Chapter 6

EXPERTS

SYNOPSIS

PART I: STRATEGY
§ 6.01 Scope
§ 6.02 Objective and Strategy
PART II: DISCOVERING FACTS KNOWN AND OPINIONS HELD BY EXPERTS
§ 6.03 CHECKLIST: Discovering Facts Known and Opinions Held by Experts
§ 6.04 Understanding Strategies, Timing, and Methods for Obtaining Expert Discovery
[1] Discovering Expert Information Through Interrogatories
[2] Making Requests for Production of Documents
[3] Setting Location of Deposition Cognizant of Potential Impact on Expenses
[4] Authorizing Voluntary Interview with Treating Physician
§ 6.05 Providing Broadest Discovery for Experts who Testify at Trial
§ 6.06 Obtaining Discovery from Non-testifying Experts when Exceptional Circumstances Exist
§ 6.07 Obtaining Expert Reports Through Request for Production of Documents
§ 6.08 Discovering Communications Between Expert and Attorney
§ 6.09 Obtaining Documents Relied Upon by Expert

PART III: DISCLOSING EXPERT REPORTS
§ 6.10 CHECKLIST: Disclosing Expert Reports
§ 6.11 Producing Contents of Disclosure
[1] Providing Entire Reports Authored by Expert
[2] Protecting Against Motion in Limine Through Complete Statement of Expert's Opinions
[3] Delineating Facts Considered by Expert in Formulating Opinions
[4] Including List of Publications in Establishing Qualifications
[5] Communicating Expert Compensation
§ 6.12 Selecting Manner of Disclosure
[1] Attaching Report to Interrogatory Answers
[2] Responding to Document Request
[3] Disclosing by Means of Amendment of Interrogatory Answers
[4] Understanding Adoptive Admission Rule
[5] Making Expert Disclosure by Providing Oral Summary No Longer Permitted
§ 6.13 Failing to Meet Expert Disclosure Deadline
[1] Serving Expert Report No Later than 20 Days Prior to End of Discovery Period
[2] Complying with Continuing Obligation to Disclose
[3] Understanding Effect of Case Track Assignment on Expert Discovery
PART IV: FILING MOTIONS REGARDING EXPERT REPORTS
§ 6.14 CHECKLIST: Filing Motions Regarding Expert Reports
§ 6.15 Filing Motion to Set Date Certain for Disclosure of Expert Reports
§ 6.16 Filing Motion to Extend Time to Provide Expert Reports Prior to Discovery End Date
PART V: SEEKING PHYSICAL AND MENTAL EXAMINATION OF PERSONS
§ 6.17 CHECKLIST: Seeking Physical and Mental

Examination of Persons

§ 6.18 Permitting Physical and Mental Examination Only in Certain Actions

[1] Determining Need for Physical or Mental Examination in Tort, Negligence, and Employment Cases

§ 6.19 Adhering to Notice Requirements when Requesting Physical or Mental Examination

§ 6.20 Considering Motions Relating to Physical and Mental Examinations

[1] Filing Motion for Protective Order

[2] Filing Motion to Compel Physical Examination on Date Certain or within Specified Period of Time

[3] Filing Motion to Dismiss for Failure to Submit to Examination

[4] Filing Motion to Dismiss for Failure to Comply with Court Order Compelling Examination

[5] Filing Motion for Re-examination by Expert if Examined Party Does Not Consent

§ 6.21 Having Counsel Present for Examination or Having Examination Recorded

PART VI: CONSIDERING AFFIDAVIT OF MERIT REQUIREMENT IN PROFESSIONAL LIABILITY CASES

§ 6.22 CHECKLIST: Considering Affidavit of Merit Requirement in Professional Liability Cases

§ 6.23 Identifying Professionals to Whom Affidavit of Merit Applies

§ 6.24 Following Criteria for Complying with Affidavit of Merit Statute

[1] Ensuring that Action Is for Damages for Personal Injury, Wrongful Death, or Property Damage

[2] Ensuring that Damages Result from Alleged Act of Malpractice or Negligence by Licensed Person in Profession or Occupation

[3] Providing Each Defendant with Affidavit within 60

Days of Filing Answer to Complaint
[4] Timely Seeking Extension of Time to File Affidavit
[5] Failing to Provide Appropriate Records for Affidavit within 45 Days of Request
§ 6.25 Complying with Requirements Regarding Contents of Affidavit of Merit
[1] Ensuring that Affidavit of Merit Is Signed by Appropriately Licensed Individual
[2] Stating Reasonable Probability that Professional's Treatment Fell Outside Acceptable Professional or Occupational Standards
[3] Signing of Affidavit by Expert
§ 6.26 Adhering to Special Requirements for Malpractice Affidavits of Merit
[1] Requiring Board Certified Physician in Same Specialty as Defendant
[2] Utilizing Hospital Credentials as Alternative to Same Specialty Requirement
PART VII: PREPARING FOR EXPERT TESTIMONY AT TRIAL
§ 6.27 CHECKLIST: Preparing for Expert Testimony at Trial
§ 6.28 Determining Admissibility of Expert Testimony at Trial Under New Jersey Rules of Evidence
[1] Evaluating Qualifications of Expert if Disputed
[2] Objecting to Admissibility of Expert Testimony
[3] Determining Admissibility of Opinions by Expert Who Relies on Reports of Another Party's Expert
[4] Ascertaining Whether Information Relied Upon by Testifying Expert Is Generally Relied Upon by Experts in Field
[5] Determining Admissibility of Hearsay Statements Relied Upon by Expert in Formulating Opinions
[6] Establishing Whether Scientific Methodology Relied Upon by Expert Is Generally Accepted by Scientific Community (*Daubert*/*Frye* Motion)
§ 6.29 Determining if Expert Testimony Is Admissible or Necessary

