determine whether compliance with practice standards was achieved. It is for the decision-maker to make a determination on whether the conduct of the party involved in the legal proceeding met the standards of practice.

Recent decisions in British Columbia have confirmed the test used by decision-makers to determine whether a professional has properly performed his or her services. The test is whether another reasonably competent and reasonably prudent professional acting in similar circumstances would have conducted himself or herself in the same manner. It is not necessary that the professional's work be perfect. It need only be up to the standard of the average APEGBC professional practising at that time in that discipline in British Columbia.

2.7 FACTS

It is not necessary for an expert to observe the site, the project, or the evidence of the incident that is the subject of the legal proceedings. The expert can do so, and may give evidence as to his or her observations, as this is factual, not opinion, evidence.

The expert should not, however, make findings of facts based upon such observations. Findings of fact fall solely within the purview of the decision-maker.

The expert opinion must rest upon factual assumptions. It is the responsibility of legal counsel to provide the expert with a list of factual assumptions to be made. This process can be iterative, as the expert will know what assumptions have to be made, and legal counsel will know whether the assumptions can be proven in the legal proceeding. The factual assumptions must be set out in the expert report so the decision-maker can ascertain whether the opinion was based on factual assumptions that have been accepted as “facts” by the decision-maker.

It is the responsibility of legal counsel, not the expert, to prove the facts on which an expert’s opinion is based.

2.8 INTERPRETATIONS

It is not appropriate for an expert to give an opinion on whether a contract or a provision of a contract has been breached or met. This is a finding of law reserved for the decision-maker. It is acceptable for an expert to give opinion evidence on practice or industry-based assumptions and interpretations underlying the language of contracts or documents.

There is one exception to this: an expert can provide a decision-maker with an opinion as to the meaning of technical or scientific terms.

2.9 LIMITS ON EXPERT TESTIMONY

At all times, an expert must be mindful of his or her role, including the limitations on admissibility of expert evidence. It is not for the expert to:

- Make findings of law
- Interpret contracts (as that is a finding of law)
- Make find

- Opine on issues of common knowledge, and
- Make arguments disguised as opinions.

2.10 DOCUMENTS

Since expert reports are documents prepared and delivered by an APEGBC professional in the APEGBC professional’s capacity, they must be *sealed*, signed, and dated by the APEGBC professional in accordance with the Section 20(9) of the *Engineers and Geoscientists Act* and the *APEGBC Quality Management Guidelines – Use of the APEGBC Seal*.

All documents prepared by an expert, including drafts, are producible to the other parties once the expert report is delivered.

A decision-maker may also order the production of ancillary documents, such as timesheets showing the time spent by the expert in providing expert advice, and agreements to provide expert services.

2.11 FEES

As with any task, the fees associated with the provision of expert services should be determined in advance of undertaking an assignment. APEGBC recommends that fees be commensurate with the hourly rate of the APEGBC professional, with some increase for the inevitable stress and dislocation, and to compensate for the loss of productivity that may ensue for those under the direct supervision of the APEGBC professional.

Fees should not be based on the result of the action or whether the expert evidence is accepted, as both fee arrangements could be viewed as leading to bias and lack of objectivity. While pro bono work is not disallowed, there is nothing untoward about accepting fees: a decision-maker would likely be surprised if an expert did not do so.

■ RESOURCES AND RELATED DOCUMENTS

BOOKS

- Continuing Legal Education Society of British Columbia. 2011. *Expert Evidence in British Columbia Civil Proceedings*, 3rd ed. 345 pp.
- Dillon, J.R.; Turriff, G. 2013. *British Columbia Annual Practice 2014*. Canada Law Book. 1580 pp.

CASE LAW

- *Dhaliwal v. Bassi*, 2007 BCSC 547.
- *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.*, (1988) 29 B.C.L.R. 128.
- *Vancouver Community College v. Phillips Barratt*, (1988) 26 B.C.L.R. (2d) 296.
- *Walsh v. Belcourt*, 2004 BCSC 471.

DOCUMENTS

- Province of British Columbia. 2012. *Engineers and Geoscientists Act*. Available online at bclaws.ca/civix/document/id/complete/statreg/96116_01 [accessed on 9/11/2016].
- The Association of Professional Engineers and Geoscientists of British Columbia. 2014. *Bylaws of the Association*. Available online at apeg.bc.ca/getmedia/e8d858f5-e175-4536-8834-34a383671c13/APEGBC-Code-of-Ethics.pdf.aspx [accessed 9/11/2016].

