

OVERVIEW TO 2019-2020 CURRICULUM

This year's curriculum takes off from last year's hypothetical/mock trial which forms the basis of this year's fully scripted pre-trial, trial and post-trial episodes. The scripted trial is designed to focus on trial strategies, trial skills, evidence issues, common objections, trial preparation, pre-trial conference and the attorney/client relationship. However, there is a large measure of ethical/professional issues grafted into the script which hopefully will make this year's overall curriculum thought provoking, educational and entertaining.

First we start with "The Sliding Scale of Professionalism and The Ten "C's." We will consider legal professionalism in terms of relative reputation, both individually and collectively. What is each of our reputations? How do we see ourselves? How do others see us? How professional is our practice area? How can we improve?

The Ten "C's" are designed as a brief way of discussing some of the components of professionalism that happen to begin with the letter "C." Our introductory general professionalism discussion, focuses on highly regarded professionalism and its components since this is a core component of the American Inns of Court. It will serve as a springboard to see how the characters of the scripted trial measure up.

Before the first pupil meeting, each group should assign two members to discuss each "C" so that it shouldn't take more than two meetings to get through the professionalism-specific part of the curriculum.

We then turn to "Competence, Professionalism and the Trial of James Jones....You Can't Win Them All" which includes five scripted scenes. Each scene will have different group members assigned to play each character and to address the questions posed after each scene. If everyone prepares their assignments well in advance, everyone should have a chance to make a quality contribution to the success of the program which in turn should make for an optimal overall educational experience. Good luck!

INTRODUCTION

These facts are based on last year's hypothetical which is included in the appendix. The same hypothetical applies to the Petitioner's personal, employment and medical history. There is no difference. The medical exhibits are all the same with the exception of some dates. This year's scripted version has various significant differences regarding what happens during the course of Petitioner's case once Monet is retained. Please disregard all interactions between the Petitioner, Monet, MacDonald and Wrightman as to last year's hypothetical because the script focuses on all such interactions as part of a new "record" for our analysis. Remember to consider professionalism and ethical issues throughout each scene. Think about what you would do differently as each person in each scene.

Justice James H. Coleman, Jr.
New Jersey Workers' Compensation
American Inn of Court
2019-2020

COMPETENCE,
PROFESSIONALISM AND THE
TRIAL OF JAMES JONES

YOU CAN'T WIN THEM ALL....

INNS OF COURT – 2019 – 2020

CHARACTERS:

Petitioner	James John Jones
Petitioner's Wife	Jana Jones
Petitioner's Lawyer	Michael Monet, Esquire
Respondent's Lawyer	Donald MacDonald, Esquire
Judge:	Honorable Benjamin Warren Wrightman
Court Reporter	Mia Teller
Petitioner's Pain Management Physician	Dr. I.M. Mello
Petitioner's Primary Care Physician	Dr. Hope Moore
Petitioner's Chiropractor	Dr. Manish Knipp
Petitioner's Evaluating Orthopedic expert	Dr. Jules Irving
Petitioner's Evaluating Psychiatric expert	Dr. Alan D. Drake
Respondent's Evaluating Orthopedic expert	Dr. Monte Jordan
Respondent's Evaluating Psychiatric expert	Dr. Sigmund Voyyd

SCENE ONE *

INTRODUCTION

Petitioner, James John Jones' first meeting at the Office of Michael Monet. (Here contrary to last year's hypothetical, Petitioner has completed all of his treatment before seeing Monet).

Monet's background is that he graduated law school in 2006 and was licensed in both New York and New Jersey. Initially he previously practiced as a general practice attorney solely in New York for approximately 12 years with a smattering of plaintiff personal injury work and petitioner workers' compensation claims. He had three New York personal injury trials all of which were no-causes. He had no New York workers' compensation trials. During that period he had three ethics complaints filed against him and was reprimanded once. His uncle, Morgan Monet, Esquire also had a general practice law firm in New Jersey which concentrated in personal injury with a small workers' compensation component. Three years ago, his uncle became seriously ill and Michael Monet felt that there was an opportunity to relocate to New Jersey for a "fresh start" since his New York practice was floundering and he liked the idea of a practice solely involving contingency fees. He felt he could avail himself of a "ready-made" practice." It was his intention to concentrate in personal injury and workers' compensation and make an "instant fresh start" by being the only other attorney in his uncle's practice. Morgan died within six months after Michael joined the firm. Michael took over the practice and the firm was renamed "Michael Monet and Associates" even though he was a sole practitioner. He has been practicing in New Jersey for 3 years. He is not certified in any practice area. He has had one New Jersey personal injury trial (which was no-caused, making his overall trial record 0-4.) He has never even started a New Jersey workers' compensation trial. He has an inventory of 25 workers' compensation cases, 10 of which are still part of his uncle's previous inventory.

After the Petitioner was injured on July 1, 2016, he had a co-worker named Jack Brown who told him that he really needed to see a lawyer. He said Monet was "really good" and helped him with his previous motor vehicle accident PI claim. He almost got policy limits of \$150,000 even though Brown thought the other driver was not at fault. The Petitioner investigated Michael Monet & Associates by checking his website which indicated that Monet "specialized in personal injury and workers' compensation" and that he had "15 years of experience."

Monet's legal assistant, Leslie Greene had already communicated with the Petitioner, obtained a relevant history, completed a workers' compensation form in addition to preparing a retainer agreement, Claim Petition and authorizations in anticipation of this first meeting.

** There are some changes in the facts as presented in last year's hypothetical in order to expedite and focus upon new issues being raised in the scenes. Where there are discrepancies, the scenes control.*

The pupil members assigned to play characters in each scene should also be responsible for answering the questions raised at the end of each scene and remember to keep in mind the Ten "C's" relevance as the plot thickens.

SCENE ONE - DIALOGUE

Michael Monet - MM

James Jones - JJ

Leslie Greene – LG

MM: Pleased to meet you Mr. Jones. I am Michael Monet, the Senior Partner of this firm. I took over the firm three years ago from my Uncle Morgan who had been in practice for 40 years. The Monet firm has a longstanding reputation for getting the “MO-NAY” in personal injury and workers’ compensation claims, if you know what I mean.

JJ: (chuckles)

MM: You have already met my legal assistant, Leslie Greene. She is part of our workers’ compensation team and she will be working closely with me on your case. Can I get you something to drink before we get started?

JJ: No, Mr. Monet, I am okay. It is nice meeting you also. Is this your only office?

MM: Yes, why do you ask?

JJ: Well, as you know your former client, Jack Brown who is my friend and co-worker, referred me to you because he was very impressed with your legal skills in his car accident case from a few years ago. He didn’t know whether you did workers’ compensation. He was in New York back then. I was relieved when I checked on your website which indicated that you were a workers’ compensation specialist with over 15 years of experience and especially that you practiced in both New York and New Jersey. When I saw the name “Michael Monet & Associates,” I just assumed that this was a big law firm. My bad I guess.

MM: Well, it depends on what you mean by “big.” I always believe in quality over quantity. This is a personal injury law firm. The client always comes first. We’re a very successful boutique firm where we exclusively handle only personal injury and workers’ compensation cases. Our team works closely with one another every step of the way in every case we handle to give our clients what we feel is the best representation and results possible. For example, Jack Brown had a very difficult case. Ethically I am not really permitted to go into it, but I am sure you know he was seriously injured. He was alleged to be intoxicated at the time of his accident, yet he still ended up with almost \$100,000.00 in his pocket after all was said and done, and as you know he made almost a complete recovery.

JJ: Yeah, I know all about that. The driver of his car was also intoxicated and it was a really crazy situation because the bus that struck both of them had a driver that had been also drinking. That was a really bad situation.

MM: Yes. It was a real legal mess. Believe me I know since I represented the driver of his car also. Real tough, tough case. But that is what we do. We get results even in the toughest cases and we do whatever it takes.

JJ: As I explained to Ms. Greene, I have only had one other lawyer in my whole life which was for a previous workers' compensation accident when I had to have neck surgery. I didn't like the process at all. You know – being forced to treat with their doctors and all. Left a real bad taste in my mouth. Then when I wanted to get back to work within two weeks after my neck surgery, the workers' compensation insurance carrier said that I had to stay out of work for almost THREE MONTHS until I was able to go back full duty. Didn't like it at all.

MM: Why didn't you go back to the lawyer who represented you in that case?

JJ: Well, he was a friend of the family and he really didn't specialize in workers' compensation, at least not like you do. He only dabbled in it. There was a point where I thought I might be losing my job and he really couldn't help me in that regard. I had to go to my union and get that straightened away. That was a really scary time for me. I almost lost my job. My job is more important than anything to me and I can't afford to be in the hands of anyone but someone I can 100% trust and who can 100% protect me - - especially if the insurance company starts to give me a hard time about working. A number of guys at work told me that when workers make workers' compensation claims nowadays, the employer finds a way to fire them. That really, really scares me. If anything, the main reason I am here is not so much the money, but protection. Protection for me. Protection for my family.

MM: Look, it's completely illegal to fire anyone who gets hurt at work. That's called "retaliation" and no employer is permitted by law to retaliate against anybody who makes a compensation claim. Workers' Compensation is intended to protect people who get injured at work. That's why you are here. That is why it is called **workers'** compensation. Plus, when the insurance company sees my firm involved, they are going to make sure that your employer doesn't mess with you.

JJ: Have you ever had one of your client's get fired after they got hurt at work?

MM: Absolutely not. Never happened, never will. Trust me on that one.

JJ: Wow.- That's impressive. That's really a huge relief, Mr. Monet. I mean you've been doing this for 15 years and in two states! I figure you probably have seen thousands of compensation cases and I would have thought at least a couple of your clients would have been given a hard time.

MM: Never happened, never will. Sure sometimes the employer will give you a hard time and sometimes that can't be handled directly under workers' compensation, but if they ever fire you just because you got hurt at work as a retaliation, then that is completely illegal and we will go after them for big time damages. They don't call me "MO-NAY" for nothing.

JJ: Did you ever have to go after an employer for retaliation damages?

MM: Never had the need to. Don't overstress yourself on this issue. The insurance company wants you to be afraid so that you won't fully pursue your case. They don't even tell you about permanency benefits and there is no doubt that based upon what I have seen from the information Leslie got from you, you have got a great workers' compensation case. In my hands, it is going to be a slam dunk. You had a previous serious neck injury where you have already received a 27 ½% rating and really I believe you should have gotten a higher rating.

JJ: Really?

MM: Yeah, in my hands it would have been at least a 35% rating which would have been a lot more money than 27 ½%.

JJ: It doesn't sound like it would be that much higher.

MM: Trust me it would be. Any time that you get a rating of permanency more than 30% of your body, the rates really go up and the insurance companies really hate to pay those big bucks. They call it the "hump." They really don't like to pay over the hump, but here we have them right where we want them. Right in the crosshairs – and I'm a sniper who doesn't miss.

JJ: Yeah, that's cool, but I got a lot better after I got my award. I mean that was a long time ago and I swore to God that I was going to do everything that I could to get right back to how I was before that last accident happened. I didn't get all the way back, but I got really close. I mean, Leslie didn't ask it, but I was considered the star of our softball team and I was a really good bowler. Almost pro level. I have always been a really good athlete. (pause) But not as good as my brother. He was a beast. He was my role model with everything.

MM: What's he doing now?

JJ: He died. He got into a really bad car accident and ended up being on opioids and got addicted to them and overdosed. When he died it was the worst day of my life. (sobbing)

MM: I am really sorry to hear that. Leslie – get Mr. Jones some Kleenex.

JJ: Thanks Mr. Monet. You really seem caring...compassionate. I'm sorry I lost it there for a moment.

MM: That's because I care more than anything about my clients and once you become our client, we will be caring more than anything for you.

JJ: That's what I need.

MM: You seem really upset about your brother's passing. Did you have to go see a psychiatrist or anything like that when he passed away?

JJ: No. A man should be strong enough to deal with his problems. I feel very strong about that. I will never take narcotics. I don't even drink alcohol. All I do is kill myself at work to provide for my family. They mean more than anything to me. My wife and three children are everything. I simply can't afford to have the injury that I have right now. Things haven't really been going too well as I explained previously to Ms. Greene. I am here because the workers' compensation doctor who treated me for my neck and back injuries said that what I have are sprains and strains and that they are going to take a long time to heal. He said that I am going to be okay but it is just going to take a while. He let me go back to full duty employment and that was that.

