

THE NEED FOR LEGAL ADVICE

Engineers are strongly advised to consult with the hired counsel before being engaged in any legal proceeding, in order to receive advice and instruction about all of their actions. Since professional engineers are not trained to perform in the adversarial justice system, their lack of knowledge of legal procedures can cause problems, which might have adverse effects on their performance. By contrast, legal counsel have had the requisite training, and are available not only to advise on matters of law, but also to interpret the effect particular facts and actions may have on the proceedings, and to plan, guide and control those proceedings to the advantage of clients.

DEFINITIONS

- *Expert Witness*—person with specialized knowledge of a technical or scientific subject whose testimony includes interpreting the facts and giving opinions about their relevance in making judgments about the matter under consideration.
- *Evidence*—any information furnished in a legal proceeding, either by witnesses or documents, to support a contention. Engineers are cautioned that the word “evidence” in engineering contexts sometimes has a meaning different from its use in the courts.
- *Fact*—something known to exist or to have occurred. Facts are usually perceived directly through the five senses. Practitioners are cautioned to make a clear distinction between opinion and fact.
- *Fact witness*—person providing testimony of personal observations or experience, or of known facts related to the matter under consideration.

- *Opinion*—a belief or judgment based on the analysis of facts rather than the direct observation of facts.
- *Trier of fact*—a person or group of people who assess the evidence presented during a legal proceeding and decide what the facts are. To decide a fact is to judge whether something existed or some event occurred. A trier of fact may be a judge, a jury or a panel in a hearing or tribunal.

FOR MORE INFORMATION PRACTICE & STANDARDS PROFESSIONAL ENGINEERS ONTARIO

101 - 40 Sheppard Avenue West
Toronto, ON M2N 6K9

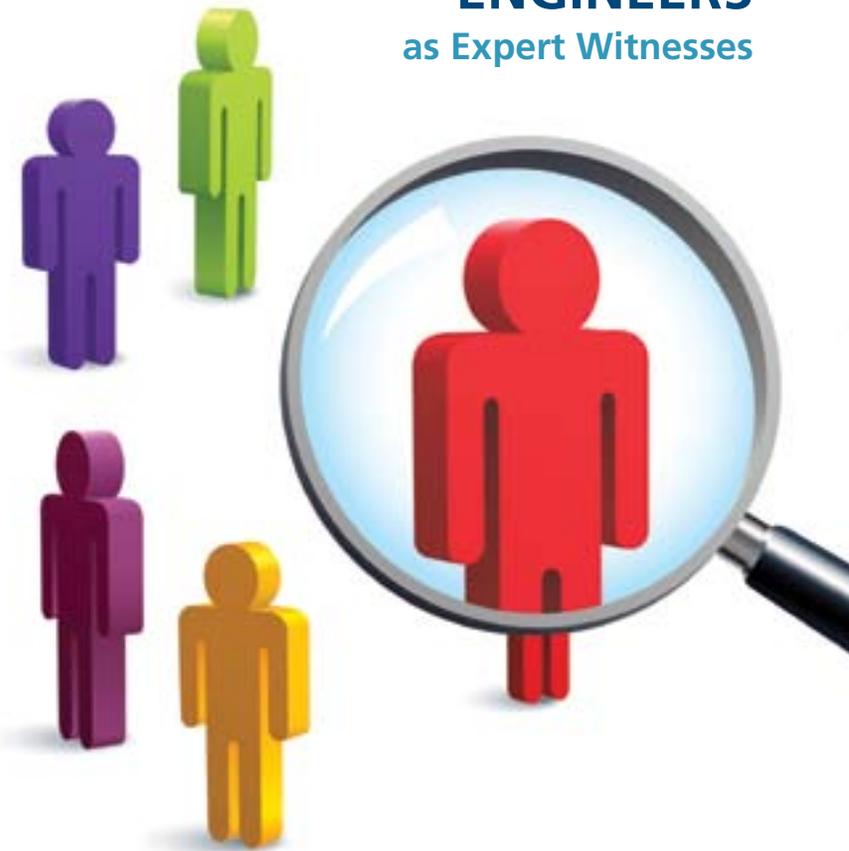
Phone: (416) 224-1100 ext 2268 or
(800) 339-3716, ext 2268

