CONSIDERATIONS FOR CROSS-EXAMINATION OF PERMANENCY MEDICAL EXPERT IN NEW JERSEY WORKERS' COMPENSATION

by
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The contents of this document represent some general approach considerations regarding cross-examination of permanency medical experts to supplement the 2018-19 curriculum of the Justice James H. Coleman, Jr. New Jersey Workers' Compensation American Inn of Court. This is not intended to be an exhaustive or definitive treatise on the topic. Rather it is based upon a paper previously prepared for the New Jersey Association of Trial Lawyers by this author and represents one person's opinion concerning some helpful hints and practical considerations in the day to day approach to workers' compensation permanency experts. Consequently its contents represent solely the personal opinions of its author which are intended solely for academic consideration and discussion. It does not purport to represent legal advice or opinion for any specific case nor is it intended to be relied upon by anyone for any such person. Cross-examination in any specific case should be based upon the particular facts and issues presented by the case in question. However, it is this author's opinion that these materials represent reasonable, practical considerations in preparing and approaching cross-examination of a permanency medical expert in a contested workers' compensation case.

INTRODUCTION

Cross-examination of the permanency medical expert is one of the greatest challenges facing an attorney in a contested nature and extent of compensable permanent partial or permanent total disability case.

While the title page of this presentation refers to the cross-examination of the "permanency expert," many of the considerations hereinafter discussed can apply equally to the testimony of either a respondent's or petitioner's medical expert. Obviously, there are fundamental differences between the focus of a respondent's medical expert and a petitioner's medical expert. A respondent's expert will be concerned primarily with either denying a compensable diagnosis, denying medical causal relationship, and/or denying or at least minimizing compensable loss of physical function. Notwithstanding such practical issues, the general considerations of effectively cross-examining a medical expert remain the same regardless of whether the expert is testifying on behalf of the petitioner or the respondent.

While highly qualified treating "independent" experts will often concede and explain the strengths and weaknesses of a particular claim typically the permanency medical experts who routinely appear in the Workers' Compensation Court have a well known bias and, therefore, their testimony is fairly predictable.

Important factors concerning an expert's effectiveness are his/her credibility and credentials. A meritorious claim of defense can he lost by reliance upon an expert whose credibility and/or credentials are questionable or effectively diminished on cross-examination. On the other hand, a "thin" or "close" claim or defense can be elevated by an expert whose credibility and/or credentials are compelling. Because of the peculiar nature of workers' compensation (high volume of claims, bench trials before experienced and normally reasonably predictable judges, non-consecutive trial dates, and a transcript-driven trial practice), many trial suggestions for cross-examination in civil jury trials are less applicable to workers' compensation trials. Nevertheless, there are many general considerations which merit discussion. This paper will discuss a number of these recurring considerations.

There is no definitive absolute "right" way to effectively cross-examine a medical expert. Approaches are as varied as the personalities of the attorneys, the bias of the physicians and the issues of the claim. There are, however, general areas for which there is consensus and which merit discussion. While this paper will focus on a number of these recurring issues, **it is important to remember that there is no substitute for preparation and having a thorough understanding of the issues and facts presented.**

General Considerations

From both the petitioner's and respondent's perspective, evidence in a workers' compensation trial can be viewed as a series of "pluses" and "minuses." Both quantity and quality count. The goal is to preponderate with respect to credible evidence. You are seeking maximum "pluses" in support of your position and minimum "minuses" against your position. Cross-examination of the medical expert can be viewed within this context.

The primary purpose of cross-examining a medical witness is to make points to advance your position by reducing his or hers. There is no point in conducting cross-examination unless you have specific material points to make. There is almost nothing worse that an attorney can do in a trial than to conduct such an ineffective cross-examination that he/she actually strengthens the adversary's position. This is especially true in a permanency trial where the medical expert who often is the most important witness (other than the Petitioner) presented. The experienced medical expert is usually a professional who can turn poorly constructed questions on cross-examination into significant opportunities to damage your case.

Making points during cross-examination can be done by way of two generally recognized approaches, which are not mutually exclusive. The first is by eliciting favorable testimony from the witness consistent with your theory of the claim. Here you have the witness admit facts which support your case or have the witness agree with the postulates which support your case. This is known as "constructive" or "positive" cross-examination, These are the "pluses." You are making your points by the expert's "agreement" with your statements. In essence, the witness becomes your expert. As a general rule, you will want to conduct such positive cross-examination in the first part of your examination, where the witness' demeanor is usually as pleasant and receptive as it is going to be. Here the expert should be most courteous and receptive to your questions. Basically, you will be testifying and the expert will he ratifying your statements by agreement. Such "agreement" questions can also represent foundation questions to lock the expert into a position which will be established in a "destructive" cross-examination (which will hereinafter be discussed). The areas of attack should be pre-formulated based upon a thorough review of the expert's report.

Normally, it is a cardinal rule not to repeat a witness' direct examination during cross-examination because you never want to give an expert an opportunity to repeat, enhance or expand upon previous damaging opinion testimony. No matter how damaging direct examination is, it can always get worse. However, when you are eliciting **favorable** testimony during cross-examination, some of the expert's testimony during direct examination undoubtedly will be helpful to your case. When conducting this type of "positive" cross-examination, by necessity you will have the witness repeat those favorable portions of direct examination which support your claim. As in all cross-examinations, **your questions need to be extremely purposeful and precise. All cross-examination questions should aim to establish strong points. Your aim here is to get as much agreement from respondent's expert as you can on issues that are material and advance your position.** Cross-examination is not the time for a fishing expedition, especially with an expert witness. Cross-examination is not the time to be curious, uncertain or academically inquisitive. A thoughtful positive cross-examination should be relatively risk tree, since most of your questions will be designed to emphasize those aspects of the expert's opinions to which he/she has already testified (or referenced in the expert's report)

and which help advance your case. In conducting such positive cross-examination, while it is permissible to repeat favorable testimony, make certain your questioning is well structured to avoid ***explanation*** by the expert. You should always be mindful of not opening the door to allow the expert to "explain" favorable testimony elicited on direct, such that it is no longer favorable for your position. In other words, **if there is any chance that yon feel the expert will change his "favorable" direct examination testimony, do not revisit the issue.** This is a judgment call where you must weigh relative risk and benefit.

An example of positive cross-examination is as follows (where the doctor has diagnosed a strain and petitioner's attorney is trying to prove the existence of a probable L5-S1herniated disc, not a strain as aragued by the respondent, even though no MRI study has been performed):

Q. Doctor, on direct examination you stated the Petitioner had a positive straight leg raising test at 30 degrees. Correct?

A. Correct.

Q. And such a finding, in and of itself, is consistent with an abnormal neurologic clinical finding. Correct?

A. Correct.

Q. And that abnormal neurologic clinical finding, in and or itself, could be explained by the existence of disc herniation at the L5-S1 level. Correct?

A. Yes, it could.

The expert's probable answer to the last question would likely not be so unequivocally in the affirmative. There would likely be significant equivocation, limitation, etc, or the ever trust-worthy "anything is possible" response. However, the point is that the doctor's own straight leg raising test is consistent with a more serious condition than merely a strain (and that could even be a further inquiry on cross-examination.)

The second major type of cross-examination is the so-called "destructive," "confrontational" or "negative" examination. These are the "minuses." Here, you are improving your position by negating or reducing the points previously made by the expert. Normally, this is riskier and more challenging than "positive" cross-examination. However, destructive cross-examination can be the most damaging type of cross-examination if done successfully. The rewards may be the greatest, hut so are the risks. Therefore, you should be extremely careful in preparing such a cross-examination. It is important to remember that such cross-examination will be conducted only with respect to those limited opinions which you feel are predictably vulnerable and worth the risk.

