

ETHICAL STANDARDS

ETHICAL STANDARDS IN PATIENT/DOCTOR RELATIONSHIP IN WORKERS' COMPENSATION CASES

Professional Standards:

See Code of Ethical Conduct for Physicians Providing Occupation Medical Services (American College of Occupational and Environmental Medicine), a copy of which is attached.

Also see Interprofessional Code (Interprofessional Committee of the Colorado Bar Association, Colorado Medical Society, Denver, Bar Association, Denver Medical Society) - copy attached. The Code may also be obtained from the Colorado Bar Association at (303) 860-1115 or via their website at: www.cobar.org.

Modern society has placed a necessary strain upon the traditional patient/doctor relationship. Specifically, the filing of a Worker's Compensation case automatically results in "limited waiver" of the patient/doctor privilege allowing release of information "relevant" to the particular worker's compensation case for the purposes of resolving the claim. This modern rule reflects a balancing of interest between the patient/doctor relationship on the one hand and the need for administrative bodies and insurance companies to properly adjudicate claims on the other. The operative word is "relevant."

**AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL
MEDICINE**
**Code of Ethical Conduct for Physicians Providing Occupational
Medical Services**

These principles are intended to aid physicians in maintaining ethical conduct in providing occupational medical service. They are standards to guide physicians in their relationship with the individuals they serve, with employers' and workers' representatives, with colleagues in the health professions, and with the public.

Physicians should:

1. accord highest priority to the health and safety of the individual in the workplace;
2. practice on a scientific basis with integrity and strive to acquire and maintain adequate knowledge and expertise upon which to render professional service;
3. relate honestly and ethically in all professional relationships;
4. strive to expand and disseminate medical knowledge and participate in ethical research efforts as appropriate;
5. keep confidential all individual medical information, releasing such information only when required by law or overriding public health considerations, or to other physicians according to accepted medical practice, or to others at the request of the individual;
6. recognize that employers may be entitled to counsel about an individual's medical work fitness, but not to diagnoses or specific details, except in compliance with laws and regulations;
7. communicate to individuals and/or groups any significant observations and recommendations concerning their health or safety; and
8. recognize those medical impairments in oneself and others, including chemical dependency and abusive personal practices, which interfere with one's ability to follow the above principles and take appropriate measures.

Adopted by the ACOEM Board of Directors on October 25, 1993.

Interprofessional Code

Second Edition

Drafted by

THE INTERPROFESSIONAL COMMITTEE

and

endorsed by:

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Denver Bar Association
Colorado Medical Society

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Overview of the Litigation Process

There are generally two types of legal cases. Criminal cases involve a charge prosecuted by a governmental body that some individual broke a criminal law and should be punished. Civil cases involve private disputes between individuals where damages or some other remedy is requested. Administrative claims such as workers' compensation or social security claims are resolved through a form of civil proceeding conducted by an administrative body. These different types of cases involve different burdens of proof, different rules of procedure, and different roles for the expert witness.

The expert is most often asked to become involved in a civil lawsuit. The expert can come from many different professions, such as physicians, accountants, engineers, and economists.

In civil cases, the "plaintiff" is the party who brings the lawsuit and the "defendant" is the party who is being sued. Before a lawsuit is commenced, the injured party may be referred to as the "claimant." A civil action is started by filing a "pleading" called a "Complaint" with the court, which is then "served" on the defendant along with a "Summons." The defendant must then timely file a pleading called an "Answer." Depending upon the complexity of the lawsuit, other pleadings and parties may be added. The purpose of this pleadings stage is simply to determine the legal claims, defenses and other legal issues involved. The pleadings serve as a framework for later proceedings.

The parties may then conduct discovery, where each side seeks to discover the facts and evidence relevant to the legal issues involved and which tend to support or contradict a given party's position. Various discovery devices are allowed under the Rules of Civil Procedure. These include "Interrogatories" (written questions requesting information provided under oath); "Requests for Production of Documents or Things" (written requests for documentary or tangible evidence in the possession or control of the other party); "Requests for Medical Examination" (an examination by a physician or health care specialist of a party's own choosing of some physical or mental condition which has been placed "in controversy" by the opposing party); and "Depositions" (sworn testimony taken before a shorthand reporter wherein the attorneys can personally ask questions of a party or witness).

Thus, in the discovery phase, a "treating physician," i.e., one who has provided care and treatment to a party, may be asked to provide medical records, medical reports, and patient billing. Or, a company's C.P.A. may be required to provide financial records, tax returns, and client billings. Such an expert may also be asked to give a deposition. Further, a physician who has never treated a party may be asked to perform a mental or physical examination, or an accountant who has never worked for a party may be requested to review the books and records of a party and provide a report on behalf of a party to the lawsuit solely for litigation purposes and not for treatment or regular business purposes.

Much of today's litigation involves complex factual issues concerning such areas as medicine, psychiatry, engineering, economics, rehabilitation, and law. When issues are sufficiently complex that they are beyond the common knowledge or understanding of the judge or jury, "expert testimony" by "expert witnesses" may be necessary to assist the judge or jury in determining the case.

Therefore, a witness may become an "expert witness" who is called to testify as to certain facts within his or her knowledge and give "expert opinions" on certain complex factual issues. For example, a treating or examining physician may be called as an expert witness to testify concerning the examination, care, and treatment of a party and may be requested to give opinions on such issues as diagnosis, causation, prognosis, permanency, disability, need for future treatment, and reasonableness of costs of past or future treatment.

In investigating or evaluating a case involving complex factual issues, an expert may also be asked simply to assist an attorney or party in understanding the issues involved. In doing so, the expert may become an "expert consultant" or "specially retained expert." Such an individual does not thereby agree to become an "expert witness" for that party and can limit his or her review or involvement in the case simply to that of a consultant with no obligation to give expert testimony. He or she can also condition his or her involvement

upon anonymity such that his or her name will not be disclosed to opposing counsel or to the court, unless compelling circumstances justify a court order requiring disclosure. If such a limited or conditional role is requested, it should be clearly understood between the expert and the attorney, and preferably reduced to writing, to avoid future confusion or disputes.

An "expert consultant" or "specially retained expert" may agree to become an "expert witness" on the issues he or she has reviewed. These may involve complex issues of causation, or apportionment of injuries as between multiple causes, in claims involving products liability, medical liability, workers' compensation, or other personal injury actions. This may also include issues such as "standard of care," "informed consent," or other issues involving propriety of conduct or responsibility.

Sometime before trial, each party must disclose his or her "expert witnesses" to the other side and to the court. Simply because an expert is disclosed by one party or another does not suggest that the expert's opinions are expected to be totally favorable to that party or that the expert should be anything other than fair and objective to all sides. The disclosure of the experts is pursuant to the rules governing procedure in the courts where the case is filed. If the expert is disclosed past the required deadlines in the rules, the expert may not be allowed to testify.

The rules are quite specific and broad requiring the items that must be disclosed for an expert specially retained to testify and include such items as a copy of the expert's report or summary; a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Experts such as treating physicians are often endorsed as possible expert witnesses based solely on their role as a treating physician and the notes or records they have generated, even though they have never been contacted by the lawyer. The disclosures required for these experts are much less burdensome. Opinions or other potential testimony of an expert that are not adequately disclosed to the other side and to the court can result in their not being allowed at trial.

After an expert witness is disclosed, he or she may be asked to submit to a deposition so that the opposing attorney can gain further knowledge as to that expert's opinions and possible testimony. This also assists the opposing attorney in assessing the need for obtaining an expert of his or her own choosing to address the same issue.

If the case proceeds to trial, those experts who have been disclosed as expert witnesses may be called to testify. The party who calls the witness asks the first series of questions on "direct examination," the opposing attorney can then "cross-examine," and there may be further "redirect examination" by the attorney who called the witness. Adequate pretrial consultations should prepare the expert concerning this trial testimony.

