EXPERT ANALYSIS

(1) **relevance** R.E. 401, 402

(2) **aid/assist factfinder – "fit" -** (to understand evidence or to determine a fact in issue) R.E. 702

(3) **qualified** (by knowledge, skill, experience, training or education) R.E. 702

(4) **sufficient facts and data** R.E. 702(1)
-perceived by expert or made known to expert at or before hearing R.E. 703
-if "type reasonable relied upon by experts" need not be admissible R.E. 703
-if inadmissible, not disclosed by proponent unless court determines "probative value in assisting jury to evaluate expert's opinion substantially outweighs prejudicial effect" R.E. 703
-whether or not admissible, may be inquired into on cross R.E. 705

(5) **reliable principles and methods*** R.E. 702(2) (Daubert and Shreck)

(6) **reliable application*** R.E. 702(3)

(7) **form of opinion and ultimate issue** R.E. 702, 704
-may not testify to ultimate opinion re criminal defendant's mental condition
-may testify to opinion without testifying to basis for opinion (discretionary)

(8) **403**

OTHER

--court appointed experts and procedure R.E. 706

*the expert may testify concerning how to use the principles and methods without actually doing the application step, leaving that to the fact finder. For example, this is true of the criminal defendant's culpability where the expert may not testify to mental state or condition – the expert testifies to how to determine whether a particular mental condition exists and leaves the application to the jury.

OBJECTIONS

--irrelevant

--does not helpful to factfinder (not outside the realm of the average reasonable person)
--does not aid/assist factfinder

--not qualified

--not qualified to give opinion requested

--opinion outside the expert's field of expertise

--opinion is speculative, conjectural

--expert giving legal opinion
--expert giving conclusion of law

--insufficient facts or data

--improper hypothetical question
--hypothetical question not supported by the evidence
--hypothetical question includes fact not in evidence

--not type of fact reasonably relied upon by experts in the field

--basic fact/data inadmissible
--basic fact/data inadmissible on direct examination

--basic fact/data hearsay

--inadmissible, does not meet balancing test in 703

--opinion/inference not based upon reliable principles/methods

--no bases for reliability of principles/methods

--application not reliable

--expert not trained in testing

--expert did not follow the testing procedure in this instance

--testing apparatus does not test for what is being inquired into

--no evidence testing apparatus was in working order on this occasion

--opinion/inference before testifying to bases (discretionary with court)

--ultimate opinion on criminal defendant's mental condition

--403

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

"vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"

Reliability tested by totality – no single factor is necessarily dispositive of reliability

Daubert factors in determining reliability of novel principles and/or methods:
--whether can or has been tested;
--peer review; publication
--known or potential error rate
--existence and maintenance of standards and controls;
--generally accepted in appropriate community

Some factors from case law
--whether subject matter grew out of research or developed expressly for litigation
--leap from accepted premises to unfounded conclusions
--account for alternative explanations
--as careful as regular professional work outside paid litigation role
--whether field of expertise claimed by expert is known to reach reliable results for the type of opinion

Kumho Tire Co v. Carmichael, 119 S.Ct. 1167, 1176 (1999)
--"trial judge has discretion both to avoid unnecessary reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arise"

--a ruling that testimony is reliable does not necessarily mean that contradictory expert testimony is unreliable – the rules permit testimony that is the product of competing principles or methods in the same field of expertise

COLORADO
People v. Shreck, 22 P.3d 68 (Colo. 2001)
Expert testimony must be relevant and reliable
CRE 702 has a "liberal standard for admissibility"

Test adopted:
(1) whether the principles are reasonably reliable;
(2) whether the witness is qualified to express an opinion on such matters;
(3) whether the witness' testimony would be helpful to the jury
(4) 403

Totality of circumstances – "a wide range of considerations that may be pertinent to the evidence at issue"
Shreck adopted **Daubert** factors in totality of circumstances
--whether technique can be and has been tested;
--peer review and publication;
--existence and maintenance of standards controlling operation of technique;
--frequency and type of error generated by technique;
--whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific methods