§ 6.30 Utilizing Exceptions to Admissibility of Expert Testimony
[1] Testifying to Matters within Common Knowledge of Jury
[2] Considering Matters of Law
§ 6.31 Eliciting Expert Testimony Regarding Ultimate Issue to be Decided by Jury
§ 6.32 Applying Net Opinion Rule and Underlying Basis for Expert Testimony
§ 6.33 Balancing Weight Versus Admissibility of Expert Testimony
§ 6.34 Qualifying Expert Witness at Trial
§ 6.35 Impugning Expert's Credibility on Cross-Examination
§ 6.36 Considering Trial and Pretrial Motions Relating to Experts
[1] Attacking Scientific Reliability of Expert's Opinions with *Daubert*/*Frye* Motion
[2] Barring or Restricting Expert Testimony with Motion in Limine

PART I: STRATEGY

§ 6.01 Scope

This chapter covers:

- Methods, strategies, procedures and timing of obtaining expert discovery.
- Differentiation of rules pertaining to different types of experts.
- Procedures for the disclosure of expert reports.
- Motion practice regarding expert reports.
- Procedures, practices and motions pertaining to the physical and mental examination of persons.
- Procedures and practices pertaining to the affidavit of merit statute and pretrial evidentiary motions regarding experts.
- Practices and procedures pertaining to the admissibility of expert testimony at trial.

§ 6.02 Objective and Strategy

The purpose of this chapter is to provide comprehensive coverage of issues pertaining to experts beginning with considerations that must be addressed prior to, or at the very least contemporaneously with, the commencement of a lawsuit, through discovery and pretrial. The chapter concludes with a discussion of expert evidentiary issues and tactics that take place during trial because, like so many other phases of civil litigation, what happens during trial is inevitably a result of the treatment of issues that are either addressed or ignored during discovery and pretrial. There is nothing like a trial to sharpen a practitioner's 20:20 hindsight and to expose the mistakes made during the discovery and pretrial stages. Therefore, it is singularly appropriate to study pretrial and discovery strategies and techniques pertaining to experts from the standpoint of the successes and failures of offering expert testimony at trial.

PART II: DISCOVERING FACTS KNOWN AND OPINIONS HELD BY EXPERTS

§ 6.03 CHECKLIST: Discovering Facts Known and Opinions Held by Experts

☐ Determine what type of expert is likely to be required in case.

○ Ascertain whether complaint alleges bodily injury, professional liability or malpractice, product liability, toxic exposure, economic loss, or any other substantive issue or claim for damages that may require expert testimony. If so, determine relevant and permissible scope of discovery.

Authority: N.J. Ct. R. 4:10-2.

Discussion: *See* §§ 6.04, 6.05 *below*.

☐ Prepare interrogatories, specifically addressing expert issues; simultaneously serve with complaint if representing plaintiff, or as soon as possible after receiving case to defend, if representing defendant.

○ Determine whether case is subject to rules requiring uniform interrogatories.

Authority: N.J. Ct. R. 4:17-1, 4:17-2.

Forms: Form CLD 6.603.01, Expert Witness Interrogatories

Discussion: *See* §§ 6.04[1], 6.05 *below*.

☐ Prepare requests for production of documents that specifically seek all documents, publications, and other materials either relied upon or provided to expert.

○ Serve request for production of documents simultaneously with service of complaint if representing plaintiff, or as soon as possible after receiving case to defend if representing defendant.

Authority: N.J. Ct. R. 4:18-1.

Forms: Form CLD 6.603.02, Request for Production of Documents by Expert Witness

Discussion: *See* §§ 6.04[2], 6.05, 6.07 *below*.

☐ Obtain grant of authorization where voluntary interview with patient's treating physician is sought.

Authority: N.J. Ct. R. 4:10-2(d)(4).

Forms: Form CLD 6.603.03, Voluntary Interview with Treating Physician (Appendix XXII-C) (N.J. Official Form)

Discussion: *See* § 6.04[4] *below*.

☐ Prepare notice to depose experts once initial expert discovery and reports have been exchanged.

○ If adversary counsel will not agree to voluntarily produce expert, prepare subpoena duces tecum and ad testificandum for expert's testimony and copy of expert's file.

Authority: N.J. Ct. R. 4:14-7(b)(2).

Forms: Form CLD 6.603.04, Expert Witness Deposition Notice

Discussion: *See* §§ 6.04[3], 6.05 *below*.

☐ Determine whether party is entitled to adversary's collateral expert information.

○ Determine whether party is entitled to adversary's non-testifying or consulting expert's report.

○ Seek court order for report from adverary's non-testifying expert only when "exceptional circumstances" exist that be demonstrated.

○ Ascertain extent of entitlement to written communication between expert and opposing counsel.

○ If entitlement exists, demonstrate, in motion papers: (1) a substantial need for the materials for case preparation; and (2) an inability to obtain the substantial equivalent of the materials by other means without undue hardship.

○ Identify and obtain underlying facts, data, standards, materials, information, etc., which is relied upon by experts.

Authority: N.J. Ct. R. 4:10-2(d)(1), (2), (3).

Discussion: *See* §§ 6.06, 6.08, 6.09 *below*.

§ 6.04 Understanding Strategies, Timing, and Methods for Obtaining Expert Discovery

[1] Discovering Expert Information Through Interrogatories

The permissible types and scope of discovery in any civil case generally are set forth in N.J. Ct. R. 4:10-1, 4:10-2, which specifically address the issue of experts. Parties are entitled to discover all facts known and opinions held by experts that are relevant to the subject matter of the litigation, relating to the claim or defense of any party. N.J. Ct. R. 4:10-2(a), (d).