Such examination should be conducted only with respect to those areas where you are certain or reasonably certain of your position and after you have carefully crafted questions which will limit and control the witness. Remember, in a workers' compensation trial, the trier of fact is usually an experienced individual. Consequently, many of the rules which apply in civil litigation involving juries (inexperienced lay individuals who can be fairly

sensitive and more easily influenced) do not apply to a workers' compensation bench trial. However, as a general proposition, you are going to want to stay in control of the witness. Such control is accomplished primarily by being **extremely** well prepared and focused in your questioning. Every witness and issue is controllable based upon the nature of the question which you ask. There is nothing wrong with actually writing out your questions and, in most cases, this is actually recommended. (Remember, ultimately the judge will be reading a transcript when rendering a decision and you want the transcript to read as well as it can in your favor.)

When conducting a destructive cross-examination, what you are aiming to do is to discredit **testimony** which is unfavorable to your position. The emphasis should **not** be on destroying the witness personally (this is usually both an inappropriate and unrealistic goal), but rather on discrediting or limiting some part of the witness' opinion testimony. Here, you are challenging the reliability of the **testimony,** not necessarily the witness *per se.* When you challenge opinion testimony based upon facts not considered, it is generally easier to get concessions from the witness. If the lawyer presenting the witness has not given the expert witness accurate facts or has failed to give the witness complete facts, the witness then has an explanation for the change of his/her opinion, which has nothing to do with the witness' competency or qualifications. Expert witnesses loath simply agreeing ***they*** are wrong. It is in this area where great damage can be inflicted. As will be hereinafter discussed, **most effective destructive cross-examination is based on facts, not medicine.**

Even the most biased and advocating of "experts" will more likely concede issues based on change of material fact(s) concerning his/her hypothesis, rather than altering his/her opinion concerning medical considerations.

The following represents cross-examination of respondent's psychiatric expert, who had opined on direct examination that the petitioner's psychiatric disability was solely the result of a pre-existing condition. There was nothing in the record to support such a finding, and therefore, there was low risk in asking the following questions designed to undermine the factual/medical basis for the expert's conclusion:

Q. When you evaluated Mr. _____, did you have any medical records specifically stating the existence of any pre-existing psychiatric diagnosis?

A. Not that I'm aware of.

Q. And did you have any documentary evidence of any nature whatsoever that indicated any
abnormal behavior that Mr._____demonstrated in school?

A, I don't recall. I don't know.

Q. Did you have any documentary evidence of any prior abnormal behavior which Mr. ____ demonstrated in his working relationships throughout his working history?

A. I don't know.

Q. Did you have any documentary evidence of any prior abnormal behavior demonstrated by Mr. _____with his family members?

A. Not that I recall.

Q. Did you have any documentary evidence of any prior abnormal behavior demonstrated by Mr. _____ in any social setting?

A. Not that I can recall.

Q. Did you have any documentary evidence of any prior drug or alcohol usage?

A. No.

Q. Did you have any prior documentary evidence of any prior criminal record?

A. No.

Q. Did you have any evidence whatsoever that Mr. _____ had any abnormal behavior in any aspect of his life before the compensable accident?

A. Again, I don't know.

Q. And by the way Dr., you are the only physician in this case who has diagnosed the existence of a pre-existing psychiatric diagnosis. Correct?

A. I don't know who else may have made such a diagnostic, but I know I did.

Note: the final point that "therefore" the expert had no evidence to base his opinion upon is never expressly made in the "Q&A" form, but rather it is implied and "saved" for final argument in the trial memorandum.

Note that most cross-examination will represent a "blend" of "positive" (agreement) and "negative" (challenging) cross-examination, with the majority of questions being "positive." You must also consider the most effective sequence of areas addressed on cross-examination (as will hereinafter be discussed).

Specific Considerations

What follows are specific considerations for approaching the cross-examination of the permanency medical expert:

Understand the issues of the case and all the relevant facts supported by the record. This is the starting point for preparing your cross-examination. Actually, it is your starting point for the representation of your client. If you do not understand the issues of the case, you are not going to be able to assess the extent to which the expert has damaged your claim and what needs to be done to minimize or neutralize the damage. Once you understand the issues of the claim, it is imperative that you know all of the relevant facts which are supported by competent evidence. Generally speaking, most compensation issues will involve 1) establishing the compensable diagnosis, 2) medical causal relationship, and 3) nature and extent of permanency. Remember, by the time respondent's expert testifies, all lay testimony and evidence has been received, as has almost all of the medical evidence. There is no excuse not to know "cold" what the trial record supports. Once there, you are then in a position to conduct your most effective cross-examination. **The weakest expert witness normally will know far more about his/her medical subject matter than you ever will,** and consequently, no matter how much you prepare medically for the witness, you will never be able to compete with that witness going "head to head" on medicine. **It is your knowledge of the *facts* which will level the playing field** and perhaps even give you the advantage, depending upon what the expert witness is relying upon in support of his/her opinion. Remember a cardinal rule: **the expert's opinion is only as good as the facts upon which the opinion is predicated.** The most successful cross-examinations of experts are normally based upon "facts," not medicine. You should be able to assess whether the expert's opinion is vulnerable on the basis of either considering inaccurate factual data or incomplete factual data. Both areas are extremely fertile grounds for cross-examination.

Once you appreciate all of the issues in the claim, and have a complete familiarity with all of the factual and medical evidence of the claim, **there is no substitute for a comprehensive preparation of your cross-examination.** (Analyze the expert's report as critically as possible.) You need to understand the expert's opinion and the facts upon which the expert has relied upon to reach his/her opinion(s). You must conduct an exhaustive search for vulnerability, especially on a factual basis. **Reviewing the expert's report cannot be overemphasized.** You need to read it, know it, dissect it, rip it apart, what has been omitted, what parts of the report help you, what the expert's methodology was, what data the expert relied upon, and what the expert's reasoning was. **The report represents a blueprint for the expert's testimony and provides a blueprint for the preparation of your cross-examination. Ask yourself: 1) why should the judge discount this expert's opinion? 2) what parts of the expert's report either help your case or are consistent with your position?** Almost all experts' reports contain some helpful findings. Create a list of every reason you can think of and then compose questions to address each of these reasons. For example, your list could be as follows:

Lacks qualifications in orthopedic surgery;
Has not considered bridging symptoms in record;
Has not read MRI film;
Has not considered treating physicians' findings;
Is misinformed regarding history of accident;
Finds positive SLR at 30 degrees;

Left thigh circumference is almost one inch less than right.
Patient is credible per all treating records.
There are non-compensable reasons for the diagnoses in issue.

Once you create your list, construct appropriate cross-examination questions. Questions need to be carefully crafted to elicit what the witness **must** admit, and what the witness **should** admit. Discard any questions where you feel the witness "**might**" admit, as this is an insufficient likelihood of result. **When in doubt, don't ask.** You want to stay in control of the witness on cross-examination. Ideally you want to establish a rhythm that projects to the Judge and the witness that you know what you are doing and you ae establishing valid relevant points. Normally, you will want to keep your cross-examination as short and purposeful as possible. As a general proposition, **it is a useful exercise to actually write out and/or outline your entire cross-examination and predict responses.** Review and re-review your questions and anticipated responses. Ideally, let a day or two elapse between reviews, as almost undoubtedly you will look at the predicted effectiveness of your questioning differently after the questions have been initially constructed. **In the final analysis, one of your goals should be a readable, clean and persuasive transcript. Ultimately, you will be referencing the transcript in your final legal argument and the judge will be relying upon the transcript concerning most of the evidence in support of your position.** Ask yourself, do your questions evoke a likely response that will give the judge a reason to disbelieve, discredit or discount the expert's opinion? **On crafting your questions, consider the likely response and how that response will advance your trial memorandum legal argument. A question that does not anticipate a response which can be used in support of your closing argument is generally a useless question.** You must also consider the **sequence** of your examination. Ideally, you want to start strong and end strong. This is a fundamental concept in the "art of persuasion" on cross-examination.