MM: I know, the insurance company doctors are really conservative. They don't like to do too much to actually treat you unless a bone is sticking out of your skin if you know what I mean? I mean they go to a medical school and get all that education to treat patients, then they get paid by the insurance companies to provide as little treatment as possible. It's all about saving money, not helping anyone. Crazy business.

JJ: Actually Dr. Payne was really nice. He seemed really caring and I actually gave him a hug when he told me I could go back to work. He said no one ever seemed happy about that. I am hoping I will get better but so far I haven't, and that's what also worries me.

MM: I understand. But you also had a head trauma. Per Leslie's notes it wasn't even treated as a concussion. Could be a non-diagnosed post-concussion syndrome but probably not worth a malpractice suit.

JJ: I'm glad about that since I don't want to sue Dr. Payne.

MM: So, how are you doing?

JJ: Well, as you know, I decided to lose a little bit of weight that I had put on. The doctor stressed that I had to get better core strength to help my back. I also had MRI studies. Fortunately they just showed some degeneration and my previous surgery. I guess when you work really hard for a long time, your spine starts to break down. Its just wear and tear. Anyway, I was really kind of understating my symptoms to Dr. Payne because I was afraid that if I was disabled for too long, I would lose my job and that they would fire me. Then there WOULD be a problem.

MM: Please don't keep worrying about that. No Judge is going to put up with you getting fired just because you got injured at work.

JJ: Are you really 100% sure about that?

MM: Absolutely sure. It is only if you can't do your job because of the injury then you could lose it, depending on what your union contract says, but if you can go out there and do your job, even in pain, you are always good to go.

JJ: You have no idea what a relief that is. But still, the bottom line in all of this is that I really haven't been well, not at all. I have really bad pain in my neck and my low back. It doesn't stop. It is just not getting any better. My primary care doctor is so worried about me. She wanted me to see a pain management physician. I told her that I wouldn't be doing any pain management, but finally I went to see Dr. Mello. She was also worried about me. She felt that I really needed injections. I am just not going to do that. She said that modern medicine is no good at curing bad spines that are really painful and don't need surgery, and my only options are to take heavy drugs, get injections or live with it. I am not going to take any narcotics and I am not going to get any injections. I guess I have to live with it and just keep hoping Dr. Payne is right about it taking time. You know, I actually pray every night that I get better or at least that I don't get worse and I pray that I don't get fired. Praying is my medicine and therapy at times.

MM: Would you be interested in getting a second opinion with a really good spinal doctor to see if you needed surgery and what your options are?

JJ: Dr. Payne assured me that I don't have a surgical problem and I am staying with that. I don't want surgery. If I got surgery I would be out of work and then I could lose my job because I would be losing too much time from work. Who knows how any surgery would go? My previous surgeon actually told me I was lucky that it was my first neck surgery because once you already have surgery, the next one doesn't usually go as well. Mine was great. Other than being out those three months when I was initially hurt at work, I have never lost another day from work, never. It did take a while to get fully back, but I accomplished my mission. As I told your legal assistant, I was always the "go to" guy at work. There wasn't anything I couldn't do. I had tons of overtime. Now after this accident, I am back at work and only working 40 hours a week. No OT. I can't participate in any sports. My wife and family have no idea how much pain I am going through. I am kind of suffering silently so that I don't make them worry too much, but I am worried. I am worried every night when I go to bed. That's why I pray. It eases my worries just a little. I still actually sweat at night worrying about how I am going to get through the next day. On days where I have to do extra lifting, it gets really hard but no one really knows what I am going through. Other than my doctor, you are really the only other person that I have been completely honest with.

MM: Have you tried medicinal marijuana?

JJ: Well, I did try to get that, but couldn't do it. I wasn't eligible. I didn't have a serious enough problem or I didn't qualify. I don't know the details of the state's rules and regulations. That was 9 months ago. You know, you've got to jump through a bunch of medical and legal hoops. I mean it is marijuana after all. I've never smoked pot-- never took drugs. Everyone says medicinal marijuana is a miracle drug. I don't know. Seems like that is my only hope.

MM: We could try to get this authorized through workers' compensation, but it would be really, really, really tough as most carriers won't authorize it, just like they don't normally authorize chiropractic treatment. The entire insurance industry is trying to avoid liability for medical marijuana because it's another drug with a huge market that they would have to cover. It will take time, but it's only a matter of time. Right now though, everyone is paying out of pocket. I could take a shot at informally asking the other side about medical marijuana, but I don't know anybody in the entire Division of Workers' Compensation who is getting authorized marijuana treatment at this point under workers' compensation. Like I said, maybe a couple of years from now it will be common, but right now to get medical marijuana, you are pretty much on your own and out of pocket and I know that's really hard. It's one of the only type of treatments that even I can't get under comp.

JJ: Yeah, if I could get on it, I definitely would give it a shot. But right now I guess I just have to suck it up.

MM: Well I realize that while you don't want to get psychiatric treatment right now, I think that your case would be helped if we have you seen by what we call a neuropsychiatrist who could fully evaluate and determine whether you have a compensable emotional issue with your legitimate chronic pain that might affect your nerves. We can check both things at once. You would just have to be honest with the doctor about your feelings and the severity of your symptoms. It might mean significant additional money to you in your case given your being so worried about everything at work.

JJ: Well, that might be really true because I know I was depressed with my brother and I have never really gotten over it as you can see. But I am using all that in a positive way to make me strong now. That's sort of my way of honoring him.

MM: You are a good man Mr. Jones. I think the right thing for us to do is to get you evaluated for permanency to determine what your loss of function is right now and try to get the case resolved within the next six months if at all possible. Then, when you get your award you will be paid over a period of time and then you will be able to re-open your case within two years. By that time you may be able to more easily get medicinal marijuana or you can try again on your own once you got some extra money in your pocket and decide what you need to do. We will also protect you if your condition worsens. Do you think you can hang on without additional treatment?

JJ: No choice. What I really want and need is job protection and future protection. That protection is worth more than money or as you say "MO-NAY." It's the protection against losing my job. I need to be protected if I get worse in the future. That would be really good. I didn't need it in my other case because I got better. I never had to re-open it. I guess if I got a few bucks on top of everything else, that would just be the cherry on top of everything. Do you think we can get this done?

MM: Yep. I couldn't agree with you more. I think you are looking at your situation very clearly. Let's project out a little bit. Your permanency is paid over time based on the schedule just like before. It depends on what the award is, but in your case you had a pre-existing award of 27 ½% and therefore the Judge must legally stack any award of compensation to your neck on top of the 27 ½% rating. Remember that "hump" we talked about? You're going over it. They won't like it. It won't be easy, but that's the goal. Plus if you have pre-existing psychiatric disability, then there is no way that the Judge won't stack additional psychiatric disability for anxiety and depression on top of the pre-existing psychiatric, so we have the pre-existing in all of your conditions. But you have gotten much worse since this new accident happened, and the law requires the Judge to award your compensation based on your overall worsened disability. While I can't guarantee anything, I would think that we are talking at least in the area of \$100,000.00 net to you. You know we work as a team. The more you receive, the more I receive. I like getting paid.

JJ: All that sounds awesome. Yeah, at this point I don't think I am going to see any more treating doctors other than the marijuana doctors sometime in the future when hopefully it is easier to get. I wish it was easier now. I am just going to deal with this and pray and hope that Dr. Payne is right and that eventually this is going to get better if I try to exercise as much as I can and don't do anything stupid. I am just going to try the best I can and with your experience and advice, I feel like I am going to be okay. I am going to be protected 100%, right?

MM: Yes, you are going to be okay and protected. You just have to sign a few documents which includes the Claim Petition, some medical authorizations and a retainer agreement with our law firm. *

JJ: I don't remember ever signing a retainer with my first lawyer.

MM: Well, our practice is that we have our clients sign a retainer so that we clearly spell out what we are doing for you and basically saying that you are not going to owe us anything unless we make a recovery for you, but we are your lawyers and that we can't guarantee any type of an outcome and that if we incur any costs and don't make a recovery that you are not going to be charged anything at all. Almost all comp lawyers use a retainer agreement now. It's for everyone's protection. There is no way that you are not going to

** See appendix for copy of Retainer.*

get a recovery, so we don't even have to worry about that, but that is the basis of everything. It also fully formalizes our relationship and that we are your lawyers and you are our client so that no other lawyer can try to steal you as a client.

JJ: I would never let that happen. How do they go about doing that?

MM: It's not worth talking about at this point in time, but the legal profession is very competitive at times and good people like you who get injured need top protection and that is what we are going to do. Not everyone is as professional as we are. Are you ready to sign everything?

JJ: Born ready.

MM: We will notify you of two permanency evaluations for us and two for the insurance companies. Just make sure you give the doctors all of your complaints. Don't hold back. Ok?

JJ: OK

(After he quickly signs all documents and after reading nothing, the Petitioner is ushered out of the office. The legal assistant, Leslie Greene and Michael Monet have a brief exchange.)

LG: Well, what do you think of our most recent referral from our favorite former client, Jack Brown?

MM: I think this is a good one. I think this is going to be a pretty smooth turnover. File the Claim Petition in the customary fashion. Get all of the treating records that the Respondent has. Obtain the unauthorized treating records and ask Dr. Mello to comment on the severity of his overall presentation. Try to get her not to charge us as a courtesy to her patient. Get her opinion as to compensability. Get the Division's records and transcript for the prior hearing. Set up a psych and orthopedic evaluation and we should be good to go....oh, and make sure you send our favorite former client the customary \$100.00 Nike gift card with a note from me "Thanks for all of your support." I think that is our 5th referral from him in the past two years. He is our biggest referring client. It's like I always say: "You can't be too appreciative of your clients."

LG: Couldn't agree with you more.

QUESTIONS (Note: RPC's in appendix)

1. What, if any, RPCs has Monet violated or potentially violated regarding his law firm advertising, or the Nike gift card practice?
2. What, if any, "misrepresentations" or "false impressions" were communicated to Petitioner by Monet? To what extent might they be ethical or professional issues?

3. What specific RPCs are involved? Any problem with the use of the word "Associates" in Monet's law firm name?
4. What "Ten C's" were inadequately demonstrated by Monet, and why?
5. Any strategic issues with the strategy which Monet is employing?
6. Can incompetence be an RPC violation?
7. Has Monet created any unreasonable expectations regarding outcome?
8. Does his strategy potentially represent any malpractice potential?
9. What is the purpose of a workers' compensation agreement? Should it attempt to address as many as possible future issues as possible in the attorney-client relationship?
10. 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?
11. 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? Is there true "freedom of contract" when dealing with a client's rights?
12. Can the written retainer agreement place limitations on any potential legal malpractice claim that a Petitioner may have?
13. Was Monet in a conflict with his previous representation of Jack Brown (passenger) and the "intoxicated" driver with whom Jack Brown was traveling?
14. Did Monet adequately prepare the Petitioner for the services to be rendered, time frames, costs and fees?
15. Did Monet adequately prepare the Petitioner for his permanency evaluations?

SCENE TWO

INTRODUCTION

The case is listed for a pre-trial conference by which time each side has obtained both of their permanency evaluations.* There had been a previous pre-trial conference where MacDonald offered Monet \$15,000.00 on a Section 20 basis. Basically, for reasons expressed in the original hypothetical, it was outwardly rejected by the Petitioner's attorney without even consulting with the Petitioner in view of its perceived paucity. It was agreed that the claim would be formally conferenced with Judge Wrightman at the next listing. Unfortunately on the morning of the listing, the Petitioner's attorney had a conflicting Municipal Court appearance to represent an "important" client who had a speeding ticket. That morning he e-mailed Judge Wrightman and Mr. MacDonald at 8:30 a.m. requesting a "ready hold" marking for 11:00 a.m. because of his conflict. MacDonald was in chambers with Judge Wrightman when the e-mail was received by both of them at 8:30 am. MacDonald was always early to court. He had two regular lists with Judge Wrightman and his normal custom was to arrive early in court to give all of his markings to the Judge before the call of the list at 9:00 a.m. and to be available for the Judge who also was typically an "early arriver."

