

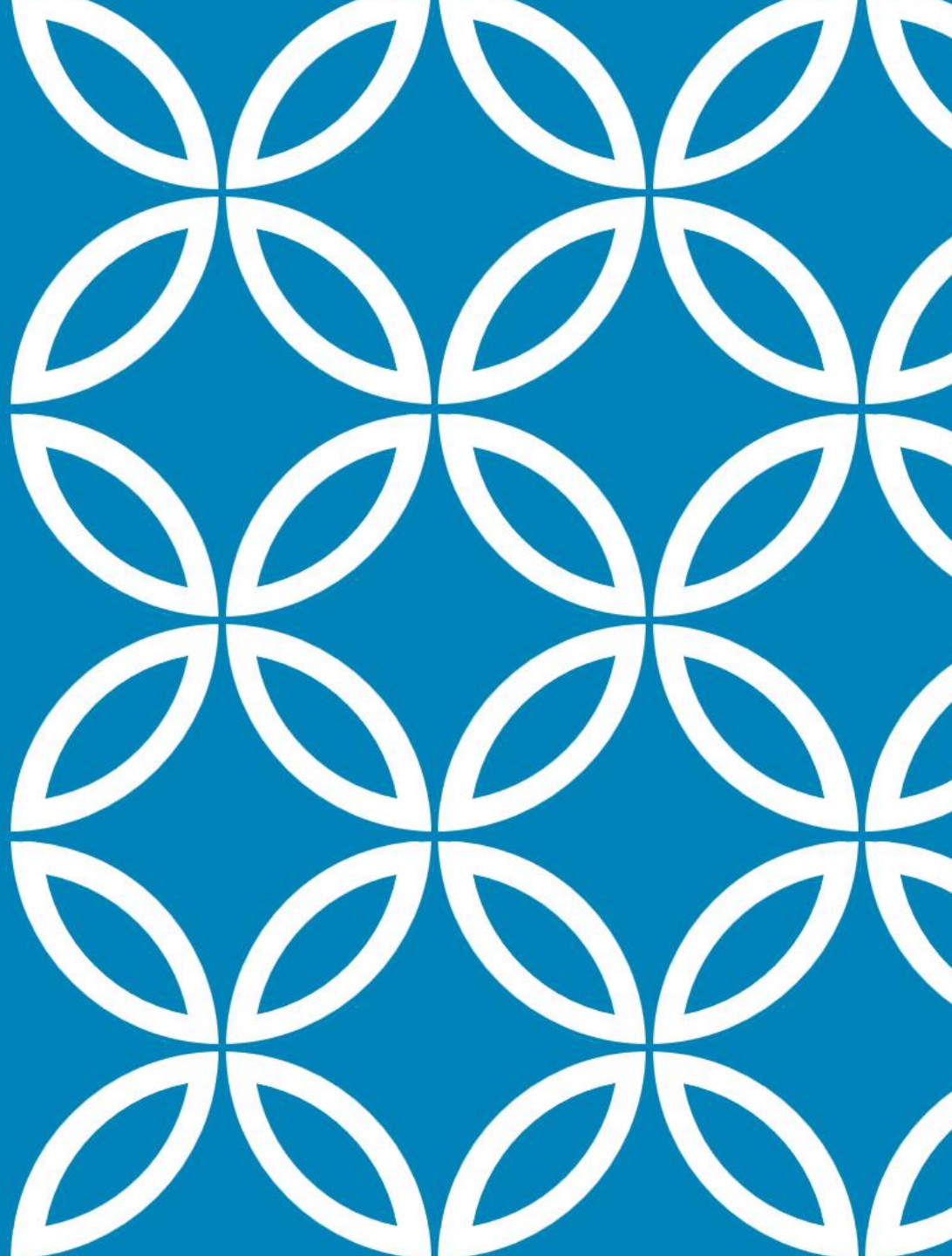


EXPERT WITNESSES

ROADMAP: 5 QUESTIONS



1. DO YOU
NEED AN
EXPERT WITNESS?



THE TYPE OF EVIDENCE YOU ARE TRYING TO GET ADMITTED THROUGH A WITNESS DETERMINES THE TYPE OF WITNESS.