In assessing the expert's report, consider the following:

a. **Review all "facts" in support of opinion.** Are they accurate? Consider material omissions. Most cases are won based on credible facts. The experts' knowledge of facts should be less than yours. Establish that the expert's opinion is based upon "facts as presented especially if they are inaccurate." Use your better knowledge of facts to your optimal advantage. Carefully, comprehensively and exhaustively consider the material history upon which expert's opinion is predicated and the methodology used. Compose questions which lock the expert into a position based on the "presumed" facts and then confront the expert with the damaging facts when appropriate.

b. **Is the history of trauma/exposure accurate?** Are there material omissions which, if considered, would help your claim? Is there a clear description of the specific mechanics of the trauma? Often the expert will not be able to testify specifically and with what force the compensable trauma occurred. Often the expert may underestimate force, repetition and range of motion in exposure claims. These are critical errors which alone can seriously damage the expert's opinion. A **medical expert cannot persuasively testify to the etiologic significance of trauma if the expert cannot accurately describe the same.** Many times even an experienced expert will not be comprehensively prepared on all the relevant facts. Due to either inexperience of the attorney presenting the expert, time constraints due to volume, and/or defense billing considerations (flat fee versus hourly - flat fees often resultant in less time spent in preparation), insufficient time may

be spent with the expert. If so, he/she will be vulnerable on the facts. Often more experienced witnesses will spend relatively less time on the "case" than will lesser experienced experts who often over prepare. If so, they may be vulnerable to a well thought out "factual" cross-examination.

c. **Where relevant, is the material pre-existing history accurate?** This is especially true where the expert has opined that the condition in question is simply a continuation of pre-existing pathology rather than an aggravation of the same. What has the expert relied upon in establishing the history? Is it a part of the trial record? What material omissions exist? What inaccuracies exist? Does the expert even concede that an aggravation is possible? For example, an expert who denies the theoretical potential for a traumatic aggravation of a preexisting orthopedic condition is an expert who should have no credibility with the trial judge. What is the time frame between the trauma and documented credible symptoms in the record? Sometimes respondent's expert will simply consider first **medical** documentation of symptomatology (where a petitioner has delayed treatment), and will rely on such a mistaken date as too remote to support a finding of causality and represents the sole basis for a finding of non-compensability. However, the record may support non-medical records bridging symptoms which, if found credible by the Compensation Judge, will be considered as having the same evidential weight as if actually contained in the medical records. Sometimes the questioned compensable body part might even be named in a claim petition of multiple injuries prepared shortly the accident but before specific appearance in the medical records.

d. **Has the expert considered all relevant treating records/diagnostic studies to reach his/her conclusion?** Are such records/studies accurate? Are the records complete (as compared to the credible factual record of the claim)? Has the expert merely read the reports, or has he/she also reviewed the films? Does the expert have the qualifications to even read the films/studies? There is usually a fairly broad "grey" area and room for bona fide disagreement in the interpretation of many MRI studies. **Regardless of the precise description of the pathology, confirm that at least an "abnormality" exists (if, of course, you are Petitioner's attorney).** As Petitioner's attorney you want to be able to argue that even the respondent's expert concedes the existence of an abnormality, then leaving as the only issue medical causal relationship and/or the severity of the pathology.

e. **Has the physician conducted a thorough physical examination?** What findings are consistent with your theory of the claim? These can be emphasized and repeated on cross-examination. For example, where the doctor is diagnosing a mere lumbar strain and the issue in the case is whether your client has a disc herniation, the physical evaluation demonstrating a positive left straight leg test would be a significant clinical finding, consistent with disc herniation. What tests have not been performed? Contrarily, the absence of expected position of clinical findings can certainly minimize the severity of the claim and is fertile ground for Respondent's attorney.

f. **Are the expert's clinical findings consistent or inconsistent with the treating physician's findings and/or the physical therapist's findings?** Most physical therapy records contain detailed findings regarding range of motion, referred pain, strength measurement and other important objective findings. Look closely at the physical therapy records at time of discharge. Often respondent's expert will report far less physical

abnormalities on the clinical evaluation than will be documented in the treating records. Consistent complaints and findings in the treating records in a case where "suddenly" there is an absence of the same the one day the petitioner is seen by the respondent's expert renders suspect the expert's opinion concerning "absence of findings." The reverse is obviously also true.

g. **What is the expert's diagnosis?** Is it helpful? Is it accurate? What is it based upon? What factual and medical data has the expert considered and what hasn't the expert considered? What data is accurate and established by the record and what is not? Determine the reliability of diagnosis and if it is not reliable, identify the basis for the error, and construct questions addressing this issue. Define necessary findings to support diagnosis. Have tests been performed to conclusively "rule in" or "rule out" any relevant diagnosis? The establishment of a reliable diagnosis is a key consideration concerning nature and extent of payable workers' compensation benefits.

h. **What is the expert's methodology/reasoning in reaching his/her conclusion concerning medical causal relationship and/or diagnosis?** Is it thorough and consistent with generally accepted medical scientific standards? If not, why not? Where are the flaws in methodology/reasoning, and how best can you expose the same? "Compensation judges should be particularly skeptical of expert testimony that supports or contests a finding of causation on the basis of reasoning inconsistent with prevailing medical standards," Hellwig v. J.F.Rast & Co. 110 N.J. 37 (1988) at 54.

i. **What is the expert's methodology concerning opinion on permanent partial/permanent total disability?** Is the expert confining his/her opinion to "impairment" rather than "disability?" Does he/she understand the definition of "permanent partial/total disability" as defined by N.J.S.A. 34:15-36 and our case law? (Asking such a question on cross-examination is usually safe, since an accurate response confirms what the expert is expected to know, while an incorrect response can be extremely damaging.) Has the expert considered the impact of the medical condition on employment and/or non-employment activities? Ask the expert if he/she understands what such impact has been. This is often more effective as Respondent's experts who typically will emphasize the specific diagnosis (or lack thereof) vs. the clinical findings and/or the second prong of Perez.

j. **Quantify the expert's percentage of disability in terms of "level of severity" rather than a specific figure.** For example, many respondent experts who have a permanency rating of either "5%" or "10%" may very well concede that such a presumptively "low" figure actually represents a more moderately severe amount of disability. In such situations, make the doctor define his/her terms and criteria for finding "mild, minimal, moderate, moderately severe and severe" disability. In appropriate cases you may wish to determine what the doctor's estimate means. You may wish to have the expert describe

the methodology used in determining his/her figures. The same is true for Petitioner's medical expert who finds a 25% permanency rating for a "strain."

k. Where doctor has relied solely upon "negative" tests for opinion, establish:

- False negative testing occurs;
- The actual "negative" finding is a conclusion which may or may not be accurate;
- Consider when the test was given (timeliness can be a consideration regarding validity, especially with respect to EMG studies. Positive findings generally do not occur until time elapses post trauma);
- Is the test dependent upon the qualifications and subjectivity of tester? (i.e., EMG/discography);
- Are there differences of opinion or "grey areas" regarding "pathology presented?"
- Why might the test not be reliable?
- The same can be true for the Petitioner's reliance on "positive" diagnostics which in and of themselves do not have a clinical impact.

l. What clinical findings are consistent with your theory of liability which the expert should affirm?

m. Re: MRI findings

- Has the expert considered only the report or has he/she actually reviewed film? If he/she has only reviewed the report, he/she should be willing to concede competent physicians do not always agree concerning their assessment of MRI films (i.e., over read/under read);
- Is the expert qualified as a film reader?
- Consider what diagnostic tests **not** performed (i.e., for Petitioner's attorney in a diagnosis of lumbosacral sprain, if there is no testing to rule out more specific pathology given clinical findings);
- Comparison of films regarding serial studies (e.g., MRI's, x-rays, myelograms, CT scans; same machines, quality of machines);
- Semantics (one physician's "protrusion" may be another physician's "herniation"). Generally, the importance of MRI findings in the spine include size, location and extent to which they are compressing on neurologic structure, together with a determination of whether they are either caused or aggravated by trauma. Consequently, a mere "bulge" may be clinically more significant than a herniation if the bulge is large enough, focal and pressing upon a nerve root, whereas the herniation is tiny, central and causing no neurologic compromise, all of these distinctions are critical in any permanency determination, at least as to their clinical significance in the actual practice of medical treatment.

n. **<u>Use of your own hypothetical in support of claim/issue.</u>** (Where the case is fact sensitive, the record supports your facts and the expert has not considered your version of facts.)