Through interrogatories, a party is entitled to discover the names and addresses of all experts expected to testify at trial, including a plaintiff's treating physician, and any expert who will not testify at trial who has conducted an examination pursuant to N.J. Ct. R. 4:19 or to whom a party making a claim for a personal injury has voluntarily submitted for an examination without court order. Interrogatory questions can also seek a copy of an expert's report as well as qualifications and the facts, data, and information relied upon by any expert, or that were communicated to the expert by a party's attorney. N.J. Ct. R. 4:10-2(d)(1), 4:17-4(e).

● **Warning:** Practitioner should be mindful of the requirements relating to uniform interrogatories as indicated in N.J. Ct. R. 4:17-1(b), which will have an effect upon the number and scope of interrogatories propounded in all personal injury cases (except for wrongful death and toxic torts) and most product liability and professional malpractice cases. The uniform interrogatories do not contain thorough expert's questions, so you may have to use some supplemental interrogatories for additional expert questions.

Forms: Form CLD 6.603.01, Expert Witness Interrogatories

[2] Making Requests for Production of Documents

A document request is the most efficient means to discover another

party's expert report. In addition, a document request is an efficient way to discover all documents, materials, standards, data, other information, or written or graphic material provided to, or relied upon by, any expert in the case. N.J. Ct. R. 4:18-1.

● **Warning:** To economize the use of supplemental interrogatories, consider what types of information are likely to be provided by way of documents, and seek that information by requests for production of documents instead of interrogatories. Additionally, requests for admissions can sometimes be used as a substitute for interrogatories. Particularly with regard to documents, standards, etc., relied upon or furnished to experts, that information can be obtained through a request for documents rather than using up some of the 10 permitted supplemental interrogatories when uniform interrogatories are required.

Forms: Form CLD 6.603.02, Request for Production of Documents by Expert Witness

[3] Setting Location of Deposition Cognizant of Potential Impact on Expenses

An expert whose report has been furnished may be deposed as to the opinions stated in that report. The party taking the deposition must pay the expert a reasonable fee for the appearance. If the parties cannot agree upon a reasonable fee for the expert's deposition, the fee will be determined by the court, usually on a formal motion. The fee for the expert's preparation for the deposition must be paid by the party producing the expert. N.J. Ct. R. 4:10-2(d)(2). If the expert lives or works in New Jersey, but the deposition is taking place in a location other than the expert's home or office, the party taking the deposition must pay for the expert's travel time and expense. If the expert neither resides nor works in New Jersey, the proponent of the expert bears the expense of producing the expert for deposition either in the county in which the lawsuit is pending or such other place within the state as the parties may agree. If the expert's deposition takes place outside New Jersey, the proponent of the expert must pay all reasonable travel and lodging expenses incurred by all parties who attend. All of the general principles set forth above are subject to modification by

order of the court. N.J. Ct. R. 4:10-2(d)(2), 4:14-7(b)(2).

Forms: Form CLD 6.603.04, Expert Witness Deposition Notice

[4] Authorizing Voluntary Interview with Treating Physician

A party may not seek a voluntary interview with another party's treating physician unless that other party has authorized the physician to disclose protected medical information, using the form set forth in Appendix XII-C of the New Jersey Court Rules. N.J. Ct. R. 4:10-2(d)(4).

The authorization form, addressed to the physician, includes the following:

1. Identifies the individuals who may conduct the interview;
2. Explains that the physician's participation in the interview is entirely voluntary;
3. Explains that the physician has the right to have the party's attorney present at the interview;
4. Indicates that the physician may disclose protected information reasonably related to the medical condition placed in issue by the lawsuit;
5. Identifies the medical condition placed in issue;
6. Informs the physician that the authorization may be revoked at any time;
7. Informs the physician that the authorization expires 120 days after the date of its execution;
8. Indicates that the physician may contact his or her own attorney or the patient's attorney to answer any questions; and
9. Is signed and dated by the patient.

N.J. Ct. R., Appx. XII-C, Authorization to Release Private Health Care Information and for Voluntary Interview.

Forms: Form CLD 6.603.03, Voluntary Interview with Treating Physician (Appendix XXII-C) (N.J. Official Form)

§ 6.05 Providing Broadest Discovery for Experts who Testify at Trial

The broadest and most complete discovery is permitted to a party

regarding experts expected to testify at trial. N.J. Ct. R. 4:10-2(d), 4:14-7(b)(2), 4:17-4(e).

§ 6.06 Obtaining Discovery from Non-testifying Experts when Exceptional Circumstances Exist

Facts known, or opinions held by experts retained in anticipation of litigation or preparation for trial, who are not expected to testify at trial, are only discoverable when the party seeking discovery demonstrates exceptional circumstances that make it impractical to obtain facts or opinions by other means on the same subject. This discovery is generally obtained by court order and, when permitted, the court will require the party seeking discovery to reimburse a fair portion of the fees and expenses reasonably incurred by the other party in retaining the expert. A party can usually meet the exceptional circumstances requirement of this rule when evidence made available for inspection, examination, or testing by one party's expert is no longer available for similar use by another party's expert. *See Graham v. Grelehinsky*, 126 N.J. 361 (1991) (holding that, though permissible in instant case due to lack of precedent, party generally not permitted to introduce opinion testimony of expert initially consulted by adversary, absent exceptional circumstances). N.J. Ct. R. 4:10-2(d)(3).

● **Warning:** The result of *Graham v. Grelehinsky*, 126 N.J. 361, 599 A.2d 149 (1991) is that counsel cannot call an adversary's non-testifying expert as counsel's own expert at trial merely because the opinion of that expert is favorable to counsel's case. This does not constitute exceptional circumstances under which the court will allow this testimony.