Type of evidence	Typical type of witness
Observations	Lay
The witness's own opinions or inferences that are rationally based on their own perception ; not based on scientific, technical, or other specialized knowledge; and helpful to a clear understanding of the witness's testimony or determination of a fact in issue. CRE 701.	Lay
Scientific, technical, or other specialized knowledge that will help the trier of fact understand the evidence or to determine a fact in issue. CRE 702.	Expert

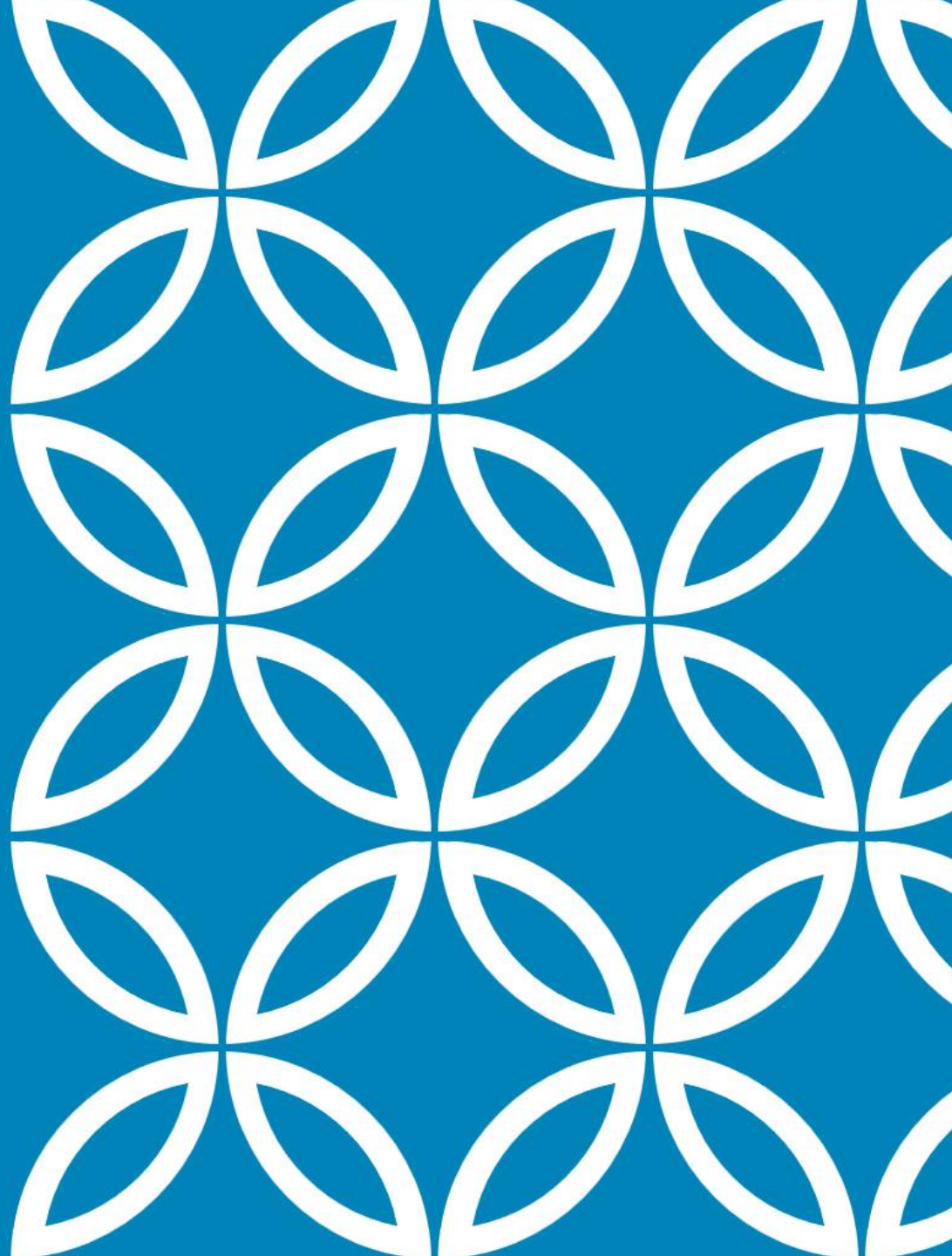
WHAT ARE SOME EXAMPLES OF ADMISSIBLE LAY WITNESS OPINIONS IN COLORADO?

