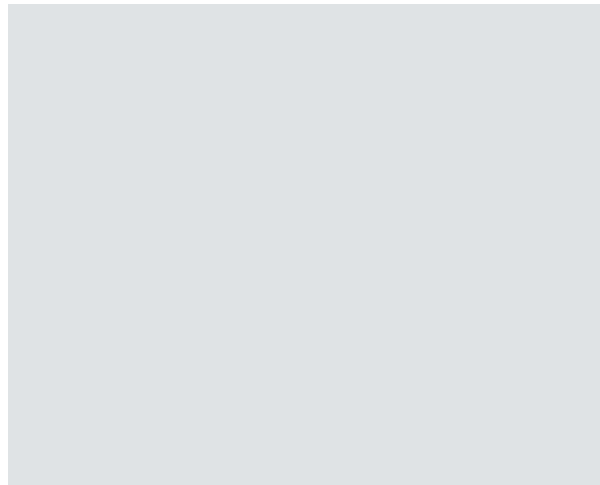
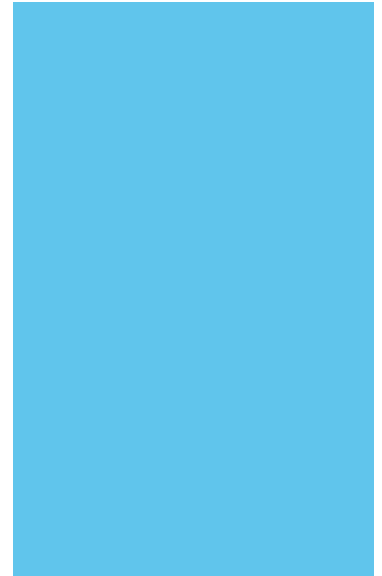




EXPERT WITNESSES
IN DEPENDENCY &
NEGLECT CASES

INTROS





HOW ABOUT YOU?

Please answer the poll question.

AGENDA

1. DO YOU NEED AN EXPERT WITNESS?

2. WILL THE WITNESS QUALIFY AS AN EXPERT?

3. WILL THE EXPERT TESTIMONY BE ADMITTED INTO EVIDENCE?

4. WHAT EXPERT DISCLOSURES WILL YOU MAKE?

5. HOW ARE YOU PAYING YOUR EXPERT WITNESS?

6. WHAT STRUCTURE WILL YOU USE FOR YOUR EXPERT WITNESS TESTIMONY?

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

8. WHAT ABOUT CROSS-EXAMINATION OF OPPOSING EXPERT WITNESSES?



PLEASE PARTICIPATE!

IT'S OKAY IF WE RUN OUT OF TIME

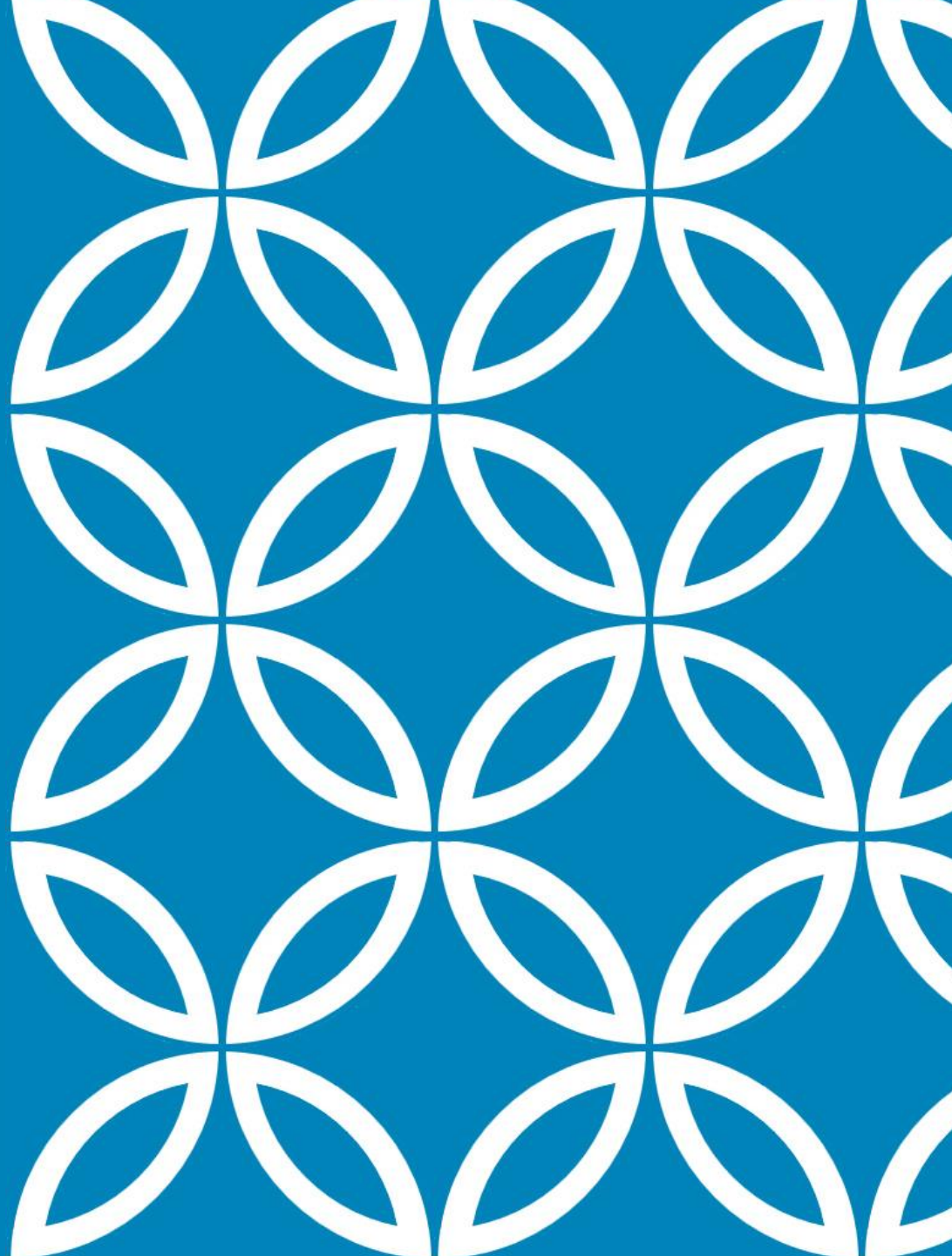
The last few slides are more detailed than the others.

