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Your First Expert Witness—Part I

by Ronald M. Sandgrund

Expert testimony often is helpful—sometimes necessary—and may leave an indelible imprint on a case. Effective expert testimony boils down to one thing: a credible, prepared expert witness. Time invested in selecting, preparing, and collaborating with an expert, or preparing to cross-examine an opposing expert, can pay substantial dividends.

This two-part article describes essential principles a new lawyer should consider when retaining, preparing, deposing, and examining expert witnesses. Part I discusses why expert testimony is useful, when expert testimony is necessary, who might qualify as an effective expert witness, how to locate and retain qualified experts, what needs to be done to prepare an expert for rendering opinions, and what qualities to look for in an expert witness. Part II, which will be printed in the June issue of *The Colorado Lawyer*, will examine defining the scope of the expert's assignment, providing the expert case information, developing and disclosing the expert's opinions, and preparing for deposition and trial examination of one's own and the opposition's expert witnesses.

Why, When, Who, How, and What

Finding the right expert can make or break a case. The four words a new lawyer never wants to hear a senior attorney utter in the middle of trial are, "Who hired this person?"[1]

The questions a new lawyer must answer about expert witnesses are:

1. Do I need one or more expert witnesses?
2. When during the case should I retain the experts?
3. Who would be effective expert witnesses?
4. How do I find qualified experts?
5. What terms should an engagement agreement contain?

Following are some guidelines to consider in answering these questions.

Assessing the Need for an Expert Witness

Just because an expert might offer testimony in a case does not mean a lawyer should retain one. Practical or cost considerations may militate against hiring an expert. Consider the following hypothetical:

> A biomechanical engineer can—for a hefty fee—make some good points about the minimal forces associated with a low-speed auto collision or an emergency elevator stop. In response, a skillful cross-examination can easily establish the limitations of biomechanical science and accident reconstruction. Next, a kindly treating physician can counter the biomechanical engineer's testimony with many examples of seemingly low-impact events with serious medical consequences.

Similarly, an insurance expert can explain in plain English the terms of the most complicated insurance policy, but if the construction of an insurance policy is a question of law for the court, the likelihood the expert's testimony will be allowed is slim.[2] Therefore, a lawyer must balance the costs associated with retaining an expert against the likely benefit of the expert's testimony.

A lawyer may need to hire an expert when

> scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[3]

In some cases, expert testimony may be required, such as for establishing professional liability, medical causation, or a pharmaceutical product's unreasonably dangerous characteristics. Expert witness testimony is economical when the benefits likely to accrue from the expert's services exceed the costs; however, such decisions often are difficult to quantify. As a practical matter, many lawyers err on the side of hiring experts.[4]

Retaining Multiple Experts

In more complex cases, it may make sense to retain multiple experts. When doing so, it is important to recall that a trial court has broad discretion to refuse to allow repetitive expert testimony.[5] Therefore, an attorney should hire experts whose opinions are distinct from one another, are drawn from independent investigations,

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and do not conflict. Generally, these experts should not communicate with one another until their reports are complete, because it may appear they are conspiring to artificially align their opinions. In rare cases, a team of experts may need to be assembled and their collective expertise yoked and marshaled during their investigation and report writing. For example, a repair cost estimator often needs to speak with the engineer who prepared the scope of repair the estimator is working from to obtain clarification and to discuss the cost benefit of certain repair options.

Determining When to Retain an Expert

Given the relatively strict and short deadlines for the plaintiff's initial C.R.C.P 26 expert disclosures,[6] the time to decide whether a plaintiff needs an expert witness is soon after the basic facts have been fleshed out and his or her lawyer has outlined the liability claim elements and damages model. The analysis should be performed before—or soon after—the case is filed and should be revisited every time new material facts are uncovered, especially as the other side's defense theories begin to crystallize.