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§ 6.07 Obtaining Expert Reports Through Request for Production of Documents

Reports of a party's expert who is expected to testify at trial can be obtained expeditiously by making a request for production of documents because a response to a document request is due within 35 days of service. Expert reports are also obtainable through responses to interrogatories. N.J. Ct. R. 4:10-2(d)(1), 4:17-4(e), 4:18-1(b).

Strategic Point: The practitioner should always seek copies of all expert reports through both interrogatories and document requests. While a document request may procure the report faster, answers provided in an interrogatory may give rise to invocation of the adoptive admission rule, whereby a party's response to a specific expert interrogatory question may result in that party's adoption of the expert report as his or her own admission. *Skibinski v. Smith*, 206 N.J. Super. 349 (App. Div. 1985) (rule applies only when expert's report is responsive to specific interrogatory question).

Forms: Form CLD 6.603.02, Request for Production of Documents by Expert Witness

§ 6.08 Discovering Communications Between Expert and Attorney

Although prior to September 2002 drafts of expert reports were routinely discoverable, this is no longer the case. N.J. Ct. R. 4:17-4(e) (as amended). Discovery of communications between a party's attorney and any expert retained by the attorney that occurred prior to service of the expert's report is limited to facts and data considered by the expert in rendering that report. All other communications between the attorney and expert constituting the collaborative process in preparation of the report, including preliminary and draft reports, are considered trial preparation material. N.J. Ct. R. 4:10-2(d)(1). A party seeking production of this type of trial preparation material must demonstrate, in motion papers:

1. A substantial need for the materials in case preparation; and
2. An inability to obtain the substantial equivalent of the materials by other means without undue hardship.

N.J. Ct. R. 4:10-2(c), 4:10-2(d)(1).

§ 6.09 Obtaining Documents Relied Upon by Expert

All facts, data, standards, etc. that are considered by an expert in formulating opinions, and communicated or provided by counsel for the proponent of the expert, are discoverable and can be expeditiously obtained by making a document request. Generally, parties seek this type of information as early as possible in the case to provide the information to

their own experts and utilize it in the deposition of experts. N.J. Ct. R. 4:17-4 (e).

PART III: DISCLOSING EXPERT REPORTS

§ 6.10 CHECKLIST: Disclosing Expert Reports

☐ Determine whether expert testimony and opinions will be used in prosecuting or defending case at trial and therefore must be disclosed in timely fashion.

Authority: N.J. Ct. R. 4:17-4(e).

Discussion: *See* § 6.11 *below*.

☐ Determine whether expert reports comply with requirements of court rules.

- ○ Ensure that report contains complete statement of expert's opinions and basis for those opinions.
- ○ Ascertain whether report accurately and adequately sets forth facts and data considered by expert in reaching opinions expressed in report.
- ○ Establish that report, or separate curriculum vitae, provides expert's qualifications.
- ○ Validate that report, or curriculum vitae, includes list of all publications authored by expert within most recent 10 years.
- ○ Verify that report discloses terms of expert's compensation for report and testimony.

Authority: N.J. Ct. R. 4:17-4(e).

Discussion: *See* § 6.11 *below*.

☐ Disclose expert report through answer to interrogatories, response to document request, or amended response to interrogatories or document request.

Authority: N.J. Ct. R. 4:17-4, 4:18-1.

Forms: Form CLD 6.603.02, Request for Production of Documents by Expert Witness

Form CLD 6.610.01, Letter Serving Expert Report

Discussion: *See* § 6.12[1], [2] *below*.

☐ Assess when and how to amend answers to interrogatories to include new or updated expert reports.

- ○ Consider discovery deadlines in case track assignment or case management order.
- ○ Consider proximity to trial date.

Authority: N.J. Ct. R. 4:17-7, 4:24-1.

Discussion: *See* § 6.12[3] *below*.

☐ Establish method of using or referring to expert report in answer to interrogatories.

- ○ Consider whether contents of expert report become adoptive admission of client.

Authority: N.J. Ct. R. 4:14-4(e).

Discussion: *See* § 6.12[4] *below*.

☐ Evaluate timing of disclosure of expert report, bearing in mind that disclosure must be prior to 20 days before expiration of discovery period.

Authority: N.J. Ct. R. 4:17-7.

Discussion: *See* § 6.13[1], [2] *below*.

☐ Consider continuing obligation to disclose.

Authority: N.J. Ct. R. 4:17-7.

Discussion: *See* § 6.13[1], [2] *below*.

§ 6.11 Producing Contents of Disclosure

[1] Providing Entire Reports Authored by Expert

If intending to use expert testimony and opinions at trial, counsel responding to an interrogatory must timely disclose to all parties all reports of each expert that counsel intends to call, encompassing all the opinions counsel intends to offer into evidence at trial. N.J. Ct. R. 4:17-4(e). Additionally, the New Jersey Rules of Evidence should be reviewed, particularly N.J.R.E. 702, 703, 704, 705, to verify that the opinions

expressed in, and the underlying basis for, the report are admissible in evidence at trial.

● **Warning:** Practitioners must be cognizant of the potential unfavorable consequences of serving and using the reports of experts who may not be called to testify at trial, among other reasons, because of opinions by the expert that may be damaging to their client's case. Once the expert report has been disclosed, and the proponent of the expert does not call the expert to testify at trial, opposing counsel may have the opportunity to request an adverse inference charge to the jury from the trial judge. *See State v. Clawans*, 38 N.J. 162, 183 A.2d 77 (1962) (allowing adverse inference as to fact witness who was not called to testify at trial). As applied to expert witnesses, the adverse inference charge would instruct the jury that if the proponent had called the expert witness to testify, the testimony would have been unfavorable to him or her. *Compare Genovese v. N. J. Transit Rail Operations*, 234 N. J. Super. 375, 560 A.2d 1272 (App. Div. 1989) (suggesting that if proponent of expert does not use expert's de bene esse deposition testimony at trial, opposing counsel should be entitled to adverse inference charge) *with Bradford v. Kupper*, 283 N. J. Super. 556, 662 A.2d 1004 (App. Div. 1995) (upholding trial judge's refusal to give adverse inference charge when deposed expert not called as witness at trial).