In jury trials, the judge determines the admissibility of evidence and instructs the jury on the applicable law. The jury determines the facts based on the credibility of the witnesses and the weight of the evidence and determines the outcome based on the law as provided by the court. If legal errors were made by the court in ruling on motions, admitting evidence, or instructing the jury, a party may ask the trial court to correct that error or may appeal to an appellate court.

Most civil cases are settled. Settlement can occur at any time, including before the case is filed, during the pretrial phase or discovery phase, during trial or even jury deliberations, or after trial and during appeal.

General Principles

1.1 In cases involving personal injuries and where a patient suffers from a condition which is the subject of a legal dispute, a treating physician has a duty to provide medical information pertinent to the patient's claim in reports, depositions, conferences and trial testimony. In other cases, experts may have a duty to provide information that experts have obtained in the course of their normal duties, such as an accountant auditing books of a business.

It is recognized that the primary duty of a physician is to treat a patient's illness or injuries. However, an additional responsibility of a treating physician is to provide necessary medical information and opinions by virtue of his or her acceptance of that patient for treatment. Like any other citizen, a physician or other expert can be required to tell what he or she knows if such information will aid the judicial process.

The transmittal of this medical or other information may include a written report which either sets forth the diagnosis, treatment and prognosis, or which responds to specific questions posed by an attorney concerning important issues in the case. Later, the expert's deposition may be taken to "discover" further information. Incidental to these contacts, one or more conferences between the expert and the attorney endorsing or retaining the expert may be requested. Finally, if the case does not settle, the expert may be called as a witness to testify in court.

The expert and attorney should cooperate in this information-gathering process to facilitate settlement, promote the administration of justice, and control the costs of litigation.

1.2 Experts and attorneys should openly communicate with one another and, wherever possible, agree in advance concerning the terms of their relationship so as to avoid conflict and disputes between the professions.

Open communication is the touchstone of dispute avoidance and dispute resolution. While experts' services are essential to the administration of justice, the expert and attorney should seek out and discuss ways of minimizing the burden of services on physicians and other experts as well as minimizing the cost to clients. Unless an attorney and expert have a history of prior business dealings, it is desirable to agree in advance concerning the nature, scope, and cost of the expert's services. (These subjects are discussed in greater detail in other sections of this Code.) The expert may already have set policies, or an agreement may be worked out at the time of the initial contact. Preferably this agreement should be reduced to writing.

If an agreement cannot be reached, the matter should be discussed immediately. At all times, the client's best interests should be the overriding concern. The professionals should agree on as much as possible and submit any residual dispute to the court or an interprofessional dispute resolution committee.

Toward this end, direct communication between the expert and attorney is preferable to communication between secretaries, receptionists, or clerical staff.

1.3 The role of the expert is not that of an advocate or trier of fact and, at all times, the expert's opinions should remain fair, unbiased, and objective.

The role of the expert in a lawsuit is that of a witness only. The expert should never become an advocate or a trier of fact. The expert should not seek to openly support or oppose the position of either party. No matter how much he or she inwardly favors or opposes the cause of one party to a lawsuit, it is the expert's clear duty to present information in a fair, unbiased, and objective fashion. When called to testify, the expert's duty is to answer the questions truthfully and to the best of his or her knowledge. Under no circumstances is an expert justified in suppressing evidence. The expert should never be influenced by extraneous matters such as the source of his or her compensation, friendships, personalities, or inappropriate pressures from patients, clients, attorneys, insurers, or professional organizations.

1.4 Although an attorney is an advocate, an attorney is never justified in abusing or intimidating an expert witness in any manner, in an attempt to discourage the expert's further involvement in the litigation or to alter or suppress the expert's testimony.

An attorney is an advocate and has a duty to zealously represent his client's best interests in litigation. However, that duty as advocate never justifies abuse, intimidation, badgering, or personal attacks on a witness. Improper attempts to discourage the expert's further involvement in the litigation or to alter or suppress the expert's testimony should be strongly denounced. Such attempts are never justified or necessary. Adequate means are available to test credibility by cross-examination, impeachment, and rebuttal. An expert need not tolerate abusive or improper conduct and should promptly bring it to the attention of the opposing counsel, the court or tribunal in which the action is pending, or an appropriate grievance committee.

1.5 Attorneys should refrain from giving advice on medical management or interfering in the physician-patient relationship. Similarly, physicians should refrain from giving advice on legal matters or interfering in the attorney-client relationship. In other cases, non-physician experts and attorneys should refrain from interfering in the relationship between the expert, his or her client, and the attorney and client.

Physicians, other experts, and attorneys must recognize that they hold a position of trust and confidence with their patient-client. Each professional must recognize the limitations of his or her role and expertise and defer to the other professional in matters uniquely within that individual's expertise.

Hence, a lawyer should not encourage "physician shopping" or "expert shopping," should not counsel a client concerning treatment options, and should not otherwise improperly influence the client in an attempt to accentuate damages.

At the same time, the expert should refrain from counseling the client concerning such legal matters as the value of the client's claim, the nature or terms of the fee agreement with the attorney, or trial techniques and strategy decisions. These are exclusively the province of the lawyer.

Confidentiality of Information

2.1 Information obtained by experts in the course of their regular duties may be privileged by statute and deemed confidential. Such privileges exist for physicians, clergy, attorneys, accountants, licensed psychologists, and others. Great care must be exercised to prevent unauthorized or inappropriate disclosures of such confidential information.

To assure frank and complete disclosure of sensitive information concerning a person's health, legal matters, religious matters, or other privileged information and to assist a particular expert in providing services for the expert's patient or client, the law in Colorado recognizes that such information is privileged and confidential and cannot generally be disclosed without the patient or client's consent. See C.R.S. § 13-90-107.

The unauthorized disclosure of such confidential information may expose the expert to a common law claim for

damages; it may constitute a violation of the expert-patient/client privilege; it may be a breach of the expert's ethics; and may also constitute a felony under Colorado's Theft of Medical Information Statute, C.R.S. § 18-4-412.

There are restrictions regarding meeting with and/or disclosing information to the patient's adversaries. See § 6.3 for further discussion.

In certain circumstances, if the disclosure of sensitive medical, psychiatric, psychological, or other confidential information would undermine the relationship with the patient/client, or adversely affect his or her treatment or services, disclosure may be opposed until appropriately reviewed by a court. If a question arises concerning the propriety of a requested disclosure of confidential information, the expert should

consult the patient/client or the patient's/client's attorney, or seek advice from the expert's personal attorney.

Medical Records

3.1 Complete and accurate medical records should be maintained for each patient.

Medical records are not only necessary for proper patient care but also assume important medico-legal implications. They are invaluable to the physician in defending medical liability claims. They are also of great assistance in evaluating and presenting a patient's personal injury claim. If they are sufficiently complete and legible, they may avoid the necessity, time, expense, and effort of formal reports. Because of their medico-legal importance, accuracy is crucial and such records must not be altered, supplemented, or destroyed because of pending or anticipated litigation.

Complete and accurate records should be maintained by other experts under various Colorado laws and rules, such as for attorneys and accountants. These records are also important in evaluating claims that may exist with regard to the services provided or for other issues. Such records should be available to the patient/client under similar conditions to medical records set forth in this Section 3.1 through 3.4.

3.2 A medical release authorization form, complying with all federal and state statutes and regulations, should be provided to the physician or health care provider before medical records are released.

By Colorado statute, patient medical records are available for inspection and copying upon " ... submission of a written authorization-request for records, dated and signed by the patient ... " C.R.S. §25-1-801.

