APPENDIX

Hypothetical Factual Background from 2018 Inns of Court

Monet's New Jersey Workers' Compensation Retainer Agreement

Miscellaneous Rules of Professional Conduct

Miscellaneous Provisions – NJ Administrative Code of Conduct for Judges of Compensation

Miscellaneous New Jersey Rules of Evidence

HYPOTHETICAL FACTUAL BACKGROUND FOR MOCK TRIAL

Claim CP 17-001 *James John Jones,* Petitioner *v. Waste Away Inc.* Respondent.

Petitioner was born on January 1, 1970. He is 5 foot 6 and weighs 225 pounds. He has been married for the past 17 years and has three daughters ages 15, 12 and 10 all of whom reside with his wife Jana and himself. The family was very close and while Petitioner himself was not "on Facebook," Jana was and her postings consisted almost exclusively of family events and her children's accomplishments, all of which both she and the Petitioner were extremely proud. She was proud of the Petitioner's athletic accomplishments and would occasionally post him bowling in a tournament or playing in a significant softball game. These were always candid photos as the Petitioner was not extroverted about himself and would never want to appear to be bragging.

The Petitioner graduated high school where he was an athlete as hereinafter described. Thereafter he was employed primarily as a truck driver most of his adult life until he became a waste removal "driver/specialist" for Waste Away Incorporated where he has been employed for the last 15 years, pridefully never having missed a day of work in his entire tenure except for a January 2, 2003 motor vehicle accident when he was out of work for three months after undergoing a C6-7 instrumented fusion surgery. He intended to return earlier for light duty, but such light duty was unavailable and he had no choice but to reluctantly accept temporary disability until he was released for full duty employment. That day could not have come quickly enough.

His primary care physician is Dr. Hope Moore who has been his primary care physician over the last 15 years. He has treated with Dr. Manish Knipp, D.C. periodically over the past 15 years. He has been a reasonably healthy individual all of his life with the exception of one specific accident/injury which occurred on his first day of work at Waste Away Inc. on January 2, 2003 when he was involved in a motor vehicle accident, which was the subject matter of Claim Petition 2003-1234 for which he received a March 1, 2006 Order Approving Settlement in the amount of 27 1/2% permanent partial total for the orthopedic and neurologic residuals of a disc herniation at C6-7 for which there was an instrumented fusion to decompress and stabilize a massive left sided extruded disc which was pressing on the left side of the cervical spine cord and causing left upper extremity radiculopathy and myelopathy. There was no third party claim filed. There was also minimal treatment for a lumbosacral strain which "resolved." The permanency award was confined solely to the cervical spine as the Petitioner had only minimal short term subjective complaints with respect to the low back with no diagnostic studies performed.

That claim was never reopened mostly because Petitioner's condition slowly improved because of his intense desire to "fully recover." The permanency reports are attached which set forth the relevant medical chronology and the diagnostic and operative findings. Relevant portions of the transcript are also attached (in an abbreviated overview form) with respect to the Petitioner's Order Approving settlement and his testimony as to his loss of function at the time of the Order Approving Settlement on March 1, 2006. Following the entry of that Award Petitioner did continue with periodic chiropractic management with Dr. Knipp primarily for "maintenance"

purposes. Most of the actual manipulation occurred in the general cervical and upper thoracic region although occasionally there was manipulation to the low back.

There were no compensable nor non-compensable intervening accidents or injuries until the Petitioner's accident of July 1, 2016 which is the subject matter of this Mock Trial. The relevant dates of chiropractic management and body parts involved are also attached as representing the records summary of Dr. Manish Knipp. Following entry of his Award on March 1, 2006, the Petitioner was able to resume his full-duty employment. He was not given any restrictions in functioning by his treating neurosurgeon (Dr. Samuel Greene.)

The Petitioner was always a very hard working, loyal, responsible and reliable employee who was well liked by both his co-workers and Respondent's management. Other than missing 3 months of employment following his above-referenced cervical spine surgery, he never missed a day of scheduled employment for any medical or personal reason until his compensable accident of July 1, 2016 which is the subject matter of this claim. It would not be an unfair characterization to describe him as having a "manic" work ethic.

He typically worked at least an 8 hour day, 5 days a week with many 10 hour days during the Summer and generally a 4 hour Saturday shift. He never complained about work and never declined overtime requests. No assignment was too tough or too demanding. He was a "go to" guy whenever anything important needed to be addressed on a priority basis. His hourly wage was $20.00 at the time of the compensable accident (and has been his hourly rate for the past three years) and his total earnings for the year for each of his last 3 years of employment were $62,000.00 in 2013, $62,500.000 in 2014 and $63,000.00 in 2015. As of July 1, 2016 he had earned $30,000.00. He was basically working the same routes and days of employment as he had over the past 5 years.

His job duties involved mostly driving various sized waste removal vehicles which were outfitted with mostly hydraulic arms which lifted almost all of the waste receptacles and products which were collected and transported during his employment. There were some routes where he had to perform some manual lifting and bending with respect to making special attachments for certain trash receptacles so that waste could be discarded. There was occasionally some manual lifting of residential trash which had to be emptied by hand which lifting was a relatively minor part of his job duties. This lifting could occasionally be up to 100 pounds on a repetitive basis for an entire day perhaps as often as 5 days per month. He had no limitations on his ability to perform any of his employment duties when his accident of July 1, 2016 occurred.

At the time of his accident, the Petitioner had been very engaged with his three daughters athletic careers all of whom were excellent softball players and swimmers. He actually coached their softball league teams. He was also an avid bowler and was a member of two leagues wherein he had an average of 200 and 205 respectively. Petitioner was right hand dominant and was taking no medication for any condition at the time of his compensable accident of July 1, 2016. He was not treating for any medical condition at the time of his accident. He occasionally saw his chiropractor but as far as the Petitioner was concerned, these periodic "manipulations" were part of his good health "maintenance" program designed to keep him as healthy as possible.

The only remaining residuals from his previous cervical spine surgery were that he had lost approximately 10 degrees of flexion, extension and bilateral rotation of his cervical spine movements. He would occasionally have some achiness in the C6-7 region of his neck with some occasional radiation into his occipital region and temples. He would experience these symptoms no more than a few times per month and they were never long lasting (at most a few hours). He estimated his cervical spine pain as basically non-existent during most of the time immediately prior to the accident but on the occasional brief periods that he experienced some symptoms, the pain was generally no more than a 3 on a 0-10 scale. Such pain occurred more so in cold or damp weather, generally no more than one or two days per month. He had no radiation of pain down either arm nor into either hand. He had no tingling in either hand. He had full grip strength. He had no problems with his sleep. He was taking no medication except perhaps a Tylenol or Advil on the rare occasion that he had some cervical symptoms. He had no lifting restrictions including overhead movements.

He was a member of the Respondent's "senior" softball team, ("The Wastenots") which was for players older than 40 years of age. He had been a member of the employer sponsored softball team since starting his employment with the Respondent. The softball team was a marketing vehicle for the Respondent for which he was encouraged to remain active by the Respondent especially since he was such a talented player. He played second base, batted fifth and had a .350 average in his last three seasons of softball. He had hit 20 home runs. This was a slow pitch softball league.

Just prior to the compensable accident, the Petitioner was very content with his life. He had a loving relationship with his wife and daughters. Everyone was healthy and happy as far as he was concerned. His daughters were athletes and doing well in school. The Petitioner felt things were going well at work and there had been some discussion that he might be in line for a promotion to an Operations Assistant Manager positon largely because of his well-known commitment to the company together with his general knowledge of all aspects of its operations. He was considered a "go-to" employee especially concerning any problems that needed "on the ground" insight and solution.

On July 1, 2016 at 4:30 p.m. (a day he was working an 8 hour shift that was to end at 5:00 p.m.), the Petitioner slipped on the steps of the Respondent's rear loading dock and fell forward down five stairs falling face first (striking his forehead) onto a concrete sidewalk in a somewhat twisted fashion with his arms forward trying to brace the fall with his hands causing a hyperextension of his neck, with his torso twisting and rolling forwards, ending up onto his back. He immediately felt knifelike pain in his neck and a "pop" in his low back just below the center of his beltline. There was no loss of consciousness but he was dazed and "saw stars" for a few seconds. No one actually witnessed his fall. He laid on the ground for approximately 3 minutes before he attempted to get up. A supervisor saw him getting up. The Petitioner did not appear steady. The supervisor asked him what happened and then had the Petitioner go "clock out" and go to the local emergency care. The Petitioner left work approximately 15 minutes early and drove directly to the emergency care which was only approximately 1 mile away. He was able to drive himself but before he left he was asked by his supervisor to fill out an accident report form basically stating that he "fell down steps of loading dock" as to the question "how did the accident happen?"

As to the question "what part(s) of your body (if any) are injured?" he stated "hurt my face, neck and back". (The Petitioner was not the most verbose employee of Waste Away, Inc.)