o. **Weaknesses in expert's clinical assessment**

- Length of time of doctor's clinical assessment of the Petitioner (normally brief - has petitioner testified as to time? Confirm number of appointments on date of evaluation, or on typical day to establish "brief evaluation);
- Reliability of the physical examination;
- Accuracy of instruments used to measure (margin of error);
- Reliable tests not used;
- Inconsistencies with treating doctor's findings; and
- Inability to "rule out" appropriate conditions/issues.

p. **Is there agreement with general propositions which represent the basis for your claim?**

For example, where your claim is that the specific lifting injury did herniate the disc, establish that, as a general proposition, lifting can cause a disc to herniate. Where there is a degeneration issue, establish that the degeneration need not be symptomatic, and that trauma can aggravate or worsen a pre-existing condition. Establish that a degenerative condition represents a greater predisposition for further injury/disability if you are Petitioner's attorney in such a case. If the expert will not accept such an obvious general proposition, he/she may very well lose credibility with respect to his/her specific opinion as to your particular case.

q. **Where a Respondent's expert alleges 12d pre-existing disability is based on "diagnosis only" (e.g., x-rays), establish where appropriate that there is no history or clinical findings to establish "disability" versus pre-existing "pathology."** Remember, respondent has burden of proving pre-existing disability based upon Sec. 36 prerequisites, which includes both prongs of Perez.

r. **Where the expert opines an absence of permanent orthopedic disability due to "minor strain" as a petitioner's attorney consider:**

- Establishing decreased range of motion can be based on bona fide pain which limits range of motion;
- Establishing a strain can be chronic and where chronic, by definition, can cause pain causing limited range of motion presented consistently in clinical evaluation;
- Establishing mere range of motion is not what is important, rather the reliability of the range of motion which requires genuine "hands on" assessment through the full range of motion;
- Establishing the most important consideration is anatomic loss of clinical function measured by range of motion, weakness, muscle integrity, tenderness^ neurologic/orthopedic abnormality, atrophy;
- Establishing range of motion is not always strictly subjective and invites important clinical considerations when all facts are considered regarding loss of function; and
- Establishing spasm not always present, even in disc herniations;

- Establish the gradation of strains and physiologically what they mean (first, second and third degrees.)

s. **Questioning the adequacy of testing to establish that there is not a more significant diagnosis potentially applicable to the severity of trauma that is consistent with the nature of the injury alleged.** If the doctor is alleging a "minor" strain, the question may be whether or not there has been any objective testing done to determine whether there is pathology beyond a mere "strain." By definition, strains only clinically manifest themselves in terms of reduction of range of motion, spasm, swelling, weakness, and not all such symptoms are always present. **If appropriate, confirm the doctor cannot rule out a more significant diagnosis unless additional testing has been done.** Establish it is generally accepted that chronic strains exist and that unless all appropriate diagnostics are performed more significant pathology cannot he conclusively "ruled out." Understand the difference between a strain (muscle/tendon) versus sprain (ligament) and the definitional degrees of severity (which often are never referenced in the absence of MRI study).

Other Recommendations

Use your own expert as a resource to understand and attack the opinions of the adverse expert. Read relevant literature and become comfortable with the area of medicine in question, either by way of leading texts, periodicals or medical articles. If possible, obtain copies of whatever the expert has published, as sometimes the expert's opinion in connection with his/her testimony will be inconsistent with what he/she has expressed in publications.

Investigate the expert's prior testimony wherever possible. Speak to other attorneys who have cross-examined the witness. Determine if transcripts are available and review them. Know the expert's report "cold" and base the primary framework of your cross-examination around it. There is no more important starting point for the preparation of your cross-examination than that expert's report. However, make certain that you listen carefully to the expert's testimony for any transgressions or openings where he/she might be vulnerable, especially where it may be inconsistent with his/her own previous report or reports.

Keep the expert within the "four corners" of the report. (See later discussion regarding "four corners" doctrine.)

Undertake a sound analytical approach in organizing and executing your cross-examination. However, do not be so locked into a preconceived approach that you fail to take advantage of unexpected openings which may occur during direct examination. If you know your case cold, there really is no reason to take notes concerning the testimony, except to highlight testimony which you may wish to repeat on cross-examination and/or flag for further limited questioning.

Appreciate the judge you are appearing before and determine whether it will be most effective to "go for the jugular" at the outset, or whether you should conduct more of a "slow build" cross-examination. If you have a particularly strong point to make which discredits the expert, and you are confident you will be effective, consider starting with this point. If you are successful, the rest of the expert's testimony should be received as less credible.

Normally skip *voir dire* on the expert's qualifications, unless you are really intent on challenging the expert's competency to testify (see later discussion). Your cross-examination concerning the amount of the expertise of the expert should generally he left for your normal cross-examination, unless you feel you can keep the witness from being qualified as an expert (or his or her bias) in the first place. Here, this timing issue is really more of a factor for jury trials, but technically you should reserve cross-examination regarding qualifications to your main cross-examination, not *voir dire.*

Note the qualifications of the expert, however, as these are important areas to establish nature and extent of expertise. Is the expert an academic, a clinician, or a forensic witness? Is the expert Board-certified? Does the expert treat? If so, how much? Does the expert testify on behalf of employers and/or insurance companies and, if so, to what extent? What amount of income does the expert derive from testifying on behalf of respondent/insurance companies and/or preparing reports on their behalf? Ask for any and all correspondence from respondent's counsel and/or the

employer which the expert reviewed prior to preparing his/her report and/or his/her testimony. This can be an extremely fertile area to establish bias if damaging correspondence is received.

Attack the qualifications of respondent's "expert," if his/her qualifications are weaker than your expert's. If the issue is medical causal relationship, and respondent has produced a typical "independent medical evaluating" physician, it is critical that you fully attack the "expert's" qualifications where such physician is less experienced in the area of medicine as your expert (e.g., number of patients, if any, treated for the condition in question; number of surgeries, if any, performed for the condition in question; number of published articles; board certifications; hospital associations; years of practice). Highlight any absence of any specialized training/experience/qualifications which may he relevant. Relative qualifications are a significant consideration in the appropriate case.

Credibility (generally)/Bias

- Number of times evaluated/testified on behalf of respondents/insurance companies and conversely on behalf of petitioners.
- Percentage of practice on behalf of respondents/insurance companies and conversely petitioners
- Fee for testimony/report (see Sec. 64) (note: undoubtedly in excess of statutory amounts limiting your expert. Argue Sec. 64 applies equally to respondents/Motion to Strike testimony if fee exceeds statutory allowance). Have fun.
- Amount of yearly income received for expert testimony/reports; the problem with all of this "payment" basis questioning is that absent a highly unusual situation, the bias is clearly equal on both sides leaving this a "push" issue and therefore not value added.
- Production/review of expert's entire file, including but not limited to letters from insurance companies/counsel or petitioner's counsel regarding evaluation or expert's testimony (no cross-examination should ever be completed before such a thorough review is conducted. Request complete file either at pretrial or trial date prior to hearing, or better yet, apply to the court for Order directing witness to produce entire file); and
- Timing - consider when, during your cross-examination, you will be most effective in addressing fee issues. Normally, this will be a relatively minor area unless the expert is charging an exorbitant amount inconsistent with his/her credentials.

Read any medical article or study which the expert is relying upon and citing. The expert may "slant" or "spin" opinion, taking extreme liberties with the study in question. Frequently, the articles will have published criticisms by experts in the field which can further assist you in not only understanding the issue in question, but for use in minimizing the strength of the expert's testimony.

During Testimony

During direct examination, listen carefully to the witness' answers, especially where there appears to be some reluctance or hesitation under direct examination. This can flag an area of weakness. It is far more important to listen carefully than it is to simply "take notes." There is a stenographer to take down the testimony. This is not your job. Eventually you will receive a complete transcription. Note taking should be performed primarily to flag areas for your cross-examination. Otherwise, you are wasting focus and mental energy. However we all have different "comfort level" approaches regarding "taking notes."