For defendants, it often is difficult to anticipate which, if any, defense experts may be needed, because many such experts are retained solely to rebut the plaintiff's experts' testimony. Still, defense counsel is well advised to anticipate as early as possible the kind of expert testimony the opposition is likely to endorse, and to retain experts in these fields. An added advantage to selecting experts early is that if the best—that is, most credible—expert in a particular field can be retained, it will deprive the other side of that expert's services. (However, a lawyer probably should not seek to deny the other side the best experts by protectively retaining them in advance.)[7]

Determining Who Would be an Effective Expert Witness

The most important quality in an expert witness is credibility. The ideal expert will be perceived by the jury as sincere, authoritative, and impartial, prompting the jury to forget which side retained the expert.[8] A healthy *curriculum vitae*, a Presidential Medal of Freedom, and the sage face of a college professor may enhance credibility, but none of these factors can substitute for how the expert performs under fire at trial. Some considerations are:

- Does the expert appear nervous?
- Does the expert qualify too much of his or her testimony with caveats?
- Does the expert avoid eye contact with jurors?
- Will the expert acknowledge weaknesses in assumptions underlying his or her theories when those weaknesses are obvious?
- Does the expert speak clearly, confidently, and concisely?
- Are the expert's explanations straightforward and simple, or are they convoluted?
- Does the expert use everyday examples, plain words, and useful analogies to make the technical aspects of his or her testimony accessible?
- Is the expert easily offended or unduly defensive?
- Does the expert seem arrogant?

Absolute and unequivocal candor is required, coupled with a mastery of the facts and the appearance of impartiality.[9] An attorney must evaluate the prospective expert's ability to communicate in a convincing and compelling manner, along with his or her credentials, demeanor, composure under fire, and common sense.

The best trial lawyers assume every case is going to be tried and prepare accordingly. These lawyers generally hire experts who have significant deposition and trial testimony experience and who can persuasively present their opinions. Ideally, an attorney should strive to hire the near-mythical "Four-P Expert"—that is, the expert who is both a practitioner and a professor in his or her field of study; has published peer-reviewed articles or books in that field; and presents well in front of a jury.[10]

A lawyer must balance various factors when selecting among what one commentator categorizes as "professorial," "professional or industry," and "occasional" experts.[11] Professorial experts may have the greatest access to recent studies and technical literature, as well as research support, but their removal from real-world experience may put them at a disadvantage. Professional or industry

experts may be more familiar with technological advances and may be the most litigation savvy, but they may suffer from industry biases, such as not wanting to criticize their colleagues or to acknowledge that industry standards they have followed fail to meet a reasonable standard of care.[12] Occasional experts, such as "industry insiders," may have the greatest credibility, but they typically are the least experienced testifiers and may be more likely to retreat from their opinions under cross-examination.[13]

The well-credentialed, distinguished-looking expert witness is ineffective if the fact-finder deems the expert's testimony not credible. For example, an elevator maintenance man with twenty years' experience repairing elevators might have more success explaining to the jury the innocuousness of a particular elevator's maintenance history than an expert witness with a PhD in electrical engineering (but who has never fixed an elevator). That same maintenance man might be better at explaining to the jury why the elevator could or could not do what the plaintiff claims it did when she hurt her back during an allegedly abrupt stop.

Finding a Qualified Expert Witness

An attorney should exercise due diligence when selecting an expert. For the seasoned attorney who focuses his or her practice in a narrow field, finding an expert often means picking up the phone, contacting an expert with whom the attorney has worked previously, and briefly outlining the assignment or simply e-mailing case information and asking the expert to call to discuss the material. For the new attorney without access to a law firm's existing stable of experts, generally the best place to start is to contact one whose testimony the lawyer previously has observed.

Beyond that, the attorney can solicit referrals from other attorneys who have worked with or observed the expert. Prospective experts also can be culled from jury verdict reports, computerized legal databases, professional and technical journals and books, case opinions, and newspaper articles. In addition, many expert referrals are available from professional organizations and industry groups, college and university faculty, and expert reference services such as the Technical Advisory Services for Attorneys, as well as on the Internet and through advertisements in professional trade magazines. Retaining an expert whose identity becomes known through advertising or a fee referral service may strike some as unseemly and could present healthy fodder for cross-examination, but this may be the only viable choice available.