He arrived at the local "emergency care" at approximately 4:50 p.m. at which time he had X-rays performed of his neck, jaw and low back, all of which were painful and all of which were negative for any fracture or other findings other than the instrumentation from the previous cervical spine fusion. The emergency care records indicated that the Petitioner had suffered "facial contusions/abrasions" together with "cervical spine and lumbar spine pain". He was prescribed anti-inflammatories (800 mg Ibuprofen 3 x per day) and told to make an appointment with Back to Work Medical for any further assessment he felt he might need "if symptoms persist more than 3 days."

He was also given an "out of work note" for the next 3 days and was told to call his supervisor "first thing in the morning to advise he would be out of work." However, the Petitioner did not stay out of work and instead returned to work the following day (July 2) despite his symptoms persisting.

He performed his "regular duties" including driving the trash truck and performing other physical exertion placing repetitive strain on his spine. He developed increasing neck and low back pain. He was experiencing a low-grade headache with a "foggy feeling" with muscle tightening at the base of his skull. He had bilateral trapezius spasm with pain radiating from the base of his skull to his shoulder joints. He had moderate constant "achiness" in his low back without any radiation beyond his bilateral upper buttocks. By the end of the day on July 2, he felt he should see a doctor.

Rather than scheduling an appointment with "Back to Work Medical," he decided to see his own chiropractor [Dr. M. Knipp] as he was hopeful an adjustment or two would improve his symptomatology and he would not need any further formal medical treatment (Dr. Knipp coined this treatment as proprietary "man-knipp-u-lation"). After work on the evening of July 2, he went to the chiropractor's office. Dr. Knipp "manipulated" both his neck and low back and advised him he had a "significant" amount of spasm in both regions. Dr. Knipp stated in his records that the Petitioner had a "strain/sprain" injury impacting his paravertebral musculature in both the cervical and lumbosacral regions. He did not issue any type of "out-of-work" prescription nor did the Petitioner seek one. The last thing that Petitioner wanted to do was lose any time from work. The Petitioner underwent a total of five additional adjustments over the next 10 days. His symptoms remained persistent with the pain unabated and fluctuating with activity. The Petitioner has having a hard time getting and staying asleep. By the end of the first week, due to spinal pain and discomfort, Petitioner started taking over the counter Advil 200 mg 4 tablets at a time 3 times per day to no avail. The chiropractor referred him to see an orthopedic group for further assessment. At that time the Petitioner spoke to his supervisor, Joe Johnson, about his situation (downplaying the amount of pain he was experiencing) and asked if Mr. Johnson could schedule an appointment for him at Back to Work Medical Group.
Mr. Johnson referred him to the Respondent's workers' compensation administrator who was also the human resources administrator. She made arrangements for the Petitioner to see Back to Work the following day. The administrator had a copy of the accident report and an open file

for the Petitioner. The Petitioner gave her an updated history of his seeing his chiropractor without success. He denied any new accidents or injuries. An appointment was made for 9:00 a.m. July 17 at which time the Petitioner saw Dr. James Payne [a general orthopedic surgeon with the Back to Work Group]. Dr. Payne's nurse took a history of the accident inclusive of relevant past medical history which included a reference to the Petitioner's prior cervical surgery, his history of chiropractic maintenance inclusive of the most recent chiropractic sessions. Dr. Payne performed a routine clinical evaluation of Petitioner's neck and low back noting mild cervical and lumbar spine paravertebral spasm and tenderness, with "muscle spasm in his cervical and lumbar region. His neurological exam was "negative." His "impression" was "closed head trauma, neck and low back pain" with a likely diagnosis of "mild cervical and lumbar strains without radiculopathy and moderate cephalgia." He prescribed 4 weeks of physical therapy three times per week with modified duties including no lifting greater than 50 pounds to waist level, no lifting of 25 pounds overhead with no excessive bending, twisting, reaching, pushing or pulling. He also continued the anti-inflammatory prescription from Emergency Care (800 mg Ibuprofen 3 times per day) in addition to prescribing Flexeril for what he felt was spasm in both the cervical and lumbar spine areas. He had a set of X-rays performed in his office which he felt demonstrated a "mild straightening of the cervical and lordatic curvature/early stage mild osteoarthritis C4-7 and L3-5." The Respondent accommodated the modified duties so there continued to be no compensable lost time. This was a great relief to the Petitioner because he did not want to be completely out of work. This was not only a function of his abnormally high work ethic, but he was also fearful that his employer might terminate him if he had a work-related injury. He knew two previous co-workers who were terminated after sustaining work-related injuries over the past 2 years. This "concern" became persistent and progressively more serious over time.

Following the initial 4-week period of physical therapy the Petitioner was re-examined by Dr. Payne on August 10, 2016 at which time the Petitioner essentially presented the same overall symptomatology and clinical presentation. His complaint of cervical spine pain was 3-5/10 and with similar description of pain with respect to the lumbar region. Frankly he was underestimating his subjective pain perception for fear the doctor would diagnose him with a "serious" injury (which to him meant possible job jeopardy.) He didn't want to be "terminated employee #3." He felt his headaches were "slightly" improving both with respect to severity and frequency and were now occurring approximately once a day "for an hour or so" mostly while at work and "less so while at home."

The doctor prescribed another 3 weeks of physical therapy three times per week and gave the Petitioner encouragement that he was going to be "fine" stating that "soft tissue injuries can take a while." Petitioner felt very reassured by Dr. Payne who advised the Petitioner that he did not have a "serious" neurologic problem and that he would likely discharge him at the time of the next office visit after physical therapy unless there was some significant change for the worse in his overall symptomatology. He advised the Petitioner that he would likely prescribe a home exercise program with a focus on range of motion exercising and core strengthening which in part were already being conducted in a formal physical therapy setting. He also advised the Petitioner that he should attempt a weight-reduction program with a target of losing 50 pounds which should help "immeasurably" with his low back symptoms. He suggested that either his primary care physician could assist him in that regard or he could see a "nutritionist" through a

prescription from his primary care physician. He further advised the Petitioner the x-rays that were performed regarding his neck and low back showed some early arthritic signs but "nothing too serious." He said it basically comes with age and the wear and tear of life "especially given the hard work you've performed over the years. It takes its toll."
This last statement did not appear in his office chart.

The Petitioner returned on August 31 after completing 3 weeks of physical therapy with no significant change in either his symptomatology or his clinical presentation. The Petitioner was becoming increasingly concerned about the persistency of his symptoms but he was assured by Dr. Payne that he had nothing more significant than a "soft-tissue injury" and that "these types of minor spine injuries" sometimes take "a while" to "fully heal." Dr. Payne said the important thing was that he did not have any severe radiation of pain down his arms or his legs and once again he observed that some people simply "take longer" to fully heal than others. The doctor did not feel that he needed any further prescription medications and that he could now take over-the-counter Ibuprofen "as needed." He advised that the Petitioner should come back in if there was any significant "change in symptoms" because he was being discharged to a less formal home exercise program. The doctor asked the Petitioner if he felt he could safely perform his regular duties and the Petitioner unhesitatingly said "ABSOLUTELY, DOC!!!" The doctor said "then I am going to release you to return to work full duty – no restrictions." This was the happiest moment the Petitioner had experienced over the last two months. He shook the doctor's hand heartily and gave him a brotherly hug. The doctor smiled and said "good luck." The doctor thought "if only most of these comp patients were like Mr. Jones."

The Petitioner decided that he was going to continue with a more aggressive course of chiropractic management than his previous regimen of maintenance one time per month. He now wanted to start with a chiropractor for one time per week which he felt would be a good supplement to his home exercise and weight loss program, the combination of which he felt would accelerate his recovery. He was careful not to complain at work and he was concealing his symptoms at home so that his family would not unduly worry about him. He continued this regimen for the next 6 months.

Since he was no longer on modified duty, he was very careful in how he performed his employment duties so that he would not further aggravate either his neck or low back pain. He re-learned proper lifting techniques in his physical therapy (which he had already been taught following his cervical spine surgery and for which he was frequently reminded by his chiropractor). Bend the knees, keep the lifted weight near your body, etc. He basically continued to work in pain during most days. It was becoming his "new normal." He did not seek any further workers' compensation treatment as he strongly believed Dr. Payne when the doctor advised him that he would "get better" but it would "take time". He figured he couldn't be too seriously injured since Dr. Payne had probably seen thousands of similar injuries and if anyone knew about spines, it would be Dr. Payne, after all, he was a general orthopedist.. He decided to have his continued medical treatment managed by his primary care physician Dr. Hope Moore who he first saw on September 15, 2016. She had been his physician for the past 10 years. He saw her mostly on the rare occasions when he had a cold, the flu or an upset stomach. He provided her with a full history of his situation and basically advised that while it was initially a workers' compensation claim he was discharged by the authorized doctor and he

just wanted to get "fully healthy." He was hoping that she would be able to help him. He had the formal discharge note (with "full duty" return to work) from Dr. Payne and he further advised Dr. Moore that his situation was "no longer a workers' compensation claim" since he was actually discharged and therefore he wasn't entitled to any further workers' compensation benefits.