Fax: (416) 224-1579 or (800) 268-0496

Email: practice-standards@peo.on.ca

Website: www.peo.on.ca

An Introduction to PROFESSIONAL ENGINEERS as Expert Witnesses





Professional engineers may be called upon to appear as expert witnesses in court proceedings, public inquiries, coroners' inquests and other judicial and quasi-judicial hearings. Professional Engineers Ontario recognizes that professional engineers may not be aware of the variety of legal and quasi-legal hearings and actions in which they might become involved, the obligations and conduct expected of them in and before such proceedings, the procedures they must follow, and the risks associated with their participation. For these reasons, the Professional Standards Committee prepared the guideline *The Professional Engineer as an Expert Witness*, to give professional engineers who might become involved in court proceedings or tribunals an idea of the situations that could arise and suggestions aimed at making their services effective. If you are a professional engineer called to appear as an expert witness or if you require further information, you should consult the guideline *The Professional Engineer as an Expert Witness*.

SIGNIFICANT CHANGES

Due to recent case law and January 2011 amendments to the Rules of Civil Procedure, the legal landscape for expert witnesses has changed dramatically in the past few years. Specifically, there is an assumption that a report prepared by an expert witness "should not only be, but also should be seen to be, the independent product of the expert."¹ To ascertain whether this is the case, courts have taken measures to clarify for experts the rules for maintaining independence.

1. *R v. Norton*, [2007] O.J. No. 811, paragraph 106

In particular, the *Rules of Civil Procedure* was amended so that the independent and impartial role of the expert is unequivocally clear to both parties and the expert. Rule 53.03(2.1) now mandates that **every** expert report include certain information, including:

- the expert's reasons for his or her opinion, which must include:
 - a description of **any research** conducted by the expert that led him or her to form the opinion, and
- a list of **every document, if any, relied on by the expert** in forming the opinion.

WHAT IS AN EXPERT WITNESS?

Unlike fact witnesses whose testimony can only describe personal observations, experience or knowledge, expert witnesses are allowed, even expected, to express *opinions* about matters in which they have been accepted as having special knowledge that the average person does not possess. Expert witnesses are needed to interpret technical information for people who do not have the knowledge to evaluate it, understand its meaning and apply it to the process of making a decision about the matter at hand.

THE ROLE OF AN EXPERT WITNESS

Experts must understand their role is to be neutral and impartial servants of the court or tribunal they appear before, and not representatives or advocates of the party hiring them. Over the past few years, courts have developed high expectations about the impartiality and neutrality of expert witnesses. This expectation is based on the inability of courts or tribunals to challenge an expert's opinion directly (because of their own lack of expertise). The leading case on this point is *The Ikarian Reefer*². The fundamental principle that emerged from the *Ikarian Reefer* decision is that expert witnesses must never act as advocates for a particular viewpoint. Rather, expert opinions must be neutral, objective and strictly limited to the area of an expert's expertise.

2. *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd* ("*The Ikarian Reefer*"), (1993), 2 Lloyd's Rep 68, QBD (Com Ct)

QUALIFICATION OF WITNESSES

In *R. v. Mohan*, the Supreme Court of Canada established that for expert evidence to be admissible, such evidence must be presented by a witness who is qualified by the court. This has nothing to do with the qualification of the expert as an engineer or scientist or other person of expertise. Qualification of witnesses refers to whether the person or evidence meets the criteria of the Mohan test:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.³

The court decides a person is a properly qualified expert if it can be demonstrated that he or she has acquired special or particular knowledge. For this, the court must rely that recognized licensing, certifying or registering authorities, such as PEO, have provided a knowledgeable assessment of the person's knowledge and experience.

When determining whether to qualify an individual as a professional engineering expert witness, courts or tribunals would look to whether the expert complies with the requirements in the *Professional Engineers Act*, namely whether the person is licensed to practise professional engineering in Ontario and, if the practitioner is providing services independently to a lawyer or other party, provides these services under the auspices of a Certificate of Authorization.

3. *R. v. Mohan*, [1994] 2 S.C.R. 9