It is important to investigate the expert's credentials, professional background, communication skills, credibility, and demeanor, or face the possible death knell of the expert not being qualified or permitted to render needed opinions. When possible, key publications and prior relevant testimony and reports should be reviewed to determine potential areas of financial, industry, and philosophical conflicts, as well as possible impeachment because of inconsistent statements. A thorough and wide-ranging interview with a prospective witness, preferably face-to-face, is critical.[14] One commentator suggests tactfully asking whether the expert has ever failed to be qualified, been through a contested divorce, had substance abuse problems, been a party to a civil or criminal lawsuit, or been fired from a job.[15]

Hiring an expert sight unseen is a risky endeavor. Also, there may be occasions when it is necessary to retain an expert with no previous trial testimony experience. In these circumstances, the attorney will need to assess whether the expert can credibly explain his or her opinions at trial after considering the expert's public speaking or teaching experience or previous deposition performance, or based solely on a phone or personal interview.

The Engagement Agreement

To avoid unnecessary disputes, an engagement letter—also known as a retention or consulting agreement—should be executed for every expert hired. The engagement letter explains the arms-length relationship between the expert and counsel (or counsel's client), terms of service, and scope of assignment. Great care should be taken in crafting the engagement agreement because it may become Exhibit A at deposition or trial due to its discoverability and obvious interest to opposing counsel for purposes of impeachment or showing bias on cross-examination. Also, before executing the agreement, the identities of the parties should be made known to the expert to avoid potential conflicts of interest. The client's authority should be obtained in advance to retain the expert, and an agreement should be reached on the permissible scope of the expert's fees to avoid later misunderstandings with the client and with the expert.[16]

Essential Terms of the Agreement

The engagement agreement, which may consist of a formal written contract or simply a confirming letter or e-mail, should define the basic terms of the professional services relationship. During this relationship, the attorney agrees to pay the expert witness to perform such study, investigation, tests, and analysis as is reasonably necessary to formulate opinions regarding the issues the expert has been asked to address. The engagement letter should briefly outline the work to be done, possibly including specific questions that need to be answered, but not the conclusions desired. It should clearly identify the experts' and their staffs' hourly rates[17] and any understanding regarding advance notice of and agreement to any future rate increases. Experts tend to provide the timeliest and most diligent service to those lawyers who pay them promptly and in full.[18]

There is some disagreement as to whether reasonable limitations on an expert's fees should be set out in the engagement letter. The agreement might state a time or dollar limit that, once reached, requires the expert to notify the lawyer and obtain written authority to exceed the limit. Still, perceptions are important: the engagement agreement should not suggest that such restrictions might stand in the way of the expert "finding the truth." Some commentators suggest that an expert's budget should take only the form of an oral "gentlemen's agreement" in which an agreeable anticipated fee range will not be exceeded without further discussion.[19] If this limitation is put in writing, the agreement should not suggest that the expert is being hamstrung from giving the issue needed attention. Although a jury may understand the need for provisions that refuse to grant the expert a blank check, the jury also could believe the expert was denied the authority to conduct necessary additional tests, investigation, research, or study because such work exceeded counsel's (or an insurer's) budgeting guidelines.[20] This could be devastating to the expert's credibility: he or she may be perceived as being honest enough to admit to want to do more work to develop an accurate opinion yet deprived of this opportunity.