Dr. Moore performed a physical evaluation of him where she noted decreased range of rotational motion in the cervical spine by 40 degrees, 15 degrees lacking of flexion/extension with palpable bilateral trapezial spasm; palpable paravertebral lumbosacral spasm with decreased forward flexion of the lumbar spine by 30 degrees. The straight leg raising test was positive bilaterally at 50 degrees but there were no muscle, reflex, sensory or strength abnormalities in either the upper or lower extremities. Actually she was surprised at the clinical findings and given the relative minimal physical therapy he had received.

The Petitioner was having some difficulty sitting in a normal upright fashion and instead was seated with his buttocks forward so that his mid and upper back was leaning on the back of the chair. She recommended that the Petitioner be seen by a pain management physician for possible injection modalities regarding his "chronic cervical and lumbosacral pain." She also provided encouragement to the Petitioner that because his pain was "axial" in nature (except arguably for his positive straight leg raising test) and that there were no "obvious" signs of any "significant" neurologic dysfunction his prognosis was "very good" and he should make a "complete recovery." Again, this was well received by the Petitioner who at this point in time was now developing increasing "anxiousness" over the chronicity of his symptoms and the impact this may have on his ability to maintain employment with his present employer. However, he kept these negative thoughts to himself.

The Petitioner spoke to his wife about undergoing "narcotic injections" as suggested by Dr. Moore. They decided that he would not schedule any such evaluation for fear that the narcotics that were injected into his system would cause more harm than good. The Petitioner had a twin brother, (John James) who became addicted to prescribed opioids in connection with a serious motor vehicle accident and ultimately died of an overdose approximately four years prior on January 10, 2014. This was a devastating loss to the Petitioner. He was closer to his brother than anyone. His brother was a role model. He was an academic and an athlete. He was captain of his high school baseball and soccer teams. His brother's crippling spine injury was difficult for the Petitioner to accept and basically the injury ruined his brother's life. When his brother died, part of the Petitioner's spirit also died, but the Petitioner never let anyone know of the grief and pain which that loss caused. He felt that "he needed to deal with it like a man" (which meant to him, no visible signs of weakness.) He never saw a psychiatrist notwithstanding that he knew the loss had caused him a deep permanent void. He vowed he would never let anything like what happened to his brother happen to him.

The Petitioner was understandably loathe to take any narcotic medications especially when he felt that if he could lose some weight and keep exercising, eventually he would make a full recovery just like the doctors stated. Over the next few months he lost 25 pounds and exercised for a half an hour every morning before work and every evening after work. Unfortunately his overall condition did not improve. By December 15, 2016 Petitioner returned to Dr. Hope

Moore who was surprised to learn the Petitioner did not avail himself of the pain management she prescribed. However, she somewhat understood the dilemma Petitioner found himself in especially since she was also the primary care physician for Petitioner's deceased brother but she was not the physician who had prescribed the opioids to address his chronic pain presentation. That physician, Dr. Felix Fraunt, was convicted of insurance fraud regarding illegal opioid prescriptions. She felt that it may be that a MRI study of the cervical region and low back might be of some assistance in better assessing a more definitive diagnosis which might give some further insight as to treatment options but that she also continued to further assure the Petitioner that he would not require any type of spinal surgery. She also recommended that he consult with a workers' compensation lawyer to determine what further rights he may have under the workers' compensation laws. She did not feel that she was "a spinal "specialist" but that now the Petitioner had a "chronic problem" that may very well be characterized as a "pain disorder" but wouldn't likely require surgery and wouldn't take the Petitioner out of work so long as he could tolerate the pain. She felt the MRI studies might reveal some specific diagnosis that could be amenable to more "targeted treatments." She felt there may be some workers' compensation "options" available to him. She wrote a formal prescription for both a cervical and lumbosacral MRI study both of which were performed on December 20, 2016. (See attached MRI reports).

She saw the Petitioner on December 24 after reviewing the MRI reports. She advised that while she was not an "expert" on reading the actual films, according to the radiologist Petitioner basically had "multi-level mild degenerative disc disease and mild osteoarthritis of his spinal vertebrae" in both his neck and low back but that none of this was the result of his workers' compensation accident but rather genetics, aging and working hard for so many years.

She then went on to explain to the Petitioner that chronic spine pain was one of the more difficult problems that modern orthopedic medicine faces not unlike the challenge of the common cold to the primary care physician. She advised that there are only so many options available and once a condition is chronic it can be difficult to obtain a definitive solution other than the passage of time, a healthy lifestyle and a "little luck". She advised that unless he wanted to reconsider a pain management physician there wasn't anything further that she could offer other than advising him to be careful at work regarding lifting and to make certain that he maintained proper posture together with continuing his present regimen on weight loss together with range of motion exercising together with his core strengthening exercising. She suggested yoga or pilates might be helpful and maybe even acupuncture. She realized and placed in her office notes, that Petitioner's presentation was challenging and he was "struggling" with a "progressively debilitating condition." The Petitioner relaxed his chiropractic schedule to once per month and did consult with workers' compensation attorney Michael Monet, Esquire who filed a formal Claim Petition on his behalf (CP 2017-0000) on January 2, 2017.

Mr. Monet was a general practitioner who was beginning to develop workers' compensation as a more significant part of his practice. He advised the Petitioner that he had a "legit case" especially because of his prior serious neck problem which was "clearly" aggravated by his fall. He advised that the Petitioner probably had a "mis-diagnosed post-concussion syndrome" especially since he was still experiencing headaches and lightheadedness but that it may be "too late" to obtain any meaningful treatment. The Petitioner was relieved to learn that "misdiagnosis" was not necessarily medical malpractice as the Petitioner was not litigious and

actually respected the medical profession, even the Respondent's authorized treatment segment. Monet advised that the Petitioner had a "really bad strain" of both his neck and back but that he "probably" did not have any major problem since the MRI reports did not indicate any clear "disc herniations" which the workers' compensation law "basically required" for anyone's spine problem to be taken "seriously" under the law. However he also advised the Petitioner that "clearly" the workers' compensation carrier had "minimized" the seriousness of his problem especially for someone as hardworking and loyal as he was. Monet indicated that the carrier was taking advantage of his decency and his not complaining by having the most conservative physicians see him and not referring him to other physicians for a more thorough investigation of a course of treatment which would be of potential benefit to him. Monet advised that he would schedule a "permanency evaluation" and make sure that the Petitioner received the compensation that "he clearly deserved." [Clearly Mr. Monet was very fond of the adverb "clearly."] Mr. Monet stated it was "too early" to predict the "full value" of the Petitioner's case but there was "clearly no doubt" that he was entitled to additional compensation and he "guaranteed" Petitioner would be compensated. Otherwise Monet would never take the case since his fee was on a contingency "set by the judge" not in excess of 20% of the recovery. No recovery – no fee. That was his motto. His would be a "guaranteed" result. Monet further stated that it was extremely important for the Petitioner to pursue his permanency rights since his monetary recovery would protect him in the future and would provide him with further re-opening rights for future medical treatment and increased permanency benefits depending upon developments.

Monet asked Petitioner if he was on Facebook. Petitioner said he was not but his wife was. Petitioner thought this was an odd question. Monet explained how the insurance company would likely be searching for evidence about his functionality and Facebook was increasingly becoming a source of damaging information to many claims. Petitioner was mildly perplexed. He said his life was an "open book." He explained that his wife loved his immediate family (as did he) more than anything and the documentation and sharing of family happiness and joy (especially that he was now more limited) was vital to her happiness. Petitioner assured Monet that there used to be photos with Petitioner being athletic but those days are "long gone" and that the photos depict nothing more than a loving family trying to enjoy their life together. Monet was satisfied.

The Petitioner was very excited about the prospect of having further medical coverage for his conditions because he felt that this would be of great help to both himself and his family if he needed further medical treatment if his condition significantly worsened especially if he wasn't able to continue working (which was a thought which he was experiencing more frequently). He was having an increasingly difficult time performing the more physical aspects of his job but he did not want to let anybody know about the problems he was having because of his increasing concerns about his continuing employment potentially being at risk.

Following the filing of the Claim Petition, an Answer was filed in a timely fashion by the Respondent and "orthopedic" permanency evaluations were obtained by both parties with a full discovery exchange inclusive of all prior records in connection with the Petitioner's previous cervical spine surgery; the complete chiropractic records of Dr. Knipp and the complete primary care physician's records from Dr. Moore. Petitioner was seen by a Dr. Jules Irving on June 1, 2017 and Petitioner was seen by Dr. Monte Jordan on behalf of the Respondent on June 2, 2017.