You are not alone! You can always...

- Contact an attorney on the Litigation Support list,
- Contact your OCR Staff Attorney Liaison, and/or
- Post a question to the listserv!



1.
DO YOU NEED AN
EXPERT WITNESS?





Fact Witness



Expert Witness

IS THE
DISTINCTION
BETWEEN A LAY
AND AN EXPERT
WITNESSES
*MERELY A MATTER
OF OPINION?*

Answer: Not usually.

CRE 701: Lay witnesses may testify about their opinions/inferences if their opinions/inferences are:

Rationally based on the perception of the witness

AND
helpful to a clear understanding of the witness' testimony or determination of a fact in issue,

BUT NOT **based on scientific, technical, or other specialized knowledge** within the scope of FRE 702.

EXAMPLES OF ADMISSIBLE LAY WITNESS OPINIONS

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**); *Jones v. Blegen*, 161 Colo. 149, 420 P.2d 404 (Colo. 1966) (**intoxication**); *Sherry v. Jones*, 292 P.2d 746 (Colo. 1956) (speed of vehicle); *People v. Nhan Dao Van*, 681 P.2d 932, 937 (Colo. 1984) (no vital signs).



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	
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.	
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.	

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

EXAMPLES

Evidence	Lay or Expert Witness?
Testimony about the similarity of shoeprints + a defendant's shoes.	
Law enforcement officer's testimony about which part of the marijuana plant is used to make edibles & whether dealers commonly maintain separate production/distribution sites.	
Testimony about grooming as it relates to sexual predator's methods of acquiring victims.	
Law enforcement officer's testimony about his understanding of Facebook and its features.	

EXAMPLES

Evidence	Lay or Expert Witness?
Testimony about the similarity of shoeprints + a defendant's shoes.	Lay. <i>People v. Vigil</i> , 459 P.3d 553 (Colo. App. 2015) (measurements and particularities were readily recognizable).
Law enforcement officer's testimony about which part of the marijuana plant is used to make edibles & whether dealers commonly maintain separate production/distribution sites.	Expert. <i>People v. Douglas</i> , 412 P.3d 785 (Colo. App. 2015) (testimony was based on officer's specific experience and is not the type of information an average citizen would be expected to know).
Testimony about grooming as it relates to sexual predator's methods of acquiring victims.	Expert. <i>People v. Romero</i> , 393 P.3d 973 (Colo. 2017) (an ordinary citizen would not be expected to have the experience, skills, or knowledge required to understand the concept of grooming as it relates to sexual predators).
Law enforcement officer's testimony about his understanding of Facebook and its features.	Lay. <i>People v. Glover</i> , 363 P.3d 736 (Colo. App. 2015) (officer's understanding of Facebook was based on officer's investigation and experience/knowledge common among ordinary people who use Facebook).