Both Judge Wrightman and MacDonald saw Monet's ready hold e-mail at the same time at which time the following exchange occurred:

* *Artistic liberties on prior curriculum hypothetical.*

SCENE TWO - DIALOGUE

Judge Wrightman – JW

Donald MacDonald – DM

Michael Monet – MM

JW: What's the story with the number 24 pre-trial Jones case that his attorney, Monet, made such a big deal about last cycle when he asked for a "peremptory pre-trial conference?" I didn't have the heart to ask him what he meant. I guess it was so significant that his municipal court speeding ticket case took precedence. Does the Municipal Court send its first listing for a traffic ticket on the day it is listed for hearing?

DM: Haha....that's funny Judge. You have a way with words. I assume that's rhetorical correct, Judge? You're not looking for a response from me about someone disrespecting the Court, are you?

JW: I am glad you recognize greatness counselor. (said very tongue in cheek)

DM: Actually it's a compensable injury that we treated as a really minor matter. There has been no real authorized diagnosis other than a soft tissue injury to the neck and back. There was no compensable lost time. He's still working for us. Monet is making a federal case out of this. He is really overreaching and I basically offered him the Section 20 equivalent of what I felt was more than full value with costs and fees considered. My client is looking at it as a Perez case, but their preference was to Section 20 the case and I thought my offer would get it done, but evidently not.

JW: Well, let's see what he has to say when he gets here. Try not to act too indignant over the late notice. Sounds like we ought to be able to get this straightened away. He only appeared before me once before with a case where it got "not moved" and then dismissed for lack of prosecution. I don't know what happened. Only thing I know is he inherited his uncle's practice and, as you know, his uncle wasn't exactly a workers' compensation maven. Like uncle like nephew?

DM: I don't know Judge. We'll see. He seems pretty jacked up about this one though. I am not sure why.

(In the meantime, just as this conversation is occurring, the Court Reporter, Mia Teller was just outside Judge Wrightman's door in the hallway about to bring a just completed transcript to him, but paused before reaching the chambers doorway, as she heard Monet's name being mentioned and could clearly hear the conversation between the Judge and the attorney. There was no other attorney in the chambers other than MacDonald. Neither MacDonald nor Wrightman saw the Court Reporter. She had been assigned to Judge Wrightman for the past few months. She met Monet at the time his previous case was being dismissed by Judge Wrightman and they struck up a conversation. Monet was divorced and Teller was in the process of getting a divorce. They were just a platonic friendship of only a few months. They recently became friends on each other's Facebook. Monet only came to compensation court

occasionally. They twice went to a Starbucks during lunch recess to have a coffee break rather than lunch. Both were on diets. They spoke for about a half hour and got to know each other a little better at Starbucks. Monet paid. They had no out of court personal interaction or dates, but they had discussed possibly having dinner out one night or catching a movie, but it never happened. Neither of them had much of a social life. Both were socially awkward. Teller actually felt bad for Monet because she felt he was nice and funny but probably in the wrong business. Monet was happy just to see a friendly face when he came to compensation court. Teller was aware that Monet was going to be late because he had also e-mailed her telling her that he would be seeing her belatedly on this date. Teller primarily enjoyed Monet's sense of humor outside of court. They had similar interests, but she was a very opinionated person and really disliked and disrespected Judge Wrightman. Unbeknownst to anyone, approximately a year earlier, Judge Wrightman had dismissed her cousin's denied occupational psychiatric claim which was tried to a conclusion. She felt very strongly her cousin should have prevailed. It was a very contentious trial. No one knew that the Petitioner was her cousin, not even Monet. Teller had been assigned to Judge Wrightman for three months. She felt he had a poor judicial temperament, was sexist, arrogant, dismissive and condescending, sometimes all at once. She also did not particularly care for MacDonald largely for the same reasons. She did, however, feel that MacDonald was one of the most effective, aggressive respondent attorneys that she had ever seen and he always seemed to get his way in every case regardless of the Judge he was appearing before. She felt that he was one of those people who was "all business" and really wasn't compassionate to the seriously injured workers who were often petitioners in the cases he defended. She and Monet had discussed her feelings about Wrightman and MacDonald. Monet appreciated her insight. Monet did not have enough interaction with either of them to have a strong opinion, but he was aware of both of their reputations. He was aware that these were not necessarily the most ideal two people to have in his case.

The Judge's list fell apart that morning. There were only two quick settlements and mostly all of the other cases were adjourned for various reasons. Teller had texted Monet to let him know that he needed to get to Court soon because she was going to be released early as the only thing remaining was his matter. She also texted that she would wait to speak to him as she had something "important" to tell him. Monet arrived at 11:15 a.m. He went immediately to Judge Wrightman's chambers to find MacDonald and Wrightman were discussing the Golden State Warriors basketball team. Both the Judge and MacDonald were rabid professional basketball fans and each one's favorite team was the Golden State Warriors. Monet stopped right at the open doorway of Judge Wrightman's chambers at which time the Judge acknowledged him and immediately waived him inside to have a seat at counsel table alongside of MacDonald.

JW: Well, "good afternoon" Mr. Monet, I hope things went well for you in that important municipal court case you had this morning.

MM: Thanks for asking, Your Honor. Actually they did, however, municipal court is a zoo. Not like the tight ship that you run here in workers' compensation court.

JW: I try to have a reputation for being as professional as possible, Counselor. For future reference I do not appreciate an 8:30 a.m. e-mail asking for a belated "ready hold" that same morning when the reason for the late arrival is a requirement to appear in another

Court which date was presumably well known far in advance. Especially in the context of your previously asking for a "peremptory" conference which I did grant last cycle. Just a friendly head's up, but I don't expect that will happen again. Agreed?

MM: Uh, agreed Your Honor. I apologize to the Court. My bad. It was an inexcusable oversight and I apologize to Mr. MacDonald as well. Somehow the municipal court appearance didn't get in my office diary and thankfully the client called me last night otherwise I would have missed municipal court entirely or probably gotten called while I was here which also would have been bad. I am glad you didn't adjourn the case.

DM: No worries. Just gave me a chance to chat with the Judge for a while about our favorite NBA team, "The Dubs."

MM: The Dubs? What NBA team is that?

DM: Obviously you are not a hoops guy. The Dubs is super short for the Golden State Warriors.

MM: Why "Dubs?"

JW: Because the team is known as the "Warriors" which begins with the letter W (which letter he pronounces hyper articulately) for which the first consonant is "Dub."

MM: Ohhhh....that's pretty cool. I didn't know that.

JW: All right...enough small talk gentlemen. Let's get down to brass tacks. It's getting near my lunch hour. You have a pre-trial that you wanted to "peremptorily" discuss Mr. Monet. What's the problem?

MM: Well, there is no "problem" Your Honor. It's just that counsel and I do not see eye to eye on the permanency to which I feel the Petitioner is entitled to receive due to his clearly compensable accident.

JW: What's the diagnosis or diagnoses?

MM: Well Judge, that's one of the problems.

JW: Well, I thought you just said there was no problem?

MM: I meant that Petitioner has degenerative findings in his neck and low back which were basically asymptomatic before the compensable fall where he fell down steps and thereafter he has had chronic and severe neck and back pain.

JW: Counselor, does he have any herniated discs?

MM: Well, he had (emphasis supplied) a prior cervical fusion for which there was a compensation award of 27 ½% permanent partial total which was entered back in 2006 and therefore his neck injury here is superimposed on that award as is further disability that would be awarded for his low back and there may even be a psychiatric disability...

JW: Psychiatric? Did he treat with an authorized psychiatrist?

MM: No, Your Honor.

JW: Was there a request for authorized psychiatric treatment?

MM: No... Your Honor, respectfully I feel like I am talking to Mr. MacDonald rather than Your Honor.

JW: Counsellor, you are clearly talking to me. I am trying to determine, albeit quickly, what the actual bottom line real justifiable issues are so I can help you gentlemen hopefully resolve this "serious" (said with an over dramatic tone and therefore with mocking intent) claim.

MM: Actually Your Honor, I do think this is a "serious" claim. I wouldn't be here otherwise. This Petitioner is probably one of the hardest working and most family committed individuals I have ever met. The truth of the matter is that he has been undertreated in part because of the Respondent's failure to provide adequate treatment.

JW: Did you file a Motion in this case to compel the obvious inadequate treatment that the Respondent failed to provide?

MM: No, Your Honor, because the problem is complicated because he is psychologically unwilling to consider any conventional modality of pain management or psychiatric treatment because he had a twin brother who was his best friend in the world and a role model that the Petitioner strived all of his life to emulate. His brother died from a prescription opioid overdose after becoming addicted to prescription narcotics following a motor vehicle accident. The Petitioner went into a deep depression.

JW: Wait a minute. When did all of this occur?

MM: This was all a few years prior to the compensable accident, but it impacted him with an ongoing depression for which he also received no treatment. But he would have refused treatment in any event because he feels it is unmanly to concede the existence of a psychiatric condition. He feels that men should be strong enough to deal with their emotional problems and that is what he tried to do.

JW: Is he a chauvinist?

MM: Respectfully, I don't think this is the time to trivialize my client's life.

JW: I am not trivializing anything. I am just trying to find out where the compensability is in this claim so that hopefully we can get it resolved. You have degenerative diagnoses, seemingly soft tissue injuries, alleged chronic pain with no treatment. No psychiatric treatment either. What am I missing here?

MM: As I was saying Your Honor, I have a pain management physician that says he needs injection modalities. He was diagnosed with chronic strains and sprains of the neck and low back aggravating previously asymptomatic spine degenerative disc disease with arthropathies primarily in his low back more so than his cervical spine. He has been struggling with anxiety and depression. All he wants to do is be able to maintain his employment.

JW: Well how much time from work did he lose?

MM: None really. In his original spinal fusion case with his neck, he only lost three months to get back to full duty employment. He wanted to go back to work light duty within two weeks following the surgery, but his employer would not allow him back until he was able to do perform full duty. That is the kind of guy he is. He is not permitted to work overtime anymore and he has given up all of his athletic activities which were a major source of pride for him as he was a star softball player and almost a professional bowler with a very strong provider personality with respect to his family. He struggles with sleep. He struggles with performing his job, but he doesn't let anyone know and basically suffers quietly. In my opinion, he has a significant disability. They never gave him an FCE. Just let him keep working.

JW: Mr. Monet, how many New Jersey workers' compensation claims have you handled?

MM: At least 25.

JW: How long have you been practicing New Jersey workers' compensation law?

MM: For the past 3 years. I have at least 50 cases in my inventory right now, but I have concluded approximately 25 altogether.

JW: Alright, I am just getting an idea of your compensation experience.

MM: I had been a practicing lawyer in New York for 12 years before I came to New Jersey and took over my Uncle Morgan's practice. I practiced some workers' compensation in New York.

JW: I knew your uncle. He was a nice guy. He appeared before me occasionally. Do you have anything else to tell me Mr. Monet?

MM: I have given you a very watered down version of the claim. I can advise you that Mr. MacDonald's experts did not find any permanency at all on a compensable basis and he is not conceding the existence of any permanency.

JW: Well, I don't blame him based upon what I've heard so far.

MM: Judge, you haven't even looked at any of the records or reports.

JW: Counsellor, I am relying on what you have had to say regarding a synopsis of your claim. I was listening to hear some objective reason why Mr. MacDonald's position in this claim is wrong. Thus far I haven't heard anything that moves me.

MM: Your Honor, you did hear the part that this injury is superimposed upon a prior compensation award of 27 ½% permanent partial total with respect to the cervical spine?

JW: I heard that perfectly clearly counsellor. I am saying "so what?" If there is no present permanency associated with the claim and the prior claim hasn't been re-opened, what are we talking about? Isn't zero the same zero if it is stacked on 27 ½% or is zero out of the box? (The Judge turns to MacDonald) Don, has there been any offer made in this claim?

DM: Well, yes Your Honor, I think you know that even in the worst of cases, I will almost always try to make some offer as I do essentially believe in the adage that "every case has a value except on the occasion that the value happens to be zero."

JW: That's funny. Your material is getting slightly better in my chambers and I do appreciate it. But, I would appreciate your answering my question. Have you made an offer?

DM: Yes, Your Honor. I believe this claim has no permanency value. It is barred by Perez and Saunderlin and Goyden. But, in an effort to resolve this claim notwithstanding that the Petitioner is still working for us so I don't really "get rid of him," I have offered \$15,000.00 on a Section 20 basis. That's the maximum that I believe my client would be willing to offer.