At the first pre-trial listing on September 1, 2017, Petitioner's attorney was surprised to learn that it was the Respondent's position that the Petitioner was not entitled to any compensation whatsoever for permanency because he had nothing more than "minor" strains of the neck and low back and as such he was not entitled to any compensation under the statute for failing to reach the statutory threshold. The Respondent's basic argument was that the Petitioner "only" had 7 total weeks of physical therapy of a fairly benign nature and "successfully" completed the same (being released to "full duty" employment) with no compensable lost time, no change in income, no diminution of his employment duties after a brief "modified duty period" with no request for further treatment. If that wasn't enough, Respondent's attorney also advised that even if there was a de minimus permanency awarded, there was no pre-existing disability as to the cervical spine since the Petitioner was completely functional at the time of the accident and therefore there would be no 12d credit or certainly not the amount that was awarded in 2006. It was Respondent's further position that the Petitioner's gross weekly wage was $800.00 giving rise to a temporary disability rate of $560.00 (40 hours at $20.00 per hour). The Respondent's counsel Donald MacDonald was a highly experienced and well-respected Respondent's attorney with a strong medical background [he had been an emergency room physician before starting a legal career in workers' compensation]. He also had a reputation of "taking advantage" of less experienced Petitioner's attorneys. He strongly viewed New Jersey workers' compensation as essentially an "adversary system" wherein his responsibility was to pay as little as possible on every case he "defended" regardless of the facts or issues presented. He was extremely fiscally conservative. His firm's website tagline was "Quality workers' compensation representation should not cost you an arm and a leg!"

Petitioner's attorney was surprised at Respondent's ultra-conservative position on this case. MacDonald was a no-nonsense attorney who clearly knew comp and had been practicing workers' compensation exclusively for the last 25 years. He received the first New Jersey Supreme Court Workers' Compensation Law Attorney certification whereas Monet had handled only 25 workers' compensation claims in his entire career. He actually thought that this was one of his "better" non-surgical cases especially with respect to an individual as credible and hardworking as this Petitioner was. He had thought of the case as a "slam dunk" permanency case which he valued in the area 10% compensable cervical permanency "stacked" on the 27 ½% cervical award and at least another 10% with regard to the low back making the overall award 47 ½% apportioned 37 ½% cervical, 27 ½% pre-existing and 10% permanent partial disability for the low back. MacDonald advised Monet that the absolute "most" that he would be willing to consider was a Section 20 payment equivalent to a 10% rating (60 weeks of compensation totaling $13,920.00.) He advised that he would recommend a $15,000.00 Section 20 figure to also take care of some part of fees and costs which he considered to be a "very generous" offer. That was also his "final offer." He further suggested that if the Petitioner's attorney had any questions he would certainly be amenable to discussing the same with the Judge of Compensation who he was "certain" would feel that this was a "fair offer" in view of the paucity of findings with respect to any compensable "demonstrable objective medical evidence" of permanent loss of function. He said Petitioner's subjective complaints were irrelevant since there wasn't sufficient objectivity to meet the first prong of Perez without which there could be no permanency. He stated that normally he doesn't consider Section 20 permanency when the Petitioner is still working for one of his clients, but he would make an exception here since the Petitioner seemed to be a "nice guy" according to his insured and Monet, while inexperienced,

was conducting himself civilly and respectfully which he appreciated. Monet said he would have to speak to this client although, "respectfully" he felt the offer to be "a little light."

Following the September 1, 2017 pre-trial "conference" [without judicial involvement] the Petitioner's attorney contacted one of his colleagues concerning the Section 20 settlement offer and the circumstances of the claim. Monet did not glean any real insight into the "value" of his claim and therefore decided to have a meeting with the Petitioner personally to discuss the options including communicating the offer. At an office meeting on November 1, 2017 Monet explained the situation to the Petitioner and advised the "only way" the claim was going to be resolved would be by way of a one-time lump sum Section 20 settlement in the gross amount of $15,000.00 which he suggested normally would be a "substantial" payment for a "soft-tissue" injury. The Petitioner was stunned at this suggestion especially since it seemed to be completely contradictory to everything Monet had previously indicated to him about the strength of his claim and the importance of the future protection which was one of the main reasons why the Petitioner decided to get representation in the first place. The Petitioner then advised his attorney that he had been "suffering" with his situation for 16 months with modern medicine offering him absolutely nothing in terms of any type of meaningful relief. He did not want to end up like his brother. Surgery was not even a suggestion (and even if it was, it is doubtful the Petitioner would undergo the same). He explained, partially tearfully, that he had completely failed at any type of meaningful physical rehabilitation despite doing everything that his chiropractor and primary care physician was suggesting. He even underwent additional "core physical therapy" suggested by Dr. Moore from June 1, 2017 through September 1, 2017 at a cost of $5,000.00 paid entirely by his wife's ERISA based insurance coverage. The therapy was provided by "Ultimate Recovery Fitness" which Dr. Moore felt was by far the finest rehabilitation/fitness facility in the area. Petitioner had provided a complete and accurate medical history at the time of his application. Monet never requested these records as the "unauthorized" program did not help and the bill was paid by a collateral source. No formal lien was filed by the carrier. Monet had not previously appreciated the depth of Petitioner's suffering and was moved by the sincerity and severity of Petitioner's description. Monet felt compelled to try to help but didn't really know what to do.

Petitioner then advised that he had also been referred to an "alternative" medicine physician who felt he was a candidate for enrollment in New Jersey's Medicinal Marijuana Program. He saw Dr. Mello one time only (September 10, 2017). He said it was by far the longest he spent with any physician. She reviewed all his diagnostic studies and put him through an extremely complex clinical evaluation. He felt this was an extremely exciting potential development. She even inquired about his emotional status and psychiatric history. He explained his opioid aversion and the reason he felt as he did.

He had never previously used marijuana recreationally or otherwise, but two of his closest friends knew of two different people who had benefitted from medicinal marijuana and Petitioner felt that this was at least an option that held out at least some potential for improvement in the quality of his life. Nothing else had even remotely helped. He realized that there was no insurance coverage yet for this type of treatment and therefore he would have to pay out of pocket to avail himself of this "state of the art" treatment. However Petitioner was rejected by the program. He was advised he didn't have a serious enough problem to meet the

program's original pre-requisites. Also, he did not have the funds for long term treatment. He was devastated about these developments. This ineligibility of availing himself of a possible non-opioid pain management solution to his problem was a difficult pill to swallow.

The Petitioner asked Monet whether this medicinal marijuana treatment could be obtained under the workers' compensation law since clearly the workers' compensation injuries were the reason he needed this potentially helpful treatment. Monet advised that it was not likely, but the issue could be raised at Trial if his treating doctor would state the need for the same. Frankly, Monet had no experience regarding medicinal marijuana, nor had he ever filed any motion for medical and temporary disability for that matter. He thought medicinal marijuana was limited to a few extremely "debilitating" conditions and even then it was strictly limited.

Monet advised that since this was "unauthorized" treatment and that there had not been any "request for treatment" the carrier would not be paying for any "medicinal marijuana". Petitioner then asked whether or not Monet could make a request for treatment and he could probably get a prescription and report from Dr. Mello who had told him she would be happy to help him in any way she could. It was Petitioner's understanding from Dr. Mello that he had both a qualifying "anxiety" and an "intractable chronic musculoskeletal pain disorder." Monet advised the Petitioner that while this would likely be a futile undertaking as there would be "no way" that the workers' compensation carrier would voluntarily provide medicinal marijuana probably even if it was recommended by its own authorized physician. Monet advised he believed while at the present time the issue was very controversial, perhaps within a few months there could be better legal precedent or even a change in the law for specific legalization. He said there are thousands of injured workers in the "same boat" and sooner or later something "had to give." Petitioner asked if the need for ongoing future medical treatment could be part of his permanency case and Monet advised he did not see why that could not occur especially if it was going to be some type of future chronic pain management that was only going to be "palliative." He advised that that issue would probably be placed in part as part of the trial if he could not otherwise resolve the claim. Petitioner advised that he did not feel that a $15,000.00 payment could possibly be adequate especially if he "needed" medicinal marijuana for a condition which he felt was "entirely" a workers' compensation disability. Monet then inquired further about Petitioner's "anxiety" diagnosis and whether he had seen a psychiatrist. Petitioner explained that all he knew was that he told Dr. Mello he wasn't sleeping due to his pain and that he was worried about his future. Monet amended the Claim Petition to add "anxiety" or "chronic musculoskeletal pain disorder." He notified Respondent's attorney to expedite scheduling a psychiatric evaluation even though there was no formal psychiatric treatment. Both neuropsychiatric evaluations were performed on February 14, 2018.

Monet further advised MacDonald that the matter would have to be tried as the $15,000.00 Section 20 offer was rejected.

A formal e-mail was sent to MacDonald requesting medicinal marijuana and psychiatric treatment and MacDonald responded that his client would not consider, under any circumstance, the authorization of medicinal marijuana which it felt was a violation of federal law. The carrier was not going to knowingly commit a federal criminal offense. MacDonald further advised that it was his position that if the Petitioner was seeking treatment then the claim was not "ripe" for a

permanency consideration and an appropriate motion would have to be filed which would be appealed in the highly unlikely event that a judge found in the Petitioner's favor. Monet then further consulted with the Petitioner and concluded that rather than making an application for medicinal marijuana medical treatment at this time, his preference would be to have the Petitioner's medical marijuana claim addressed at the time of the permanency trial as part of the need for ongoing "palliative" care and to bolster the claim by way of a psychiatric assessment. Monet also saw the potential for compensable psychiatric disability "stacked" on prior depression with the compensable disability resultant from both Petitioner's chronic pain and anxiety, but also ironically (in part) resulting in a significant depression resultant from not being eligible for the "illegal" medical marijuana program and thereby losing an ever-shrinking chance of his getting better. He thought this might even be a "novel" theory of liability that could gain him enhanced stature with MacDonald.