Federal Privacy Acts concerning the release of drug and alcohol treatment program records also have very specific requirements concerning the contents of an authorization form (42 C.F.R. 2.31). Other federal, state, and local statutes, laws, and regulations may also limit the disclosure and dissemination of certain medically related information.

A standard approved authorization form, complying with all existing applicable laws and privacy interests, has been developed in a joint effort by the Colorado Bar Association Interprofessional Committee and the Colorado Certified Medical Record Administrators, and is included here as an Appendix. If questions arise concerning the propriety of releasing certain information, the health care provider should contact his or her attorney. The requirement by some institutions and health care providers that a special internally developed form be used is disapproved. Such special forms add undue expense and are a waste of time and effort to the institution or health care provider, as well as to the patient and attorney. The perceived advantages of internal forms are outweighed by the advantages of the standard approved authorization form.

Further, an internal requirement by a health care provider that the form be signed within a certain period of time prior to the request is disapproved, and the signed form should be deemed valid unless, by its expressed terms, it has expired.

There is no requirement that the signature be notarized. The release should identify the individual or entity to which the authorization is given, but one release may cover multiple health care providers. There should be a description of the information requested, and specific authorization should be stated if drug or alcohol treatment records or psychiatric or psychological records are requested.

3.3 A treating physician should surrender legible and complete copies of all records requested in the authorization to assist a patient in litigation and to advance the administration of justice.

Under Colorado law, a patient has a right of access to his or her patient records. An exception applies to certain psychiatric or psychological records which have special restrictions before disclosure is allowed. CRS §25-1-801 et seq.

A physician therefore has a duty to provide all information requested in a patient authorization concerning a patient's health to assist the parties and the finder of fact in the evaluation and presentation of that patient's personal injury claim. (See §1.1.)

Often times, all parties to a lawsuit will request such medical records. When this occurs, an attempt should be made to coordinate requests for medical records to avoid needless duplication of effort and unnecessary inconvenience to the health care provider.

Whenever possible, if a medical records deposition is taken and the only purpose is to obtain patient medical records, the subpoena should be addressed to the custodian of records or the physician's agent and not the physician.

Generally, the original medical records or x-rays should not be provided, but should be available for examination. While releasing original records or x-rays may pose some concerns, where necessary to release the originals, a receipt should be obtained. All copies provided should be complete and legible. If records are not legible, a literal transcription of those records may be requested.

If original records from a health care provider are required for trial purposes, this should be fully explained to the custodian of the records. Promptly following the completion of the trial, copies should be substituted in the court file for the original records and the originals should be returned to the custodian.

3.4 A reasonable charge may be requested for copies of medical records. However, the charge may not exceed that permitted by Colorado Department of Public Health and Environment regulations.

Currently, the Colorado Department of Public Health and Environment regulations governing patient access to medical records from licensed health institutions, facilities, or health care providers mandates that the maximum allowable charge can not exceed \$14.00 for the first ten or fewer pages, \$0.50 per page for pages 11-40, and \$.33 per page for every additional page without Department approval. Actual postage or shipping costs and applicable sales tax, if any, also may be charged. The per-page fee for records copied from microfilm shall be \$1.50 per page. No fees shall be charged by a health care provider of patient records for requests for medical records received from another health care provider or to an individual regulated pursuant to Section 25-1-802(1) solely for the purpose of providing continuing medical care to a patient. Chapter II 5.2.3.4. A physician or health care provider cannot charge an exorbitant fee for medical records simply because litigation is involved or he or she wishes to discourage litigation-related requests. (See § 9.3.)

If an attorney requests that a physician's hand-written chart be transcribed, an additional reasonable charge may be requested for that service.

Records should be released without regard to any outstanding unpaid balance due on the patient's bill for medical treatment. (See § 9.7.)

Although there are no current regulations for records kept by other experts, they should also be entitled to a reasonable charge for copying records. The reasonableness of the charge will be evaluated by reference to the standard set by the Colorado Department of Public Health and Environment.

Expert Opinions, Reports and Endorsements

In many instances, expert reports may be legally required by procedural rules or court order. Even when not required, reports from experts may foster settlement or avoid more formal, expensive, and time-consuming depositions.

Experts should be mindful that all expert opinions must be disclosed to the opposing side by way of either a report or an endorsement of the expert witness in discovery or pre-trial documents. If an opinion is not disclosed, it may be precluded. Therefore, clear communication of the expert's opinion is of utmost importance.

4.1A request for a formal expert opinion should be in writing. It should fully inform the expert concerning the purpose for which the opinion is sought. It should identify the parties to the claim and the party requesting the opinion. It should specify the information and documentation provided to the expert on which the expert opinion should be based. The request should preferably provide a brief summary of the case. The request should specify the issues to be addressed by the expert and the legal terminology, if any, involved or required. The request should list all information that the expert will be required by court rule to disclose. The request may recite the financial arrangements to which the expert and the attorney have agreed.

The request for a formal expert opinion is intended to alleviate any future misunderstandings concerning the nature, scope, and purpose of the expert's review and further involvement. In many cases, a request for a formal expert opinion may be preceded by a conference at which the expert's qualifications will be reviewed and the issues requiring the expert's opinion described. The information needed by the expert to complete the review will also be discussed. Information about the expert that must be disclosed because of court rules will be discussed. This information may include the qualifications of the expert, the expert's publications, and any previous cases in which the expert has testified at trial or deposition within the preceding four years. Financial arrangements will be agreed upon.

4.2 The attorney has the duty to determine the expert's legal competency to render opinions on a given issue. The expert should recognize the difference between a legal expert and an expert among his or her peers in a given specialty.

The attorney should be familiar with the legal rules of evidence governing competency of expert witnesses. It is the attorney's duty to make adequate inquiry into the expert's education, background, training, and experience to determine if the expert is legally qualified to address a given issue. An attorney should accept the limitations of the expert's expertise and avoid attempts to obtain opinions from an expert that are clearly beyond that expert's expertise.

At the same time, the expert should be aware that under the Colorado and Federal Rules of Evidence, an expert witness is one who by knowledge, skill, experience, training, or education, has sufficient knowledge and expertise to assist the trier of fact to understand the evidence or determine a fact in issue. To qualify as an expert for the purpose of testifying at trial, such an individual need not be a super-specialist or a university professor, nor must that person be recognized as an expert in a given subspecialty by the expert's peer group.

However, when an expert is testifying on the issue of standard of care in a medical negligence case, he or she is required to be substantially familiar with the applicable standards of care and practice as they relate to the act or omission in issue. The expert must also be in the same subspecialty or in a subspecialty with similar standards of care and practice as the defendant health care provider to testify with respect to standard of care issues. These restrictions do not apply to other testimony, such as degree of permanency of mental or physical impairment.

4.3 A copy of all records and other documentation pertinent to the issues to be addressed by the expert should be furnished to a reviewing expert before a formal opinion is rendered.

Experts who have had direct contact with the patient-client may rely on their observations, findings, and records in rendering their opinion. For example, treating and examining physicians may legitimately rely upon the history, examination findings, radiological studies, and other test results which they acquire in their treatment or examination of a claimant.

However, non-treating physicians and experts who are retained or specially employed to independently evaluate or review an issue should be provided with all relevant documentation and records so that the opinions rendered are fully informed. The practice of providing only partial records which are favorable to a client's position is firmly condemned. If an expert requests further information which is reasonably available to the attorney, it should be provided. However, the expert should not be burdened with unnecessary, extraneous materials. Fair and unbiased summaries of depositions, records, or other facts may be provided to assist the expert in economically reviewing the issue involved.

The expert and retaining attorney should discuss the advantages and disadvantages of providing other experts' reports to the reviewing expert before he or she arrives at an opinion. Such disclosure of other experts' opinions may appear to affect the expert's independence and objectivity in his or her initial review.