I can add that there is another issue that counsel hasn't advised the Court of which is Petitioner has tried to get medicinal marijuana treatment since he is unwilling to consider any type of conventional pain management. The only time I would ever potentially consider medicinal marijuana would be in a compensable catastrophic case where opioids were no longer an option due to either an addiction or health issues and even then, I have never had a client authorize medicinal marijuana even in the face of an authorized doctor suggesting it being an option. I don't know of any other Respondent which has either. Your Honor is well aware and perhaps Mr. Monet does not appreciate, the use of marijuana is technically a federal crime. My client is not going to put itself at risk to violate federal law. I can't completely advise them otherwise. You're aware of the Maine decision. We feel this is an extremely slippery slope. Marijuana is palliative at best. It is first and foremost a recreational drug. Its prescription and consumption needs to be carefully monitored and maintained and it really is not recognized mainstream medicine at this point in time. This Petitioner has not ever made any formal request for meaningful treatment other than for medicinal marijuana. He is not even utilizing it on his own. As Your Honor knows, the original prescription standards have been reduced in New Jersey and he could easily have taken some steps to see if this modality of treatment

would help him. Again he hasn't filed a Motion. He hasn't received any pain management on his own except for an evaluation. There's no prima facie claim. What am I missing?

JW: I see your point.

DM: Additionally Judge, I am not conceding that in this particular case the starting point for the Petitioner's pre-existing disability is 27 ½% permanent partial total. The Statute is very clear that the Respondent and the Petitioner have the right to apply to review or modify any previous permanency award which technically is a recognition by the statute that in certain instances a pre-existing disability can improve. Certainly it can in real life. It dramatically improved in this case. Also, I have lay witnesses that I have personally interviewed who are Petitioner's co-workers, one of whom is one Mr. Monet's former PI clients, who will testify that immediately before this compensable accident, the Petitioner was their go-to guy. He was probably the hardest working individual for the Respondent. He worked routine overtime. He was the star of the company softball team. His athleticism was actually unparalleled and the only change after our compensable accident is that he has stopped softball and bowling. My client no longer permits overtime as that program has been eliminated. Other than that he has no restrictions whatsoever now in his employment duties. That's what he told all the doctors. My client has video that shows him working very hard, but I don't think I will even use it because it would be superfluous. We take the position that in view of his substantially greater functioning just before our accident compared to the time of his Order Approving Settlement 13 years ago, we will be able to satisfy Your Honor that there is no pre-existing cervical disability notwithstanding that there had been a prior cervical procedure. I believe that if there is any question in the Court's mind as to the validity of our position, Your Honor is not going to find any precedent compelling absolute compliance with a prior remote award as representing the actual pre-existing disability at the time of a subsequent accident 16 years later. I would respectfully agree that while it is a presumptive figure, that presumption is rebuttable in the right case and this case is it. We are easily going to persuade Your Honor that this Petitioner's pre-existing cervical disability was not 27 ½% at the time of this compensable accident. Factually it could be stipulated. However, since I also believe that there is not going to be any compensable additional disability, the pre-existing condition is a nominal consideration. Mr. Monet is hyper-focused on the pre-existing psychiatric for which there was no treatment and therefore no pre-existing disability there either although respectfully I do appreciate his client's loss.

MM: Oh come on counsellor.

DM: What? That was a sincere statement.

JW: Yes, Mr. Monet, I think you are out of line. We are officers of the court aren't we? We are supposed to be compassionate. I have known Mr. MacDonald for many years. He is a consummate professional. He is always trying to do the right thing, at least in my Court. He always provides cogent arguments for his position and I have always found him somehow amenable to resolving every case he handles. In my opinion you would

do well to seriously consider his generosity or at least his assessment. However, I am not prejudging this claim. He is a pragmatist. Every case has a value.

MM: Respectfully Judge, I would hate to see what this conversation would sound like if you were prejudging it.

JW: Mr. Monet, I am going to ignore that ill-advised unprofessional statement. I am going to pretend that you and I have established a relationship of mutual respect and that your comment was made in gest. I'm going to assume you respect maintaining a proper decorum in these chambers. I am simply telling you that from what I have heard at this point in time, I am not certain that you are going to carry your burden of proof and therefore you ought to consider what appears to be a relatively generous offer from your adversary. Christmas only comes once a year.

MM: Your Honor, respectfully you are trivializing this situation solely on Mr. MacDonald's representations. While I do appreciate what you are saying, I strongly believe that this claim, in person, will play much better than it does on paper. I believe Your Honor is going to find my client 100% credible. I verily believe that you will find that he has enough pathology to meet the requirements of the statute on both prongs of Perez. I may not have a ton of experience, but I know someone who is legitimately suffering when I see that person. You heard Mr. MacDonald tell you about all of the Petitioner's significant abilities at the time of the accident. I largely agree with that. But you also will appreciate that he now lives a life of chronic and severe pain notwithstanding that he is still working. That happened due to his accident. We aren't seeking perm total. He struggles with the pain every day and accordingly, I don't believe that this is a 0% disability claim and therefore respectfully \$15,000.00 on a Section 20 is inadequate and rejected. If the Petitioner's condition worsens much more, he is going to have to consider modalities of treatment that he didn't want to undergo before. He may even teeter into the territory of work incapacity and then who knows?

JW: Then wouldn't he have an occupational claim given the significant work efforts that he is performing? Isn't Mr. MacDonald only putting a "band aid" on this claim by offering you its full value in terms of a conversion of permanency money into a Section 20 payment? Your argument assumes that there is a legal pre-existing disability of 27 ½% onto which there will be "stacked" compensable disability exceeding the 30% threshold. But if I find that there is no actual loss of functional disability, then the pre-existing doesn't matter and your client gets nothing. Does your client understand that? Do you understand that? I won't just necessarily rubber stamp pre-existing at 27 ½% automatically. Mr. MacDonald seems very confident that your client will not agree that he had improved his functionality significantly since the previous award and you have said as much in this conference. I don't see where I am necessarily precluded from finding that the disability is lower than 27 ½% even if I find an overall increase in the Petitioner's cervical disability. I cannot imagine that your client is going to receive an overall compensable Award of 5% permanent partial total or so, orthopedic only, strictly flowing from the accident itself regardless of the amount of pre-existing at least based on present circumstances. Five percent at 2016 rates is \$5,960.00. At this point the

\$15,000.00 offer seems presumptively reasonable to me, for whatever that's worth. You are free to be guided accordingly.

MM: Your Honor, I don't think I am going to convince anyone without testimony. I would prefer to just execute a Pre-trial Memorandum and have the Petitioner testify and set up the doctors. I am hopeful that once you hear my client you will have a different opinion as to the realistic value of his compensable permanency. Respectfully, my client needs and deserves the protection of an award of compensation regardless of the amount.

JW: Counsellor, listen to me very carefully. I haven't told you what I believe the value of this case will be after a trial. I am not clairvoyant. My crystal ball is not working today. But I am the trier of fact. I am only saying at this point in time that I believe that you are seriously swimming against the current for the reasons we have discussed. I am extremely strong on the first prong of Perez, the demonstration of the existence of "demonstrative objective medical evidence" supporting any claim for permanency. I believe that is the cornerstone of our statute and if that component of the alleged disability is lacking, then the second prong will not save it.

DM: Judge, just one more thing quickly for housekeeping in light of what Your Honor has just stated. As Your Honor is aware, I try to expedite trials, especially one like this one where there should be due deference to Your Honor's expertise and consumption of judicial time. I have no objection to all of the exhibits being introduced into evidence including but not limited to all of the evaluating doctors reports with CVs and all treating doctors records and reports authorized or not. I do reserve the right to cross-examine the medical experts for permanency. I will put lay witnesses and videotape on the pre-trial, but I doubt if I will use them. Counsel has not advised the Court yet in this conference, but he has raised the issue of obtaining authorized medicinal marijuana at this point in time. If he stipulates that this would represent only palliative treatment, then I have no problem with having that issue addressed by the appropriate proofs as part of this permanency award. This would avoid forcing a separate formal Motion for Medical and Temporary Disability Benefits at this time, have counsel lose that issue and then have to come back for the permanency trial.

JW: Well, Mr. MacDonald, I must say that is an extremely generous and gracious offer. Kind of an "entire controversy" approach that they use in the Civil Courts. I am certain that Mr. Monet appreciates that you are saving him a considerable amount of expense, time and effort with your assuming the risk that I could possibly find in his favor. You also seem unusually sure of yourself especially with possibly skipping your lay proofs.

DM: Your Honor, I think my defense is overwhelmingly compelling on the factual, medical and legal basis with respect to the medicinal marijuana at this point in time and frankly all other issues. I just don't see how Your Honor is going to find any bona fide chronic pain condition on a compensable basis which would be a condition precedent for any type of medical treatment much less as controversial and respectfully, illegal as medical marijuana. I just don't see anything here that moves the needle.

MM: Your Honor, medicinal marijuana is not illegal. The State of New Jersey authorizes it under very strict control and we are amenable to abiding that control. There is no doubt that two years from now this treatment is going to be mainstreamed all over the country especially in view of the opioid issues which the Petitioner painfully appreciates better than anyone. It's the only reason why marijuana is an option. The Petitioner is the perfect candidate for this palliative treatment.

DM Your case is going to be dismissed with prejudice given that the last date of authorized treatment was more than two years ago. Hence there is going to be no future chronic pain medication because you will have failed the permanency issue. A failing of the permanency issue here means no re-opener. I don't think you understand the concept, however, notwithstanding all of that, my \$15,000.00 offer stands and will stay standing until the first day of trial at which time you may consider it revoked. Please be guided accordingly, counselor.

JW: Gentlemen, please execute the appropriate Pre-trial Order and have all of the exhibits marked and an evidence list prepared before the next listing. We will take the Petitioner's testimony at that time.

A Pre-trial Memorandum was executed. As Monet was finishing, he sees Mia Teller who in turn has him come into an empty court room. She advises him exactly what she heard in connection with the 8:30 a.m. conversation between Judge Wrightman and MacDonald. Monet can't believe it. He is irate and feels the pre-trial conference was nothing more than a sham. In his words, a "dog and pony show between Wrightman and MacDonald" except he conceded he wasn't exactly sure what that meant nor was he sure who was the dog and who was the pony. They had a laugh about that "funny" remark. Wrightman asked Monet whether there was a Section 20 offer, yet acted like he didn't know when Monet came into chambers. He felt that there might be more than mere mutual professional respect going on between the Judge and MacDonald and also so stated to Teller. They appeared to be extremely friendly more so than mere collegiality. However, the thought then occurred to him that he is also similarly friendly with Teller who will be assigned to this case. He makes the decision to not formally act on Teller's information, but he does feel fortunate to have "friends in the right places." He still believes his client's credibility will move Judge Wrightman and "all will be well." He decides that he will let Teller keep an open "eye and ear" on interactions between Wrightman and MacDonald as the case progresses. He was impressed that Teller would confide in him what she had heard.

QUESTIONS

1. How did the Judge handle the “ready hold” marking (both with respect to his ex parte discussion with MacDonald and his initial greeting of Monet)?
2. Discuss any unethical or unprofessional conduct by anyone in Scene 2.
3. Rate each attorney and the Judge in terms of overall professionalism in the pre-trial conference. (0-10)
4. Is there any ethical or professional issue with the “relationship” between Monet and Teller and/or its “non-disclosure?” (inclusive of Facebook status).
5. Was there any duty on Teller not to disclose to Monet what she had heard? What if anything should she have done with the information she heard?
6. If Monet felt there was an improper ex-parte conversation, did he have an obligation to disclose and/or report it and if so, to whom and when?
 - 6a. Discuss the balance between civility/collegiality and improper ex parte communication.
7. How would you have handled the medical marijuana issue at this point if you were:
 - a. Monet
 - b. MacDonald
 - c. The Judge
8. Was Monet ethically permitted to reject the \$15,000 offer in the absence of Petitioner’s express consent on the basis it was an “executive” decision contemplated by the retainer agreement in the event this became an issue? Why or why not?
9. Would the retainer provisions trump the RPC’s on any conflict between the two?
10. Do you think the Judge appeared biased and if so on what basis?
11. Discuss the Court’s demeanor and temperament within the mandates of the Code of Conduct for Judges of Compensation (appendix to N.J.A.C. 12:235 et seq) Canon 3 Rules 3.1, 3.5, 3.6 and 3.8
12. Would this be an appropriate situation for an “informal conference” with the Petitioner? Discuss the advantages or disadvantages of the same generally and in this case in particular.
13. Which of the two attorneys exhibited more candor to the tribunal? Rate each attorney in terms of confidence and conviction.