It was ultimately agreed at the time of the next pre-trial conference (at which time both sides were ready to proceed), that permanency remained contested. Respondent had no interest in violating federal law and would not even need to obtain an evaluation in opposition to the opinion of Dr. Mello and that as an accommodation to the court it would allow Dr. Mello's report in order to expedite a disposition of the claim which Respondent felt had de minimis overall value.

At the next pre-trial listing the judge conducted a brief pre-trial conference at which time MacDonald advised the judge that the matter will have to be tried as the Petitioner has rejected a $15,000 Section 20 settlement offer and the parties were otherwise ready to proceed. MacDonald further stated he did not believe any further discussions would be fruitful. He advised the court that both sides are ready to execute the pre-trial memorandum with the main issue being the nature and extent of any compensable permanency with each side having two permanency evaluating physicians who would testify. The Honorable Benjamin Warren Wrightman had been a member of the New Jersey Workers' Compensation Judiciary since January 2, 2014. He was not yet tenured. He also had three lists per cycle with MacDonald who he felt was a very competent workers' compensation attorney. If MacDonald indicated a case must be tried there was usually a bona fide basis for doing so. Judge Wrightman would not normally "pre-judge" a case. He would let the proofs unfold organically. He was not particularly enamored with the 3-week cycle system for trial dates as he felt that it was not the ideal method of having a case decided, but he was not one to "rock the boat." He was an avid supporter of the Justice James H. Coleman, Jr. New Jersey Workers' Compensation American Inn of Court which he felt was an excellent organization and a valuable learning tool for attorneys and judges alike. (He also correctly believed it was the longest named Inn in the nation.)

He was appreciative of preparedness, confidence, professionalism, civility, collegiality and candor to the tribunal. MacDonald had tried five cases to a conclusion before Judge Wrightman and won all five of them. All five were on entitlement to permanency benefits. He always felt that MacDonald had a strong understanding of the issues presented in any case and normally was very efficient with respect to both his direct and cross-examination. He got to the point and focused on the relevant issues presented.

On the other hand, Judge Wrightman had virtually no experience with Monet, other than his conduct of pre-trial conferences. Monet had never tried a workers' compensation claim nor even started one. Monet was the first one to admit that he was relatively inexperienced in workers' compensation but he was a certified civil trial attorney and was considered a competent personal injury attorney. Judge Wrightman had a reputation for being fair and intellectually honest. These were judicial virtues which Monet held in the highest of esteem and therefore liked appearing before Judge Wrightman.

On April 5, 2018, the pre-trial memoranda were executed with the trial to start June 4, 2018. There was a scheduling order signed by the parties. Opening statements and Petitioner's direct and cross-examination would be on Trial Day 1; Petitioner's evaluating orthopedist Trial Day 2; Petitioner's evaluating neuropsychiatrist Trial Day 3; Respondent's evaluating orthopedist Day 4; Respondent's neuropsychiatrist Day 5; closing arguments Day 6. He expected a complete exhibit list prior to the doctors' testimony and confirmed with the parties that there was no surveillance or other fact witnesses being presented. Monet had not agreed to wage and rate. There was an agreed stipulation that the issue of Petitioner's potential need for medicinal marijuana could be addressed by the court primarily during the permanency trial on the basis that Respondent's position was as a matter of law that this could not be ordered by the court under any circumstance and it might as well be addressed now rather than later in the case or on a re-opener. The Respondent required a finding that the same would be stipulated as "palliative" and not "curative" and Monet agreed. Additionally Judge Wrightman required an exchange of the permanency reports at the time of the execution of the pre-trial memo which did occur. However attached to each of Respondent's paper copy permanency reports was a covering letter inadvertently attached by MacDonald's secretary which covering letter basically set forth Respondent's "position" to his experts with respect to the claim with a clear recommendation for findings expected or lack thereof by the Respondent. The covering letter to each physician was not discovered by Monet until the night before he was first preparing for cross-examination of Petitioner's orthopedic expert which was the very first time he actually even looked at the expert's report recognizing the covering letter which presumably was not meant for his file but also was correspondence that he felt was fertile ground for cross-examination as to the experts' absence of objectivity relative to his opinions concerning compensable disabilities. The handling of this issue will be part of the Mock Trial. Have fun.

NEW JERSEY WORKERS' COMPENSATION RETAINER AGREEMENT

I, James John Jones, ["client"] on this ____ day of ____, 2018, as client, hereby retains the Law Firm of Michael Monet and Associates [hereinafter "law firm"] to represent me with regard to my workers' compensation case as a result of my accident on July 1, 2016 while in the employ of Waste Away, Inc. I agree that the law firm is engaged solely to prosecute my workers' compensation claim as above referenced.

A. SCOPE OF RETENTION

My retention of the law firm is solely in connection with my workers' compensation claim as above referenced. I hereby acknowledge that the law firm has not been retained to investigate, examine or represent me for any other claims or actions whatsoever, including the possibility of any claims or actions arising from or related to my workers' compensation accident. This specifically includes but is not limited to, any claims for negligence, employment/labor rights, FMLA, pension, medical negligence, Social Security, wage and hour, and/or short-term/long-term disability claims.

For any other such engagement of legal services, a separate request and written agreement must be executed with the law firm. I also acknowledge that the law firm has not rendered any legal opinions to me as to the merits or lack of merits for any other potential claims which I may have. The scope of the law firm's representation is solely limited to my workers' compensation claim and nothing more unless otherwise expressly agreed upon by the law firm by separate written Retainer Agreement.

It is understood and agreed that I will be responsible to the law firm for a counsel fee which will be set by the Division of Workers' Compensation in accordance with NJSA 34:15-64 which allows an attorney to receive a fee up to 20% of the recovery for any and all compensation

benefits obtained as a result of the law firm's efforts. This specifically includes temporary disability benefits, medical treatment paid for and provided by the Respondent, permanency benefits [both partial and/or total] and/or any lump sum benefits paid pursuant to the provisions of NJSA 34:15-20. It is further understood and agreed that subject to the Court's discretion, I will be responsible to reimburse the law firm for any out-of-pocket expenses it incurs in the handling of my case. If there is no recovery, I owe the law firm nothing other than reimbursement of incurred costs in connection with the prosecution of my claim.

I agree that the law firm reserves the right to make decisions about my case without specific prior consultation with me, including but not limited to the selection of medical experts, trial strategy, and manner of this position including acceptance of reasonable Section 20 disposition regarding the resolution of any contested issue.

I understand the law firm does not warrant any specific outcome of my case but it will use reasonable efforts to address the workers' compensation issues raised by my claim.

In the event there is a disagreement concerning whether my case should be tried or resolved by a reasonable settlement offer, the law firm will not be obligated to try my case without my advance paying any and all anticipated expert costs. My failure to front such costs under those limited circumstances, will give the law firm the right to terminate the relationship for cause. I specifically agree that the law firm would then have the right to seek an attorney's lien on my file in the full amount of settlement offer which may have made in the event that my claim is prosecuted by other counsel. I understand that I have a right to discharge the law firm at any time and for any reason. However, I further understand the law firm will then have the right to assert an attorney's lien on my file for the quantum merit value of its services rendered

on my behalf up until the date of discharge together with upfront reimbursement of any costs which were expended by the law firm as a condition of any such discharge made by me.

I understand that the law firm is not ethically permitted to make any type of advance payments to me in connection with my case nor is it permitted to loan me any money in anticipation of repayment from the proceeds of my settlement or recovery.

The law firm is under no obligation to undertake an appeal of any denial of benefits to me. The law firm's services are terminated with the entry of any Award of compensable permanency which is awarded by the Division of Workers' Compensation, the entry of a Section 20 settlement or a dismissal of my case. The law firm has no obligation to accept my claim for any future Application for Review or Modification. The law firm has no obligation to represent me at any time following an Award of permanent total disability benefits regarding any future issues regarding that claim. Any such future engagement will be done by separate retainer.

I acknowledge and understand that if my claim results in an award of permanency benefits in any amount, I only have two years to obtain further authorized medical treatment and/ or file an Application for Review or Modification of my claim. Otherwise, I am permanently barred by the Statute of limitations. I understand that after I receive my permanency award I will not be receiving any future notice from the law firm of the time limits to reopen my claim. Such recordkeeping of the re-opening time limits is my sole responsibility.

B. STATUTE OF LIMITATIONS

There are limitations dates [deadlines] which apply for initiating and prosecuting claims. I have been apprised that the workers' compensation deadlines for actions may be different than other potential claims which are not part of this agreement for which there may be different sets of deadlines as a matter of law. For example, if there is a potential third-party claim or

negligence claim, then as a general rule in New Jersey, there is only a 2-year statute of limitations that runs from the date of the accident. However, there can be shorter time periods and notice requirements, especially with respect to any public entity, which can be applicable depending on the nature of the third-party case especially involving governmental entities which are defendants. Each type of any such claim requires a review of the specific legal deadlines that would apply. It is again emphasized that the law firm is not being retained for any potential collateral claim at this point in time. I also agree and acknowledge that I have not been given any opinion as to the statute of limitations on any other potential claims which I might have. I am not in any way relying upon the law firm to represent me concerning the substantive viability of any collateral claim and/or the time limitations necessary to prosecute such a claim. I have been further advised that any such claim should be examined and investigated as quickly as possible following any incident which gives rise to any potential such claims in order to identify all parties, preserve critical evidence and meet notice and/or statute of limitations deadlines. If I am referred to any other attorney I realize I am not obliged to retain any such attorney and can select an attorney of my choosing if there is any type of cause of action I have against any such referred attorney. I will not seek to hold the firm liable.