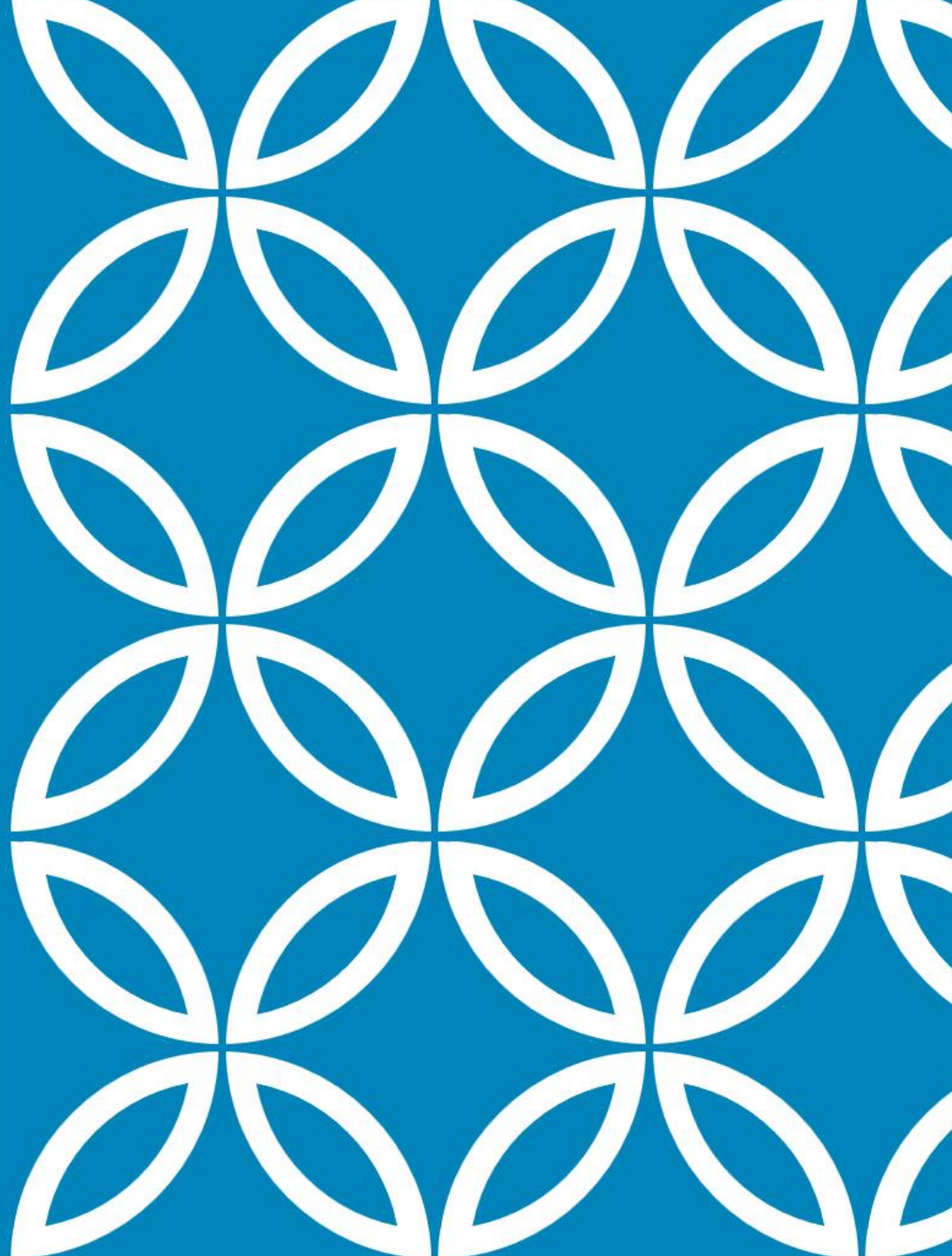
VISITATION WORKER AS AN EXAMPLE

Evidence	Lay or Expert Witness?
What the visitation supervisor observed - the behavior of the parents and the child	
Whether the parent and the child are bonded and attached	
Whether visitation should move to unsupervised	

VISITATION WORKER AS AN EXAMPLE

Evidence	Lay or 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?





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 MISC. 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.)

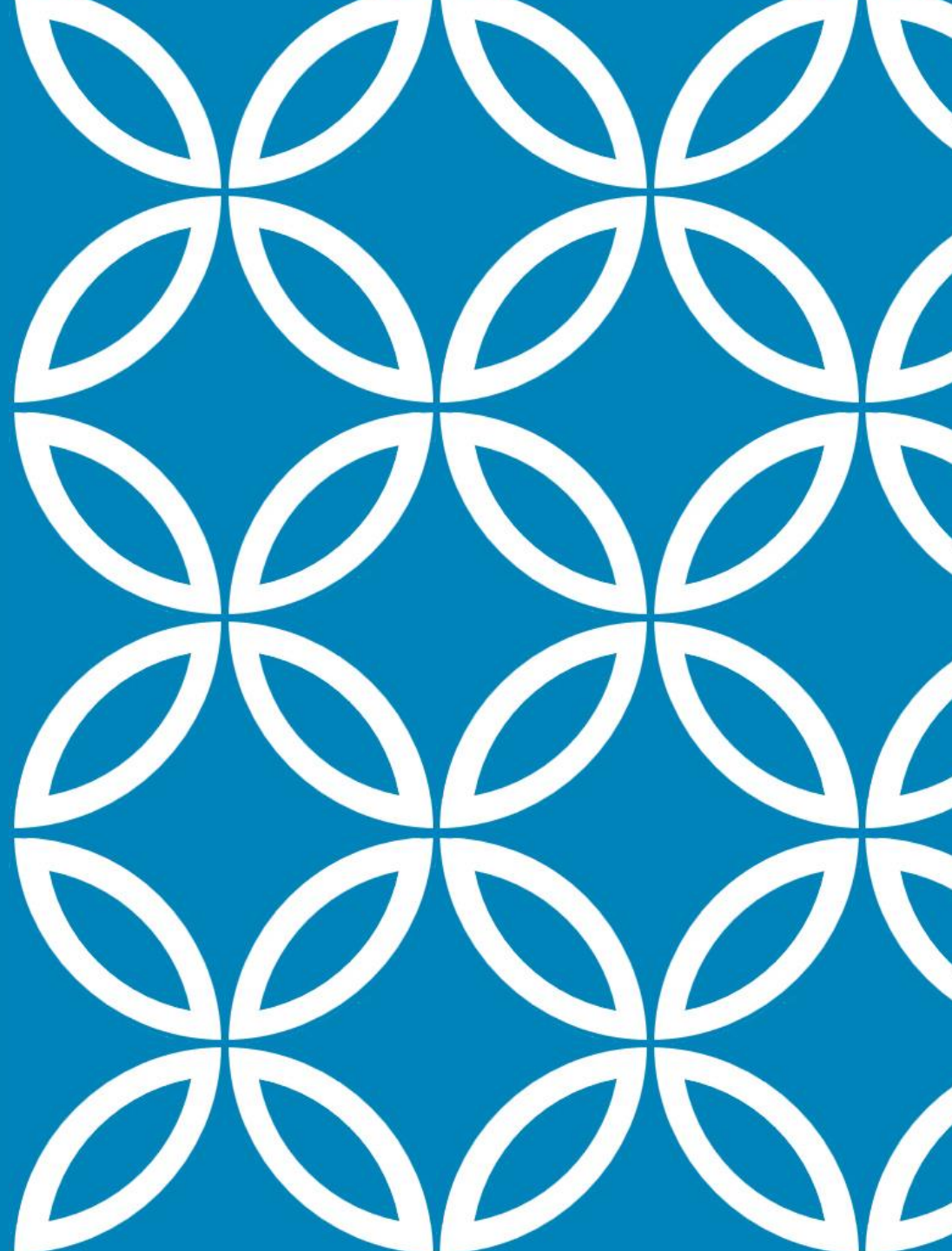
Do you have any special licensures or certifications? In what? When did you earn your _____ (name of licensure or certification)? What were the requirements for that licensure or certification? You completed all those requirements? (Emphasize special licensures or certifications relevant to the opinion 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
TESTIMONY BE
ADMITTED INTO
EVIDENCE?