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[2] Protecting Against Motion in Limine Through Complete Statement of Expert's Opinions

To protect against a motion in limine at trial that attempts to bar or limit expert testimony, the practitioner should ensure that the written report of each expert contains a complete statement of the expert's opinions and the basis for those opinions. N.J. Ct. R. 4:17-4(e).

[3] Delineating Facts Considered by Expert in Formulating Opinions

The practitioner should ensure that all expert reports clearly delineate all facts, information, and other data that experts have relied upon in reaching their opinions. N.J. Ct. R. 4:17-4(e).

[4] Including List of Publications in Establishing Qualifications

Under prior practice, expert qualifications could be established by a standard resume of the expert's education, professional accomplishments, and work history. Currently, qualifications must also include a list of all publications authored by the expert within the most recent 10 years. N.J. Ct. R. 4:17-4(e) (eff. Sept. 1, 2004, as amended).

[5] Communicating Expert Compensation

The terms of an expert's compensation should be included either as part of the report or in a separate disclosure that accompanies service of any expert report upon all parties. N.J. Ct. R. 4:17-4(e).

§ 6.12 Selecting Manner of Disclosure

[1] Attaching Report to Interrogatory Answers

Attaching an expert report to interrogatory answers is probably the most commonly used method of providing or disclosing expert reports. Attachment to interrogatory answers necessitates strict compliance with the contents of the disclosure as set forth in § 6.11[1] – [5] *above*. N.J. Ct. R. 4:17-4(e).

[2] Responding to Document Request

Because responses to a document request are due within 35 days of service of the request, although no sooner than 50 days after service of the summons and complaint, this method of discovery usually requires the quickest response to an adversary's request for expert reports and related materials. N.J. Ct. R. 4:18-1.

● **Warning:** N.J. Ct. R. 4:18-1 (document requests) does not specifically address production of expert reports or related expert information, and there is no automatic requirement for a party responding to a request for an expert report to provide the more specific information necessitated by answering interrogatories that request an expert report. *See* N.J. Ct. R. 4:17-4(e). *See also* Form CLD 6.610.02, Letter Serving Expert Report.

Forms: Form CLD 6.603.02, Request for Production of Documents by Expert Witness

Form CLD 6.610.01, Letter Serving Expert Report

[3] Disclosing by Means of Amendment of Interrogatory Answers

Frequently, expert reports are not available when parties initially respond to document requests and interrogatories. Consequently, expert reports and related information are often disclosed by means of an amendment to interrogatory answers. Largely due to the time constraints discussed in § 6.13 *below*, it is necessary to constantly plan for and be acutely aware of timing issues regarding expert disclosure. It is always best to seek relief from the court as early as possible if there is a need to extend a deadline to provide expert reports. N.J. Ct. R. 4:17-7.

[4] Understanding Adoptive Admission Rule

The manner in which an expert report is referenced in answers to interrogatories, or an amendment of answers, has a direct impact upon whether the contents of the report may be deemed an admission of the party serving it. N.J. Ct. R. 4:17-4(e). If an interrogatory question simply seeks a copy of an expert's report, and that report is attached in response to the interrogatory, there is no adoptive admission by the party producing the report of the opinions contained within that report. *Skibinski v. Smith*, 206 N.J. Super. 349 (App. Div. 1985) (expert report not adoptive admission because interrogatories only sought copy of report). If, however, an interrogatory question asks for the substance of the facts and opinions as to which the expert is expected to testify, and the response given is to "see the attached report," then the party who has answered the interrogatory has adopted the contents of the attached expert report as his or her admission. *Corcoran v. Sears Roebuck & Co*., 312 N.J. Super. 117, 127 (App. Div. 1998) (because defendant never responded to specific interrogatory requesting substance of facts and opinions of expert, there was no adoptive admission).

[5] Making Expert Disclosure by Providing Oral Summary No Longer Permitted

Until September 2002, a party could properly make an expert disclosure by providing an oral summary of the expert's opinions and report. This practice is no longer permitted under the most recent amendments to the

applicable court rule. N.J. Ct. R. 4:17-4(e).

§ 6.13 Failing to Meet Expert Disclosure Deadline

[1] Serving Expert Report No Later than 20 Days Prior to End of Discovery Period

It is imperative to meet deadlines to amend discovery responses, including the proffer of new or supplemental expert reports. Delays often occur because of the following:

1. Expert reports are not available when responses to document requests and interrogatories are initially provided; or
2. Supplemental reports need to be prepared based on additional discovery obtained during the evolution of the case.

The consequences of failing to meet an expert disclosure deadline may include preclusion of an expert's testimony at trial. *Zadigan v. Cole*, 369 N.J. Super. 123 (Law Div. 2004) (expert report not admissible at trial as it was submitted after discovery end date and without application for extension prior to expiration of discovery). N.J. Ct. R. 4:17-7, 4:24-1.

The latest that an expert report can be served, as with all amendments of interrogatory answers, is not later than 20 days prior to the end of the discovery period as set forth either in the case track assignment, including any extensions, or as provided by a case management order signed by a judge. N.J. Ct. R. 4:17-7, 4:24-1(a), (c). *See* § 6.13[3] *below.*

[2] Complying with Continuing Obligation to Disclose

The New Jersey Court Rules specifically mandate that parties update their original answers to interrogatories rendered incomplete or inaccurate by virtue of new information. If new or supplemental expert reports or information become available following the discovery end date, amendments are only allowed when the party seeking to amend certifies that the late expert report was not reasonably available through exercise of due diligence prior to the discovery end date. In the absence of this certification of due diligence, the court and opposing counsel are entitled to disregard the late expert report. Any challenge to a certification of due diligence will be deemed waived unless brought by notice of motion filed within 20 days after service of the expert report. Any objections made thereafter may not be entertained by the court. N.J. Ct. R. 4:17-7.