I fully understand that once the applicable statute of limitation time period has elapsed, a claim is permanently barred by operation of law.

I am aware that if I successfully prosecute a third party negligence claim arising out of the same accident as my workers' compensation claim, Section 40 of the Workers' Compensation Act establishes a lien which the workers' compensation carrier/respondent have against my third party recovery which must be determined and repaid to the carrier out of my third party proceeds.

I have been advised and agree that in order to have a productive law firm-client relationship, there must be reasonable cooperation by me and reasonable communication from me. I agree to have such a relationship. I have been advised and agree that at any time during the handling of my case, the law firm may recommend that my claim should be discontinued for good based upon sufficient reasons including but not limited to an unlikely chance of success on the claim's merits in their judgment and/or the absence of available workers' compensation coverage to satisfy the claim should it be successful. Other potential reasons include a breakdown in the attorney-client relationship with an absence of adequate cooperation by me. Under any of these enunciated circumstances if I reject the law firm's recommendations to discontinue my claim, I hereby agree that the law firm may withdraw as my attorney pursuant to this agreement and I will be given due notice of the law firm's withdrawal, which requires permission of the Court, if I have not retained substituted counsel. If I obtain substituted counsel and/or represent myself in such circumstances, I agree the law firm will have an attorney's lien based on the value of their services rendered while they represented me and reimbursement which amount shall be determined by the Division of Workers' Compensation. I also agree that the law firm reserves its right to terminate its services immediately in the event I have made any misrepresentation concerning any material issue concerning my case. I further agree that there will be no unauthorized recordings of any communication with any member of the law firm and breach of this provision is a basis to terminate the attorney-client relationship.

I agree that any such unauthorized recordings cannot be used in any other forum for any purpose including but not limited to the adequacy of the firm's legal representation in connection with my workers' compensation claim without the law firm's approval.

I have been advised that in the event there is a failure of communication which makes it difficult for the law firm to prosecute my claim, the Division will mark my claim "not moved" and an Application will be filed to dismiss my claim for a lack of prosecution. If this occurs and an Order is signed by the judge, I understand I will only have 1 year within which to reinstate my claim for good cause shown. In the event I fail to contact my attorneys in such a situation, I represent that I am aware of these time constraints and my attorneys can provide me notice at text to my last documented cell phone number, last documented landline telephone number, last documented email address and/or last documented postal address [pursuant to registered mail return receipt requested]. If I have not made contact with my attorneys for any 1-year period, I understand that I run the risk that my claim has been dismissed and may not be able to be reopened unless I have filed an application to reinstate my claim for good cause shown within 1 year from the date my claim was dismissed.

I agree to keep in future contact with the law firm and promptly advise them of any e-mail, residence or telephone number changes.

C. FILE RETENTION AND DESTRUCTION

At the conclusion of my case, the law firm will retain its file for a period of 7 years. We may store some or all the materials in a digital format. In the process of digitizing documents, original paper documents provided by client will be returned to client. Copies of paper documents provided by client will not be returned unless client requests they be returned in writing. After paper documents are digitalized, the law firm will destroy the paper counterpart except as noted above. After the 7-year period, the law firm will destroy all file materials unless client notifies the law firm in writing that client wishes to take possession of them before the time expires. This clause also applies to any file materials being held or stored by any third-

party vendor. The law firm reserves the right to charge fees and costs associated with researching, retrieving and copying and delivering such files or any portions of the files to me.

I understand that if any other insurance company, Medicaid or Medicare has paid for any benefits for medical conditions that I am claiming to be the subject of my workers' compensation claim, they may have a lien against my workers' compensation claim and recovery. It is solely my responsibility to both notify the law firm of the existence of any and all such liens and to make certain their interests are satisfied in my case. The law firm has no responsibility for any liens that may surface at any time or for any reason if I did not make the law firm aware of all relevant information regarding the amount, dates or nature of the lien.

Any provision of this Retainer Agreement which is deemed invalid by a court of jurisdiction does not invalidate any other provision of the Retainer Agreement. By signing this document the client acknowledges that he has had an opportunity to have all of his questions answered concerning any aspect of this Retainer Agreement had he chosen to do so and that client fully understands the parties' mutual rights and obligations pursuant to this Retainer Agreement. It is further understood that this Retainer Agreement supersedes any and all oral remarks which may have been made at any stage of the proceedings as the written Retainer Agreement takes legal precedence in terms of the parties' agreement with respect to any issue about the attorney-client relationship.

JAMES JOHN JONES, CLIENT MICHAEL MONET, on behalf of Law Firm

_____ _____

By signing this copy I also acknowledge receipt of a copy of the Agreement.

QUESTIONS:

What is the purpose of a workers' compensation retainer agreement? Should it attempt to address as many future issues as possible in the attorney-client relationship?

Evaluate this retainer in terms of the issues it addresses. What, if any modifications would you make. Are all of the provisions enforceable? Are all of the provisions advisable? Is there any provision(s) missing regarding any relevant issue which should be addressed?

Can written retainer agreements supersede any RPC or other legal duty which imposes a greater obligation on the attorney than is contained in the retainer agreement?

MISCELLANEOUS RULES OF PROFESSIONAL CONDUCT [RPCs]

Rules of Professional Conduct hereinafter [RPC].

RPC 1.1. Competence

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

RPC 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d) and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ... a lawyer may counsel a client regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.

RPC 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

RPC 1.4. Communication

(a) A lawyer shall fully inform a prospective client of how, when and where the client may communicate with the lawyer.

(b) A lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information.

(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

RPC 1.8. Conflict of Interest: Current Clients; Specific Rules

(3c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving a lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

3(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

RPC 1.16. Declining or Terminating Representation

(a) Except as stated in Paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the rules of professional conduct or other law;

(2) The lawyer is discharged.

(b) Except as stated in Paragraph (c), a lawyer may withdraw from representing a client if:

(1) Withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) The client has used the lawyer's services to perpetrate a crime or fraud;

(4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) Other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practical to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. No lawyer shall assert a common law retaining lien.

RPC 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant .....

RPC 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

RPC 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority and the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable medial measures; or

(5) Fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duty stated in Paragraph [a] continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

RPC 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(g) Present, participate in presenting or threaten to present criminal charges to obtain an improper advantage in a civil matter.

RPC 3.5. Impartiality and Decorum to the Tribunal

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate ex parte with such a person except as permitted by law;

(c) Engage in conduct intended to disrupt the tribunal; or

(d) Conduct or have discussions with a judge or other adjudicated officer, arbitrator, mediator or other third-party neutral [hereinafter "judge"] about the judge's post retirement employment while the lawyer [or a law firm with or for whom the lawyer is a partner, associate counsel or contractor] is involved in a pending matter in which the judge is participating personally and substantially.

RPC 4.1. Truthfulness in Statements to Others

(a) In representing a client, a lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

RPC 4.4. Respect for the Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall:

(1) Promptly notify the sender.

(2) Return the document to the sender and if in electronic form, delete it, and take reasonable measures to assure that the information is inaccessible.

A lawyer who receives a document or electronic information that contains privileged lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. A lawyer shall

(1) Promptly notify the lawyer whose communications are contained in the document or information.

(2) Return the document to the other lawyer and if in electronic form, delete it, and take reasonable measures to assure that the information is inaccessible. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

RPC 5.3. Responsibilities Regarding Non Lawyer Assistance

With respect to a non lawyer employed or retained by or associated with a lawyer:

(a) Every lawyer, law firm or organization authorized by the court rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of non lawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

(b) A lawyer having direct supervisory authority over the non lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or ratifies the conduct involved;

(2) The lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) The lawyer has failed to make reasonable investigations of circumstances that would disclose past instances of conduct by the non lawyer incompatible with the professional obligation of a lawyer which evidence a propensity for such conduct.

RPC 5.4. Professional Independence of the Lawyer

Except as otherwise provided by the rules of court:

(a) A lawyer or law firm shall not share legal fees with a non lawyer ...

RPC 7.1. Communications Concerning a Lawyer's Service

(a) A lawyer shall not make false or misleading communications about the lawyer, lawyer services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) Compares the lawyer's service with other lawyers' services, unless

[i.] The same of the comparing organization is stating,

[ii.] The basis for the comparison can be substantiated and

[iii.] The communication includes the following disclaimer in a readily discernible manner "no aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or

4. Relates to legal fees other than:

[i] A statement of the fee for an initial consultation;

ii. A statement of the fixed or contingency fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

RPC 7.2. Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, Internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

(b) A copy or recording of an advertisement or written communication shall be kept for 3 years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their web sites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis and retain this information for 3 years.