Both expert and attorney should bear in mind that all documentation and information provided to the testifying expert, as well as all research, notes, reports, and other papers generated by the expert in his or her review of the claim, are discoverable by the opposing side.

4.4 If the treating physician or expert in another field who has not been retained or specially employed to provide expert testimony has an opinion, he or she may be obligated to state it. It is unclear to what extent an expert may be required to form an opinion.

The extent to which experts may be required to formulate expert opinions is unclear. However, a physician and other expert can be compelled to state his or her observations concerning a patient or other event that he or she has witnessed and may be required to testify as to information acquired in the course of treating a patient or investigating a matter. If the expert has an opinion concerning an issue, he or she may be compelled to express it.

An expert may also be required to answer hypothetical questions. If the expert can answer the questions as posed, he or she must do so. If further facts or study are necessary to answer the questions, the expert may so state.

4.5 Expert witnesses should be advised of factual disputes concerning the underlying facts on which the expert opinion is to be based. Even though the expert is asked to assume a "hypothetical" set of facts, the expert witness should still be provided with all relevant facts and records.

Experts asked to review issues should understand that they are not the ultimate finders of facts. Therefore, there may be factual issues which are beyond the competence of an expert witness to resolve, as where there are discrepancies in various records or disagreements over certain conversations, etc. The expert may therefore be requested to assume the truthfulness of a "hypothetical" set of facts when formulating his or her opinion.

"Hypothetical" facts do involve real cases. The reviewing expert should still be provided with all relevant records and facts and is entitled to know the nature of the underlying dispute.

In responding to hypothetical questions, the expert witness should set forth the significant factual assumptions underlying his or her opinions, and may qualify an opinion by stating that it could change if different factual assumptions were made.

4.6 It is preferable that the expert's opinions be set forth in writing in the expert's own language. If an attorney makes an expert witness endorsement or summary in addition to, or in lieu of, an expert

report issued by the expert, such an endorsement or summary should only be done after its contents have been carefully reviewed and approved by the expert.

Experts often prefer that their opinions be set forth in writing to avoid future misunderstanding concerning the nature, extent, and scope of the expert's review and opinions. The expert report also assures that the opinions are accurately communicated in the expert's own language.

In cases filed in the federal court, experts who are "retained or specially employed" to provide expert testimony in the case, or whose duties as an employee of a party to the case regularly involve giving testimony, must prepare and sign a written report. That report must contain a complete statement of all opinions to be expressed and the bases and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

In cases filed in state courts, the expert's opinions may be set forth in either a written report prepared by the expert or a summary of the expert's opinions prepared by the lawyer. The report or summary must contain a complete statement of all opinions to be expressed and the bases and reasons therefore. With regard to "retained or specially employed" experts, the report or summary must also contain the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. In state court cases, if a report has been issued by the expert, it must be provided whether or not a written summary of the expert's opinions is also provided to the court.

To avoid miscommunication, expert witness reports should be encouraged. However, when an affidavit or a pre-trial summary of expert testimony is drafted by the attorney in the attorney's own language, legal terminology should be fully explained, and it should not be tendered to the court or opposing counsel until its contents are fully approved by the expert to whom the opinions are attributed.

4.7 Expert reports should be promptly provided.

Physicians and other experts should recognize that there are often legal time restrictions and court-imposed deadlines concerning the submission of expert reports or the summary of expert opinions. Therefore, attorneys should retain the expert and request reports sufficiently in advance of such deadlines so as to avoid inconvenience and hardship to the reviewing physician or expert. At the same time, undue delay in providing expert reports may hamper settlement negotiations, cause otherwise unnecessary continuances of trial dates, create burdensome scheduling difficulties for later depositions, or otherwise prejudice the party's ability to use the expert witness at trial.

4.8 An expert's report should be accurate and objective, and should fully and fairly address the issues presented. The author should be mindful of the legal terminology necessary to satisfy evidentiary rules concerning competency and burden of proof.

The expert should be aware of the significance and use of his or her reports. They play a vital role in the settlement process and in the necessary pretrial disclosure of expert witness opinions. The expert should therefore carefully review the attorney's request for the report and fully and objectively answer any special questions posed. Where legal terminology is required, the expert should attempt to set forth his or her opinions consistent with that necessary legal terminology.

4.9 Unless otherwise requested, a report from a treating physician should generally include the following information:

(a) History of present illness

- (b)Examination findings**
- (c)Pertinent radiological and other diagnostic test results**
- (d)Diagnosis**
- (e)Etiology and/or causation**
- (f)Treatment rendered**
- (g)Course and prognosis, including anticipated permanency and residual disability**
- (h)Future treatment options and needs**
- (i)Past and future medically related expense**

Reports or summaries of opinions from other experts must contain a complete statement of all opinions to be expressed by the expert at trial and the bases and reasons for those opinions.

4.10 A reasonable charge may be made for the time spent in preparing an expert's report, and payment may be requested in advance of the expert's release of the report.

Experts have the right to be reasonably compensated for preparation of reports. The amount, terms, and conditions of such payment should be handled at the outset, preferably in a written retainer agreement or a letter setting forth the expert's policies. (See § 9.2.)

4.11 The furnishing of an expert report should never be conditioned upon payment of a bill for the underlying treatment or services. (See §9.7.)

4.12 Any expert is entitled to be advised whether he or she may be the subject of a professional liability claim if the expert is contacted by an attorney representing the claimant. If the expert is so advised, he or she should not provide a new written report to the attorney without first contacting his or her professional liability insurer and/or attorney. The expert must provide the complete records, unaltered, to the requesting party.

When an expert is contacted by a claimant's attorney and advised that he or she is being investigated as a possible defendant in a professional liability claim, the expert should not provide that attorney with new summary reports concerning the claim or facts underlying the claim. The complete records unaltered must be provided to the requesting party. The expert should also contact his or her professional liability carrier and/or attorney.

Similarly, attorneys investigating a potential professional liability claim against an expert should clearly state their purpose when requesting information from the expert about the claim.

Choice of Language and the Communication of Expert Opinions and Testimony

5.1 Experts and attorneys should attempt to understand the differences between their own professional concepts and legal definitions and standards to avoid confusion in opinions.

Experts and attorneys often differ in the terms of art they use in their respective professions. For example, physicians and attorneys differ in their defining of causation. This often leads to misunderstanding when the physician is asked an expert opinion on the issue of legal causation.

Medical etiology is the science of determining the causes of disease requiring medical treatment. As such, it is concerned with all possible causes. Through differential diagnosis, these causes can be narrowed such that treatment is rendered based on a final diagnosis. Therefore, the physician focuses primarily on those causes which are still operative and can be controlled, altered, or removed by treatment such that the outcome is affected. Legal causation focuses on these earlier precipitating or aggravating causes brought about by allegedly tortious conduct. Legal causation is a political and social decision as to where society feels a loss should fall. It is a factual determination, based on legal standards, as to whether a sufficient causal relationship exists between the alleged wrongdoing and the injury complained of.

Legal causation therefore has little to do with medical etiology and focuses on the role of a single past traumatic event rather than all possible causes and conditions contributing to a medical condition.

A legal cause is often defined as a cause without which the claimed injury would not have occurred. A legal cause is also sometimes defined as conduct which is a "substantial factor" in bringing about the claimed injuries. It need not be the sole cause nor the last or nearest cause.

So long as it is a cause, it does not matter that it joined with other causes to bring about the claimed injury.

In cases where an underlying symptomatic medical condition was aggravated or worsened by a defendant's conduct, the defendant will only be responsible for that portion of the total harm caused by his or her conduct. These cases often require a physician's opinion attempting to apportion the plaintiff's underlying condition and the aggravation of that condition by defendant's conduct. If apportionment is impossible, the law will hold the defendant legally responsible for all of the harm. However, under the law there should be no apportionment made for asymptomatic pre-existing physical frailties, mental conditions, illness, etc. that may have made the plaintiff more susceptible to injury, disability or impairment.