Some commentators believe that the engagement letter should specify that the lawyer or law firm, rather than the client, is retain-

ing the expert, because this approach may allow the expert the appearance of more independence from the client and, perhaps, a perception of less bias. Most experts insist that the retaining lawyer guarantee or assume primary responsibility for payment. The Colorado and Denver Bar Associations and the Colorado Medical Society have adopted a nonbinding interprofessional code to minimize fee disputes that may arise from the depositions of the opposition's medical experts.[21]

It is improper to retain an expert on a contingency basis dependent on the case's outcome,[22] and it is risky to allow a substantial balance for the expert's services to remain outstanding during trial, because this could be perceived by the jury as serving as an incentive for the expert to shade his or her opinions to help the retaining attorney's case and improve the expert's chances of payment. If a client or the person ultimately responsible for payment—such as an insurer—has special billing requirements or limitations, these should be noted.

Consulting Versus Testifying Expert

The engagement agreement should state that the expert is being retained as a consultant. By identifying the expert as a consultant, and leaving open the possibility he or she may be asked later to become a testifying expert, the agreement tracks C.R.C.P. 26(b)(4)(B), which prohibits the opposing side from obtaining discovery of experts retained simply as consultants.[23]

Although it is important that experts who are retained on a consulting basis agree to keep their files and opinions confidential, putting this in writing in the retainer agreement may be perceived by the jury as evidence that the lawyer was not confident in his or her case and intended to hedge bets as far as what those experts might say if asked to testify. In addition, if a confidentiality provision is too broad, the expert may become concerned that its breadth may interfere with employment opportunities with other law firms or in other cases. Still, a properly crafted confidentiality provision probably will not offend most jurors and sometimes may be necessary. Alternatively, an oral confidentiality agreement contemporaneously noted in the attorney's file should have some moral and legal force.

Protecting the nondiscoverability of some communications with consulting experts may be critical if they reach conclusions harmful to a case. If this occurs, the attorney may not want to call them as witnesses and may not want the other side to obtain discovery of their identities, files, or reports. In fact, if a consulting expert's opinions appear to be souring, it may be best to have the expert simply stop work and close the file. If time allows, the lawyer may want to look for another expert or settle the case, especially if the first expert has identified weaknesses not reasonably expected to be overcome.

Consulting experts' identities, and possibly their files and work product, may have to be revealed under some circumstances. This could occur if they have (1) observed evidence or property since altered or destroyed; (2) spoken to witnesses who have disappeared or whose memories have faded; or (3) handled evidence whose chain of custody is at issue.[24]

What Should Not Appear in the Engagement Letter

Certain concerns probably should be addressed orally with every expert and then orally disseminated by the expert to the expert's staff. For example, experts need to be educated about the danger of creating draft reports and making ill-considered notes, as well as to the importance of meeting deadlines and being available to the lawyer on short notice. Also, experts should appreciate the wisdom of not sending any substantive written communications—other than bills or scheduling communications—to the attorney, to the client, to another party, and even to the expert's own staff.

Finally, an expert's proposed form agreement should be carefully scrutinized to ensure it does not contain provisions that may come back to haunt an attorney. Some experts use standardized consultant agreements that they or their business counsel have developed to protect against misunderstandings or unscrupulous lawyers. Others use form contracts they might use with nonlawyers when rendering day-to-day professional services. Attorneys should be alert to disclaimer language—such as a boilerplate provision relieving the expert from liability arising from anyone relying on his or her opinions—that is unsuitable for an expert witness retainer agreement. Language that may be appropriate in agreements related to commercial products and services may be inappropriate and even counterproductive in an expert witness retainer agreement.

Developing a Relationship With the Expert

Lawyers take varying views of their work relationship with expert witnesses. Ultimately, though, lawyers are well served to treat their experts as equals and collaborators in developing and presenting a lawsuit's technical aspects.

"They're the Experts!"

Some lawyers simply supply experts with the basic data and then let them formulate their opinions with little direction. Most lawyers learn quickly that this approach can be a recipe for disaster. Experts may be skillful in one or more narrow field of study; however, they likely are not experts in how judges or juries will perceive their testimony or their theories, or the peculiar circumstances and equities of a case.