(c) A lawyer shall not give anything of value to a person for recommending a lawyer's services, except that:

(1) A lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule;

(2) A lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and

(3) A lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

RPC 7.3. Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of Paragraph b.

(b) A lawyer shall not contact or send a written or electronic or other form of communication to a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) The person has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) The communication involves coercion, duress or harassment; or

(4) The communication involves unsolicited direct contact with a prospective client within 30 days after a specific mass-disaster event when such contact concerns potential compensation arising from the event; or

(5) The communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by Section 4 of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided that the letter:

[i] Bears the word "advertisement" prominently displayed in capital letters at the top of the first page of the text and on the outside envelope unless the lawyer has a family, close personal, or a professional relationship; with the recipient. The envelope shall contain nothing other than the lawyer's name, firm, return address and "**ADVERTISEMENTS**" prominently displayed and

[ii] Shall contain the party's name in the salutation and begin by advertising the recipient that if a lawyer has already been retained, the letter is to be disregarded; and

[iii] Contains the following notice at the bottom of the last page of text "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision" and

[iv] Contain an additional notice, also at the bottom of the last page of text, that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, PO Box 970, Trenton, New Jersey 08625-0970. The name and address of the attorney responsible for the content of the letter shall be included in the notice.

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and responsible fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

RPC 7.4. Communication of Fields of Practice and Certification

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in Paragraphs b, c and d of this Rule ...

(d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been improved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

RPC 7.5. Firm Names and Letterheads

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "legal services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization ...

RPC 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

RPC 8.3. Reporting Professional Conduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6 ...

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) Engage in a professional capacity, in conduct involving discrimination [except employment discrimination unless resulting in a final agency or judicial determination] because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm. See also conduct for judicial employees.

CANONS 1 – 8

Canon 2 – Protection of Confidential Information

(a) A court employee may not disclose to any unauthorized person for any purpose any confidential information acquired in the course of employment, or knowingly acquired through unauthorized disclosure by another ...

(b) Every court employee shall report confidential information to an appropriate authority within the judicial system when the employee reasonably believes that that information is or may be evidence of a violation of law or of this Code ...

Canon 3. Avoiding Actual or Apparent Impropriety

A court employee shall reserve high standards of conduct so that the integrity and independence of the courts may be preserved and shall avoid impropriety or the appearance of impropriety.

Canon 4. Avoiding Actual or Apparent Conflicts of Interest

A court employee shall regulate outside activities to minimize the risk of conflict with court-related duties. Generally a conflict of interest exists when the court employee's objective ability or independence of judgment in the performance of his or her job is impaired or reasonably may appear to be impaired. Outside employment or other activities, whether related to judicial administration or not, must not involve the court employee in conflict of interest nor appear to do so, nor encroach on or conflict with judiciary-related duties.

MISCELLANEOUS PROVISIONS – NJ ADMINISTRATIVE CODE OF CONDUCT FOR JUDGES OF COMPENSATION

N.J.A.C. 12:235-10.1 Causes for discipline or removal

(a) A judge may be disciplined for:

1. Violation of the Code of Conduct for Judges of Compensation;

2. Willful misconduct including misconduct which, although not directly pertaining to judicial duties, brings the office into disrepute or is prejudicial to the administration of justice;

3. Failure, neglect or inability to perform judicial duties; or

4. Failure to notify the Director when the judge has reason to believe that a medical report, medical bill for services, or medical finding has been altered, falsified, or withheld by a licensed physician, dentist, chiropractor, osteopath, optometrist, physical therapist, medical technician, attorney, or a representative of an insurance carrier or self-insured.

12:235-10.5 Establishment of Commission on Judicial Performance

N.J.A.C. 12:235-10.11 Judicial independence and discipline process

The methods used by the judge, but not the result arrived at by the judge in any case, may be the cause for discipline of the judge. In order to foster and encourage independence, claims of error shall be left to appellate review and not subject to discipline.

CODE OF CONDUCT FOR JUDGES OF COMPENSATION *

The Code of Conduct for Judges of Compensation is intended to establish basic ethical conduct standards for judges of compensation. The Code is intended to govern the conduct of these judges of compensation and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct. This Code is based upon the revised New Jersey Code of Judicial Conduct, adopted by the New Jersey Supreme Court to be effective September 1, 2016.

* See also Rules Governing the Courts of the State of New Jersey Code of Judicial Conduct: Appendix to Part 1 (Canons 1-7) which form basis for New Jersey Administrative Code. The Canons are rules of reason. They should be applied consistent with constitutional requirements, statutes, administrative rules, and decisional law and in the context of all relevant circumstances. The Code is to e construed so as not to impinge on the essential independence of judges in making judicial decisions. The Code is designed to provide guidance to judges of compensation and to provide a structure for regulating conduct.

The text of the Canons is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

CANON 1: AN INDEPENDENT AND IMPARTIAL JUDICIARY IS INDISPENSABLE TO JUSTICE. A JUDGE THEREFORE SHALL UPHOLD AND SHOULD PROMOTE THE INDEPENDENCE, INTEGRITY AND IMPARTIALITY OF THE JUDICIARY.

Rule 1.1 Independence, Integrity and Impartiality of the Judiciary

A Judge shall participate in establishing, maintaining and enforcing, and shall personally observe, high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved. This Code shall be construed and applied to further these objectives.

Rule 1.2 Compliance with the Law

A Judge shall respect and comply with the law.

COMMENT:

Violations of this Code, or violations of law or N.J.A.C. 12:235 that reflect adversely on a judge's honesty, impartiality, temperament or fitness constitute a failure to respect and comply with the law.

CANON 2 A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

Rule 2.1 Promoting Confidence in the Judiciary

A Judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

COMMENT:

[1] Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny. This principal applies to both the professional and personal conduct of the judge. A judge must

therefore accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

[2] Actual impropriety is conduct that reflects adversely on the honesty, impartiality, temperament or fitness to serve as a judge.

[3] With regard to the personal conduct of a judge, an appearance of impropriety is created when an individual who observes the4 judge's personal conduct has a reasonable basis to doubt the judge's integrity and impartiality.

Rule 2.2 External Influences on Judicial Conduct

Judges shall decide cases according to the law and facts. Judges shall not permit family, social, political, financial or other relationships or interests to influence their judicial conduct or judgment.

CANON 3 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTY

Rule 3.4 Decorum

A Judge shall maintain order and decorum in judicial proceedings.

Rule 3.5 Demeanor

A Judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall not permit lawyers, court officials, and others subject to the judge's direction and control to display impatience or discourtesy or to detract from the dignity of the court.

Rule 3.6 Bias and Prejudice

(A) A judge shall be impartial and shall not discriminate because of race, creed, color, sex, gender identity or expression, religion/religious practices or observances, national origin/nationality, ancestry, language, ethnicity, disability or perceived disability, atypical hereditary cellular or blood trait, genetic information, status as a veteran or disabled veteran of, or liability for service in, the Armed Forces of the United States, age, affectional or sexual orientation, marital status, civil union status, domestic partnership status, socioeconomic status or political affiliation.

(B) A judge shall requires lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice on the bases specified in Rule 3.6(A), against parties, witnesses, counsel or others. This section does not preclude legitimate advocacy when the listed bases are issues in or relevant to the proceeding.

(C) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice or harassment on the basis specified in Rule 3.6(A), and shall not permit court staff, court officials or others subject to the judge's direction and control to do so. This section does not preclude reference to the listed bases when they are issues in or relevant to the proceeding.

Rule 3.8 Ex Parte Communications

Except as authorized by law or N.J.A.C. 12:235, a judge shall not initiate or consider ex parte or other communications concerning a pending or impending proceeding.

COMMENT:

[1] This rule does not prohibit a judge from appointing an independent expert in accordance with the rules of court.

[2] The proscription against communications concerning a proceeding generally includes communications with or from lawyers and other persons who are participants in the proceeding. It does not preclude a judge from consulting with other judges on pending matters, provided that the judge avoids ex parte discussions of a case with judges who have previously been disqualified from hearing the matter and with judges who have appellate jurisdiction over the matter, or from consulting with court personnel whose function is to aid the4 judge in carrying out adjudicative responsibilities.

[3] In general, settlement discussions, discussions regarding scheduling and a judge's handling of emergent issues are not considered to constitute ex parte communication in violation of this rule.

Rule 3:14 Responding to Judicial and Lawyer Misconduct

(A) A judge who receives reliable information indicating a substantial likelihood that another judger has committed a violation of this Code shall take appropriate action. A judge having knowledge that another Judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(B) A judge who receives reliable information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) Acts of a judge in the discharge of disciplinary responsibilities under this rule shall be absolutely privileged.

Rule 3:16 Disqualification

(A) A judge shall hear and decide all assigned matters unless disqualification is required by this rule or other law.

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

(1) Personal bias, prejudice or knowledge, Judges shall disqualify themselves if they have a personal bias or prejudice toward a party or a party's lawyer or have personal knowledge of disputed evidentiary facts involves in the proceeding.