Accountants, engineers, and court reporters may all use terms and concepts which differ from the meaning which attaches to those terms and concepts in a legal setting. Thus, experts and attorneys need to be clear on the other professional's use of various terms and concepts that may differ from their own.

5.2 An expert should understand the legal standards of proof and evidentiary rules concerning expert opinions, and attempt to express opinions by using necessary legal terminology.

Each profession has a highly technical language largely unknown to the other. This technical terminology is needed in each profession to attain accuracy and certainty of meaning. However, while this terminology facilitates understanding within a profession, it often blocks understanding between professions. Experts reporting or testifying in a lawsuit or claim should attempt to understand some of the legal standards of proof and technical terminology. The expert should understand that law is largely a profession based on words and language. Therefore, while many legal terms are foreign to the expert, they are of critical importance in stating a relevant and competent legal opinion.

Foremost among these necessary legal terms is "reasonable probability." To be competent, an expert's opinion should generally be based upon "reasonable probability." This term simply means that which is more probable than not, more likely than not, or over 50 percent probable.

This is consistent with the legal standard of proof that findings must be based upon probabilities and not possibilities. Opinions based upon surmise, speculation, or conjecture are irrelevant and inadmissible in law. However, an opinion need not be based upon scientific or medical certainty, which is a far more stringent standard than the law requires.

Therefore, experts should attempt to express their opinions using such terms as "reasonable medical probability," or "probably" or "likely." Terms such as "possible," "might," "may," "could," "guess," "maybe," and the like may, under some circumstances, render the opinion inadmissible.

Similarly, before testifying regarding a medical or professional liability claim, the expert should be thoroughly versed on such terms and issues as "standards of care," "negligence," "respectable minority," "judgment calls," etc.

It is the responsibility of the attorney requesting an expert opinion to educate the expert concerning the legal standards of proof and the significance of technical legal terminology. This can and should be done in the various meetings with the expert and any letters requesting a formal opinion.

5.3 Experts should use clear, plain and understandable language when testifying and should attempt to avoid overuse of complex terminology.

An expert may have an excellent command of the facts and the professional language of his or her specialty and may be adequately versed in the legal terminology. However, the expert must communicate his or her facts and opinions consistent with the level of sophistication of the fact-finding body hearing the case. Expert testimony may be so technically worded that its meaning is entirely lost to the jury or is so completely misunderstood that the jury arrives at a verdict that would have been different had it known the true import of the testimony.

The expert witness should remember that his or her role is essentially that of a teacher. The testimony is not intended to impress or edify, but to explain. If the testimony does not help explain and does not clarify the issues of a particular case, it has failed in the sense that it was not useful to the determination of the case.

To make expert testimony clear, an expert witness should preferably express his or her findings and opinion in medical or technical terms first. Those terms should then be translated as accurately as possible into language intelligible to the court, attorneys, and jury.

The attorney should assist the expert witness in choosing appropriate terminology and then monitor the testimony. If undue use of complex terminology is made by the expert, it is appropriate and even recommended that the attorney interrupt the testimony and obtain necessary clarification.

In complex cases, it may be appropriate to compile a glossary of terms and definitions which, with permission of opposing counsel and the court, may be provided to the jury.

Conferences and Consultations Between the Expert and Attorney

Communication with the expert is all-important to assure that necessary, competent and persuasive expert opinions are developed. This in turn facilitates settlement and the orderly presentation of evidence at trial. Therefore, conferences and open communication between the attorney and expert are encouraged so as to minimize misunderstandings over scheduling and fees, diminish the frequency and impact of surprises to both expert and lawyer, and overcome the often-present divisiveness between the professions. (See §1.2.)

6.1 It is often advisable to meet with a potential expert at the outset before the expert has reviewed the issues or rendered a report.

An attorney and expert should often confer at the very outset before opinions are formally rendered. The attorney should explore the expert's background, training, and experience to determine that expert's competence to render opinions on the issues involved. The background facts and disputed issues should be explored. The nature, scope, and availability of records and other documentation on which the expert opinion will be based should be discussed. Any special legal concepts or language needs which should be included in a report should be addressed. The attorney and expert should discuss the issues to be addressed by the expert. The information about the expert that must be disclosed because of court rules should be discussed. See § 4.9. Finally, financial arrangements, deadlines, scheduling, and availability should be fully reviewed at the initial consultation. Such conferences can often be held over the telephone, which saves the time, expense, and inconvenience of a more formal office consultation. Reasonable fees may be charged for such telephone conferences.

6.2 An attorney who expects to call an expert who has treated or who has been retained or specifically employed on behalf of the client to testify in a deposition or at trial should confer in advance with that expert.

An attorney should always meet with an expert before a trial, hearing, or deposition to place the expert at ease. Most experts have a fear of looking "foolish" in a testimonial setting and, by proper preparation of the expert, any such fears should be alleviated while, at the same time, a more effective presentation of evidence should be fostered. It is the responsibility of the attorney to schedule that conference at a mutually convenient time sufficiently in advance of the time for testimony.

Some or all of the following topics should be discussed at a pre-deposition or pre-trial consultation:

- (a) The purpose for which that expert is being called as a witness, if that purpose has not previously been disclosed;
- (b) The significant issues which may arise during testimony;
- (c) Any potentially problematic evidentiary rules or issues;
- (d) The strengths and weaknesses of the evidence concerning these issues;
- (e) The theories and evidence which will probably be advanced by the opposing side and its experts;
- (f) Important legal terminology as it relates to the issues;
- (g) Supporting and contrary literature;
- (h) Any reports, records, or literature generated by the expert or others which should be studied to prepare for testimony;
- (i) Updating and reviewing the expert's qualifications and curriculum vitae and assuring his or her competency to address certain issues;
- (j) The substance of the questions the attorney will probably ask of the expert, including key specific questions and hypotheticals;
- (k) The scope and content of the anticipated cross-examination by the opposing side, including prior depositions, publications, reports, conflicting medical histories, fee arrangements, etc.;
- (l) Scheduling and trial or deposition procedures; and
- (m) Financial arrangements.

6.3 A treating physician or nurse has a duty of confidentiality concerning a patient's medical information.

A treating physician or nurse cannot meet to discuss medical information privately with a patient's adversaries without the patient's attorney's prior knowledge of the time and place of the meeting, affording the patient's attorney the opportunity to object and be present at that meeting. This assures that the physician-patient relationship of trust and confidence is not undermined and assures the propriety of any disclosure made. A physician or nurse may refuse requests from the patient's adversaries for informal interviews altogether. However, a patient or patient's attorney may not instruct a treating physician or nurse not to participate solely for the purpose of preventing the disclosure of non-privileged information.

During such informal interviews, if granted, it is improper to disclose information not relevant to the same physical or mental condition at issue in the litigation. If there is any question or dispute as to whether information remains privileged, the information should not be disclosed until the dispute is resolved by the parties or the court.

An exception may exist to the duty of confidentiality when a physician or nurse is sued by the patient as to the condition and treatment at issue in the suit.

A non-treating expert witness should not engage in private consultations with a representative of the opposing party without the knowledge of the party who retained him or her.

Scheduling and Subpoenas

7.1 The attorney should schedule an expert's testimony in depositions or at trial far enough in advance and in such a manner so as to minimize inconvenience to the expert and disruption of the expert's practice.

Scheduling of an expert's deposition or in-court testimony should be done as far in advance as possible. It is often a good practice to advise all potential witnesses of a trial date at the time the trial is first set. Vacation schedules and other potentially conflicting obligations can then be determined and resolved in advance. Specific arrangements concerning the date, time, and place of trial testimony preferably should be made more than six (6) weeks prior to the scheduled appearance.