And other case law factors:
--relationship of proffered technique to more established modes of scientific analysis;
--existence of specialized literature dealing with technique;
--non-judicial uses to which technique are put;
--frequency and type of error generated;
--whether such evidence has been offered in previous cases
--may be sufficiently reliable if accepted by other courts that have considered the issue (referring to other **trial court** rulings) see also Luster v. Brinkman, ___ P.3d ___, 2008 WL 2684132 (Colo.App. 2008) (citing to appellate and trial court opinions) Farmland Mutual v. Chief Industries, 170 P.3d 832 (Colo.App. 2007) (citing "the vast majority of courts")

Shreck does not require a reliability hearing – judge must find principles/methods reliable and expert qualified **People v. Whitman**, ___ P.3d___, 2007 WL 4198391 (Colo.App. 2007) cert. denied 2008 WL 2581401 (Colo. 2008); People v. McAfee, 104 P.3d 226 (Colo.App. 2004); People v. Johnson, 74 P.3d 349 (Colo.App. 2002)

OBJECTIONS TO FORM OF QUESTIONS

ambiguous, confusing, vague
argumentative
asked and answered; cumulative; repetitive
assumes facts not in evidence
comparing testimony, credibility of other witnesses
compound
embarrassing, harassing
leading
misleading
misquoting
narrative – calls for narrative response
non-responsive
scope
speculation, conjecture
without good faith basis

EVIDENTIARY OBJECTIONS

competency - deficient in ability to perceive/remember/relate; age, mental impairment or incapacity; failure to take oath/affirmation
judicial notice
relevance - R.E. 401, 402, 403
- irrelevant 401, 402
- probative substantially outweighed by danger unfair prejudice 403
- confusion of issues 403
- misleading 403
- waste of time, cumulative 403

privileged - R.E. 501
competency - R.E. 601, 602, 603, 605, 606
- personal knowledge 602
- ability to perceive, remember, relate 601, 602, 403
- lack of oath/affirmation 603
- deadman statutes
- judge/juror as witness R.E. 605, 606

character - R.E. 404, 405, 406, 607, 608, 609
- bolstering (good character before bad) 404, 608
- improper criminal case exceptions 404
- improper other acts - 404(b)
- improper method of proof (opinion/reputation) 405
- improper specific instances of conduct 405, 608
- habit/ routine practice 406
- untruthful character, opinion/reputation 608
- specific instances of untruthfulness 608
- convictions 609

hearsay
foundation - 401, 402, 601, 602, 800's, 900's, 1000's
five general requirements for exhibits:
- Relevance 401, 402, 403
- Personal knowledge 602
- Hearsay 800's
- Authentication 900's
- Original 1000's
  - duplicates, other evidence of contents
  - public records, summaries

opinion
reading from unadmitted document
document speaks for itself

VOIR DIRE OBJECTIONS

misstating law
ask juror to prejudge case
irrelevant inquiry
currying favor
repetitious
argumentative
personal opinion
personal attack against party/attorney
appeal to sympathy/prejudice
anticipating defense
Batson challenge – challenge to a peremptory based on race/ sex

OPENING STATEMENT OBJECTIONS

argumentative
calls for sympathy/prejudice
expressing personal opinion
collateral issue
shifting burden of proof
improper evidence - inadmissible because excluded by court order, violation of discovery, irrelevant
comment on the law
personal attack party/attorney
anticipating defenses
injecting personal belief

CLOSING ARGUMENT OBJECTIONS

misstating evidence
improper argument - limited purpose
misstating law
misstating evidence
personal attack party/attorney
injecting personal belief
appeal sympathy/prejudice
personal opinion
collateral issue
comment on excluded evidence
arguing improper function for jury
shifting burden of proof
abusive, profane, obscene
calling for jury nullification