Like most people, experts may be blind to their own limitations and foibles. The most qualified expert in a particular field is not necessarily as qualified as most lawyers (or even most lawyers' legal assistants or receptionists) in gauging the expert's credibility as it may be perceived by a jury. Again, whether the expert appears credible is more important than the soundness of the expert's technical theories, the length of the expert's *curriculum vitae*, or whether the expert went to a first-tier university or never went to college at all. Giving an expert witness the ball and telling him or her to run with it is an unnecessary gamble. Lawyers

> who actively communicate with, guide, monitor and oversee their experts will receive a better return on their investment and also secure better reports and testimony than if the expert is given free rein.[25]

As tempting as it is to defer to a well-credentialed expert's superior technical knowledge and self-professed trial experience, such deference is imprudent. For the new lawyer, overcoming this natural inclination to defer to the expert can be difficult, especially when this is the attorney's first jury trial and the expert has testified before dozens of juries and confidently and convincingly speaks in technical jargon.

The Hired Gun

Some lawyers view their experts as hired guns whose only role is to unwaveringly support a lawyer's theory of the case and to oppose and destroy (although this almost never happens) the other side's case. Lawyers who view their experts this way sometimes find that by so narrowing the expert's focus, both the expert and the lawyer lose the benefit of much of the expert's talent of objectively evaluating the evidence and the merits of the case theory. For example, a "hired gun's" testimony that a home builder's multiple and undisputed building code violations amount to no more than immaterial infractions that have not caused any damage may irreconcilably conflict with a jury's common sense conclusion that such code violations may seriously affect the home's resale value.

Such narrowing of purpose and perspective may do no serious harm, and a lawyer who benefits from such an expert's testimony may not think changing this approach is necessary. However, a lawyer who watches an expert who has performed well in the past wilt under the questioning of a skillful cross-examination soon realizes there is more to the game than finding a hired gun. Instead, an expert who is not limited by his or her biases, and who has been properly prepared by counsel to view the evidence objectively rather than with blinders, will present his or her opinions most persuasively at trial.

Still, seasoned lawyers recognize that many experts embrace a particular school of thought, and that experts who testify for both sides are more susceptible to impeachment based on previous testimony.[26] A practicing lawyer quickly accepts the reality that if one mycologist embraces the conclusion expressed in some published literature that stachybotrys mold exposure induces a particular medical condition, and another mycologist has reached the opposite conclusion, a defense lawyer will hire the latter mold expert and a plaintiff's lawyer the former. Similarly, because some physicians are philosophically more amenable than others to finding a cause and effect between a low-speed car accident and back pain, doctors tend to fall into either the plaintiff's or the defense's camp. In sum, retaining an expert with strong biases can limit the expert's effectiveness, but may be appropriate in some cases.

The Collaborator

A best practices method may be to approach the retention of expert witnesses as a collaborative process whereby qualified, credible expert witnesses present a lawsuit's technical aspects in a reasonable and favorable light, while acknowledging weaknesses in their theories or in the data in a credibility-enhancing manner. The

expert works collaboratively with the lawyer, both learning from one another. On the one hand, an expert can teach the lawyer that an elevator "drops at 2.7 meters a second"; on the other, the lawyer can teach the expert that his or her testimony will be more effective if the expert testifies simply that the elevator "travels at about six miles an hour."

The lawyer–expert working relationship should be such that any gaps in the evidence and the lawyer's legal theories are identified early so they can be dealt with as effectively as possible. Experts who ignore such flaws are setting themselves up for a great fall, and may be perceived by the judge or jury as not credible. Every lawyer's dream expert is the expert who is an authority in his or her field but who also anticipates and thwarts potential attacks on his or her conclusions.[27]

Juror Perception of Well-Worn, Highly Paid Experts

Close and longstanding working relationships between attorneys or their law firms and expert witnesses are common and can be greatly beneficial, though sometimes potentially burdensome. The pros and cons of such relationships are described in the accompanying chart.