14. Was MacDonald's case citation accurate? If not, why not. What's the difference between the Sanderlin/Prettyman standard vs. Goyden in psychiatric cases?
15. Did MacDonald seem bona fide in his offer to resolve this case on a Section 20 for the amount he has offered? At this point in the proceedings, how much would you have offered to Petitioner's attorney either on an Order Approving Settlement or Section 20?

15a. How much would you have demanded as Petitioner's attorney?

16. Does this seem like a likely Perez dismissal at this point?
17. Did Monet have an obligation to advise either MacDonald or the judge regarding the information provided by Teller?
18. Was there anything unethical about any of the "ex-parte" pre-conference discussions between Wrightman and MacDonald?
19. Was there anything unprofessional about their conversation?
20. Was Wrightman showing personal bias in his comments during the conference?
21. If you were Monet, what if anything would you have done rather than execute the pre-trial memorandum?
22. Was seeking a higher Section 20 offer a reasonable option?
23. If you were the Judge would you be urging such a Section 20 at this point?

23a. Do you think Judge Wrightman was overly aggressive in the conference regarding his opinion regarding the extent to which Petitioner's claim was challenged on the merits?

24. If you were the Judge would you allow the execution of a pre-trial memorandum at this point? Why or why not?
25. Do you think a reasonable effort has been made by all to resolve this case? If not, what further would you have done if you were the Judge? What more, if anything, should he have done?
26. Rate Judge Wrightman, Monet and MacDonald on their relative professionalism and specifically in terms of the Ten "C's."

SCENE THREE

INTRODUCTION

The Petitioner and Monet meet in Monet's office the day before Trial to prepare the Petitioner's testimony. This is the first time the Petitioner has ever testified in Court. He is extremely nervous about having to testify. He is concerned that he is not going to be able to explain himself well enough. He is also very upset about how his case is progressing. Following the last pre-trial conference Monet had sent him an e-mail basically stating "As expected, the workers' compensation insurance carrier is taking a very dim view of your case and accordingly we are going to have a trial to let the Judge decide your entitlement. I am duty bound to advise you that the insurance company has made an offer of \$15,000.00 for a one-time lump sum payment in return for a full and final dismissal of your claim under the provisions of Section 20 of the Workers' Compensation Act. We have discussed this possibility previously. It is your right to accept this settlement offer, but this would mean that your case is dismissed with prejudice and not only would this be all of the money that you would receive, but you would also have no rights in the future if your compensable conditions worsen. Consequently I do not advise that you accept this disposition. The Trial is scheduled for 11:00 a.m. at the Workers' Compensation Court on Monday, July 11. Please contact my legal assistant, Leslie Greene to schedule an appointment prior to the trial date so that we can prepare your testimony. Very truly yours."

The Petitioner is visibly stressed when he arrives at Monet's office. The Petitioner expressed his opinion that things did not seem that they were going well. He didn't feel that there had been any real previous discussion of some type of lump sum settlement of his case and especially not for \$15,000.00. He remembered being told his case was probably worth \$100,000 net to him. He re-emphasized that the primary reason he was pursuing his claim was to protect himself and to protect his family. He felt that a highly experienced specialized attorney like Monet gave him his best chance. Monet deflected most of his concerns and basically told him that he unequivocally believed that he expected the insurance company to "posture" in the way they did with the expectation that "we would fold." He indicated that "this is the way the system works." Monet advised that the Judge would decide the case based on the testimony and evidence presented. He stated "Now our job is to make a good human impression" about Petitioner's post-accident functioning as only he could do. He reassured the Petitioner that "justice will be done." He expected that all Petitioner had to do was tell his "own personal story" again as only he could. Monet emphasized however, that their strategy was to establish that immediately before this accident occurred, Petitioner was almost, if not fully back to his pre-cervical fusion accident level. It is against this background of "almost if not full recovery" that the July 1, 2016 accident occurs. It was a "major" trauma. His life had drastically changed in terms of his functioning both physically and mentally both at home and on the job. Monet advised the Petitioner that the whole hearing would probably take about two hours at most. He tried to describe what to expect (even though he never tried a workers' compensation case.) First he would be asking background questions about his life and functionality before the July 1, 2016 accident and then quickly focus on his medical treatment with a major emphasis on how he basically had "ended up" generally speaking now. He advised that the workers' compensation insurance company lawyer was going to cross-examine him with questions that basically sought

“yes or no” answers and that he should listen to the questions very carefully. If the answer was not “yes or no,” then he was not “forced” to answer that way. He could explain himself. He also emphasized that if he misunderstood any question asked by anyone, that he could ask the person who posed the question to please rephrase the question because he didn’t fully understand it. He tried to put the Petitioner at ease. He emphasized to try to relax as much as possible and that while he was taking an oath to tell the truth, his testimony was really “just a recorded conversation between two people.” At the end of the day all the Judge cared about is what was actually true. That meant, that if “you didn’t remember something, the right answer would be “I can’t remember.” Never guessing. Approximations were generally acceptable. Any answer saying “always” or “never” probably wasn’t a good idea. Monet emphasized that basically the Judge “wants to see you as a human being, not a piece of paper.” This is the time where your case goes from something that is only on paper to now being “fully alive” and real in front of the Judge. He emphasized the Judge himself may ask some questions and it was the Petitioner’s job to answer honestly and to be as forthcoming the best he could. After all, this was just a search for the truth and no one better than the Petitioner knew his truth. Monet assured him the Petitioner would do “great.” This conference was intended to provide Petitioner with a much needed boost in confidence. Monet said that the Petitioner was the most hard-working person he had ever seen and his loyalty to his family and work ethic would come “shining through” to even the most causal or cynical of observers. He “guaranteed” that at the end of the Petitioner’s testimony the Judge would find him to be a completely credible individual who has a compelling case even though this time he didn’t have surgery. He re-emphasized that whenever there are claims that don’t involve surgery or broken bones, the amount of permanency becomes much more disputed than if there are clear diagnostic studies that support the routine types of diagnoses for major injuries. He further stated that because his authorized treatment had been minimal and because he had worked so much, it looked on paper like he had a relatively minor injury. But Monet felt after Petitioner’s testimony, the Judge “will appreciate the seriousness of all of this” and the case could even reach a settlement rather than continue as a Trial. They would be “back on track.” He explained that after the Judge understood the severity of his chronic pain, he would also have a better idea why Petitioner’s psychiatric status had worsened because of all of his worrying and anxiety. It was all going to come together.

The Petitioner ended the meeting by telling Monet that the meeting with him made him feel “a little better” but he also stated “at this point I guess I have no choice.” He told Monet that it was easy for Monet because he probably had tried hundreds of cases, but this was his first and he was stressed. The Petitioner stated that he trusted Monet to do the best for him, but that he would also “pray hard” before he went to sleep that night. All Monet said was “everything will be fine.”

QUESTIONS:

1. Was Monet completely candid with the Petitioner? If not, why not?
 - 1a. Any RPC violations committed by Monet?
2. Evaluate Monet’s trial preparation of Petitioner. What would you do differently, if anything?

3. Evaluate Monet's trial strategy. What would you have done differently, if anything?
 - 3a. Is there any potential claim for malpractice against Monet at this point in time? If so, on what basis?
4. Was Monet's e-mail to Petitioner accurate?
5. Was Monet obligated to tell Petitioner this was his first compensation trial?
6. Was Monet obligated to discuss his actual New Jersey workers' compensation experience in view of the Petitioner's clear misimpression of the extent of experience he had?

SCENE THREE

PETITIONER'S TESTIMONY

JW - Judge Wrightman

DM - Donald MacDonald, Esquire -- Respondent's counsel

MM - Michael Monet, Esquire -- Petitioner's counsel

JJ - James Jones, Petitioner

JW: Alright ladies and gentlemen, we are here to start the Trial in connection with CP 2017-001 filed on January 2, 2017 captioned "James John Jones, Petitioner vs. Waste Away, Inc." Please enter your appearances.

MM: Michael Monet on behalf of the Petitioner.

DM: Donald MacDonald on behalf of the Respondent.

JW: May I have stipulations?

DM: Yes, Your Honor, may it please the Court, the Respondent admits the happening of the compensable accident on July 1, 2016 during the course and scope of his employment with the Respondent at the time. Our position is that he earned a gross weekly wage of \$800.00 giving rise to a temporary disability rate of \$560.00. There was no compensable lost time. All authorized medical treatment has been paid for and provided. The nature and extent of compensable disability, if any, is disputed and the Petitioner is put to his proofs on that issue. There is a remaining secondary issue as to whether or not the Petitioner requires any palliative care regarding medicinal marijuana which issue is contested by Respondent. The parties are stipulating such care is "palliative" regardless of whether or not it is ordered by the Court. I recognize that this is a somewhat unusual situation, but we did not want to delay the potential resolution of the permanency issue and therefore the parties agreed that this issue could be merged with the permanency determination under the peculiar circumstances of this particular case. We appreciate the Court's indulgence and cooperation. We are trying to avoid the length of time any such motion would formally take in terms of prosecution and a potential appeal. We felt that with counsel's consent and the Court's cooperation, the Petitioner would be put to his proofs as to his potential entitlement both legally and medically to any such relief sought for the specific compensable diagnoses in question determined at this particular time in this particular case. Thank you Your Honor.

JW: Counselors, I also note that the Pre-trial Memorandum executed on June 20, 2019 indicates that an exhibit list will be prepared containing all relevant records and reports inclusive of the prior pleadings, transcript and treating and evaluating physicians records regarding prior Claim Petition 2003-1234 which involves a previous compensable

accident of January 2, 2003 for which there was a previous award of March 1, 2006 in the amount of 27 ½% permanent partial total. Is that correct?

MM: Yes, Your Honor.

DM: Yes, Your Honor. Again, the reason for the same was to expedite these proceedings, however, it is anticipated that all permanency evaluating physicians will appear in Court for testimony notwithstanding that their reports are already in evidence. We trust that this facilitates the optimal use of judicial time and that it is appreciated by the Court. The list will be prepared by next listing. Is that acceptable to the Court?

JW: Yes of course. It is refreshing to have attorneys interested in facilitating our collective search for the truth in the most expeditious way possible. Are there any other questions or housekeeping issues to be addressed?

DM: No Your Honor, other than Respondent's Section 20 offer is withdrawn pursuant to my previous representation.

MM: Uh.....no Your Honor.

JW: Alright then, I will take opening statements. Mr. Monet?

MM: May it please the Court just briefly Your Honor. As counsel stipulated, this is a compensable accident of July 1, 2016 for which the primary issue is the nature and extent of compensable permanency with the additional medicinal marijuana treatment issue left to the Court for determination. As the Pre-trial Memorandum indicates, we do dispute Respondent's determination as to wage and rate as the Petitioner routinely worked overtime and we will be submitting those records before the conclusion of the case. I am hopeful we will thereafter be able to stipulate wage and rate, otherwise the Court can make its determination based on the records produced and the testimony of the Petitioner. The Petitioner did have a previous Award of March 1, 2006 in connection with Claim Petition 2003-1234 for which he received 27 ½% of permanent partial total for an instrumented fusion at C6-C7. It is our position that it is *res judicata* on the issue of pre-existing disability onto which any further cervical spine disability would be "stacked" in connection with this claim together of course with any and all other disabilities determined to be resultant from the accident.

DM: Objection Your Honor.

JW: I'll hear you.

DM: This is an opening statement. The opening statement should be basically the facts counsel intends to prove. Counsel is making legal argument at this point in time and frankly misstating the law. This has no place in an opening statement and I do not want my silence to be taken as a tacit agreement with the position advocated by Mr. Monet.

JW: Mr. Monet. I will hear you.

MM: I am simply providing the Court with an opening statement that addresses the issues for the Court's determination

JW: Aren't they already set forth in the Pre-trial Memorandum which was signed by both of you?