● **Timing:** A party adversely affected by service of a late expert report may need to ask the civil presiding judge of the county in which the case is pending, or the specific judge assigned to manage or hear the case, for an adjournment of the trial date or further extension of discovery to address new issues raised by an adversary's late submission of an expert report.

Forms: Form CLD 6.610.01, Letter Serving Expert Report

[3] Understanding Effect of Case Track Assignment on Expert Discovery

Effective September 5, 2000, the New Jersey Supreme Court implemented wide-ranging rule changes pertaining to civil litigation practices and procedures that are known as "Best Practices." *See* Pressler, Comment 4 to N.J. Ct. R. 1:1-2 (Gann). At the same time, the Court adopted N.J. Ct. R. 4:5A, 4:5B regarding case track assignments and case management conferences. As a result, at the outset of each civil lawsuit filed within the state, each case is given a track assignment based upon complexity, with predetermined discovery time frames and, in some instances, mandatory case management.

PART IV: FILING MOTIONS REGARDING EXPERT REPORTS

§ 6.14 CHECKLIST: Filing Motions Regarding Expert Reports

☐ Determine propriety and timing of motion to fix date certain for production of expert reports and related information if opposing counsel has not provided expert reports in initial discovery responses.

- ○ Consider that motion to fix date certain for expert report disclosures must be filed sufficiently in advance of discovery end date.
- ○ File motion to set date certain for opposing party to provide expert reports and related expert material approximately 20–30 days after attorney has received party's answers to interrogatories, and has written letter asking to know when expert reports can be expected and received either no response or unsatisfactory response.

Authority: N.J. Ct. R. 4:17-4(e), 4:24-2.

Forms: Form CLD 6.614.01, Notice of Motion to Fix Date Certain for Adversary's Disclosure of Expert Report

Form CLD 6.614.02, Affidavit in Support of Motion to Fix Date Certain for Adversary's Disclosure of Expert Report

Form CLD 6.614.03, Order to Fix Date Certain for Adversary's Disclosure of Expert Report

Discussion: *See* § 6.15 *below*.

☐ Determine propriety and timing of motion to extend discovery deadline if there is difficulty in obtaining and producing necessary expert report.

- ○ Consider that motion to extend discovery must be filed to be returnable prior to expiration of discovery end date.

Authority: N.J. Ct. R. 4:24-1(c).

Forms: Form CLD 6.614.04, Notice of Motion to Extend Time to Provide Expert Report

Form CLD 6.614.05, Affidavit in Support of Motion to Extend Time to Provide Expert Report

Form CLD 6.614.06, Order to Extend Time to Provide Expert Report

Discussion: *See* § 6.16 *below*.

§ 6.15 Filing Motion to Set Date Certain for Disclosure of Expert Reports

For diary purposes, the attorney should be mindful of the track assignment or case management order that sets the discovery end date. For various reasons, expert reports, or supplemental expert reports, are often obtained and disclosed at the end of the discovery period. Given the strict interpretation of the court rules regarding expert reports and late amendment of interrogatory answers since the advent of "Best Practices" several years ago, it is advisable in most circumstances, depending on the complexity of the case track assignment, to file a motion to set a date certain for an opposing party to provide expert reports and related expert material approximately 20–30 days after the attorney has:

1. Received a party's answers to interrogatories;
2. Written a letter asking to know when expert reports can be expected; and
3. Received either no response or an unsatisfactory response.

N.J. Ct. R. 4:17-4(e).

Forms: Form CLD 6.614.01, Notice of Motion to Fix Date Certain for Adversary's Disclosure of Expert Report

Form CLD 6.614.02, Affidavit in Support of Motion to Fix Date Certain for Adversary's Disclosure of Expert Report

Form CLD 6.614.03, Order to Fix Date Certain for Adversary's Disclosure of Expert Report

§ 6.16 Filing Motion to Extend Time to Provide Expert Reports Prior to Discovery End Date

When filing a motion for extension, it is essential to be certain that the return date is prior to the discovery end date from which the practitioner is seeking the extension, and to meticulously document why the extension is

needed. If appropriate, a certification from the proposed expert should be included. The practitioner should attempt, at all costs, to avoid the exceptional circumstances criteria used by the court when the application to extend discovery is filed after arbitration, or, after the trial date is set. N.J. Ct. R. 4:24-1(c).

Additionally, it is now required that any motion to extend discovery include copies of any prior orders extending discovery.

Forms: Form CLD 6.614.04, Notice of Motion to Extend Time to Provide Expert Report

Form CLD 6.614.05, Affidavit in Support of Motion to Extend Time to Provide Expert Report

Form CLD 6.614.06, Order to Extend Time to Provide Expert Report

PART V: SEEKING PHYSICAL AND MENTAL EXAMINATION OF PERSONS

§ 6.17 CHECKLIST: Seeking Physical and Mental Examination of Persons

☐ Determine whether physical or mental examination is warranted.

- ○ Ascertain if complaint alleges personal injury or places party's physical or mental condition at issue.

  Authority: N.J. Ct. R. 4:19.

  Discussion: *See* § 6.18 *below*.

☐ Consider who may be examined, including parties to action.

Authority: N.J. Ct. R. 4:19.

Discussion: *See* § 6.18 *below*.

☐ Consider timing of physical and mental examination.

- ○ Ensure that physical examination is within time set for discovery by track assignment, including permitted extensions, or case management order.