OBJECTIONS TO CONDUCT OF WITNESS

arguing
display of unadmitted exhibit
interruption of questioning
looking for/receiving cues from attorney/audience
use of notes without foundation
refusal to answer questions
disparaging comments
non-responsive
argumentative

OBJECTIONS TO CONDUCT OF COUNSEL

blocking view, distracting conduct
coaching witness comments/signals
cutting off answers/not letting witness answer question
display of unadmitted exhibits
disparagement attorney/party/witness
currying juror favor
statement personal belief/attorney testifying

OBJECTIONS TO THE FORM OF THE QUESTION

Ambiguous, Confusing, Vague: where a question may be interpreted in different ways or is so vague or unclear that it is likely to confuse the witness in the question or factfinder in the answer

Argumentative: (1) summarizes testimony, or (2) comments on the evidence, or (3) attempts to draw an inference, or (4) attorney response to a witness answer that is not asking a question, or (5) any other attorney conduct that is not seeking factual information from the witness

Asked and answered: the attorney has already asked and the witness answered the same or substantially the same question – this attorney conduct is common when the attorney does not get the answer that he was looking for

Assumes facts not in evidence: the attorney in asking his question assumes facts that as of yet have not been proven in the case – this attorney conduct is common when the attorney skips steps in the foundational requirement of personal knowledge

Conclusion, Speculation, Improper Opinion: the witness must have a basis in personal knowledge and can form an opinion under R.E. 701 when the opinion is rationally based upon perception, helpful to the factfinder, and not an expert opinion – the attorney may ask a question in a form that calls for an improper conclusion, speculation, or opinion, or the witness may answer in such a way, so that it can be both an objection to the form of the question and an objection to the answer

Comparing Testimony, Credibility of Other Witnesses at Trial: it is improper for this witness to compare his testimony with another witness or to comment on the credibility of another witness who has testified in the matter

Compound: the attorney is asking questions that relate to more than one fact in a single question

Embarrassing, Harassing

Leading: a question is leading if it suggests the answer – generally not permissible on direct examination unless the witness is an adverse party, identified with an adverse party, a hostile witness or the leading question is used to develop testimony – leading questions may also be used when the witness has a special condition, e.g. young age, old age, mental disability

Misleading: the question is such that it misleads the witness or the factfinder

Misquoting: asking a question that misstates the testimony or evidence

Narrative: in order to properly manage the evidence before the factfinder, it is necessary that the attorney proceed by a series of fairly specific questions – this gives the attorneys and the judge the ability to be sure that the testimony is circumscribed by the rules of evidence, the ability to control the evidence – a narrative question is one that turns over the control of the content to the witness – this can be an objection to the question, i.e. "calls for narrative," or an objection to the answer, i.e. "narrative answer."

Non-response: this is an objection to the answer a witness might give – the witness does not respond to the question of the attorney, but rather provides other information that has not been asked for – traditionally this is an objection that only the inquiring attorney can make, although the modern view is that either attorney may object on this basis

Scope: the "scope" of an examination relates to the topics that can be explored. Direct examination topics are limited by principles of relevance and 403. Cross-examination is limited to the topics from direct examination and credibility. Re-direct examination is limited to rehabilitation and new topics from cross-examination. A judge may permit an attorney to "adopt" the witness for a topic that exceeds the scope of questioning. If the judge permits this, the attorney generally has to ask questions "as if on direct," i.e. non-leading, unless there is an exception to the non-leading requirement.

Without Good Faith Basis: attorneys are required to have a good faith basis before asking a question. See Colorado Rules of Professional Conduct, Rule 3.4(e), Fairness to Opposing Party and Counsel, "a lawyer shall not in trial allude to any matter that the lawyer does reasonably believe is relevant or that will not be supported by admissible evidence, assert personal opinion as to the justness of a cause, the credibility of a witness . . . . or the guilt or innocence of an accused . . . ."