The Expert's Credibility

Lawyers disagree about how juries view expert witnesses who garner fabulous sums by serving as paid witnesses, and who repeatedly do the majority of their work for the same law firms or companies. However, if the expert otherwise is perceived as credible, the money he or she makes and for whom he or she primarily works becomes considerably less relevant in gauging credibility.

An expert's credibility can be established in various ways:

1. The expert researches his or her assignment and conducts the investigation in a thorough and objective manner.
2. The expert acknowledges obvious weaknesses in the data or the expert's assumptions.
3. The expert discloses any work he or she has performed for the opposition or those associated with the opposition in other cases.
4. The expert describes to the jury up front the amount of work he or she performs for the retaining law firm or similarly situated law firms.
5. The expert conveys opinions simply, directly, and persuasively, and bases these opinions on the provable facts in a reasonable, unstrained manner.

Jurors certainly may sit up and take notice when they find out that an expert earns twenty times what the jurors' earn per hour of work, or that the expert testifies 95 percent of the time for one of the party's law firms. Nevertheless, jurors are capable of compartmentalizing and appropriately weighing such information against the case's actual facts and equities to determine whether the expert's testimony is reasonable and comports with common sense.[28]

Conclusion

An attorney's collaboration with expert witnesses usually begins shortly after a new matter is entrusted to counsel's hands. In every case, it is critical that the lawyer determine early whether expert

Benefits and Burdens of the Long-Term Attorney–Expert Relationship

Benefits	Burdens
Familiarity with each other's work and communication styles.	Subject to cross-examination and loss of credibility due to extent of prior work for and fees paid by retaining attorney.
Greater payment flexibility.	Expert may view law firm as a piggy bank that will not scrutinize fees for fear of alienating expert.
Greater efficiency because there is no need to reinvent the wheel regarding the expert's approach to the case and how the expert wants to work with lawyers.	Expert may begin working for the opposition, using his or her previous work as a credibility enhancer and taking advantage of knowledge of former counsel's work product and practice methods.
Expert begins to think like a lawyer, anticipating lines of attack and appropriate responses to these challenges.	Expert begins to think like a lawyer and starts directing counsel regarding case and testimonial presentation.
Familiarity with billing limitations.	
Able to improve expert's testimonial performance with critique.	
Understands preferences about what the rules require as far as report writing, disclosures, contents of *curriculum vitae*, and compiling previous testimony.	
Expert may become dependent on a revenue stream but also may become used to working relationship and be willing to add value to his or her services without additional charge, or may provide services more readily on a tight deadline.	
Expert may not wish to testify for opposing counsel for fear of antagonizing current counsel.	

testimony will be useful or necessary; locate and retain only qualified experts; determine whether a prospective expert has the qualities that will make him or her an effective witness; and devote the resources needed so that the expert renders relevant, factually supported, and persuasive opinions. Part II of this article will explain how careful preparation, attention to detail, playing the devil's advocate with one's own expert and treating him or her as a collaborator (without unnecessary deference), and treating the opposing expert with respect and healthy skepticism will pay dividends in every case.

Notes

1. The author heard these words twice during one of Colorado's largest class actions lawsuits. Fortunately, they were spoken at opposing counsel's table.

2. Such expert testimony is more likely to be allowed when, in addition to simple breach of contract claims, tort claims resting on an insurer's unreasonable policy interpretation exist, or matters extrinsic to the contract, such a waiver, estoppel, or illusory coverage, are at issue. *Cf. Roberts v. Am. Fam. Mut. Ins. Co.*, 113 P.3d 164, 167 (Colo.App. 2004) (where a contract term has a special technical meaning or use unique to an industry, parol evidence may be considered in giving meaning to the term), *overruled on other grounds* 144 P.3d 546 (Colo. 2006); *Travelers Indem. Co. v. Howard Elec. Co.*, 879 P.2d 431, 434-35 (Colo.App. 1994) (extrinsic evidence regarding the purpose of retrospective insurance premiums and how they operate proper).