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

Criteria	Rules
<p data-bbox="50 337 305 391">Relevant</p> 	<ul data-bbox="479 337 1854 751" 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
<p data-bbox="50 799 440 856">And reliable,</p> 	<p data-bbox="479 793 1862 965">“...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.</p>
<p data-bbox="50 1019 397 1162">But not prejudicial?</p> 	<p data-bbox="479 1008 1877 1305">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.</p>

CAN CASEWORKERS BE PERMITTED TO TESTIFY AS EXPERTS?

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 and italics 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.



PEOPLE IN INTEREST OF D.M.F.D., 497 P.3D 14 (COLO. APP. 2021)

FACTS:

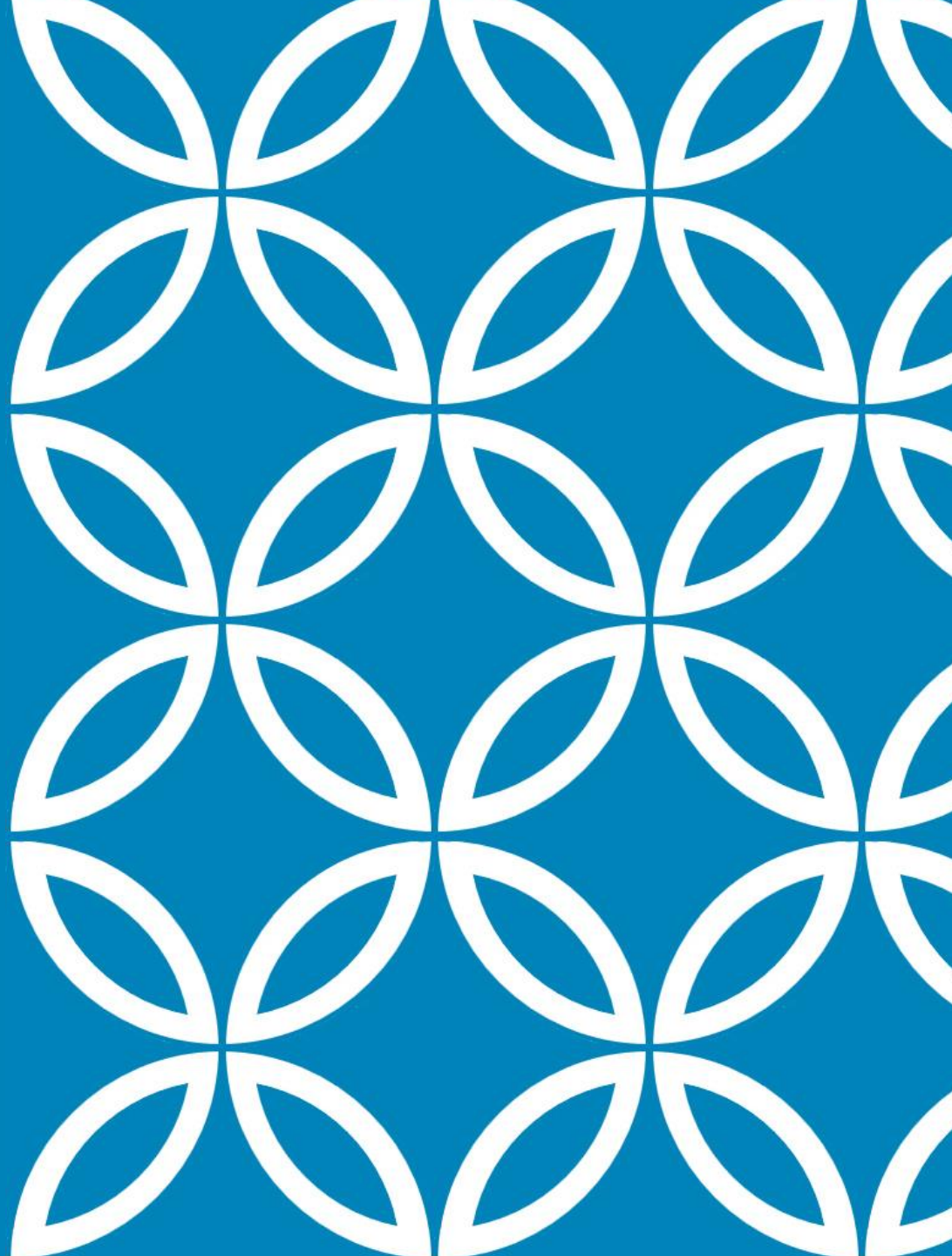
- Adjudicatory court trial.
- Department's case rested on hospital staff's observations (e.g., child tested positive, lost weight, and was not cared for at hospital)
- Witnesses were intake and ongoing caseworkers as experts.
- Department attempted to admit father's criminal history, caseworker's testimony about what hospital staff said; and caseworker's limited observations at hospital.
- Court admitted caseworker's testimony about what hospital staff said for effect on the listener, *not for the truth of the matter asserted.*

HOLDING:

- Father's criminal convictions and pending charges did not support adjudication because the court did not explain how they affected the child.
- Intake caseworkers' testimony about what hospital staff said could not be relied on since it was hearsay admitted for a limited purpose.

**LESSON: DO A BETTER JOB
PROVING YOUR CASE!**

4.
WHAT EXPERT
DISCLOSURES
WILL YOU MAKE?



WHAT AUTHORITY APPLIES?