Similarly, depositions should be scheduled at a mutually convenient time and place. Attorneys should readily agree to depositions "after hours" at the expert's office if that is the least disruptive to the expert's

practice. However, if the expert's office is not large enough to accommodate the attorneys in a multiple-party case, the expert should readily agree to the deposition being held at an attorney's office, hospital, or other convenient location.

To avoid delays and unnecessary waiting at trial, the attorney should try to schedule an expert witness as the first witness in the morning or afternoon sessions. Lay witnesses may also be used as buffers to expert witnesses. It is sometimes possible to call an expert "out of order" to accommodate his or her schedule.

However, being called "out of order" may disrupt a trial, inconvenience other witnesses and interrupt the logical flow of evidence. Therefore, while the expert is entitled to some estimate of the amount of time needed for testimony, he or she should be mindful that the attorney has little control over the court's docket, the needs of other witnesses, or the opposing attorney's conduct or questioning. These may necessarily result in some delay in testimony or other inconvenience to the expert.

7.2 Experts should understand the significance of the subpoena and honor its enforcement. Likewise, an attorney should never abuse the power of the subpoena.

A subpoena is an order of court that may be issued by an attorney, compelling a witness to appear at the time and place stated in the subpoena. A subpoena duces tecum ("subpoena to produce") requires a witness to appear and produce certain things or documents. Subpoenas may be issued for deposition or trial testimony. The failure to comply with a subpoena may constitute contempt of court and subject the noncomplying witness to fine or imprisonment unless there exists "good cause" for the failure to comply such as a true medical emergency. A witness who does not comply with a subpoena takes the risk of later having to convince the court that the emergency was of sufficient gravity to constitute "good cause."

Not only professional courtesy, but the reputation of the expert and the safety of his or her patients or clients, demands that an attorney not abuse the subpoena power. Life or health must not be jeopardized so that an expert can make a timely appearance in court. On the other hand, every reasonable effort should be made by the witness to appear as scheduled, whether or not a subpoena has been issued.

While every reasonable attempt should be made to accommodate the expert, it must be understood by the expert that he or she does not always have the right to choose the time and place to give testimony. Like any other witness, an expert summoned to court by subpoena must appear at the time and place so designated. However, it must constantly be stressed that a lawyer should never abuse the use of a subpoena and should always recognize the potentially disruptive effect it could have on an expert's practice, if reasonable arrangements have not been made in advance to have the witness set aside the time.

If an expert feels that a subpoena has been improperly used, or a subpoena duces tecum's request to produce documents is overly burdensome, oppressive, or invasive of his or her privacy, the expert should contact his or her lawyer to determine what protective measures, if any, might be available.

Even though testimony is scheduled in advance, sound reasons still exist for subpoenaing an expert. The witness should understand that the issuance of a subpoena does not signify a lack of trust in the expert's agreement to appear, nor is it intended as a heavy-handed tactic to compel a recalcitrant or hostile witness. Rather, a subpoena is often necessary to protect the interests of the client seeking the testimony of the expert and to allow the attorneys and the court to better accommodate the expert's scheduling needs. Courts are often reluctant to grant continuances in the event of an emergency, take witnesses out of order, or otherwise accommodate busy experts unless they have been previously subpoenaed.

Frequently, a judge will permit the expert who has been subpoenaed to remain "on call," which means that the expert need not be personally present at all times, so long as he or she can be reached by telephone and respond promptly when needed.

When the testimony of the expert witness has been completed, counsel should immediately move the court to excuse the witness from further appearances under the subpoena.

7.3 The use of a subpoena to compel an expert's presence does not in any way affect the expert's entitlement to an expert witness fee.

If the subject of testimony arises out of an individual's role or status as an expert, he or she is entitled to an expert witness fee. (See § 9.6.) The use of a subpoena to compel a witness's presence at a deposition, hearing, or trial does not in any way affect the expert's entitlement to such an expert witness fee.

Before a subpoena is issued and served on the expert, the better practice is for the attorney to contact the expert and attempt to agree upon a reasonable expert witness fee for complying with the subpoena. At the very least, a short note by the attorney should be served with the subpoena explaining that the check for the statutory mileage and witness fee accompanying the subpoena should not be considered the expert's sole remuneration for appearing under subpoena and a further expert witness fee is justified.

If no prior agreement is reached, the expert may bill the attorney for a reasonable expert witness fee for attending pursuant to the subpoena. (See §9.) If a disagreement arises over the entitlement to such a fee, or the amount requested, that dispute may be submitted to the court or to an interprofessional dispute resolution committee. (See §10.)

7.4 Service of a subpoena should be handled in the least disruptive manner. An expert should never seek to evade service of a subpoena so as to avoid having to give testimony.

At the time the expert's testimony is scheduled, the attorney should discuss with the expert the need for service of a subpoena and the manner in which the subpoena should be served. Personal service can be disruptive to the expert's office and embarrassing to the expert. A private process server should be instructed by the attorney concerning tactful and discrete service of a subpoena.

Many experts prefer that the subpoena be sent through the mail with a "Waiver and Acceptance of Service." This can also save the client service of process costs. If this is not returned a reasonable time before trial, personal service can still be accomplished.

An expert should never seek to evade service of a subpoena so as to avoid having to testify. This is beneath the dignity of the expert, substantially increases litigation costs, obstructs the administration of justice, and can result in eventual embarrassment to the expert when service is finally accomplished.

Depositions

8.1 Depositions are an inherent part of the pre-trial discovery process. Usually, the taking of a deposition is not in lieu of court appearance and testimony.

Depositions of witnesses, including expert witnesses, are sometimes taken for "discovery" purposes. In other words, they are taken by the attorney opposing the party retaining or endorsing the expert in order to discover the expert's opinions. As such, different rules of examination, foundation, and qualifications apply to discovery depositions than to trial testimony. Therefore, a pre-trial deposition is often not admissible at trial. This is especially so if the expert is otherwise available in the jurisdiction and amenable to compulsory attendance by the service of a subpoena.

The attorney retaining or endorsing the expert naturally does not want to rely upon his opponent's questioning to present his or her evidence. The lawyer also wants to assure an orderly presentation of evidence in compliance with all rules of evidence to assure admissibility of the testimony. Further, the attorney must be allowed the flexibility of addressing new issues that first arise during trial and could not have been reasonably foreseen prior to trial. Finally, for the trier of fact to understand and evaluate expert testimony, especially complex or conflicting testimony, it is essential that they see that testimony live and that the expert appear in court.

Under new, limited discovery rules, and new rules mandating certain advance reports and disclosures, the prior practice of routinely deposing experts may be curtailed.

8.2 The party taking the deposition is responsible for timely payment of all reasonable charges for time spent by the expert traveling to and from the deposition and for participating in the deposition, unless there is an agreement or order to the contrary. The party retaining or endorsing the expert is responsible for the cost of the expert's time in preparing for the deposition. In the event a request for review of the deposition has been made, if the witness is a treating physician, the party noticing the deposition is responsible for any reasonable cost associated with the review and signature. If the witness is a retained expert, the party retaining the expert is responsible for any reasonable cost associated with the review and signature.

The party taking the deposition must pay reasonable compensation for the deposition he or she has requested. This includes reasonable costs and fees associated with any travel to or from the deposition as well as an expert witness fee for participating in the deposition. Preparation for the deposition, on the other hand, inures primarily to the benefit of the party retaining or endorsing the expert, and that party should be responsible for that preparation time. Presumably, such preparation furthers the cause of the endorsing party. Also, it would be unworkable and inappropriate for the opposing party to exercise control over the amount of time the other party's expert is to spend in preparation for a deposition. Rather, the party retaining or endorsing the medical expert can and should discuss and agree with the expert concerning the amount of time to be spent in preparation for a deposition and the charges to be incurred.