3. *See* C.R.E. 702. Counsel should not forget that nonexpert witness opinion testimony is allowed. C.R.E. 701 provides that nonexpert witness opinion is allowed and that some party employees may be deemed experts subject to the disclosure requirements of C.R.C.P. 26(a)(2)(B)(I) or (II).

4. Some cynics might argue that experts are sometimes retained for no reason other than to minimize malpractice exposure and reduce attorney anxieties.

5. *See* C.R.E. 403 and 611. *See also Chapman v. U.S.*, 169 F.2d 641 (10th Cir. 1948).

6. *See* C.R.C.P. 26(a)(2)(C)(I) and (II). Although the Colorado and Federal Rules of Civil Procedure are substantially similar, this article focuses on the Colorado Rules, although some distinctions between the rules are noted.

7. Some lawyers do this, however, and it is debatable whether such conduct meets strict ethical requirements. *See* Ambrogi, "Hiring Expert Witnesses You Don't Plan to Use" (June 2004), available at www.ims-expertservices.com/newsletters/june/hiring-experts-you-don't-plan-to-use-062408.asp (discussing the ethics of such practice, and noting, "Of the lawyers and experts contacted for this article, no one considered the practice unethical in the strict sense of the word. But several made clear their distaste for the practice as one they would never do."), *citing Koch Refining Co. v. Boudreaux*, 85 F.3d 1178 (5th Cir. 1996), describing such practice as "unscrupulous"), *quoting English Feedlot, Inc. Inc. v. Norden Lab, Inc.*, 833 F.Supp. 1498, 1505 (D.Colo. 1993).

8. *See* Fried, "Choosing and Using an Expert Witness," 12 *Hawaii B.J.* 4, 7 (July 2008).

9. *See* Benson, "The Care and Feeding of an Expert Witness," 70 *Fla. B.J.* 44, 44-45 (July/Aug. 1996).

10. Tirella, "Winning Strategies: The Four Ps of Expert Witness Selection," 80 *Fla. B.J.* 65 (Dec. 2006).

11. Hirsch *et al.*, "Living in a World of Expertise: The Perils of Innocence—Guidelines for Trial Counsel's Careful Handling of Expert Witnesses," 26 *The Advocate (Texas)* 61, 61-64 (Spring 2004).

12. *See* Sandgrund *et al.*, "Crossing the Separation of Powers Threshold: Legislative and Regulatory Control of Expert Witness Testimony," 37 *The Colorado Lawyer* 27, 32-33 (May 2008) (discussing the tension between industry standards and reasonable care).

13. *See* Hirsch, *supra* note 11 at 64.

14. *Id.* (noting that "[o]nce a [résumé] misrepresentation has been uncovered, resurrecting the expert's credibility is difficult, if not impossible."

15. *See* Hirsch, *supra* note 11 at 71.

16. In the case of contingency fee legal services agreements, it is prudent and often necessary to put in writing the attorney's estimate of the anticipated litigation costs, including expert witness fees and the authority to incur those fees. *See* Rules Governing Contingent Fees Rules 4(a)(3), 4(b), 5, and 6 (C.R.C.P. Chapter 23.3). Because these costs can escalate rapidly, unexpectedly, and sometimes unwittingly just before or during trial, exceeding the authorized amount, the fee agreement should anticipate and address this possibility.