MM: Yes Your Honor.

JW: Then Counselor, please just provide us with a personal opinion-free and legal argument-free opening statement so that we can expedite this hearing and get on to your client's testimony which is why we are here today. Mr. MacDonald is right. There's no place for personal opinion in opening or closing - nor legal argument in your opening. I am well aware of the issues in this claim based upon both of your diligence in completing a very comprehensive Pre-trial Memorandum and both of you cogently expressing your respective positions in the prior pre-trial conference. You will have your chance to argue in closing argument and/or legal memoranda when and if we get there.

MM: Thank you Your Honor. Then in that case I simply would say that a preponderance of the credible evidence will demonstrate that the Petitioner has a significant overall increase above his pre-existing condition with respect to his cervical spine with an additional compensable lumbosacral chronic pain presentation with an emotional disability superimposed upon pre-existing psychiatric all of which has had a significant overall impact on the Petitioner and warrant a compensation award of permanent partial disability with the Respondent receiving proper credit for the prior award.

DM: Objection Your Honor.

JW: Sustained.

MM: Judge, aren't I permitted to be heard?

JW: Counselor. I have already told you no legal argument. Anything else?

MM: Simply that I believe that the record should reflect that the only offer for any type of disposition of this claim prior to the court hearing was a \$15,000 Section 20 offer which was rejected.

DM: Objection, Your Honor.

JW: What is the relevance of what you are raising Mr. Monet? You are improperly injecting offers for settlement into the record. If this was civil court before a jury, we would have a mistrial. I am well aware that the parties failed to reach a settlement of this claim and as such the parties have a right to have a trial. This is the start of that trial. You both know I have no authority to compel a Section 20 outcome. I can only approve a

specifically agreed upon Section 20 proposal. The issues are the issues. At the end of this case that may be a woefully inadequate offer on the Petitioner's best day and it may be an excessive offer on Petitioner's worst day. That is why we are having a trial so I can make a determination based upon a preponderance of the credible evidence which I hear. The prior offers of settlement are irrelevant to the issues before me which need to be determined. Am I making myself clear?

MM: Yes Your Honor.

JW: Opening statement, Mr. MacDonald?

DM: The Respondent waives the necessity of an opening statement. I am confident that the Court already appreciates all of the issues in connection with this claim and is prepared to fairly consider all of the credible evidence and decide what if any further compensation benefits to which the Petitioner is entitled based upon the full record created in this trial.

JW: Mr. Monet, your witness.

MM: I would like to call the Petitioner please, Your Honor, James John Jones.

The oath is administered by the Court Reporter.

MM: Mr. Jones, I am going to ask you a series of questions. Mr. MacDonald will ask you some questions and the Judge may even have some questions for you. Today is the start of your compensation trial. I know you have never been in Court before, so a few quick reminders. If you don't understand a question that any of us may ask you, please let us know so we can rephrase the question so that you understand. We want any testimony that comes from you to be clear and reliable. If you can't remember something, you need to tell us saying "I forgot" which is perfectly acceptable if you can't remember or just say "I can't remember." We don't want you guessing with respect to any question that is asked. An approximation where appropriate is permissible, but again please do not guess. Also, please just answer the question that is asked. Okay?

JJ: Yes.

MM: When were you born?

JJ: January 1, 1970.

MM: What is your height and weight?

JJ: I am 5 foot 6 inches and I weigh approximately 225 pounds.

MM: What is your marital status?

JJ: I have been married for the past 17 years and I have three daughters who live with us.

MM: What are the ages of your daughters?

DM: Objection as to relevancy. What do the ages of his three daughters have to do with his compensable disability in connection with this claim?

JW: Mr. Monet?

MM: This is basic background information so Your Honor has a better understanding of the stability and credibility of my client and his values relative to the overall impact of this accident. You will learn in this trial what his most important values are. Respectfully the evidence will show that there is nothing more important to him than his family and hence his need to support his family. He has a psychiatric allegation of depression and anxiety and his previous physical ability to support his family has been impacted and it therefore is absolutely relevant to the issues.

JW: Counselors. You are both lawyers who practice compensation. I know Mr. MacDonald is one of the most experienced attorneys in the Division and I know Mr. Monet that you have experience in the area of workers' compensation, although we have never tried a case together, but I certainly have tried numerous cases with Mr. MacDonald. Let me say preliminarily that this Court is very appreciative of both of you trying to expedite things. To that end, you both are aware that the technical Rules of Evidence do not apply in the workers' compensation court although any decision must be based upon competent evidence as that concept is determined by those very Rules of Evidence. I view any trial as a search for the truth and generally I will allow any marginally relevant evidence in and assign the appropriate weight to it. I am going to give latitude in this particular instance in our search for the truth, but I would appreciate both of you doing your best to get to the primary and most important issues without undue delay regarding marginally relevant considerations and not make objections that might be hyper-technically sound, but really more appropriate for possibly the Civil Courts. I will allow the question. Have I made myself clear?

MM: Yes, Your Honor

DM: Yes, Your Honor

MM: Mr. Jones, you can tell us the ages of your daughters.

JJ: My oldest is Jenna. She is 15. My next is Jamie and she is 12 and Jill, is my youngest and she is 10. My wife is Jana. We are all J's.

MM: How involved were you with your family prior to this accident of July 1, 2016.

JJ: Very involved. Actually, very, very involved, at least we used to. My family is everything to me. We are very close and do everything together. I have always worked very hard and I used to work a lot of overtime, but was always there for any of my

children's school functions. We would take routine family vacations. We would eat dinner together almost every night.

MM: How far did you get in school?

JJ: I graduated high school.

MM: What type of work did you do after high school?

JJ: I have been a truck driver all of my life. I started with Waste Away 15 years ago. I am considered a "Driver Specialist."

MM: How much did you earn an hour at the time your July 1, 2016 accident occurred?

JJ: \$20.00

MM: How many hours did you typically work?

JJ: I had regular overtime. During the year the typical day was 8 hours, 5 days a week with a 4 hour Saturday shift. However, during the summer time I usually worked 10 hours days, 5 days per week, plus the Saturday shift.

MM: This morning I provided your 2013, 2014 and 2015 W-2s to Mr. MacDonald. Is it fair to say that those W2s reflect overall earnings with the Respondent of \$62,000 in 2013, \$62,500 in 2014 and \$63,000 in 2015 and you earned \$30,000.00 through July 1, 2016. Is that correct?

JJ: Yes. I still have the originals in my pocket. Do you need them?

MM: No. I don't believe that will be necessary. Mr. MacDonald and I should be able to work this issue out.

DM: Your Honor, I appreciate your previous admonishment. I am not stipulating wages. Counsel was leading during his client's testimony, but again, while I have no reason to quarrel with what the W2s state, I will be obtaining payroll records from the Respondent and I am certain we will be able to come to an agreement and therefore be able to stipulate as to wage and rate before the end of this trial. If not I will stipulate that we can revisit the proofs and amend the exhibit list, if that is permissible with the Court.

MM: I would agree Your Honor.

JW: Alright Counselors. I appreciate that. May I say I don't want this record to become cluttered. I appreciate Mr. MacDonald's restraints thus far, but I would appreciate Mr. Monet moving this along.

MM: Yes Your Honor. Could you briefly describe your job duties as they existed let's just say in the three months or so before your accident occurred?

JJ: I mostly drive waste removal vehicles which collect and drop off waste. The job used to be much harder because now almost every truck is outfitted with hydraulic arms which never existed before. That takes a lot of stress off your body. But there is still a lot of manual lifting that has to be done especially with residential trash. There is some further lifting in connection with the hydraulic vehicles. I would say there is probably five days per month, probably a day or so a week where I am lifting up to 100 pounds all day long. That's been my job description for the past 5 years except for the overtime issues.

MM: Okay. Are you right handed or left handed?

JJ: I am right handed.

MM: In the year or so before this accident did you have any limitations at all in connection with your employment duties for any condition whatsoever?

JJ: No.

MM: Were you treating with any doctor for any condition whatsoever?

JJ: No....unless you count my chiropractor, Dr. Knipp. I would get occasional "maintenance" manipulations as I was determined to be as healthy as possible following my accident of January 2, 2003. I really wanted to rehabilitate myself to be as healthy and as physically fit as I was before that accident.

MM: You did receive an Award on March 1, 2006 for 27 ½% of your body for what the records reveal was an instrumented fusion at the C6-7 level. Is that correct?

JJ: Yes.

MM: And that accident occurred on January 2, 2003 or almost 13 ½ years before your accident of July 1, 2016.

JJ: That seems about right.

MM: Were you engaging in any type of sports just prior to July 1, 2016?

JJ: Yes.

MM: And what were they?

JJ: I had been on my employer's softball team since the day I started except for about one year after my surgery. I had to go to the Senior version. We called ourselves the Waste-Nots. It was for people over 40.

MM: Did you have any limitations playing softball?

JJ: No. Actually, I am not trying to brag Your Honor, but I was a pretty good baseball player all of my life and softball is much easier than hardball. I played second base. I think I had around a 450 batting average over the last three seasons. I hit 20 homeruns which led the league. I was pretty good.

MM: Did you play any other sports?

JJ: Well, I was also a really good bowler. I was in different bowling leagues and won a lot of tournaments. A lot of people thought I could go professional because I had an average around 215.

MM: Before this accident happened you had a twin brother. Is that true?

JJ: Yes.

MM: Could you tell us briefly about him and your relationship with him.

At that point Judge looks at MacDonald and MacDonald looks at the Judge and transmits a look of "I am letting this go."

JJ: We were as close as two brothers could be. He was my role model. He was a much better athlete than I was. I looked up to him because he was 5 times better. He inspired me to be my best. He could have been a professional athlete in a lot of sports and probably should have been one. He was really that good. Like me he always wanted to work and help his family. That is what we were taught as kids. It is the right thing to do and I am certainly not complaining. But he got into a car accident and it messed him up. He got into opioids and narcotics and he ended up dying from an overdose on January 10, 2014. I will never forget that day. It was the worst day of my life. It devastated me.

MM: Did you seek any type of psychiatric treatment?

JJ: No.

MM: Why not?

JJ: Because my brother was a role model for what it was to be a man. He was captain of his high school baseball and soccer teams and when he got crippled in the car accident four years before he passed away, it was devastating to him but he still had the courage and fortitude to fight through it. He never saw a psychiatrist, but he got hooked on those damn...I'm sorry Your Honor, those opioids and then an overdose killed him. He dealt with his issues. He never complained. Who am I to complain? But there is not a day that goes by that I don't feel his loss and really his loss helps to make me stronger in my

situation because I don't want what happened to him to happen to me. But honestly I am scared to death about it.

MM: Let's talk about what happened on the date of your accident on July 1, 2016. You don't have to go into great detail but just explain the mechanism of the fall.

JJ: Well basically it was near the end of the workday on July 1 at about 4:30. The day ended at 5:00. I slipped on the loading dock steps and fell down five steps and struck my forehead on the concrete sidewalk. I kind of twisted my arms while going forward to try to brace the fall because it was really sudden and my neck snapped back. My body itself twisted and rolled forward. I ended up on my back. I felt like this knifelike pain in my neck and pop in my low back. I saw some stars and I was just on the ground. I am not sure how long, maybe just a couple of minutes.

MM: Then what happened.

JJ: Well there was a supervisor who was there when I got myself up. I filled out an accident report form and drove myself to the emergency care facility.

MM: The bottom line was that you ultimately saw some doctors including your chiropractor and you finally went to see the authorized Back to Work Group, Dr. James Payne on July 17. Is that true?

JJ: Yes.

MM: And you received conservative treatment including about 7 weeks of authorized physical therapy. Is that also true?

JJ: Yes.

MM: You did receive x-rays of your neck and your low back. Is that true?

JJ: Yes.

MM: You continued with Dr. Payne through about August 31. Is that also true?

JJ: Yes.

MM: Did the treatment that was authorized help your condition?

JJ: Well, I guess so to some extent, but really it just wasn't going away. Dr. Payne wanted me to keep exercising and lose some weight because he felt that that would help my low back and also to some extent my neck with exercise. I was getting all of the exercise I needed at work, but I also did some formal exercise, mostly flexibility stuff. Actually I really liked Dr. Payne. I thought he cared about me. He told me that sometimes injuries like mine would take a while to heal. He said that some people just take longer than

others. To me that was music to my ears. It was good news. When he said I could be discharged and released to full duty employment with no restrictions at all, that was a very happy day to me. I thought I was going to be good enough to do my job and I would be good enough to keep doing it. I even gave him a hug when he discharged me and he seemed to be happy about that.