“The topics upon which courts have permitted lay witnesses to express an opinion are extremely varied. See *People v. Gallegos*, 644 P.2d 920 (Colo.1982) (**giggling by a rape victim was nervous reaction**); *Montgomery v. Tufford*, 165 Colo. 18, 437 P.2d 36 (1968) (value of personal property); *Jones v. Blegen*, 161 Colo. 149, 420 P.2d 404 (1966) (**intoxication**); *Sherry v. Jones*, 133 Colo. 160, 292 P.2d 746 (1956) (speed of vehicle).” *People v. Nhan Dao Van*, 681 P.2d 932, 937 (Colo. 1984).

VISITATION WORKERS AS EXAMPLE: LAY OR EXPERT WITNESS?

The type of testimony you want to admit	Can you use a lay witness or do you need an expert witness?
What the visitation supervisor observed - the behavior of the parents and the child	Lay
Whether the parent and the child are bonded and attached	Expert
Whether visitation should move to unsupervised	Expert

2. WILL THE WITNESS QUALIFY AS AN EXPERT WITNESS?



WHAT MAKES A WITNESS AN EXPERT?

- Knowledge,
- Skill,
- Experience,
- Training, or
- Education.

CRE 702.



QUALIFYING AN EXPERT WITNESS: EXAMPLE EDUCATION QUESTIONS

Do you have an undergraduate degree? In what? From what college or university (if from a prestigious college or university)? When did you earn it? How many credit hours did you complete to earn that undergraduate degree? Did you graduate with any honors? What honors? While earning that degree, did you complete coursework related to _____ (a topic relevant to this case)? What coursework? How many credit hours? (Emphasize coursework relevant to the opinion the expert witness will provide.)

Repeat the above questions for additional relevant undergraduate and/or graduate degrees.

QUALIFYING AN EXPERT WITNESS:

EXAMPLE EXPERIENCE/TRAINING QUESTIONS

Are you currently employed? Where? How long have you been so employed? What is your current title? Have you had the same title throughout your employment at _____ or have you been promoted? Promoted from what title to what title? What are the requirements for such a promotion? You satisfied those requirements? What are your primary duties and responsibilities as a _____? Did you complete any training to become a _____? When? How many hours? In what areas? (Emphasize trainings relevant to the opinion the expert witness will provide.) Have you completed any ongoing training as a _____? How many hours? In what? (Emphasize trainings relevant to the opinion the expert witness will provide.)

Do you have any prior work or volunteer experience relevant to your current position as a _____? (Repeat the above questions for every relevant job.)