Prior to commencing your cross-examination, you will want to **review the expert's entire medical file.** Ask the expert to confirm that the file brought to court represents his/her entire file, including any and all notes made by the physician during the examination (or prior thereto), in addition to including all documents the physician reviewed. Of great potential importance is any correspondence from respondent's attorney or the insurance carrier regarding the evaluation. Such correspondence may be extremely biased concerning the party's "view" of the case. While invariably the expert will deny on cross-examination that he/she relied on was in any way influenced by such correspondence, the correspondence "speaks for itself." By first establishing that the file is complete and represents all materials/documents "reviewed" by the expert prior to testimony, the trial judge should permit full cross-examination on such correspondence, including even admitting the correspondence into evidence. You may apply to the court for an order or directive prior to testimony that the expert bring his/her entire file with him/her containing all documents reviewed by the expert prior to testimony. Frequently, experts only bring "skeleton" files, indicating it is their "office policy" to discard most materials. One expert once testified that his office policy is to "shred" the covering letter that accompanies the permanency appointment. In such instances, walk the expert through how the examination is set up, where/how does he/she receive instructions or guidance as to what the purpose of the evaluation is, who orders it, and what specifically is being requested. Ask for the letter of engagement. Where the expert denies any recollection of receiving any such correspondence, ask the court to direct your adversary to produce copies of any correspondence sent to the physician by his office and/or the workers' compensation carrier. If the court permits this line of inquiry, the attorney will have an ethical obligation to produce the materials or risk violation of the rule requiring "candor to the tribunal."

Generally, **do not argue with a medical witness.** This is much more important in jury trials, where juries can be "turned off" by such behavior unless the physician is completely incredible or otherwise combative. Most trial judges are more understanding, forgiving and less sensitive. However, even in compensation trials, arguing with a medical witness is normally unprofessional and ineffective. Usually such arguments are a result of poorly formed questions. There are times when you will have no choice but to engage the expert in argument (or at least "spirited" engagement), and occasionally you may even be successful. However, even for the most experienced cross-examiner, this will be a rare occasion.

Do not ask a witness to explain on cross-examination. **DEFINITELY DO NOT ASK A MEDICAL WITNESS TO EXPLAIN ON CROSS-EXAMINATION!** You should not have any open-ended questions. Questions which begin as "what," "how," or "why" generally are invitations to disaster, since they open the door for the witness to provide unrestricted opinion

probably carefully worded to reinforce prior testimony and further designed to damage your case. Cross-examination is not the time to be intellectually curious. If your question is not designed to make a specific point for which you are reasonably assured of the answer, do not ask it.

Your strongest cross-examination should "hammer" on facts which are inconsistent with the expert's presumed hypothesis or consistent with yours. It cannot be overstated that the credible facts supported by the record as a whole are one of your greatest weapons. You can and should know them better than the expert. The key is to determine the most relevant facts which make a material difference concerning the issues of your claim. Do not assume your adversary has taken a great deal of time in preparing the expert, especially regarding testimony concerning an IME permanency evaluation. Often your adversary and the expert have a volume practice which does not permit the time for careful exhaustive review of all potentially relevant facts.

Avoid the temptation to ask the ever-disastrous "one too many" question unless you are absolutely certain of the response. Generally, when you are on "third base" on cross-examination, you are in an excellent and enviable position. Except on the rarest of occasions, resist the temptation to ask the final question which is the obvious "point" you are making in connection with any phase of your cross-examination. Generally, it is better to save such "points" for your trial memorandum. Such points are implied and obvious. By asking the expert to agree with your "final point" (stating the obvious conclusion), you will almost never get such agreement, and your cross-examination can be diluted by way of further explanation and/or argument from the witness. Effective cross-examination normally ends with the point being made by suggestion or inference. A noted trial expert explains this by an example similar to the following: In Manhattan there was an intersection motor vehicle accident at 37th Street and Third Avenue. Both the plaintiff and defendant claimed the green light. Defendant produced an eyewitness who testified he saw the accident and that the plaintiff ran the red light. On cross-examination, plaintiff's attorney established the witness was a number of blocks away. Instead of leaving the clear inference that the witness could not possibly be a reliable eyewitness, the "one too many" question was asked, asking the witness to agree with the "obvious" conclusion, i.e., he could not possibly have seen the accident from such a distance away. Once given the opportunity, the witness explained that he was on top of the Empire State Building looking down through the high powered binoculars and saw the accident perfectly clearly. This may not have ever actually happened in real life, but hopefully the point is made.

The basic form for almost every question on cross-examination is the leading question. This will assure that there will be no explanation by the witness. Expert witness "explanations" during cross-examination generally reinforce and reaffirm opinions offered on direct examination. You do not want the witness to argue with any of your points unless that is intended for some specific reason. The typical type of effective cross-examination is where you make the statement of fact and have the witness agree with it. This assumes that the questions that you will be asking are carefully worded and that you have high confidence in the witness' response, in essence, you will be testifying and the witness will be ratifying your testimony. **Each point should be geared towards argument in your trial memorandum as to why the court should disregard or minimize the expert's opinion.**

Your questions normally should be short and clear. You are building a framework on cross-examination point by point. Each point should be made as clearly as possible. Avoid

longwinded, compound or convoluted questions. They generally represent ineffective cross-examination and are objectionable.

It is critical to **keep control over the witness.** This is accomplished by the form of your questioning and insisting upon responsive answers. In a jury trial, often you will reserve your objections regarding unresponsive answers for fear a jury will he "turned off' or think you are trying to "hide something." In workers' compensation, where the witness' answers are non-responsive, you should immediately move to strike the testimony and ask the court to admonish the witness to answer the question and only the question. The compensation judge should understand where the witness is attempting to advocate rather than testify, and where the court rules that the answer is non-responsive, the answer should be stricken from the record. Only you have the right to object to an unresponsive answer on cross-examination.

You should **project confidence** (within the parameters of your own personality) on cross-examination, as you should be confident with the strategy you intend to employ on cross-examination, assuming you have properly prepared for the same. It is not necessary to cross-examine "crossly" in order to cross-examine effectively, but sometimes it is necessary. Remember, **the trial judge has tremendous discretion with respect to how far you will be allowed to go on cross-examination.** The more confident and prepared you seem, the greater the likelihood that your self-designed but possibly "borderline" questions will be permitted.

Where a "good" question results in a "bad" or "damaging" answer from the expert, simply move on without pause or reaction, unless you are certain you can "undo" the damage by a follow-up question. If you are not certain, then move on, as undoubtedly the follow-up answer will elicit even more damaging testimony. Do not let the judge of compensation see that you are "rattled" or affected by any such "bad" or "damaging" answer. If so, it will more likely be more noteworthy by the judge. It is important to develop your own natural style on cross-examination. Remember, the most unacceptable cross-examination is that which enhances the expert's opinions set forth on direct examination. Cross-examination is the wrong time for your adversary to "score" more points.

Normally, the witness will be the least adverse to your position at the start of your cross-examination. This is why many attorneys recommend that you attempt to elicit **most favorable testimony at the start of the cross-examination** as it is here where the expert will be most likely to be as agreeable as he/she will be during cross-examination. You should be as pleasant and courteous as you can at this stage of the cross-examination, since this will represent your best chance of eliciting favorable testimony.

Where there is an objection to your question as being improper, a standard "fall back" response should be that you are conducting cross-examination as a search for the truth for which the court, in the exercise of its discretion, should afford wide latitude. You may also add that the strict Rules of Evidence do not apply to a workers' compensation trial (even though a compensation award must be based upon "competent" evidence as determined by the Rules of Evidence).

If you believe your case is particularly strong, you should take as little risk as possible with the cross-examination of permanency expert (normally the petitioner's case will be won based upon the strengths of its own affirmative claim.) However, if you do not feel that your case is particularly strong, then you may conduct a more risky cross-examination, which may be your

only option. However, in controlling the witness and making as many points as possible, "asking" questions where you are certain or reasonably certain of the response is your best strategy for effective cross-examination.