MM: So you then continued with a further course of treatment. Is that correct?

JJ: Yes, I decided to try to see my chiropractor to get myself as well as I could as fast as I could. I tried to lose some weight. That really didn't go that well. I finally went to my primary care physician, Dr. Hope Moore. She didn't like how my neck was functioning *(at this point MacDonald started to raise to object, but sat back down. The Judge looked perplexed.)* She wanted me to see a pain management physician. Me and my wife spoke about all of that. I just didn't think that this was in my best interest. But I was continuing to have severe neck and back pain and I wasn't getting any better.

MM: On or about December 20, 2016, you had MRI studies of your neck and low back based upon Dr. Moore's prescription. Is that correct?

JJ: That is correct.

MM: In addition to your primary care physician, you continued with your chiropractor and you eventually also saw a pain management doctor, Dr. I.M. Mello. Is that correct?

JJ: Yes. That's where this medical marijuana issue comes in. She thought it would be a good idea because I was determined not to do any type of opioids or narcotics. I just thought that this medicinal marijuana might be a perfect solution to my issues. Or, at least it seemed to me like it would make a lot of sense, but I didn't qualify and that was really disappointing to me.

MM: What do you mean?

JJ: I even used my wife's insurance to get further physical therapy for about three months at this really good physical therapy (Ultimate Recovery Fitness). That really didn't help. It felt like a good work out, but I mean I have had neck surgery and I recovered from that. I am not recovering from this.

DM: Motion to strike Petitioner's last statement. It is not responsive to the question asked.

MM: Your Honor, I am the person who has standing for that objection, not Mr. MacDonald.

JW: OK counselors, I am going to allow the witness' testimony to stand. Please move on Mr. Monet.

MM: Have you had any accidents or injuries of any type whether at work or otherwise from the date of this accident, July 1, 2016 until now.

JJ: No.

MM: Have you had any other medical issues of any type since your compensable accident?

JJ: No.

MM: Are you treating with any physician at this point in time for your condition?

JJ: No - other than still seeing Dr. Knipp, my chiropractor for maintenance management, if that counts.

MM: Can you tell the Court if you have resumed any of your athletic activities, softball, bowling or any other athletic activity?

JJ: No.

MM: Why not?

JJ: I can't do it. It's just too much. I can't even perform them at a low level. It is just too much stress on my neck and low back. I am struggling just to keep the weight off.

MM: Can you tell the Court what problems, if at all you have with your neck?

JJ: Well, I have big problems. It's chronic. It is a terrible constant aching in my neck and feels like it is in a vice and the vice is getting closed down on it. It's right inside where the spine is. It doesn't hurt in the front but it hurts on the sides and in the back and inside. It is kind of hard to describe.

MM: What does the pain feel like?

JJ: It's just like a compression. It's like at times burning. At times it is sticking me. My neck goes into spasm and it is hard to turn it at times.

MM: Can you rotate your head like I am doing to do side to side?

JJ: Not too much. *(At which time the Petitioner demonstrates approximately 45 degrees of rotation to each side which is described for the record by MM).*

MM: How about flexion and extension?

JJ: *He demonstrates. (Extension is almost non-existent and flexion is half of normal. All of this is placed on the record by MM).* I have to actually twist my upper body to look out of the side view mirrors at times. Not all the time, but at times. I never had that with my neck fusion once I was able to get back to work.

MM: Does the pain stay in your neck or does it travel anywhere.

DM: Objection. Leading the witness.

JW: Sustained. Rephrase the question.

MM: Do you have any additional pain coming from your neck?

JJ: Yes. The pain kind of goes into my head at times and the base of my skull and the sides of my head. Honestly I don't know if that is from my neck or not, but I have had it ever since I hit my head from the front. I have had headaches and I get a little dizzy. Not too much now, but the headaches have always been there. It seems when my neck is stiffer I get more headaches and once in a while when they get bad I take some Aleve or Tylenol but that doesn't seem to do much. I am lucky that they don't last too long.

MM: Have you told us all of the symptoms that you have in your neck?

JJ: Well, I don't know what symptoms are exactly. I have the aching I described and the pain, but it is also some cracking that gets me worried sometimes. Especially since I had that previous fusion done. But that was going on with Dr. Payne and he told me not to worry about it, so right now I am just not worrying about it unless it gets really bad or when someone tells me there is something real serious to worry about. They did an MRI study and no one said I needed any more surgery or anything like that, so I am just happy that I don't.

MM: As to your low back, what if any problems do you have?

JJ: My low back is bad too. I slightly injured my low back when I first hurt my neck back in 2003, but my back got completely well. I never really had any problems at all until this new accident happened and now it has been just like someone is sticking a knife in the middle of my back. I have a real hard time sitting. I have to tilt my pelvis forward most of the time and lean back just a little bit. At home I'll reach my arms back behind me to take some pressure off. I am super careful how I lift. Fortunately I have been on trucks where I don't have to do a lot of the residential lifting like I did before. I can't bend over enough to put on my shoes and tie them myself. I try to have them pre-tied as much as possible, but sometimes my wife actually has to help me on those days when my back is really, really stiff. It is not every day Your Honor, but it happens a pretty lot, especially in the colder weather.

MM: Does the weather have any impact on your condition?

JJ: Yeah, like I said I think I get more stiff both in my neck and my back. Real cold days are pretty bad, but in the truck we have heat so it is usually okay. It's not like I have to go out and shovel snow. That would be a major problem.

MM: Have these injuries impacted your work around the house?

JJ: Oh yes. I am not doing any heavy snow shoveling or anything like that. I can't risk it at all. I do cut our lawn. I will even try to rake the leaves. It's in much smaller doses than I used to do, but I am still doing everything I can. I'm working at about one third speed as before. My wife doesn't know the pain I go through. I really don't talk to anybody about it. I am dealing with this myself. I am scared to death that I am going to lose my job and I feel that even testifying today that this could have some repercussions on my job. No one has said that to me – it is just how I feel. I am not the man I used to be. I would like to get back to that person somehow someday.

MM: Has this impacted you emotionally?

JJ: Well yeah, how couldn't it? You go to bed every night not knowing if you are going to be able to make it up the next day and be able to get to work. When you have a whole family with three kids and you need to work and save to put them through college and you don't enough savings yet to do that and this is all that I know how to do to earn a decent living. What happens if I can't work? I mean it will be all over for everyone. I have always been seen as the guy. Not anymore. I am doing everything right by the book except I'm not getting better. You know, you just worry....or at least I just worry. I pray every night that my pain will go away. It doesn't. I pray every night that I won't lose my job. So far that's worked. I'm grateful. I get most depressed at night when I can't sleep. My mind races. A few times a week I get out of bed and close the bathroom door and start crying. I don't know why. It just comes over me. I don't want my wife to hear.

MM: Have you taken any medication?

JJ: Like I said, I am not taking any prescription medication, narcotics. There is not one narcotic pill that is going in my mouth, ever. I take over the counter Ibuprofen or Aleve on occasion. It doesn't really do anything. It is only on those super bad days which happen a couple of times per month or so during the colder weather, but otherwise, I am just trying to take it as easy as I possibly can outside of work. I try to do my job the best way I can to make sure I give my employer an honest day's work so I can stay on the job and continue to work until I reach retirement age. I pray to God every night that that will happen. I just wish I could have at least tried this marijuana treatment because there seems to be hope. If I was able to get this pain down just a little bit, it would make a world of difference in my life. I wouldn't mind having chronic pain if it was manageable. It's just that this severe pain just grates on you every day and wears you down. I can't expect to be pain free. I would like to be, but I am not expecting that. There just has to be some way I can get myself more functional.

MM: I have nothing further.

JW: Cross examination – Mr. MacDonald.

DM: Mr. Jones, I am going to ask you a series of questions. Most of the questions you can say you either agree or don't agree or yes or no and that probably would speed things up, but you answer the best you can. Okay?

JJ: Alright.

DM: Your attorney asked you some questions about how you were functioning generally speaking physically immediately before this accident of July 1, 2016. Remember that?

JJ: Yes.

DM: Basically you told the Court that you were functioning with no limitation at work. Is that true?

JJ: Yes.

DM: And you also told us that in connection with your previous back injury in 2003, you were fully recovered from that and that you were having no back pain at all when the accident of July 1, 2016 occurred. Is that also true?

JJ: Yes.

DM: The only doctor that you were seeing as of July 1, 2016 was for your occasional chiropractic treatment and that was really more for maintenance or a health visit so that you could get your entire spine as healthy as possible and make sure that you stayed at that optimal health level. Is that true?

JJ: Yes. It wasn't like I was having any major problems or anything. I was good to go.

DM: And you told your pain management doctor, Dr. I. M. Mello specifically as to your neck that by the time you saw her on February 10, 2018, the only issue you had with your neck was that you had lost a little range of motion side to side but that you had felt that you had made a 95% recovery. Is that accurate in terms of how you felt immediately before your July 1, 2016 accident?

JJ: Yes. Yes....that is exactly what I told her. I had basically recovered. I would occasionally have a little bit of pain in my neck, but it didn't stop me from doing anything. It was there. I know it was there, but I had zero restrictions in my employment duties and they were very physically demanding. I was very competitive in both softball and bowling and that little loss of range of motion was nothing, at least as far as I was concerned. I did know I had a major neck surgery previously, but I got over it.

DM: You said that you really liked Dr. Payne. Is that true?

JJ: Very much so. He was really a caring doctor. And very professional.

DM: You do remember at the last appointment one of the things that he told you was that you could come back to see him if you ever had any further problems.

JJ: That is correct.

DM: And you never did go back to see him, did you?

JJ: No.

DM: You have never seen a psychiatrist in your life other than the two psychiatrists you saw in connection with your permanency evaluations in this case. Is that true?

JJ: Yes. That is true.

DM: If a person was to stand back and look at your daily activities objectively, they would see a person who is still working just like he used to. Is that true?

JJ: Yes. Just no overtime. I hide things well.

DM: There is no part of your job that you have told your employer you can't do. Is that true?

JJ: That's true. Actually I wish I could get some extra overtime, but there is none. I don't know why I am not getting overtime, but I am not.

DM: If they gave you overtime, would you be willing to do it?

JJ: I certainly would try.

DM: Fair enough. You still have a very close knit family. Is that true?

JJ: Yes. I am very grateful for that.

DM: You may have had to make some adaptations with what you do at home compared with what you did before this accident, but you still do all the maintenance and chores around the house that you did before the accident. Is that true?

JJ: Yes. More slowly, and in smaller bites, but yes, I contribute. They all count on me. I pull my weight, just more slowly and carefully.

DM: There is not one doctor that has advised you that you need surgery for either your neck or your low back. Is that correct?

JJ: That is correct.

DM: Dr. Moore and Dr. Mello both advised you that injections might be helpful for you, but you have declined to even try one. Is that correct?

JJ: That is correct.

DM: Are you taking any type of prescription medication for your spine?

JJ: No.

DM: Are you taking any type of prescription medication for your emotional condition?

JJ: No.

DM: If I told you that the work records indicate that you have not lost any time from work at all since this accident occurred, would you agree with that?

JJ: Yes. I would agree with that. My record is intact since I came back from work from my cervical spine injury back in 2003. I take great pride in that.

DM: That's impressive and commendable.

JJ: Thank you.

DM: Are you aware that over the past year they have made it easier to get on a medicinal marijuana program? When did you last try to apply?

JJ: That was last year. Do you think I should reapply?

DM: Mr. Jones you should take that up with your attorney and your doctor.

MM: I object Your Honor.

JW: On what basis, Counselor?

MM: The relevance of his questioning.