17. Although Colorado has adopted a liberal view of what expenses may be taxed as costs, some uncertainty exists as to expenses charged for the services of an expert's team members. *Compare Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 389 (Colo. 1994) (expert witness costs properly include all costs for the expert's opinion formulation and testimonial preparation), *Estate of Breeden v. Gelfond*, 87 P.3d 167, 174-75 (Colo.App. 2003) (awarding costs for expert's assistant), *and Moore v. W. Forge Corp.*, 192 P.3d 427 (Colo.App. 2007) (*accord*) *with W. Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570 (Colo.App. 2006), *and Perkins v. Flatiron Structures Co.*, 849 P.2d 832 (Colo.App. 1992) (both precluding award of expert's assistants' expenses as taxable costs under different cost statute). *See also Heritage Greens at Legacy Ridge Homeowners Ass'n, Inc. v. Heritage Greens at Legacy Ridge, LLP*, No. 06CV713 (Adams County Dist. Ct. Nov. 7, 2008) (testimonial expert witness support team expenses recoverable).

18. Of course, contingency fee plaintiffs' lawyers on a shoestring budget often need to develop special understandings and fee payment schedules with their expert witnesses.

19. *See* Hirsch, *supra* note 11 at 65.

20. In the case of a defense expert who is unreasonably limited by an insurer's expert witness expense protocol, defense counsel must take care to exercise independent judgment on the client's—*i.e.*, the insured's—behalf to seek to obtain the additional needed authority and to keep the insured informed of all material developments in this regard. *See* CBA Ethics Comm. Formal Ethics Op. 91 (1993). *See also In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 815 (Mont. 2000) (requirement that counsel obtain insurer's prior approval before incurring defense cost "fundamentally interferes with defense counsels' exercise of their *independent* judgment" (emphasis in original)).

21. *See The Interprofessional Code* (2d ed., 1997), available at www.cobar.org/docs/InterprofessionalCodeFullDocument.pdf?ID=1927.

22. *See* Colo. RPC 3.4(b) ("A lawyer shall not: . . . offer an inducement to a witness that is prohibited by law.") and Comment [3] ("it is not improper to . . . compensate an expert witness on terms permitted by law. *It is improper to pay any witness a contingent fee for testifying*. . . . The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis." (emphasis added)).

23. C.R.C.P. 26(a)(2)(B)(I) requires the disclosure of the opinions of experts "retained or specially employed to provide expert testimony," or whose "duties as an employee of the party regularly involve giving expert testimony." Moreover, "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial." C.R.C.P. 26(b)(4)(A). However, "[a] party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial *and who is not expected to be called as a witness at trial only . . . upon a showing of exceptional circumstances* under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." C.R.C.P. 26(b)(4)(B) (emphasis added).

24. *See Hajek v. Kumho Tire Co., Inc.*, No. 4:08CV3157, 2009 WL 2229902 at *6 (D.Neb. July 23, 2009) ("when issues of authentication, alteration, or spoliation are raised for judicial determination, the court will re-examine whether 'exceptional circumstances' justify ordering the plaintiffs to identify their non-testifying consulting experts"). *Cf.* Hirsch, *supra*

note 11 at 66 ("Spoliation has been found to have occurred when consulting experts destroyed drafts sent to them for edit and review by testifying experts in the same case. . . . The fewer written drafts produced, the better. However, the ones that are produced should be preserved by the expert to protect against spoliation and any negative consequences.").

25. *See* Hirsch, *supra* note 11 at 65.

26. The greatest courtroom experts—like forensic scientist Henry Lee—are masters of their discipline, testify consistently over time, and let the chips fall where they may in formulating their opinions.

27. For a humorous look into how one highly regarded expert witness views his relationship with attorneys, *see* University of California, Los Angeles screenwriting chair Professor Richard Walter's comments in "When Your Expert Witness is a Screenwriter," *The Docket* (Nov. 2004), available at www.cobar.org/docket/doc_articles.cfm?ArticleID=3950.

28. Jurors' immediate reactions to such disclosures may be wide-ranging, from believing that the more experts make, the more expertise they have; to disgust at the high cost of our court system; to wondering who is paying these extravagant fees and, perhaps, even speculating that the costs may be passed on to them in the form of higher insurance premiums; to seeing dollar signs dancing in their heads for a while before turning back to the actual testimony; to wondering about the inequities of well-heeled corporate defendants buying justice. ■

Race day 2010.