When cross-examining on treatises, get the expert to acknowledge the treatise is a "reliable authority." If so, impeach the witness on such "reliable authority" which is inconsistent with his/her opinion. Have the expert commit to his/her previous direct examination and lock him/her in. Then build up the reliability of the treatise in question. Finally, confront the expert by reading the impeaching portions of the treatise inconsistent with the expert's testimony. In such situations, you may wish to have photocopies available for the court and your adversary.

While questions with uncertain responses generally should not he asked, **do not be intimidated by asking potentially objectionable questions for fear an objection may be interposed and sustained.** If you feel a question that has a logical basis will likely advance your case, ask it and worry about any objection when and if it is made. Remember, the judge has considerable discretion concerning the scope of permissible cross-examination in connection with your search for the truth.

In jury trials, your attitude, intonation and general demeanor are sometimes as important as the questions asked. Juries are often "turned off" by attorneys who appear "nasty," "argumentative" and/or "unfair" in their questioning. However, where you passionately believe in your position and you are facing an expert who you feel is "advocating" an indefensible position, it is sometimes difficult to maintain a completely "neutral" and respectful attitude toward the expert. There are limited situations where such projection of well pointed disdain, incredibility and/or sarcasm might be effective, but these situations are usually limited to obvious "hired gun" testimony where the expert is clearly advocating in disregard of the credible proofs. Remember, such attitude should be reasonably well restrained so as not to be unprofessionally argumentative. If it is obvious to you, it should be obvious to the judge. In such obvious situations, it is not necessary to "cannonade the proverbial butterfly." Fortunately, most compensation judges are less sensitive than juries concerning this area, and you normally can safely inject at least some of your personality into such cross-examination. Remember, however, unless your performance is particularly memorable/effective, ultimately the medical issues will be decided more on the "naked" transcript than anything else. Your aim should be to have a clean transcript that effectively makes your points.

Additional Miscellaneous Considerations

- **Four corners of report doctrine**

As a general proposition, you will want to keep the expert from testifying to issues not contained within the "four corners" of the expert's report. An expert will usually be prohibited from testifying as to opinions not contained in the expert's report. However, the courts are generally very reluctant to dismiss a case because of inadequacy of an expert's report. The courts are also reluctant to restrict experts from explaining opinions in the report, even if the explanation exceeds the opinions contained strictly within the "four comers" of the report.

The trial judge clearly has discretion to preclude expert testimony on a subject not covered in the written reports furnished by an adversary. In Ratner v. General Motors Corp., 241 NJ. Super. 197 (App. Div. 1990), the Appellate Division strongly urged the trial judge in the exercise of his discretion not to exclude or preclude testimony if there were "(1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which could result from the admission of the evidence." All of the precedent involving testimony beyond the scope of the report are in connection with civil claims, where there is the routine opportunity for deposition (unlike workers' compensation). The upper courts normally reason that the deposition process should "flush out" all such opinions which are not clearly set forth in the court, so as to minimize any "prejudice" at trial. Additionally, the courts have permitted deposition of the expert during trial concerning the "new opinions" as a reasonable compromise of all issues. Such reasoning is that "the sins or faults of an errant attorney should not be visited upon a client," and therefore the courts are loathe to "impose the sanction of testimonial exclusion where a litigant's attorney has failed to comply with the Rules of Discovery," Gaido v. Weiser, 227 NJ. Super. 175 (App. Div. 1988), affd 115 N.J. 310 (1989)). Where relevant it is arguably important to impress upon the workers' compensation judge that the limited discovery in a workers' compensation claim and the potential for unfair surprise/prejudice requires stricter adherence to the "four corners" doctrine. While the workers' compensation trial undoubtedly is a "search for the truth," there is an equal requirement that the search be conducted "fairly" and therefore with "proper notice" and without under prejudice or surprise.

- **General rule against use of adversary's expert**

The Civil Rules do not even allow the discovery of the identity of experts who are not anticipated to testify at trial, except in cases of "exceptional circumstances are 4:10-2(d)(3)." The general proposition against use of an adversary's expert or a deposition of an adversary's expert should not be permitted over that party's objection. See Genevese v. New Jersey Transit Rail Operations, 234 NJ. Super. 375 (cert. denied) 118 NJ. 196 (1989). However, note that an expert's report attached to answers to interrogatories is considered an adopted admission. See Samatino, 146 NJ. Super. 416 (App. Div. 1976) (cert, denied) 75 NJ. 24 (1977).

- **Scope of cross-examination of treating physician**

Sometimes it is argued that treating physicians are only permitted to testify as "fact witnesses" regarding their examination and diagnosis. However, once a patient files a personal injury claim or workers' compensation claim, the physician-patient privilege is extinguished regarding relevant and material discovery is concerned, which is tantamount to a "waiver of the privilege in regard to all of [the physician's knowledge]" (Cigliano v. Connaught Laboratories, 140 NJ. 304 (1995), 312), and

therefore testimony concerning the likely and unlikely causes of a condition in the form of an opinion is permitted.

- Scope of cross-examination must be on good faith bases

While an expert may be asked hypothetical questions, the hypothetical question must be based upon facts in the records, or otherwise known by counsel to be available. See Gewecke vs. Wolarsky, 186 NJ. Super. 166 (Law Div. 1982). On request, counsel conducting the examination must represent that the facts do exist and identify their source. Moreover, there must be a good faith basis for any such question asked. It is improper to ask questions based upon factual assumptions which are neither part of the records or which will not be offered.

- **Expert testimony from "non-specialists"**

Note: there is no doubt that an expert can give testimony concerning a particular field of medicine, even though he/she is not a "specialist" in that field (see Carbone v. Warbuton, 22 NJ. Super. 5 (App Div 1952) aff d 11 NJ. 418 (1953). In this case, a gynecologist was permitted to testify against an orthopedist concerning the appropriate treatment of a fracture. Here, the plaintiffs expert was an 82-year-old retired gynecologist. The defendant objected on the basis that the expert was not qualified. The court held that the expert witness need not be a specialist in the same field of medicine as the defendant, but the expert could be qualified because of actual experience and/or study of the subject. Here, the expert witness asserted that he had knowledge of the method of the treatment of fractures, both in hospitals and generally, and he supported that assertion by appropriate references. However, the issue would be the **weight** to which such testimony would be given, in light of the absence of specialization. While generally courts are fairly liberal in qualifying a medical witness as "expert," the mere possession of a medical license is insufficient to qualify a physician to testify as an expert in all areas of medicine. There must be compliance with Rule 702, wherein the court must find that the witness' specialized "knowledge" will likely "assist the trier of fact." Justice Brennan explained in greater detail what the court requires in terms of a threshold of experience and/or knowledge (Carbone, 11 N.J. 418 (1953) at 426. In allowing a general practitioner to testify as an expert against a specialist, such a proposed expert can testify if he was "shown to be versed in the subject matter from actual experience in his own practice or from .observations of treatments from other practitioners or from reading and study. The fact that he or she is not a specialist may disparage his qualifications, and thereby the weight to be given to opinion, but it does not render the expert incompetent to offer an opinion. This was further confirmed in Sandari v. Rosenfeld, 34 N.J. 128 (1961). Remember, generally, absent "novel theory" issues, **the courts are fairly liberal in allowing "expert" testimony of someone with credentials beyond a lay person such that the witness may "assist" the trier of fact. The real issue is the weight afforded to such testimony.** In the majority of workers' compensation cases, the Courts will presumptively give greater deference to the more credentialed specialist, all other factors being equal. Remember however, the treating physicians opinion on causal relationship is generally presumptively entitled to the greatest of deference.

- **Regarding novel theories**

The courts have struggled with "novel theories" or new advances in medicine where there has not been "general acceptance" in the scientific/medical community. The problem is that generally medical progress is such that the newest technology often represents the minority view, even though over time it may ultimately be the generally accepted view in the medical/scientific community. On

the other hand, there are many "fringe" theories which represent nothing more than "junk medicine /junk science." It is here that the court has to be the "gatekeeper" to ensure a requisite level of reliable methodology to warrant consideration by the trier of fact. The first leading New Jersey case in this area was Rubanick v. Witco Chemical Corp., 125 N.J. 421 (1991). Here a trial court dismissed expert testimony in a chemical exposure civil claim because the plaintiffs theory of causation ".. .had not been generally accepted by the scientific community" (Id. at 449). The Appellate Division affirmed. However, the Supreme Court reversed. In toxic tort litigation, **a scientific theory of causation that had not yet reached general acceptance may be found sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field.** The evidence of such scientific knowledge must be proffered by an expert who was sufficiently qualified by education, knowledge, training and/or experience in the scientific field. The expert must possess the demonstrated professional capability to assess the scientific significance of the underlying data and information, to apply the scientific methodology, and explain the bases for the opinion reached. (See discussion re: Federal Rules 702 and Daubert.)