JW: Actually I think it is very relevant Counselor. He simply asked a perfectly relevant question as to when he last applied for medicinal marijuana. The standards in New Jersey have been lowered for patients who wish to avail themselves of the program. The Court itself has questioned why your client hasn't reapplied, and now I at least know the answer. Objection overruled, and frankly I can tell you Mr. Jones, if you have not attempted to apply for the program since the prerequisites were lowered concerning the types of medical conditions that can be treated, then you would probably have a higher percentage of qualifying at this point in time, but I am not making any judgment about whether this is in your medical best interest. Nor am I recommending what you should do. I am not a doctor. I am not judging compensability of the condition at this point nor

the propriety of the treatment you wish to avail yourself of. However, I can say as officers of the court, we would all like you to be as healthy as you could be within reason. You clearly have communicated to me that this marijuana issue was an important one for you and all I am saying at this point in time there may be no harm in reinvestigating your options through your attorney. I am certain that he will be very happy to help you in that regard.

JJ: Thank you Your Honor.

JW: Does anyone have any further questions?

DM: No Your Honor.

JW: Any redirect?

MM: Yes, just one brief question Your Honor, if you don't mind.

JW: Go right ahead.

MM: Mr. MacDonald asked you about you not returning to Dr. Payne. Could you explain to the Court why you did not?

JJ: As much as I like Dr. Payne, he basically told me that unless my condition got worse, that some people just take longer to improve and I really didn't think there was anything more he had to offer me. He was an orthopedist who had me doing proper exercises and had me going through all of that. I don't want to have surgery, so it looks like the only other option in my mind would have been pain management to take care of my condition as it exists. I don't know even if that would be a help, but I really can't bring myself to get the injections or the narcotics. It's all the same thing. It is just way too stressful. That's why I thought the medicinal marijuana was really a good idea, but my thing with Dr. Payne is that I am not really any worse now than what I was then and I just persisted and I haven't improved. So, I just thought I would be wasting his time. I would like the Court to know that I did really like him and thought he was really caring about me and I didn't mean any disrespect by not going back to him.

JW: None is taken, sir. Any other questions counselors?

MM: No, Your Honor.

DM: No, Your Honor.

SCENE THREE QUESTIONS

1. Was Teller under any obligation to withdraw as Court Reporter for this proceeding in light of her "friendship" with Monet and/or her "informant" status?

2. Was Monet under any obligation to have her withdraw and/or advise the Court of his "friendship" with her and/or her "informant" status?
3. Critique Monet's direct.
Critique each of Monet's objections.
4. Critique MacDonald's cross.
Critique each of MacDonald's objections.
5. Critique each of the Judge's rulings.
6. Critique the Judge commenting on medicinal marijuana.
7. What is the definition of relevance?
8. What is the definition of an improper leading question?
9. Is "asked and answered" a proper objection? If so, why? If not, why not?
10. What do you think of the procedure of admitting all evidence/reports/records in a typical workers' compensation trial in order to facilitate the efficient use of judicial time?
11. Has MacDonald committed malpractice if he has not obtained his client's consent regarding admission of all records including Dr. I.M. Mello report?
 - 11a. How dangerous was that report to his defensive position? Would the "palliative" stipulation be a defense in and of itself?
12. Should Judge Wrightman have allowed the medicinal marijuana issue to be tried concurrently with the permanency trial?
13. Assess each attorney's opening.
14. To what extent, if any, can an attorney personalize an opening or closing statement?
 - 14a. To what extent is it either an ethical violation or error?
15. To what extent, if any, can an attorney comment on credibility of a party or expert witness?
16. Rate the relative professionalism of Judge Wrightman, Monet and MacDonald in this scene.
 - 16a. Who appears to be the most competent of the above three individuals?
17. Would you have expected a post-testimony judicial conference to follow?

18. Considering solely Petitioner's testimony and the record created, what would you consider the "value" of his claim right now?

18a. If you were MacDonald, would you have changed your position?

18b. If you were Monet, would you have changed your position?

SCENE THREE

POST HEARING CONFERENCE

- JW: Well gentlemen has what you heard in anyway impacted your respective positions? I would really like to see if we can make an effort to resolve this claim.
- MD: I haven't heard anything from the Petitioner Your Honor that would change my client's position towards settlement at this point in time. Stick a fork in him on establishing any pre-existing disability. He's toast. That is unsalvageable in my opinion. I don't think it could have gone any better for me. I'm glad I timely revoked the \$15,000 offer.
- MM: Your Honor, I was hoping that Your Honor would see what I meant once you heard this Petitioner in person. I think his situation is completely credible, that he has a serious overall medical condition which is largely resultant from his compensable accident. I think it's somewhat unusual, but he's not malingering. In fact I think he's in a really tough spot. He's struggling with his employment and his life and I think he deserves to be compensated accordingly. I agree with Mr. MacDonald except that this award as a matter of law starts at 27 ½%.
- JW: Well I do believe he is a credible individual, certainly hardworking and appears to be very entrenched in his own ideas as to what he needs to do in life. But as a judge my job is to apply the compensation law fairly under the facts of the case and Mr. Monet, your client has the burden of persuading me by a preponderance of the credible evidence that he's entitled to benefits when it comes to permanency based upon demonstrable objective medical evidence and material interference with working or non-working function. It's your client that has to persuade me that he meets the criteria. He brings a certain responsibility to the equation. The Respondent clearly offered conventional appropriate treatment for his initial injuries. He was very satisfied with Dr. Payne who kept the door open if he needed to come back. Per the MRI study he does not have any obvious major spinal abnormalities except for his old fusion which apparently wasn't giving him much of a problem just before the accident as we all agree. He has personal issues with not even attempting one injection to see if it might help. He has to get in the game. Respondent's position could easily be that he is seeking secondary gain and really isn't as bad as he professes to be. On the other hand even if he is credible there has been no conventional modality of treatment for any bona fide compelling structural diagnosis that I can see. You're saying he's aggravated a pre-existing condition with his neck. There's no doubt that this injury is superimposed on that surgery but I am not so certain that there is an automatic 27 ½% which is actually legally aggravated. I'm going to eventually need briefs on this issue. I see it lots of times in Fund cases where there's an old, remote award and under the right circumstances that gets ignored sometimes for pre-existing disability if it's the same body part. I don't mean to prejudge this case at this point in time but these are my initial observations. But probably more than anything in that regard I am really astounded, Mr. Monet that you come into this court with this type of presentation to emphasize Respondent's obligation, which you know is an area of significant controversy in the Division at this point in time, for a condition that you say is so significant yet at

least based on the testimony you haven't even sent him back for another shot at seeing if he can qualify collaterally for the relief he is actually here for. This would've been the quickest avenue for him. It would have helped solve our issues. It's clear you aren't conversant with the issue. You have a responsibility to be and to your client. I'm not saying this is going to work but I am saying if you want that, it's hard to understand why he hasn't renewed his application but I think we both know why. I'm not going to cannonade the proverbial butterfly. The medicinal marijuana threshold standards have been significantly limited. He doesn't appear to have a major financial issue. Did you ever discuss with him sending him back and if not why not? Am I missing something? You have skin in this game and have an ethical obligation to provide him with competent advice. The RPC's even protect you in that regard. (See RPC1.2 (d)).

MM: Judge honestly I'm not an expert in medicinal marijuana. This is the first case I've ever had with someone who's come to me. You are right, I wasn't aware of the treatment protocol. I apologize to the court but regardless I still strongly feel that this is a modality of treatment that could be of some benefit to him and –

JW: [interjects] Counselor, let me make myself perfectly clear. I am not ordering any treatment under any circumstance or any type of modality of medical treatment that "could be" or "might be" a benefit to someone especially in the absence of exhausting other tried and true conventional modalities. That's a conceptual position, a presumptive position. I am not discounting that appropriate evidence could come before me and could sway me, but I doubt it. Frankly I really think you have your hands full in this case and I'm wishing you good luck. Perhaps the testimony of the physicians will help clarify where we are. Mr. Monet in our previous conference you summarily dismissed a \$15,000.00 Section 20. Let me ask you a question: is a Section 20 disposition still out of the question regardless of the amount, assuming Mr. MacDonald is willing to reconsider?

MM: Frankly Judge I have not discussed the issue of an increased figure with my client. I know that his major concern is future medical protection under the statute and dealing better with his chronic pain. In view of his significant ongoing problems he's very afraid that he may not be able to continue to work at some point in the future which may be sooner rather than later.

JW: Isn't that true in any case? You have no medical evidence regarding prognosis. You've got a previous cervical spine problem and he has ultimately overcome it medically. He seems to be a hardworking individual. If he Section 20's this claim why wouldn't he have potential future rights or an occupational exposure or possibly maybe even re-injury that would put him over the top and get him some type of more aggressive medical treatment if that's what his needs are? It's not like the Section 20 would be a death sentence to his potential future options depending on how the future develops.

MM: I hear what you're saying your Honor. I will discuss this with my client but Mr. MacDonald has not indicated that he will reinstate his previous offer, much less increase it.

DM: [Looks at Monet]. You know counsellor right now you should be sweating bullets. But you don't get it. I'm a man of my word. When I say I'm going to do something, I do it. I'll hear further from you when and if you tell me that your client is willing to either accept my former offer or if there is some other number that may be acceptable. Until then you are on your own. My concern is that your client has no idea whatsoever of what he's realistically entitled to in this claim and frankly you and I are miles apart in our analysis of potential exposure. As I've told the judge and I'm telling you right now I would have preferred to resolve this claim. I believe I made the appropriate offer at the time. There was a reason it was going off the table on the first day of trial. In reality your client's not going to get any court-ordered medicinal marijuana at this point in time. He's not going to get any psychiatric disability. Finally, he will be lucky if the judge finds this to be something more than a minor strain or sprain so that it's not barred by Perez even if he finds that, I do not believe that the judge is going to stack anything on a 27 ½ pre-existing disability. You are in the twilight zone, not reality.

JW: [interjects] Counselors I don't want to get bogged down in all this little argument at this point in time. It's all premature. I think you are all "big boys" and can figure this out. You've heard my impressions at this point in time. I am not prejudging this case. I am trying to effectuate a settlement between you two. However, Petitioner's doctors are scheduled in one cycle. Per the pre-trial memorandum I am more than happy to hear all the evidence and determine this case accordingly. However I can't help but saying I think the Petitioner deserves a little bit more time with you Mr. Monet to carefully review everything and perhaps you may want to employ a more experienced attorney to assist you in that regard or at least consult with one.

MM: Your honor frankly that's offensive.

JW: [Comes back] Frankly counselor I find your assessment of my well-intended and constructive suggestions offensive. Good day.

At which time the conference ends. There is no discussion between MacDonald and Monet. Monet has a brief conference with Petitioner and they leave. MacDonald puts together his file, the judge makes a personal phone call and the court reporter has packed up. All three converge in the elevator going down as they leave the courthouse. Judge Wrightman asks the court reporter, "Well what did you think?" and she pauses and says to him "I think this is a very sad situation." To which he responds "that's one way of putting it" and gives her a wry smile. MacDonald just looks down at the floor and they all leave the elevator without further comment. Needless to say Mia Teller texted the exchange to Monet by the time she reached the court parking lot.

Monet is shaken by the tenor of the post-hearing conference. He feels the Judge has prejudged the case. He felt he had two adversaries in the conference. He had banked everything on his client's credibility and while he felt Petitioner was great, he also felt it didn't budge the needle. He felt as if both Wrightman and MacDonald had concluded he was incompetent and were now trying to bully him into a settlement. He decided to call a more senior colleague who couldn't believe what was happening. She told Monet to stick to his guns and take an appeal if necessary.

If Wrightman ignored the award as a starting point that would be an error of law, not in the Close v. Kordulak wheelhouse. Different ballpark. Monet felt encouraged. He felt he was swimming upstream but he felt oddly vindicated and somewhat empowered. Forget getting another \$5,000 on a Section 20. He could probably sell it to the Petitioner, but why do so? This was not a time for expediency. He had a shot of getting the justice he believed his client deserved. This was indeed a big deal. He decided to try this to a conclusion and like his client, pray for the right outcome. No need to contact the Petitioner any further. His confidence and conviction were growing.

QUESTIONS

1. Critique Judge Wrightman's handling of the post-trial conference. Did he violate any Canons of Judicial Conduct?
2. Do you agree with Monet's decision to go forward without exploring a higher Section 20 (as he represented to the client he would do)? Why or why not?
3. Was Monet obligated to investigate whether Petitioner had a Section 20 interest at a figure more than the \$15,000 offer based on Monet's representation to the Court?
4. Is it an ethical violation to have your client's authority to resolve a claim at a certain figure and then "hold out" for a higher figure without the client's permission?