QUALIFYING AN EXPERT WITNESS: EXAMPLE MISCELLANEOUS QUESTIONS

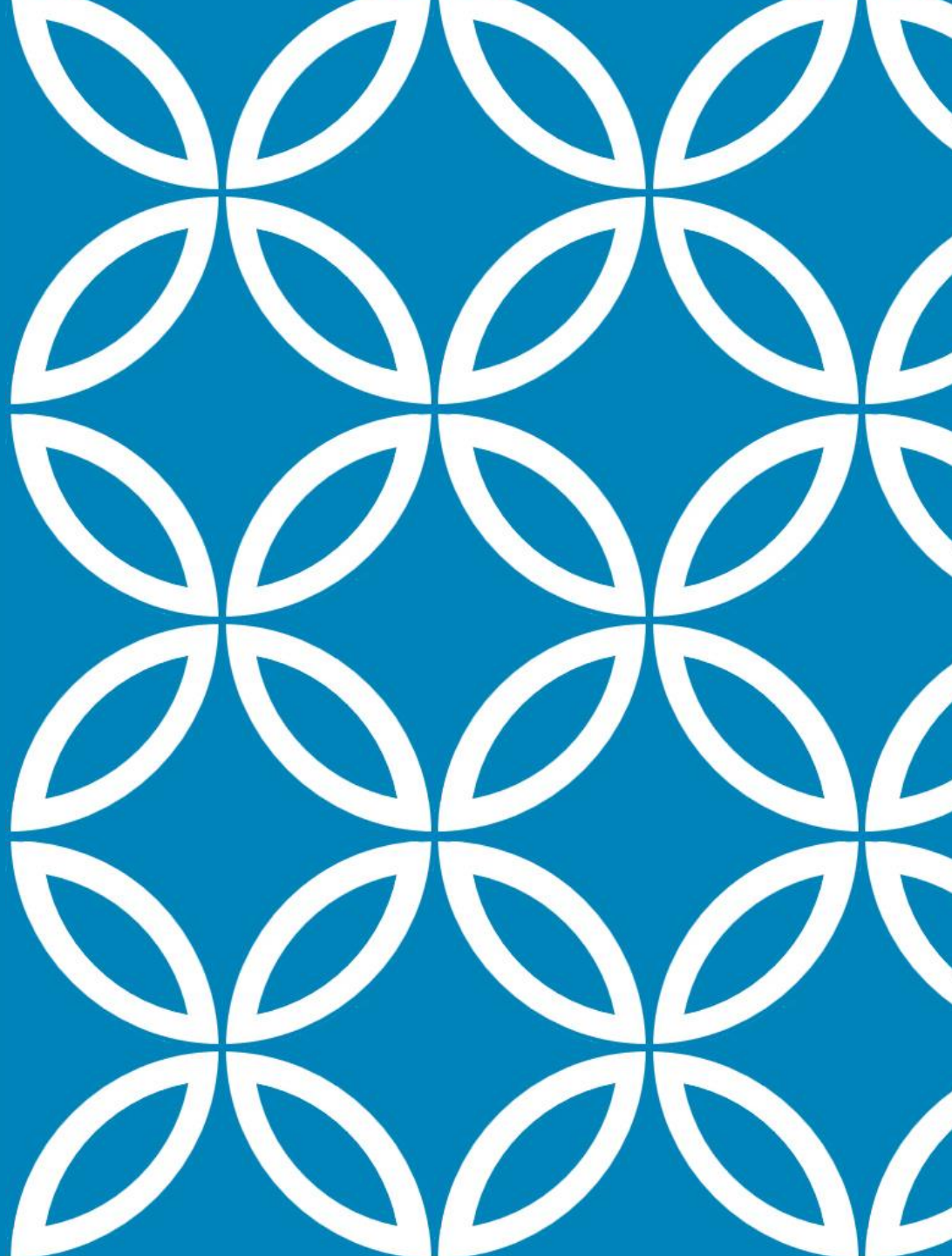
Have you ever testified as an expert before? How many times? In what fields? Where? (Emphasize prior expert testimony relevant to the opinion the expert witness will provide.)

Do you have any special licensures or certifications? In what? When did you earn your _____ (name of licensure or certification)? What were the requirements for that licensure or certification? You completed all those requirements? (Emphasize special licensures or certifications relevant to the opinion the expert witness will provide.)




Have you ever been published? In what? By what organization? When? (Emphasize publications relevant to the opinion the expert witness will provide.)

Have you ever led trainings? In what topics? When? Where? What did you do to prepare for that training? (Emphasize trainings relevant to the opinion the expert witness will provide.)