CRJP 1

Where an issue is not covered in the CRJP or the Children's Code, the CRCP apply.

CRCP 26

CRCP 26 does not apply to D&N proceedings unless the court orders that it applies or the parties stipulate that it applies.

In Practice

Parties typically file witness lists and make expert disclosures. Many counties have local orders governing disclosures and discovery.

TIP

CHECK LOCAL PRACTICE AND ORDERS!



IF CRCP 26 APPLIES AND THERE IS NO CMO, THEN USE CRCP 26(A)(B).

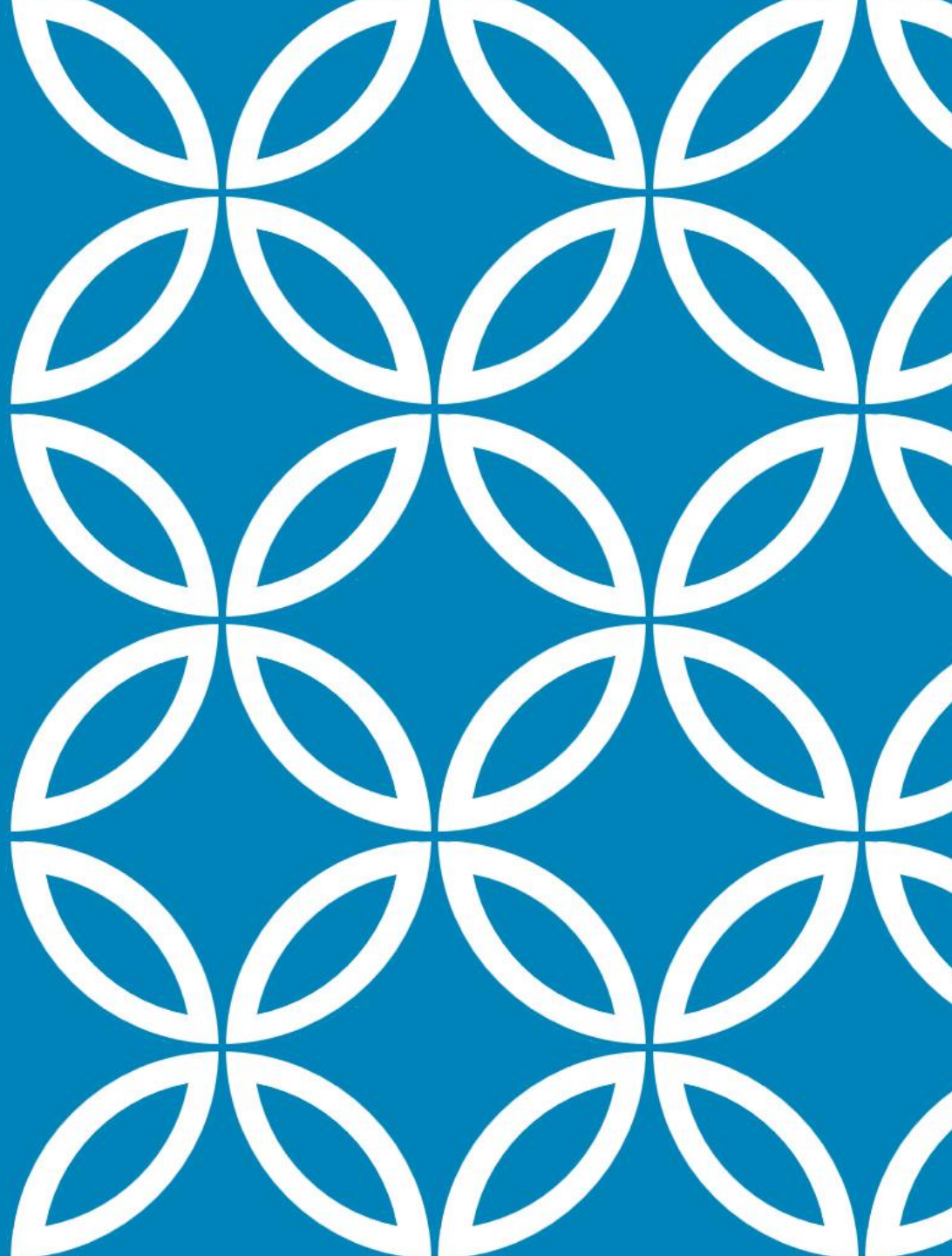
Professional Experts

- Definition: retained solely for purpose of providing expert testimony.
- Example: parent/child interactional evaluator.
- Required Disclosure: detailed report and additional disclosures. CRCP 26(a)(B)(I)(a-h).

Other Experts

- Definition: most experts in D&N hearings.
- Example: caseworker.
- Required Disclosures: expert report or summary prepared by counsel. CRCP 26(a)(2)(B)(II).

5.
HOW ARE YOU
PAYING YOUR
EXPERT WITNESS?



OCR BILLING POLICIES AS OF 1/2022.

Review OCR's most recent billing policies.

<https://coloradochildrep.org/attorney-center/billing/> → Billing Policies and

Procedures. On the 1/2022 Policies, experts are addressed on pages 21-22.

- Maximum hourly and total fees, with limited pre-approved exceptions.
- Expert bills OCR directly.
Forms/Instructions are in Billing Policies.

EXPERT BILLING: THREE TIPS

Make sure you actually need an expert! See prior slides.

Because OCR pre-approval is required, request as early as possible.

Make detailed requests. See next slide.