  Authority: N.J. Ct. R. 4:24-1.

  Discussion: *See* § 6.18 *below*.

☐ Prepare request for physical and mental examination.

- ○ Include date, time, place, name of examiner, nature of examination, and any proposed tests.
- ○ Set examination date within 45 days of service of notice.
- ○ Note different rules pertaining to request for physical or mental examinations for cases in the Special Civil Part. *See* Ch. 1 *above* (Planning Discovery).

  Authority: N.J. Ct. R. 4:19, 6:4.

  Forms: Form CLD 6.617.01, Request for Physical Examination

  Form CLD 6.617.02, Letter to Physician Regarding Physical

Examination

Form CLD 6.617.03, Reminder Letter to Attorney Regarding Physical Examination

Discussion: *See* § 6.19 *below*.

☐ Investigate need for motion for protective order.

○ Draft notice of motion to prohibit or limit examination.

Authority: N.J. Ct. R. 4:19.

Forms: Form CLD 6.617.04, Notice of Motion for Protective Order Against Physical Examination

Form CLD 6.617.05, Affidavit in Support of Motion for Protective Order Against Physical Examination

Form CLD 6.617.06, Protective Order Against Physical Examination

Discussion: *See* § 6.20[1] *below*.

☐ Consider motion to compel physical and mental examination.

○ Draft notice of motion to compel physical or mental examination.

Authority: N.J. Ct. R. 4:19, 4:23-5(c).

Forms: Form CLD 6.617.07, Notice of Motion to Compel Physical Examination

Form CLD 6.617.08, Affidavit in Support of Motion to Compel Physical Examination

Form CLD 6.617.09, Order to Compel Physical Examination

Discussion: *See* § 6.20[2] *below*.

☐ Determine need for motion to dismiss due to failure of plaintiff to submit to examination or comply with court-ordered physical and mental examination.

○ Draft motion to dismiss.

○ Include affidavit or certification detailing actions of defaulting party.

- ○ State that movant is not in default of any requests for discovery made by defaulting party.
- ○ Certify that good faith provisions set forth by N.J. Ct. R. 1:6-2(c) were complied with.
- ○ Include appropriate form of order with motion.
- ○ Annex order and certify failure to comply, if order compelling discovery has been granted.
- ○ Serve dismissal order and requisite notice on parties who appear pro se.

Authority: N.J. Ct. R. 4:19, 4:23-2(b)(3), 4:23-5.

Forms: Form CLD 6.617.10, Notice of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.11, Affidavit in Support of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.12, Order to Dismiss for Failure to Submit for Physical Examination

Discussion: *See* § 6.20[3] *below*.

☐ Move to dismiss, or to suppress adversary's pleading, with prejudice, for failure to comply with discovery demand after entry of initial dismissal or suppression order made without prejudice

- ○ Wait 90 days after entry of order of dismissal without prejudice.
- ○ Include affidavit or certification asserting continuing default.
- ○ Include appropriate form of order.

Authority: N.J. Ct. R. 4:23–5(a)(2), (3).

Forms: Form CLD 6.617.10, Notice of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.11, Affidavit in Support of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.12 , Order to Dismiss for Failure to Submit for Physical Examination

Discussion: *See* § 6.20[4] *below*.

☐ Consider need for re-examination of plaintiff.

○ Draft motion for re-examination if plaintiff does not voluntarily submit.

Authority: N.J. Ct. R. 4:19.

Discussion: *See* § 6.21 *below*.

§ 6.18 Permitting Physical and Mental Examination Only in Certain Actions

[1] Determining Need for Physical or Mental Examination in Tort, Negligence, and Employment Cases

In civil litigation, the need for a physical or mental examination of a party arises most frequently in tort or negligence cases in which the plaintiff has a claim for personal or bodily injuries, or mental or emotional distress. N.J. Ct. R. 4:19. Examinations are occasionally utilized in employment cases, particularly those in which the plaintiff claims emotional distress or physical manifestations of emotional distress. N.J. Ct. R. 4:19; *Schmidt v. Smith*, 155 N.J. 44 (1998) (claims for physical manifestations of emotional distress qualify as bodily injury for purpose of insurance coverage under employer's liability portion of workers' compensation policy).

In addition to employment and personal injury cases, the physical or mental condition of a party is in controversy with some frequency in matrimonial and custody actions. N.J. Ct. R. 4:19.

● **Warning:** Note that N.J. Ct. R. 4:19 only permits examination of parties to a lawsuit. For example, a guardian ad litem for an infant plaintiff cannot be considered a party required to submit to a psychological examination under this rule. *Little v. McIntyre*, 289 N.J. Super. 75 (App. Div. 1996) (guardian ad litem for infant plaintiff in lead poisoning case could not be compelled to submit to psychological examination because her mental condition was not in controversy as she was not party).

Strategic Point: Among most members of the personal injury bar, due to well-established practices and procedures, most issues regarding physical examinations are resolved amicably. Many plaintiffs' attorneys allow their clients to be examined at the request of insurance company adjusters before a lawsuit is commenced. Issues that frequently present problems relate to the location of the physical examination and cases in which multiple defendants cannot agree on the experts who will conduct the examinations.

§ 6.19 Adhering to Notice Requirements when Requesting Physical or Mental Examination

In practice, a notice requesting a physical or mental examination is usually sent, in letter format, from the defendant's attorney to the plaintiff's attorney, simply requesting that the party to be examined appear at a certain time, date, and place, to be examined by a specific medical doctor or other expert with particular expertise. Notice should, but in practice does not always, specify proposed tests, including x-rays, blood tests, etc., to which the examined party may be required to submit as part of the examination.