3. WILL THE
EXPERT
WITNESS'S
TESTIMONY BE
ADMITTED INTO
EVIDENCE?



3-PART TEST: IS THE EXPERT TESTIMONY...

Criteria	Rules
Relevant 	<ul style="list-style-type: none">• Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable.” CRE 401. Relevant evidence is generally admissible. CRE 402.• “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue...” CRE 702
And reliable, 	“...a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” CRE 702.
But not prejudicial? 	Relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” CRE 403.

CAN CASEWORKERS BE PERMITTED TO TESTIFY AS EXPERT WITNESSES?

Holding: The trial court did not abuse its discretion in permitting caseworkers to testify as expert witnesses in the area of social work with an emphasis on child protection.

Reasoning

- **Expert testimony must be relevant and not unfairly prejudicial.** (CRE 401, 402 403, 702).
- **A trial court may admit expert testimony if it will help the trier of fact understand the evidence or determine a fact in issue.** CRE 702.

Application: “[T]he decision to qualify the caseworkers as experts was within the court's discretion [...] and the court properly left the determination of the weight to be given to the experts' testimony to the jury.”

People ex rel. A.E.L., 181 P.3d 1186, 1193 (Colo. App. 2008).

P.S.: BASIS OF AN EXPERT'S OPINIONS

“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Facts or data that are otherwise inadmissible shall not be disclosed to the **jury** by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.”

CRE 703. Spaces added.

P.S.: EXPERT'S OPINION ON ULTIMATE ISSUES

“Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” C.R.E. 704.



4. HOW WILL YOU STRUCTURE YOUR EXPERT WITNESS'S TESTIMONY?

ONE METHOD: NATIONAL INSTITUTE FOR TRIAL ADVOCACY (NITA) (WITH ADDITIONAL NOTES)

1. Introduction.
2. Teaser: “(Name), will you please answer the next question with a ‘yes’ or a no”? Have you been asked to come here today to give your expert opinion about whether _____?”
3. Qualifications: “Before we get to your opinion, let’s find out what qualifies you to give an expert opinion today.” Focus on qualifications related to the opinion the expert witness will provide.
4. Tender: “Your Honor, I tender (Name) as an expert in _____.” Tailor the field to the opinion the expert witness will provide.
5. **Opinion: “Do you have an opinion to a reasonable degree of probability as to whether _____? What is that opinion?”**
6. Basis for opinion: “Is there a typical procedure experts in _____ use to arrive at such opinions? What is that procedure? Did you follow that procedure here? Why? In what ways did you follow that procedure here? What did you do/look at/consider?”

5. WHAT ARE
SOME
RISKS OF,
AND TIPS FOR,
EXPERT
WITNESSES?

WATCH OUT FOR THE RISKS OF CALLING THE CHILD'S THERAPIST AS A WITNESS!



L.A.N. v. L.M.B., 292 P.3d 942 (Colo. 2013).



Issues: Who holds the psychotherapist-patient privilege for children in child welfare cases? Can the holder of the psychotherapist-patient privilege in child welfare cases waive that privilege; if so, how?



Holdings: The privilege can be held by a child, a parent, or a GAL in a child welfare case. The holder of the psychotherapist-patient privilege can waive that privilege impliedly/explicitly and completely/limitedly.

PREPARE EXPERT WITNESSES.

Prepare/coach experts to:

- Use simple language...teach.
- Avoid or explain every acronym.
- Explain terms of art like “family treatment court” or “team decision meetings.”
- Speak slowly so the court reporter can keep up.
- Use the same titles you will use such as Mother or Ms. Smith.

Remind expert witnesses that testimony is their chance to show off – share their qualifications, all the work they’ve done on the case, and everything they know about the case.

Remind expert witnesses that the attorney who called them on direct will have an opportunity to rehabilitate/revive them.

Practice direct and cross examination.

Thank
you !