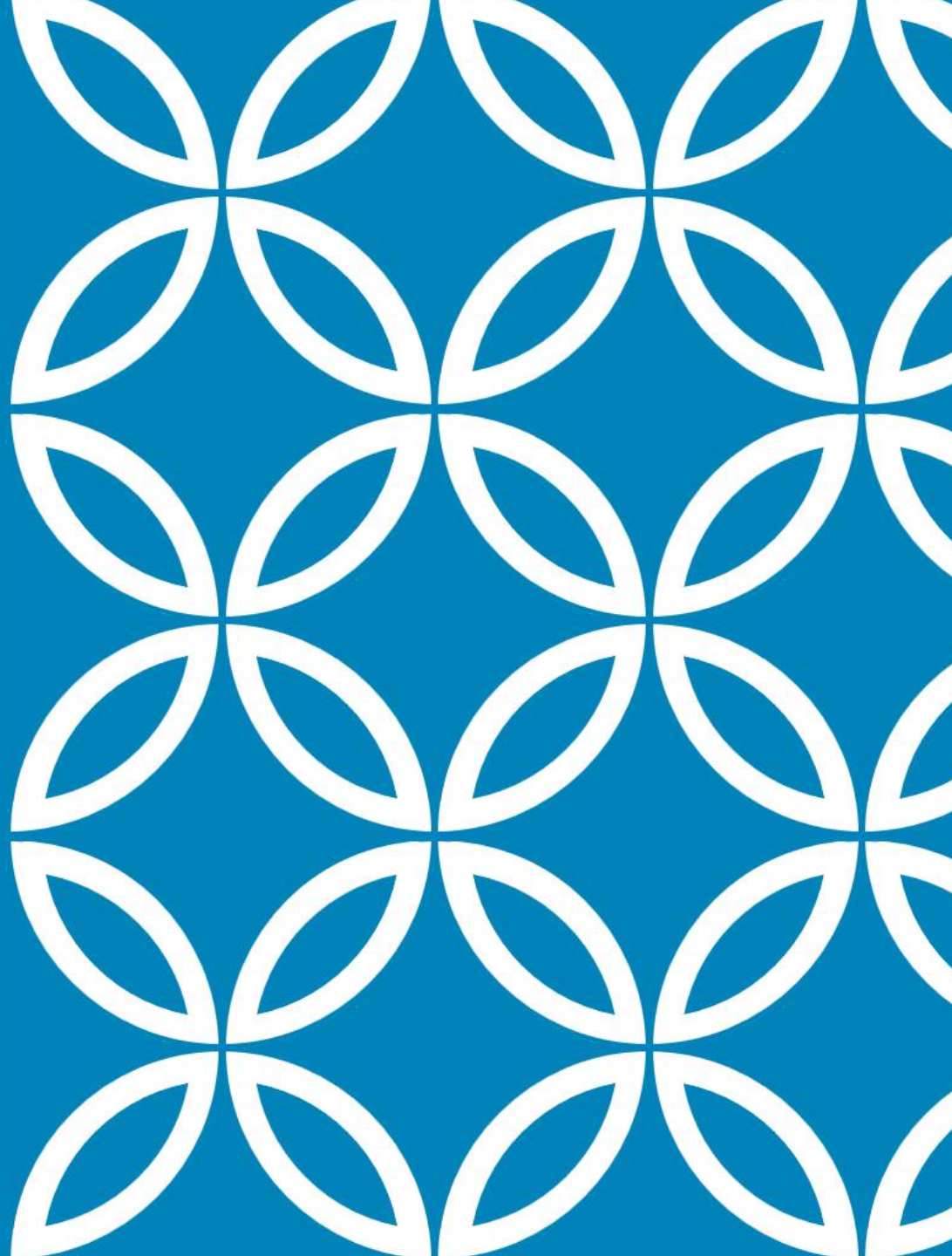
EXPERT BILLING: EXAMPLE REQUEST

GENERAL REQUEST: I would like to (potentially) request expert fees on the [name] case, [Name] County case [##JV###]. We are currently set for a hearing on [date], in part, requesting that the court order medication for [##] of the four children, over the objection of their parents.

REASONS FOR REQUEST: This case opened due to [what]. The [##] children referenced in this email by name reported the [what to whom]. Upon investigating, DHS found [what]. All [#] children are placed out of home. The [#] oldest, [Names] have struggled in their own ways. [Brief but detailed explanation of each child's mental health struggles]. I say *potentially* because I am trying to have a conversation with [#] doctors [Names]. [Doctor Name] prescribed [what, to which child, when, and why]. [Doctor Name] prescribed [what, to which child, when, and why]. [The caretakers for children Names] have noticed positive improvements since the [name of medication] has been in place. [Explanation of improvements.] Parents do not want the children on these medications. If, after talking with the doctors, I feel the medications are in the children's best interests, I will go forward on the hearing requesting a court order for medication. Given the children's behaviors, I do think it is likely I will be supporting the medication. I do not do this lightly – I am usually for a few meds as needed.

[DETAILS ABOUT AMOUNT OF FEES] **I think I will need trial prep with each doctor for about [how long] and would anticipate they would each testify for about [how long]. I am guessing they will request to testify virtually and usually there is no objection to that – so hopefully, no travel fees.**