This analysis will generally be applicable to workers' compensation claims alleging compensable carcinoma, CRPS/RSD, Hepatitis C, mild brain injury, and numerous other emerging and/or poorly understood diseases.

- **Net opinions excluded**

The expert must explain all opinions concerning material issues, otherwise inadequately explained or merely conclusory opinion represents a "net opinion" and is inadmissible. Mere "bare conclusions, unsupported by factual evidence" represent an inadmissible net opinion (Buckelew v. Gross Bar, 87 N.J. 512 (1981) (Id. at 524). However, note that the expert is not "required to produce a treatise to support his opinion" (Bellardini v. Krikorian, 222 N.J. Super. 457 (App. Div. 1988, p. 463). This was a medical malpractice case where the plaintiff alleged that he was born with multiple birth defects because of the defendant physician's negligent failure to perform a pregnancy test prior to prescribing various prescriptions medications to the pregnant mother. Plaintiffs medical expert could not cite any specific medical literature establishing the standard of care for providing women of child-bearing age with prescription medications. Here, defendant's counsel moved *in limine* to bar the testimony of the plaintiffs expert, arguing that it was a net opinion. The trial court barred the testimony, since the expert could not provide "evidential support" for the opinion. In reversing, the Appellate Division stated, "obviously, the support for such expert opinion can be based on what the witnesses learned from personal experience or from persons with adequate training and experience... Expert testimony may be fiirnished by a person whose knowledge, training or experience are deemed qualified to express their opinions on medical subjects... The requirements for expert qualifications are in the disjunctive. The requisite knowledge can be based on either knowledge, training or expertise...

> "Expert testimony is admissible where the witness has peculiar knowledge or experience not common to the world, which renders his opinion an aid to the court or jury in determining the question in issue" (462 Id. at 462-463).

- **Definition of terms and recurring issues**

Do not assume even a "seasoned" workers' compensation permanency expert understands all appropriate legal terms. Where appropriate, consider challenging expert on relevant definitions:

- "Reasonable medical probability" - expert testimony can be stricken for failure to comply with the appropriate standard;
- "Medical causal relationship" (medical v. legal). Is the doctor using the same standard or quantum of contribution to determine compensability (material contributing factor to causation, aggravation, acceleration or exacerbation)?;
- "Permanent partial disability" (versus impairment) - many physicians will testify to loss of function based on impairment rather than disability. Has doctor considered material interference with working or non-working activities?
- "Objective" versus "subjective" and the extent to which there may be overlap;
- Establish importance of clinical findings versus "normal" "objective" tests (false positives/false negatives in all "objective" testing);
- Doctors treat patients and clinical findings, not necessarily "objective" test results;
- "Curative" versus "palliative;" (legal and medical distinction);
- "Material degree" (an applicable degree or a degree substantially greater than de minimus). See Fiore v. Consolidated Freightways, 140 452 (1995). "The "material degree" standard, requires courts to evaluate carefully an expert witness' conclusion "in the context of both the statutory criteria and the prevailing medical standards," Hellwig, supra. 110 NJ. at 54. "...Compensation judges should be particularly skeptical of expert testimony that supports or contests a finding of causation on the basis of reasoning inconsistent with prevailing medical standards."

SPECIFIC RULES OF EVIDENCE AND DOCTRINES

Relevant New Jersey Rules of Evidence. While the Rules of Evidence do not expressly apply to workers' compensation trials (see NJ.S.A, 34:15-56), a compensation award must he based upon "competent" evidence as defined by New Jersey Civil Rules. Consequently, as a practical matter the Rules of Evidence actually do apply (at least as to material issues). It is only as to collateral or cumulative/corroborative evidence that the court can safely admit evidence which do not comply with the Rules.

Rule 611 - Mode and Order of Interrogation and Presentation

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

Normally, the scope of cross-examination should be limited to the subject matter of the direct examination and matters affecting credibility of the witness. However, the court may allow inquiry into additional matters and, if so, examination is normally conducted as if on direct examination. When examining the witness, make certain that improper answers/unresponsive answers are stricken from the record. The common law confined cross-examination to matters testified to on direct examination so as to prevent an adversary from unduly disrupting the orderly presentation of the claim. Usually, if the area was beyond the scope of direct examination, the attorney would recall the witness as part of his/her case. In the spirit of judicial economy, a trial judge may allow cross-examination into "new matters" but such examination may not be conducted by way of use of leading questions. The trial judge also has the authority to limit or terminate cross-examination concerning matters which are purely collateral, only remotely probative, or beyond the parameters of permissible inquiry concerning credibility.

Questions on cross-examination are subject to objection if they are argumentative, compound or abusive. It is improper to ask a question on cross-examination without a good faith factual basis. It is important to always remember that the Appellate Division will almost always defer to the broad latitude of discretion exercised by the Trial Judge in particular absent a clear abuse of that discretion. (See commentary to Rule 611 (b). The Court has the right to permit leading questions to avoid confusion, appropriate clarify testimony or "otherwise bring out the truth in serving the cause of justice. Noberro Co. v. Ferro Trucking, Inc. 107 N.J. Super. 404 (App. Div. 1969).

Rule 702 - Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence, or to determine a fact at 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.

New Jersey's Rule 702 is different from the Federal Rule 702, which was amended in December 2000. The Federal Rule permits such opinion testimony from the "expert" provided: "(1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case."

The Federal Rule amendment (narrowing the scope of expert testimony) is in response to the leading United States Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, frig. 509 U.S. 579 (1993), which decision made trial judges the "gatekeepers" to exclude expert testimony which is unreliable in "novel theory" situations. Kuhmo Tire Co. v. Carmichael. 526 U.S. 137 (1999), clarified that the court's gatekeeper responsibility applied to all "expert" testimony, and not just testimony based in "science."

The court has discretion to exclude expert testimony that was not covered in written reports furnished in discovery.

Note: Landrigan v. Celotex Corp.. 127 N.J. 44 (1992). Here, an epidemiologist/biostatistician (admittedly not a physician) was deemed competent to render an opinion based upon statistical analysis rather than personal clinical examination of specific patients where the allegation was that asbestos exposure caused the plaintiffs decedent's adeno-carcinoma of the colon. It was held that such opinion should be admitted if, after a preliminary hearing, the trial judge concluded that the experts could testify and "identify" the factual basis for their conclusions, explain their methodology, and demonstrate that both the factual basis and the methodology are scientifically reasonable (127 N.J. 417).

In Landrigan. a physician who had never examined the victim was allowed to give an opinion on causation if the court was satisfied that his underlying assumptions were valid. That is, that the scientific literature accepts proof of causation based upon population studies, that the claimant sufficiently resembled those in the general studies, and that the claimant was not exposed to other agents which could have caused the pathology in question.

Rubanick v. Witco Chem Corp., 125 N.J. 421 (1991). This is a toxic tort claim involving the development of cancer, where it was held that a scientific theory of causation which has not yet reached general acceptance in the relevant scientific community may be found to be sufficiently reliable so as to be admissible if it is based on sound, adequately founded scientific methodology, involving data and information of a type that is reasonably relied upon by experts in the appropriate scientific field.

It is a rare situation where an expert medical witness will be precluded from testifying in workers' compensation. But it is important to appreciate the standards applicable to qualifications of this expert and the scope of his/her testimony, especially in "novel theory" situations.

Rule 703 - Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Note that Rule 703 is a liberal standard and an expert's conclusions can be based upon the expert's own observations, or other evidence submitted at the trial, or upon any other information which is of a kind normally relied upon by experts in the particular field in question. The requirement that an expert's conclusions be based substantially on evidence established at trial was formally abrogated in New Jersey in 1982.