However, special requests made by opposing counsel for research or compiling of information may fall outside of "preparation for deposition." Who is responsible for payment of the fees for fulfilling these requests should be determined between the parties before the task is performed by the expert.

Under new rules, effective in 1995, review and signature of a deposition transcript are waived, unless the deponent or a party requests review and signature before completion of the deposition.

In the event a request for review of the deposition has been made, if the witness is a treating physician, the party noticing the deposition is responsible for any reasonable cost associated with the review and signature. If the witness is a retained expert, the party retaining the expert is responsible for any reasonable cost associated with the review and signature.

8.3 Depositions costs and fees should be reasonable and should be agreed upon in advance of the deposition. Disputes should be noted at the outset, and attempts should be made to amicably resolve such disputes or timely submit them to the court for resolution.

Deposition costs and expert witness fees should be reasonably based on the factors set forth in Section 9.2 of this code. Every effort should be made by the expert and retaining and deposing counsel prior to the deposition to agree on the manner, timing, and amount of compensation. In the alternative, the party endorsing the expert may legitimately condition the deposition upon prior financial arrangements being agreed to or determined by the court as set forth in Rule 26(b)(4) of the Colorado or Federal Rules of Civil Procedure.

An attorney taking the deposition of an opponent's expert witness should not withhold or delay payment of that expert's fees or engage in unnecessary conflict so as to discourage that expert witness from further involvement in the case, or as a means of "punishing" that expert for his or her testimony. When an agreement has not been reached and a dispute does arise, it should be promptly submitted to a judge or interprofessional committee for resolution. Any undisputed amounts should be remitted without delay.

Expert Compensation and Expert Witness Fees

9.1 Experts and attorneys should strive to agree in advance concerning the nature and scope of the services to be performed, the terms and amounts of compensation to be paid for those services,

and the responsibility for payment of that compensation. Absent an agreement, disputes may arise which will require resolution by the court or an interprofessional committee.

The expert is entitled to reasonable compensation for providing services in connection with litigation. The issues of fees, costs, and scope of employment for expert services are frequent areas of disagreement. This is usually due to lack of open communication and the absence of a prior agreement between the expert and the attorney.

Therefore, whenever possible, these issues should be clarified before services are rendered and, whenever possible, confirmed by written agreement. It should be remembered that "an agreement" is not created by simply sending out a fee schedule, but is a product of negotiation and mutual consent. Failure by an attorney to object to a written fee policy may be an implied consent to abide by its terms. The agreement should be tailored to fit the specific circumstances, but it is suggested that the following be included:

- (1) The scope of services to be performed by the expert;
- (2) The rate of compensation to be paid for the expert's services, including whether the fee will vary depending upon the services rendered, e.g., research, review of documents, examination, dictating of report, travel, or testimony;
- (3) Whether advance payments or retainers are required and, if so, under what circumstances;
- (4) The handling of costs and expenses;
- (5) Cancellation terms and amounts; and
- (6) The person or persons responsible for payment of those costs and fees.

Experts are encouraged to develop office policies concerning involvement in legal matters, which can then be reduced to writing and provided to the attorney at the time of the initial request.

An attorney provided with such a written policy should immediately assent or object to the terms provided. It is improper for the attorney who does not object to continue to request the expert's services after being advised of the expert's policies for involvement in legal matters and then later deny that he or she agreed to the terms of those policies. However, the expert should recognize that providing the attorney with the expert's policies merely constitutes an offer and does not bind the attorney or client until they expressly or impliedly agree to those terms.

If no agreement can be reached between an expert and an attorney, the expert must recognize that he or she can still be compelled to provide necessary information and a court or Interprofessional Committee may be called upon to determine the amount and terms of reasonable compensation. A non-treating or consulting expert can simply refuse to participate absent an agreement with the attorney or his or her client.

9.2 An expert is entitled to fair and reasonable compensation for providing expert testimony.

In determining what constitutes a fair and reasonable expert witness fee, some or all of the following factors should be considered:¹

- (1) The amount of time spent, including review, preparation, drafting reports, travel, or testimony;
- (2) The degree of knowledge, learning, or skill required;
- (3) The amount of effort expended;
- (4) The uniqueness of the expert's qualifications;
- (5) Current and reliable statistical income information of similarly situated experts;
- (6) The amounts charged by similarly situated experts for similar services;
- (7) The amount of other professional fees lost; and
- (8) The impact, if any, on the expert's practice because of scheduling difficulties, other commitments, or other problems.

An expert should also be aware that some statutes, such as those governing workers' compensation claims, set reasonable medical fee schedules and provide that it is unlawful, void, and unenforceable as a

debt for any health care provider to charge a claimant in excess of the scheduled fee. See C.R.S. §8-42-101(3).

The use of itemized billing by the expert to the attorney should be encouraged and will often expedite payment.

9.3 An expert is never justified in charging excessive fees so as to capitalize on the client or patient's legal problem, or so as to discourage requests for information. At the same time, an expert cannot be expected to lose money or suffer financially as a result of participation in the litigation process. The expert should recognize that it is the patient or client who is ultimately responsible for payment of such litigation costs, regardless of the outcome of the case. Hence, charges for an expert's services should generally be no higher than the expert's hourly charges for other professional services.

An expert should neither gain nor lose financially as a result of his or her participation in the litigation process. An attorney should never expect the expert to sacrifice income merely because his or her patient or client is involved in litigation. The attorney should not abuse the power of the subpoena to attempt to obtain free or discounted expert testimony.

On the other hand, expert witness fees should not be so high that the fees prevent the patient or client from obtaining the expert's services, or as to create the appearance that the expert is attempting to capitalize on the patient's or client's legal problem. Experts should not seek to punish or deter attorneys, patients or clients from seeking the medical expert's services or information. This merely further victimizes the party who is compelled to seek compensation through litigation. The practice of charging fees in excess of those usually charged for other professional services to compensate for the "aggravation of litigation" is discouraged.

Even though the attorney may become obligated initially to pay the expert witness fees, the expert should always be mindful that the attorney's client is ultimately responsible for such litigation costs, regardless of the outcome of the case. Even in cases handled on a contingency fee basis, only the fee is contingent. While an attorney may advance these costs on behalf of the client, the lawyer's professional ethics require that the client remain ultimately responsible.

Therefore, fees charged for litigation-related services should be roughly equivalent to fees charged in the expert's practice for professional services.

9.4 In contracting for the professional services of an expert, the attorney is acting as an agent for the client. It is the client who remains ultimately responsible for such fees and costs. However, an attorney may ethically obligate himself or herself to pay the expert's fees and costs and, customarily, the attorney contacting or retaining an expert on behalf of a client is personally obligated to see that the expert is paid for litigation-related services.

An attorney is only an agent for his or her client, and litigation costs and expert witness fees are contracted for by the attorney on behalf of the client. Under agency law, an agent is usually not responsible for debts contracted for or on behalf of a disclosed principal.

However, different rules apply to expert witnesses in the litigation setting. An attorney is ethically obligated to compensate the expert directly for professional services he or she has requested. The attorney may also ethically advance or guarantee such litigation costs and expert witness fees, so long as the client remains ultimately responsible for payment.

Customarily, the attorney advances fees for expert witnesses he or she contacts on behalf of the client, even if the attorney is not obligated to do so. This is because the attorney is in a better position to assess the client's ability to pay and to collect such advanced costs from the client.

The attorney's obligation, however, is generally limited to those fees relating to the expert's services as a witness, and does not extend to payment for treatment or services rendered directly to the client or patient.

9.5 Compensation of an expert witness may never be contingent upon the outcome or the content of the expert's testimony, or the court's acceptance of the witness as an expert witness.