(3) Personal Relationships. Judges shall disqualify themselves if:

(d) The judge has a social relationship with a party or a lawyer for a party of a nature that would give rise to a partiality or the appearance of partiality.

(C) A disqualification required by this rule is not subject to the parties' waiver. The judge shall, however, disclose to the parties any circumstance not deemed by the judge to require disqualification but which might be regarded by the parties as affecting the judge's impartiality.

(D) A judge shall address disqualification or issues of recusal and disqualification promptly upon recognition of grounds which would give rise to partiality or the appearance of partiality.

(E) A judge shall not be automatically disqualified upon learning that a complaint has been filed against the judge with the Director/Chief Judge of Compensation, litigation naming the judge as a party, or any other complaint about the judge by a party. If, however, the judge concludes that there is a reasonable basis to question the court's impartiality, the judge may recuse himself or herself. A judge shall promptly disclose to the parties to the pending litigation that a complaint has been filed or made.

COMMENT:

[1] Judges must be available to decide the4 matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity and impartiality of the judiciary, unwarranted disqualification may bring public

disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial or unpopular issues.

[2] In determining whether disqualification is necessary, the applicable standard is as ofollows: Would a reasonable, fully informed person have doubts about the judge's impartiality. DeNike v. Cupo, 196 N.J. 502

MISCELLANEOUS NEW JERSEY RULES OF EVIDENCE

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 in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." See State v. Kelly, 97 NJ 178, 208 [1984] and Landerigan v. Celetex Corp., 127 NJ 404, 413 [1992]. The criteria includes requirements that "(1) the intended testimony must concern a subject matter that is beyond the Ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable and [3] the witness must have sufficient expertise to offer the intended testimony."

The expert must have "scientific, technical, or other specialized knowledge" such that the proffered expert testimony would assist the trier of fact in making its determination. As stated in State v. Chatman, 156 NJ Super., 35 [App. Div.] Certif. Den. 79 NJ 467 [1978] the court stated that the modern tendency is to permit expert testimony wherever it would help the jury decide the ultimate issue of the case. See also Jobes v. Evangelista, 369 NJ Super. 384, 399 [App. Div.] Certif. Den. 180 NJ 457 [2004] expert testimony is also admissible in non-jury cases if it would be helpful to the trier of fact. [See NJDYFS v. Z.P.R., 351 NJ. Super. 427, 439 [App. Div. 2002]. Expert testimony will only be admissible if it "will assist the trier of fact to understand the evidence or determine a fact in issue." The court has said "the true test of admissibility of [expert] testimony is ... whether the witnesses offered as experts have peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience **any [emphasis supplied]** aid to the court or jury in determining the questions at issue." Regarding the qualifications of experts, the New Jersey Supreme Court has held that the expert must be "suitably qualified and possessed of sufficient specialized knowledge to be able to express [an expert opinion] and to explain the basis of that opinion." For a witness to give expert testimony it must be shown that the witness has certain skills, knowledge or training in a technical area or that one is not common to the world. It is generally within the discretion of the trial court to determine whether to qualify an individual as an expert and that decision should normally be conclusive unless "clearly shown to be erroneous" meaning that the decision should only be disturbed on appeal if necessary to "prevent manifest error or injustice". However, notwithstanding the discretion of the trial court to reject expert testimony, the same is to be used with "great caution in light of the strong policy exhibited by NJRE 402 in favor of the admission of all relevant evidence."

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 in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." The requirements for medical experts are often more stringently applied especially if the issue regards a very specific specialty area.

Before this rule, the testimony of an expert witness in the form of opinion or inference had to be limited to those opinions which the judge found to be "based primarily on facts, data or other expert opinion established by evidence at the trial". The new broader rule allows the expert to base an opinion or inference on facts or data which he perceived or which were "made known to him at or before the hearing" and they need not necessarily be admissible into evidence if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject". This allows the expert opinion to be based on facts derived from either the expert's personal observations, evidence admitted at the trial or data relied upon the expert that is not necessarily admissible in evidence, but is a type of data normally relied upon by experts in forming opinions on the same subject. However, an expert's bare conclusions" which are not supported by factual evidence or other data are inadmissible and represent "net opinions". The rule mandates that an expert must "give the why and wherefore" of his or her opinion rather than the mere conclusion. While an expert is permitted to use hearsay evidence to confirm an opinion which he reached on an independent basis, the inadmissible evidence must merely be of the type "reasonably relied upon by experts in the field". However, courts have warned that expert testimony should not be allowed to become a "vehicle for the wholesale introduction of otherwise inadmissible evidence". This issue can arise when a party attempts to bolster the testimony of its experts by citing to opinions of non-testifying doctors. See Agha v. Feiner, 198 NJ 50, 64 2009] where the Supreme Court explained that the rule should not be "anchored to the reason for its existence". In Agha, the plaintiff tried to demonstrate that he had a herniated disc by eliciting through testimony of an anesthesiologist and a chiropractor that a non-testifying radiologist had diagnosed it through an MRI scan. In rejecting the plaintiff's argument that it was permissible under Rule 703, the court cited three main concerns:

(1) Violation of the hearsay rules;

(2) Permitting experts to testify beyond their expertise; and

(3) The prevention of adequate cross-examination.

Rule 703 in and of itself does not provide an independent basis to admit a medical report into evidence even when the expert has relied on it. See Day v. Lorenc, 296 NJ Super. 262, 267 [App. Div. 1996] where defense's attempt to introduce evidence of a medical report prepared by a doctor who had treated the plaintiff because the plaintiff's expert had relied in part on the report when forming his opinion. Because the report did not agree with the plaintiff's theory, defense tried to introduce the report. The trial court relied on Rule 703 and admitted the report into evidence based upon the plaintiff's expert's reliance on the report but the Appellate Division reversed, concluding that the expert could rely on the report and refer to it at trial under Rule 703, but the report itself could not be admitted under an independent basis for admissibility. The opinion can be based upon inadmissible evidence but the inadmissible evidence remains inadmissible.

Rule 704. Opinion on Ultimate Issue

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

Rule 705. Disclosure of Facts or Data Underlying 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's discretion it is so required." While expert testimony is normally subject to "expansive" cross-examination, the scope of such examination generally rests within the sound discretion of the trial judge and that discretion will not be interfered with "unless clear error and prejudice are shown". Both the facts and reasoning on which an expert's opinion is based may be questioned. Credibility of the expert can be attacked by the use of learned treatises. Until July 8, 1991, an expert was open to cross-examination upon a treatise only if he admitted that the treatise was a "recognized and standard authority on the subject involved"; however, upon the adoption of NJRE 803c[18] a text qualifies as a "reliability authority" if it represents the type of material reasonably relied on by experts in the field. In making this determination, focus must be on what experts in fact rely upon rather than what court things they should rely upon. [See Jacober v. Saint Peter's Medical Center, 128 NJ 475, 486 [1992]]. If a text's reliability is in doubt, the trial court should conduct a NJRE 104[a] hearing either before or during the trial to determine whether the text qualifies. Where the expert who is being cross-examined does not acknowledge that a particular treatise is a reliability authority, the court's determination may be based on judicial notice or testimony from other experts. According to the Jacober court, this "avoids the possibility of the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness". Id. at 490. Hypothetical questions are clearly permitted so long as the questions "include facts admitted or supported by the evidence". Townsend v. Pierre, 221 NJ 36, 58-59 [2015].

Rule 401. Definition of Relevant Evidence

"Relevant evidence" means evidence having a tendency and reason to prove or disprove any fact of consequence to the determination of the action." Two things must be established to satisfy the rule. The first is that the evidence presented must have a "tendency and reason to prove or disprove" a fact [i.e. probative value]. The second is that the fact to be proved or disproved must be a "fact of consequence" in the matter. There must be a logical connection between the proffered evidence and a fact in issue. The test for relevance is broad and favors admissibility.

The courts have repeatedly stated that if the evidence offered makes the inference to be drawn more logical, then the evidence should be admitted unless otherwise excludable by a rule of law." See Lozano v. Frank DeLuca Const, 178 NJ 513, 536 [2004] regarding relevant considerations as to whether or not a Petitioner had a reasonable belief that a Respondent

"compelled participation in a recreational activity". Such evidence could be the degree to which the employee was required in the past to perform tasks unrelated to employment, the reluctance of the employee to question the employer in the presence of a customer and whether the employee was paid for the time in question.

Rule 402. Relevant Evidence Generally Admissible

Except as otherwise provided in these rules or by law, "**All relevant evidence is admissible.**" It has been said that Rule 402 is the keystone of the Rules of Evidence.

Rule 404. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Wasted Time

Except as otherwise provided by these rules or other law, irrelevant evidence may be excluded if its probative value is substantially outweighed by the risk of [a] undue prejudice, confusion of issues or misleading the jury or [b] undue delay, waste of time or needless presentation of cumulative evidence. The court has discretion to find that even admissible evidence's probative value is substantially outweighed by any of the factors annunciated in the Rule 4 exclusion and various case law supporting the concept that the possibility of undue prejudice may be reduced if the challenged evidence is to be heard only by a judge.