New Jersey experts are given a great amount of latitude in considering information relevant to the formulation of expert's conclusions. However, the expert may not base an opinion unsupported by evidence or data. Such "net opinions" are inadmissible (Ripa v. Owens Corning Fiberglass Corp., 282 N.J. Super 373 App. Div. (1995) cert. denied 142 NJ. 518 (1995)). (Articles and statements made by other experts in the field may be the basis for an expert's opinion with respect to the cause of mesothelioma.) (See Net Opinion Section.)

Rule 704 - Opinion on Ultimate Issue

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

Rule 705 - Disclosure of Facts or Data Underlining Expert Opinion; Hypotheses Not Necessary

The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires.

Commentary - Rule 705

Generally, during direct testimony, the expert will describe the basis upon which he/she assessed the claim and formulated his/her conclusion. Failure to provide such testimony would make his/her testimony inadmissible on a net opinion basis. The idea behind Rule 705 is to allow the expert to explain his/her conclusion based upon summary and generalization without addressing all minutiae upon which he/she may have relied upon to base his conclusion, especially in a complex or fact intensive claim. However, Rule 705 authorizes the trial judge to require that the expert provide the underlying facts and data during his testimony, which the trial judge should do in situations where the expert is rendering opinions based upon either "novel or controversial methods."

The civil court rules generally require the trial expert to disclose the bases for his/her conclusions* inclusive of his underlying data and the results of any tests which were conducted in reaching his/her conclusions. This would normally be done in a discovery situation, and if there was a proper discovery order and the expert failed to provide the information which would allow for competent cross-examination, the expert's opinion can be stricken and/or not permitted to testify in the first place (see, for example, Mauro v. Owens-Corning Fiberglass Corp., 225 NJ. Super 196 (App. Div. 1988) (aff d O.B. 116 N.J. 126(1989)).

The purpose of Rule 705 is to permit the expert to "avoid undue minutiae" during direct examination.

Rule 803 - Hearsay Exceptions Not Dependent on Declarant's Unavailability

The following statements are not excluded by the hearsay rule: ...(c) statements not dependent on declarant's availability. Whether or not the declarant is available as a witness: (18) learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the

expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphic, shown to the jury.

Commentary - Learned Treatises

The rules allow cross-examination on publications so long as they are established as "reliable authority." Such "reliable authority" can be established by cross-examination of the witness; your own expert, or by judicial notice (where appropriate). The entire treatise is not evidential. However, a photocopied portion of the treatise for impeachment purposes can be received.

Where texts and articles are shown to be "reasonably relied upon" by experts in the field (either by testimony or judicial notice), they are deemed reliable and therefore admissible to either impeach a witness or as substantive proof. A learned treatise under Rule 803 (c) (18) maybe excluded if its potential for prejudice outweighs its probative value or if it is deemed to be cumulatively wasteful (see Rule 403). An expert can no longer block cross-examination based upon a "learned treatise" on the basis that he/she does not **personally** recognize it as "authoritative."

In order for a statement contained within a learned treatise to be admitted, it must be (1) relied upon by an expert either during direct examination or brought to his attention during cross-examination; (2) the work must be proven "reliable" by either testimony or judicial notice (it is not mandatory that the expert testify to its reliability and general acceptance); and (3) the text must be part of a published treatise, periodical or pamphlet on a subject of science or medicine.

Technically, the learned treatise rule is intended to supplement and/or clarify expert testimony, not to supplant it.

The Supreme Court addressed this issue in Jacober v. St. Peters Medical Center. 128 NJ. 475 (1992), where it urged the **increased** use of learned treatises and quoted Wigmore. who wrote, "Those who write with no view to litigation are at least as trustworthy, than one sworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the htigants" (Jacober at 495). The Jacober court felt that greater use of reliable learned treatises would improve "the ability of jurors to evaluate expert testimony" (Id. at 494), and distinguished meritorious claims and defenses from those claimed by "hired guns" (see, e.g., Rubanik v. Witco Chemical Corp., 125 NJ. 421, 453; **see also Fiore v. Consolidated Freight. 140 N.J. 452 (1995), where the Supreme Court countenanced the use of evidence through "scientific literature" to establish a petitioner's claim of a compensable carbon monoxide exposure.**

The court indicated that a treatise generally has great trustworthiness and reliability because of the scrutiny, criticism, review and revisions necessary to "find its way into publication" (Id at 495). The court found that "it certainly is illogical, if not actually unfair, to permit witnesses to give expert opinion based on folk knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them without the divergent opinions expressed in other reputable books" (Id. at 494-495). Therefore, the court concluded that an expert is only required to recognize the text as **"the type of material reasonably relied upon by experts in the field"** (Id. at 495) so as to allow a party to utilize it as "substantial evidence on both direct and cross-examination." These are arguments which can be utilized in support of your cross-examination based upon a specific medical article/publication/text/journal so long as the publication represents "reliable" authority, the compensation judge should liberally allow their use in cross-examination.

The court specifically noted that the policy behind the Rule is to help level the playing field with respect to relative resources by "permitting a party with less access to expert witnesses to advance an argument before a jury based on opinions set forth in learned treatises" (Jacober at 495).

The Jacober doctrine was followed in DaGraca v. Bell. 288 N.J. Super. 292 (App. Div. 1996), where plaintiff attempted to use the report of a task force of the American Psychiatric Association on cross-examination of defendant's expert witness. Plaintiffs expert had testified that the task force report was considered reliable by the medical professional. However, the defense expert testified that the task force report was not a rehable authority, and the trial court sustained defense counsel's objection thereby preventing plaintiff from utilizing the report. The Appellate Division reversed, stating that "the trial court's ruling in this regard is plainly incorrect and violates the learned treatise rule announced by our Supreme Court in Jacober v. St. Peters Medical Center. 128 N.J. 475, 498 (1992)" (DaGraca at 299). Here, the Appellate Division specifically noted that a text may be determined to be rehable by an expert *other than the one being cross-examined,* and may also be determined to be reliable by judicial notice. The reason for this is to avoid the strategic potential of one expert "at the outset [blocking] cross-examination by refusing to concede rehance..." (Id.). **The court emphasized that "reliable authority" is one which is merely representative of the type of research material relied upon by experts in the field, and that the purpose of the Rule is to preclude a witness from avoiding being questioned about "divergent opinions expressed in other reputable books" (Id. at 300 citing Jacober, 128 N.J. at 494-495).**

However, it is clear that a treatise may not be substituted for expert testimony (see Morlino v. Medical Center of Ocean County. 152 NJ. 563 (1998)). **The use of learned treatises is limited to those situations where there is an expert on the witness stand, and as such is available to either explain and/or assist in understanding the treatise. It is very important to appreciate that Rule 803(c) (18) requires that the learned treatise either be relied upon by the expert in his/her direct examination, or called to his/her attention during cross-examination before the learned treatise can be utilized. Such learned treatise cannot stand alone, nor is it a substitute for expert testimony.** See Tyndall v. Zaborski. 306 NJ. Super. 423 (App. Div. 1997).

Discovery of treatises utilized by the expert

Civil Rule 4:10-2(a) provides for disclosure of "any books, documents, electronically stored information or other tangible things," which stands for the proposition that discovery of treatises to be used during cross-examination should be permitted. Uniform interrogatory C: (3) 13 provides "If you or your expert intend to rely on or use **in any way** at trial any treatise, identify the treatise by title, author, and edition, and indicate the pertinent portions to be relied on or used at trial" [emphasis supplied]. Note: Uniform Interrogatory C(3) technically is for answering by defendant physicians in medical practice cases only and Uniform Interrogatory A(1) 10 (identical language) applies similarly to medical malpractice plaintiffs. The production of such information cannot be blocked on the basis that it is work product (see, e.g., Van Langen v. Chadwick, 173 NJ. Super. 517 (Law Div. 1980).

This rule can be referenced in a discovery application to the workers' compensation judge expert disclosure preferably prior to testimony. (obviously)