6.
WHAT STRUCTURE
WILL YOU USE
FOR YOUR EXPERT
WITNESS
TESTIMONY?



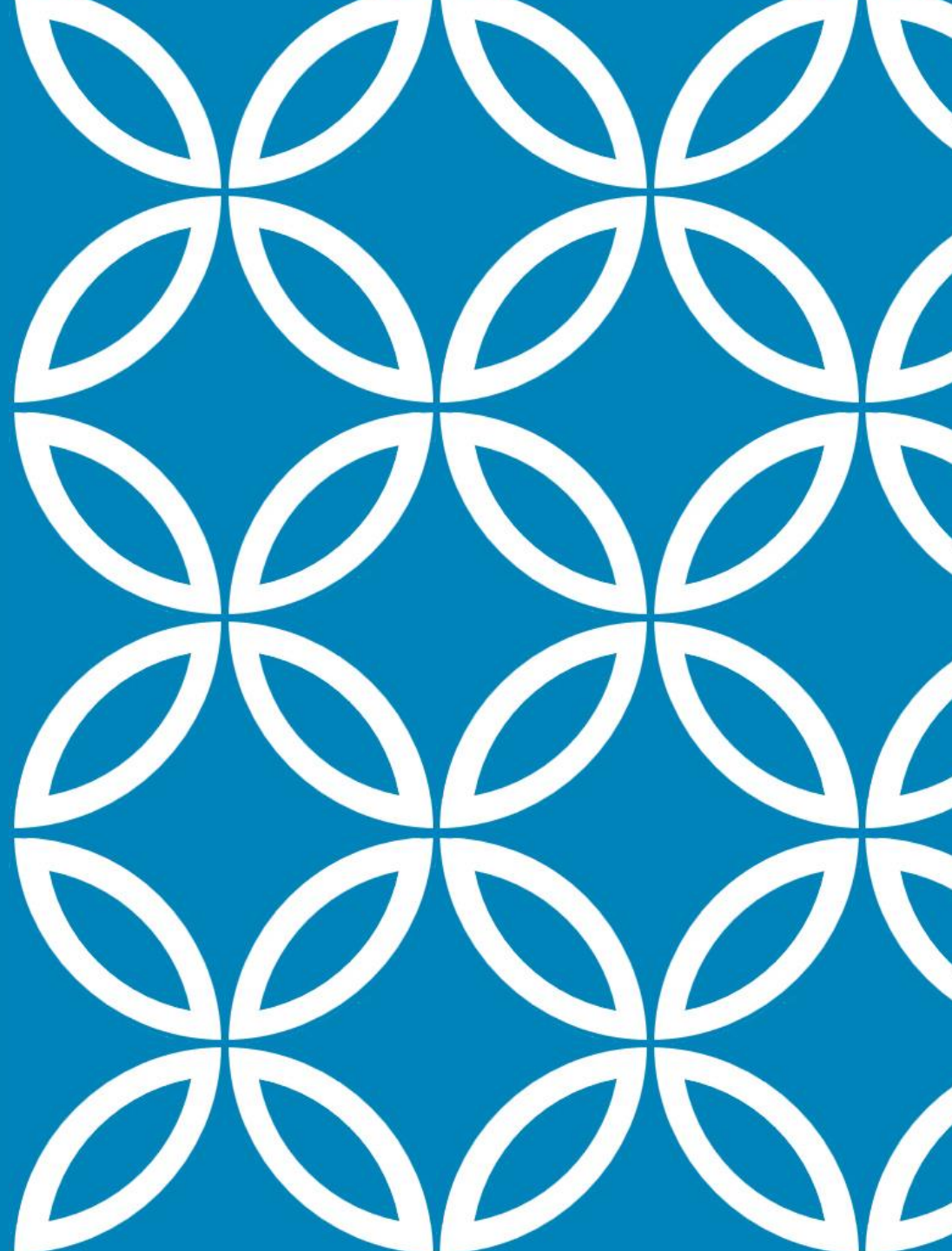
NATIONAL INSTITUTE FOR TRIAL ADVOCACY (NITA) METHOD (WITH SOME ADDITIONAL NOTES)

1. Introduction
2. Teaser: “(Name), have you been asked to come here today to give your expert opinion about whether _____? Before we get to your opinion, let’s find out what qualifies you to give this opinion.”
3. Qualifications: ”Before we get to your opinion, let’s find out what qualifies you to give an expert opinion about whether _____.” 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?

ANOTHER METHOD: TERMINATION TESTIMONY — CASEWORKER (ON LITIGATION TOOLKIT)

1. Introduction
2. Qualifications: "Before we get to your opinion, let's find out what qualifies you to give an expert opinion about whether ____." Focus on qualifications related to the opinion the expert witness will provide.
3. Tender: Your Honor, I tender (Name) as an expert in ____." Tailor the field to the opinion the expert witness will provide.
4. Rest of testimony.

7.
WHAT ARE SOME
RISKS WITH, 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.

PLAN EXPERT WITNESS TESTIMONY.

Decide vocabulary: what titles will be used (e.g., Mother or Ms. Abrams), which (if any) acronyms will be used and how they will be defined, how technical language will be boiled into understandable language for the fact-finder and the record on appeal. *Mauet.*

Decide which exhibits the expert will use and how. *Id.*

Prep for cross: verify credentials, ensure witness has reviewed her own publications, speeches, presentations, and prior testimony as well as any opposing expert witness report and general treatises on the subject. Practice a hard and a soft cross. *Id.*



PREPARE EXPERT WITNESS.

Practice direct examination - both content and communication (e.g., tone, pauses, and gestures.) *Id.*

Coach expert to do the following.