GUIDELINES

- APEGBC. 2013. *Quality Management Guidelines – Use of the APEGBC Seal*. Burnaby, BC. 32pp.
- APEGBC. 2013. *Quality Management Guidelines – Retention of Project Documentation*. Burnaby, BC. 12pp.
- Association of Professional Engineers and Geoscientists of Alberta. 2003. *Guidelines for Professional Member as a Witness*, v 1.0. 16pp.

■ APPENDIX A: EXPERT REPORT TEMPLATE

Decision-makers in legal proceedings generally consider it the duty of legal counsel to ensure that expert reports presented in legal proceedings are properly organized and contain the information necessary to assist the decision-maker. Some decision-makers may specify the scope, format, and length of expert reports they will accept. Experts must therefore consult with legal counsel, or in the absence of legal counsel with the decision-maker, to ensure that the expert reports they submit meet the applicable requirements.

The following pages contain a model report that could serve as a template for an expert report prepared by an APEGBC professional.

EXPERT REPORT TEMPLATE

To: [XXX Law Corporation] _____

From: [Your name], P.Eng., P.Geo. _____

File: [file number] _____

Date: [mm/dd/yyyy] _____

RE: [File Name from Legal Firm] _____

1. General

Name: [Your name], P.Eng., P.Geo. _____

Address: _____

Area of Expertise: _____

2. Qualification

Please refer to Attachment 1: Resumé of [your name].
[Summarize key qualifications below]

Employment: _____

Education: _____

Associations: _____

Other: _____

3. Instructions

I have been retained by [XXX Law Corporation] to provide an expert opinion relating to [identification of subject].

I have been asked by [legal firm contact name] to provide an opinion in respect of the following question(s):

- 1) [Set out the questions on which you have been asked to give an opinion – these questions should be set out in the instruction letter from legal counsel.]

Instruction letter(s) from [legal firm contact name] to me are included at Attachments 2 to this report.

4. Confirmation of Duty

The opinions provided on the above issues are for the use of [lawyer's name] of the firm of [XXX Law Corporation] in [describe legal proceeding].

In this capacity:

- I am aware that as an expert witness, I have the duty to assist the Court and I am not an advocate for any party;
- I have made my report in conformity with this duty; and
- I will, if called upon, give oral or written testimony, and give that testimony in conformity with that duty.

5. References and Definitions

The [mm/dd/yyyy] letter from [legal firm contact name] provides the following definitions: [For example:]

- The “Development” means
- The “Property” means
- “MOTI” means Ministry of Transportation and Infrastructure
- “ha” means hectares
- etc.

6. Documents Reviewed

In preparing my opinion, I have considered:

- 1) [Names or documents reviewed that have bearing on the opinion. There may be many or few and they would normally be supplied by legal counsel.]

In preparing my opinion, I have also considered the following documents:

- i) [Letters, emails, drawings, and other related documents that may have been used by you during the course of the investigation.]
- ii) [Reference documents such as publications.]

In preparing my opinion information developed from research conducted in preparation of the opinion:

- a) [Field trip to >>>>]
- b) [Review of aerial photography >>>>]
- c) etc.

7. Assumptions

The opinions expressed in this report are based on the following assumptions:

- 1) [These assumptions will largely be supplied by legal counsel, but you may add to these as well. If there is a long list, the assumptions from legal counsel and your own assumptions should be separate.]

8. Nature of the Opinion Being Sought and Each Issue in the Proceeding to Which the Opinion Relates

[This requirement is fulfilled by setting out the questions on which the expert has been asked to opine. The list of questions can be repeated here, followed by the “Opinion” section in which the opinions in response to each question are set out. Alternatively, they can be “collapsed”—one question is set out, followed by the opinion on that question, and the next question is then set out, followed by the opinion on that question, and so on.]

9. Opinion and Reasons Regarding Each of the Issues

1) [Repeat the lawyer’s statement from above (Section 3).]

OPINION:

[This is where you discuss how you developed your opinion and may include calculations, references, other supporting information, and so on. This section could be quite long and may require explanatory notes. Short discussions and straightforward explanations with examples are preferred.]

[YES or NO or explanation as may be needed.]

[Closing remarks regarding the opinion if appropriate.]



[Your name,] P.Eng., P.Geo.

Attachment 1: Resumé (one page or longer, as needed)

Attachment 2: Instruction Letter from Legal Counsel



Professional Engineers
and Geoscientists of BC

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