An expert's compensation should never be conditioned upon, or measured by, the amount of the recovery in damages in the litigation. Any contingent witness fee naturally compromises the integrity of the testimony of that witness. The expert is entitled to reasonable compensation regardless of the outcome of the case.

It goes without saying that the attorney cannot condition compensation upon the content of the expert's testimony and thereby seek to purchase favorable testimony. This is clearly improper conduct on the part of the attorney.

Because the attorney should be familiar with court rules governing competency of expert testimony and has a duty to inquire concerning the qualifications of his or her tendered expert, it is also inappropriate to condition the expert's compensation upon the court's acceptance of the witness as an expert.

9.6 An expert witness fee is owed if the subject of the testimony arises out of the individual's role or status as an expert and cannot be conditioned upon the eliciting of expert "opinions."

The premise that an expert witness fee is due only if an expert opinion is elicited from the witness is not a valid assumption. An expert who comes into possession of facts or information solely because of his or her position as a professional person is entitled to receive compensation as an expert when he or she testifies to those facts in a deposition or in court. The expert's position and status at the time he or she comes into possession of relevant information determines whether the expert should be entitled to an expert witness fee.

However, the federal courts have held, in Colorado and elsewhere, that treating physicians may not be considered expert witnesses, unless specifically designated as such and unless expert opinions are elicited. The issue of whether a treating physician is an "expert" has been alluded to in a recent state court case, but not resolved.

9.7 An expert has a duty to provide information and participate in the client or patient's litigation regardless of the status of the client's or patient's bill for non-litigation related professional services.

Fees for non-litigation related professional services incurred by the party are exclusively the responsibility of the client/patient. It is unethical for the attorney to advance these costs on behalf of the party.

An expert may not condition his or her involvement in litigation (i.e., providing records, reports, depositions, or trial testimony) upon payment of the client's/patient's bill for other professional services. An expert should never feel that he or she has some financial interest in the outcome of the case, due to an unpaid bill, which might appear to taint the objectivity of expert testimony. The expert should recognize that some clients or patients are dependent upon a legal recovery to pay for past and future services. Further, public policy mandates that the expert provide necessary information and testimony to evaluate claims. However, as a professional courtesy, the attorney may make reasonable and ethical efforts to assist the expert in obtaining payment for his or her services. The attorney may urge the client to pay the expert for the services received as soon as possible regardless of the status of the lawsuit. It is not proper for the attorney to advise the client that payment for care and treatment professional services may justifiably be withheld until the lawsuit is completed. If the client has resources to make full or partial payment, the lawyer may properly urge the client to make payments due to the expert for services.

The attorney may also request permission from the client to pay the expert for such services directly out of any recovery received in the litigation. This authorization for direct disbursements to the expert can often be set forth in the attorney-client fee agreement.

9.8 Terms concerning cancellation of testimony should be discussed and agreed upon in advance. An expert is entitled to prompt notification of cancellation of testimony. Cancellation fees should be reasonably related to the actual loss to the expert.

Cancellation of testimony is often a source of interprofessional disputes. This usually can be alleviated by prior agreement between the expert and the attorney endorsing or retaining the expert. If the expert has a reasonable cancellation policy, the opposing attorney should be advised of that policy at the time a deposition is scheduled. The opposing attorney is then subject to the terms of the cancellation policy should he or she later be responsible for the cancellation of the deposition.

If a case is settled or continued, or the expert's testimony is otherwise canceled, the attorney who scheduled that testimony should immediately notify the expert of the cancellation. This should preferably be initially done by telephone and followed by a confirming letter or facsimile transmission.

In the event of settlement, the cancellation notification should also include an inquiry concerning any outstanding fees and costs which may be withheld and paid out of the settlement. As a professional courtesy, it is often a good practice to advise the expert of the outcome of the case and the role, if any, the expert played in that resolution or recovery.

Cancellation policies should be reasonable under the circumstances. There should be agreement concerning what constitutes "reasonable notice" of cancellation such that a cancellation fee will not be charged. Two or three business days in advance is usually considered to be reasonable. Longer cancellation periods are considered on a case-by-case basis.

Cancellation fees that are charged must be reasonably related to the actual loss to the expert in terms of lost professional fees and the impact on his or her practice. If the expert can use the canceled time productively, e.g., for seeing other patients or clients, necessary administrative functions, billing, dictation of reports, reviewing professional literature, this factor should be heavily considered in determining the need for and amount of a cancellation fee. Cancellation fees that provide excessive compensation must in fairness be reduced notwithstanding any written agreement or policy.

Dispute Resolution

10.1 Interprofessional disputes should be promptly submitted to an interprofessional dispute committee. Disputants should cooperate in the submission, investigation, and resolution of such disputes.

Regardless of the best efforts of both professions to avoid disagreements, disputes do arise. The Colorado/Denver Bar Association Interprofessional Committee is available to assist with the resolution of such disputes between experts and attorneys. Other local professional societies may have similar committees. If a dispute arises, the disputants are encouraged to submit the controversy to the appropriate dispute resolution committee for review.

In matters submitted to the CBA/DBA committee, the disputants are requested to submit written summaries of relevant facts along with pertinent documentation concerning the matter in controversy. Submission of the dispute should be done with fairness and candor, without rancor, and without unprofessional remarks or other conduct which would be further divisive to interprofessional relations.

A member or members of the committee are then assigned to investigate the dispute and make recommendations for its resolution. The disputants should remember that these investigators are unpaid volunteers, and every effort should be made to cooperate in their investigation.

A final recommendation by the investigator is then reviewed by the full committee. When the committee makes a final recommendation, the disputants will be advised in writing by the interprofessional committee involved. The recommendation of the interprofessional committee is not binding unless agreed to by the disputants. However, in most cases, the recommendations of the committee are followed.

Disputes may be submitted to the following CBA/DBA committee in writing, addressed to:

Colorado Bar Association/Denver Bar Association
Interprofessional Committee
1900 Grant Street, Suite 950
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¹While not controlling or meant to suggest the parameters of acceptable fees charged by experts, the following cases are illustrative of how various judges in various jurisdictions at various times have addressed the issues surrounding reasonableness of expert witness fees:

Leadville Water Co. v. Parkville Water District, 436 P.2d 659 (Colo. 1968): Expert witness fees are subject to the trial court's discretion; unusual compensation paid by a party may not be recoverable. Amounts allowed in the case included travel, ordinary witness fees, food and lodging expenses, preparation time, and \$100.00 per day for each day's attendance at trial.

Perkins v. Flatiron Structures Co., 849 P.2d 832 (Colo. App. 1992). Fees for experts' assistants are not recoverable; nor are fees for pre-trial preparation to render opinions not admitted into evidence; mileage costs are limited to statutory amounts.

American Water Dev. v. City of Alamosa, 874 P.2d 352 (Colo. App. 1994). The amount of expert witness fees is discretionary; the court may consider preparation time as well as time in court; travel, ordinary witness fees, food, and lodging may be considered.

Anthony v. Abbott Laboratory, 54 USLW 2024, D. RI 1985). \$420.00 per hour fee was reduced to \$250.00 for doctor associated with a medical school.

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 US 437, 107 S.Ct. 2494, 96 L.Ed. 2d 385 (1987). Federal courts can tax expert witness fees above \$30.00 per day, only if expert is court-appointed.

Baldwin v. Commercial Union Ins. Co., 87 CV 26030, Denver District Court (J. Stephen Phillips, J.) \$500.00 per hour fee is excessive. Fee for deposition of \$125.00 per hour is set as a reasonable fee.

THE ROLE OF THE OCCUPATIONAL MEDICINE PHYSICIAN IN THE MANAGEMENT OF INDUSTRIAL INJURY

You may contact the Division's Physician's Accreditation Program for a copy of this 1991 article. It is not available electronically for insertion into this document.