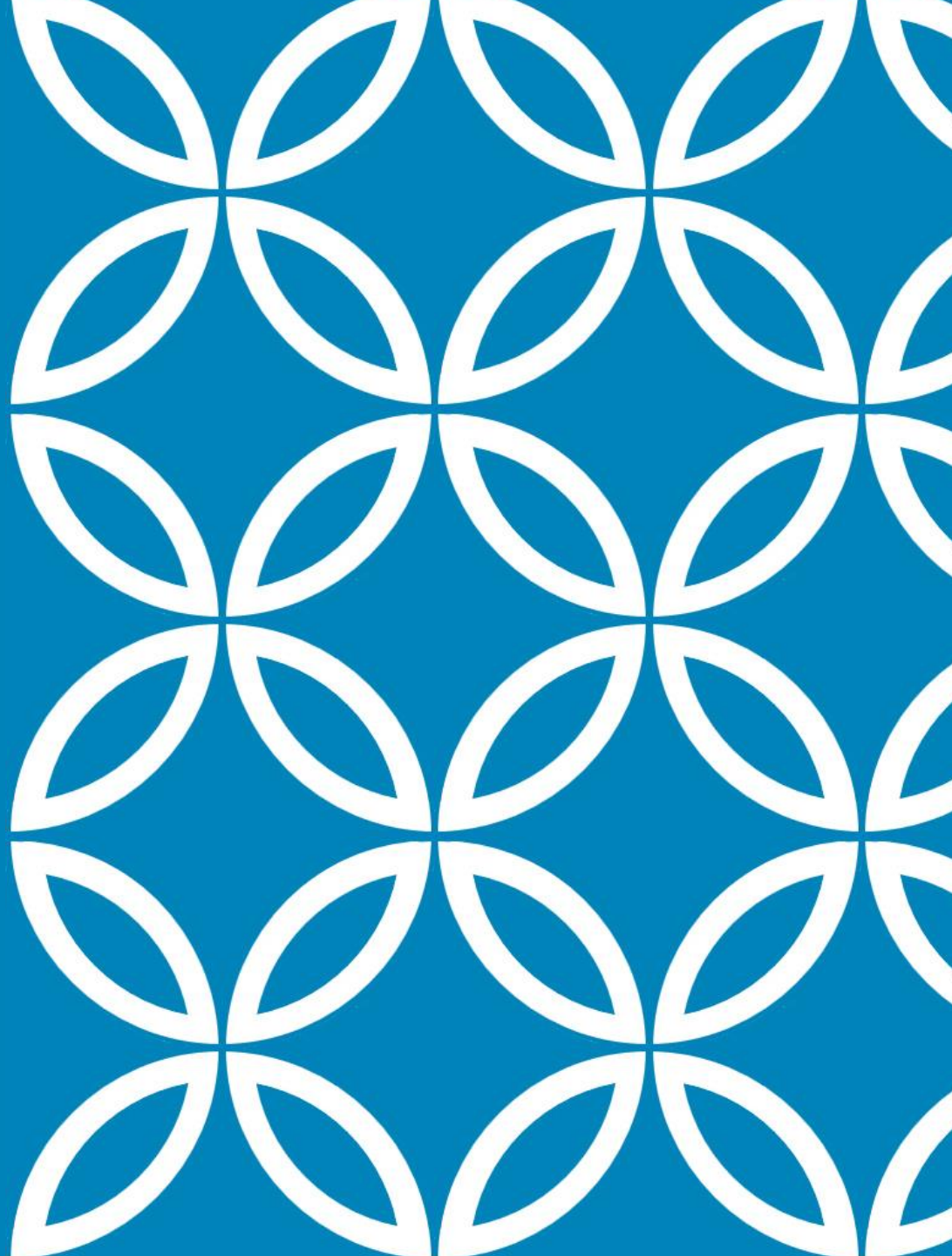
- Use simple language...teach.
- Explain terms of art like “family treatment court” or “team decision meetings.”
- Speak slowly so the court reporter can keep up.
- Use the same titles you will use such as Mother or Ms. Abrams.

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



8.
WHAT ABOUT
CROSS
EXAMINATION OF
OPPOSING EXPERT
WITNESSES?



TIPS FOR CROSS EXAMINATIONS OF EXPERT WITNESSES: MAUET

Should you **cross examine at all**?

- 2 purposes of cross are (a) to elicit favorable testimony or (b) to discredit.
- Ask: Did the witness hurt your case? Is the witness important? Was the witness's testimony credible? What are your realistic expectations on cross? What risks do you need to take?

What should the **organization** of your cross be?

- **Simplicity:**
 - Do not repeat direct examination
 - Aim to establish as few points as possible.
 - Use simple leading questions.
 - Stop when the point is made.
- **Primacy and Recency:** make your strongest points at beginning and end.
- **Indirection:** vary the order of your topics so they are different than the order of the direct examination.



TIPS FOR CROSS-EXAMINATION OF EXPERT WITNESSES: MAUET AND NITA.

Potential areas of cross include favorable admissions, qualifications, correctness of assumptions, biases, lack of personal knowledge, quality of information relied upon, what expert has not done, errors in calculations, omission of significant facts, learned treatises. NITA.

Review the opposing expert witness's **report**. This will tell you what the expert's probable testimony will be. Mauet

Use your own expert witness to help you understand/attack the opposing expert's anticipated testimony. *Id.*

Read the **literature** in the field. *Id.*

Obtain a copy of everything the opposing expert has **published, spoken on, etc.** The expert's resume/CV is a good place to find such information. *Id.*

Learn where the expert has **testified** and obtain a copy of his/her testimony. *Id.*

Review the expert's **resume** to locate weaknesses in the expert's qualifications and to determine if the expert's true area of expertise is in an area other than the specific area involved in your case. *Id.*



P.S. A FEW RESOURCES

THE LITIGATION SUPPORT LIST!

<https://coloradochildrep.org/attorney-center/> → Litigation Support List.

Register for OCR's May 20, 2022, Trial Skills Training

<https://coloradochildrep.org/event/trial-skills-training/>.

Trial Techniques by Thomas A. Mauet.

Trial Advocacy for the Child Welfare Lawyer: Telling the Story of the Family by Marvin Ventrell and Patrick Furman.

Cross Examination: Science and Techniques by Posner and Dodd.

The Articulate Advocate: New Techniques of Persuasion for Trial Lawyers by Brian K. Johnson and Marsha Hunter.



THANKS...AND MAY ALL YOUR WITNESSES BE BRIGHT.