The scheduled date for the physical examination must be no less than 45 days from the date notice is served upon plaintiff's counsel. N.J. Ct. R. 4:19. The request for a physical or mental examination can be sent to the plaintiff's attorney as soon as the defendant appears in the case or has sufficient information necessary to identify an appropriate expert for the examination. The request for a physical or mental examination must be sought and completed prior to expiration of the discovery end date, which is set forth either in the case track assignment or a case management order. N.J. Ct. R. 4:19, 4:24-(1), 4:24-(2).

Strategic Point: Although not addressed by the New Jersey Court Rules, there are occasional disputes between counsel concerning the plaintiff's convenience as it relates to the venue of the requested physical or mental examinations. Some plaintiffs' attorneys argue that they will not voluntarily instruct their clients to submit to physical or mental examinations outside the county where the lawsuit is venued.

Objections are sometimes based on the inability of some plaintiffs to afford transportation to and from the physical or mental examination. Frequently, these disputes can be resolved, as required by N.J. Ct. R. 1:6-2(c), by, for example, a defendant offering to arrange and fund a plaintiff's transportation to and from an out-of-county or distant expert's office.

Forms: Form CLD 6.617.01, Request for Physical Examination

Form CLD 6.617.02, Letter to Physician Regarding Physical Examination

Form CLD 6.617.03, Reminder Letter to Attorney Regarding Physical Examination

§ 6.20 Considering Motions Relating to Physical and Mental Examinations

[1] Filing Motion for Protective Order

In the vast majority of personal injury cases, there is rarely an instance in which plaintiffs need to apply for a protective order relating to physical and mental examinations. This is perhaps the case because of the requirement that attorneys make a good-faith effort to resolve discovery issues before a motion is filed. N.J. Ct. R. 1:6-2(c). A motion for a protective order is more likely to become necessary in an employment, matrimonial or custody case. Nonetheless, a protective order may be successfully obtained if the plaintiff can show that the physical or mental distress likely to result from the invasive nature of the examination or test outweighs its probative value. *See Il Grande v. DiBenedetto*, 366 N.J. Super 597 (App. Div. 2004) (trial court abused discretion by prohibiting certain claims by plaintiff in medical malpractice action because plaintiff refused to undergo invasive procedure (cystoscopy) as part of defense medical examination); *Duprey v. Wager,* 186 N.J. Super. 81 (Law Div. 1982) (defendant requested that plaintiff have substance injected into her uterus and fallopian tubes for diagnostic tests in medical malpractice case; court held that potential physical and mental consequences of tests outweighed potential benefits). *See* N.J. Ct. R. 4:19.

● **Timing:** A motion for a protective order relating to a physical or mental examination must be filed with a return date prior to expiration of the 45-day period after service of the notice. N.J. Ct. R. 4:19.

Forms: Form CLD 6.617.04, Notice of Motion for Protective Order Against Physical Examination

Form CLD 6.617.05, Affidavit in Support of Motion for Protective Order Against Physical Examination

Form CLD 6.617.06, Protective Order Against Physical Examination

[2] Filing Motion to Compel Physical Examination on Date Certain or within Specified Period of Time

If the plaintiff does not submit to an examination on the date requested, or make reasonable attempts to reschedule the examination, the defendant's attorney may file a motion to compel the physical examination. N.J. Ct. R. 4:19, 4:23-5(c).

Forms: Form CLD 6.617.07, Notice of Motion to Compel Physical Examination

Form CLD 6.617.08, Affidavit in Support of Motion to Compel Physical Examination

Form CLD 6.617.09, Order to Compel Physical Examination

[3] Filing Motion to Dismiss for Failure to Submit to Examination

If the plaintiff has failed to submit to a properly requested examination, and fails to either reschedule the examination within a reasonable time or move for a protective order in a timely fashion, the defendant can file a motion to dismiss the complaint without prejudice. N.J. Ct. R. 4:19. Note that a motion to dismiss the complaint for failure to submit to a physical or mental examination can be filed either with or without the defendant having first filed a motion to compel plaintiff to submit to a physical examination. N.J. Ct. R. 4:23-5(a)(1).

Forms: Form CLD 6.617.10, Notice of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.11, Affidavit in Support of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.12, Order to Dismiss for Failure to Submit for Physical Examination

[4] Filing Motion to Dismiss for Failure to Comply with Court Order Compelling Examination

If the plaintiff fails to comply with a prior order compelling a physical or mental examination, and defendant files a motion to dismiss without prejudice for failure to comply with that order, defendant can request that the party failing to obey the order pay reasonable expenses, including attorney's fees, caused by the failure. Expenses may not be awarded if the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. N.J. Ct. R. 4:19, 4:23-2(b)(3), 4:23-5(a)(1).

Where an order of dismissal or suppression without prejudice has been entered in accordance with N.J. Ct. R. 4:23-5(a)(1) and it has not been vacated, the party seeking discovery may move on notice for an order of dismissal or suppression with prejudice after 90 days. N.J. Ct. R. 4:23-5(a)(2). The motion must be accompanied by an appropriate form of order. N.J. Ct. R. 4:23-5(a)(3).

● **Warning:** Continuous refusal to voluntarily submit to a physical or mental examination may become admissible evidence in front of a jury if the factual scenario supports an inference that refusal to submit is related to a weakness in the plaintiff's case. *Levine v. Scaglione*, 95 N.J. Super. 338 (App. Div. 1967) (without plaintiff's knowledge, numerous requests were made to plaintiff's attorney for physical examination, which never occurred).

Forms: Form CLD 6.617.10, Notice of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.11, Affidavit in Support of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.12, Order to Dismiss for Failure to Submit for

Physical Examination

[5] Filing Motion for Re-examination by Expert if Examined Party Does Not Consent

In some cases, discovery lasts for years. Frequently, and in accordance with the requirements of the New Jersey Court Rules, plaintiffs will provide updated medical information and reports right up to the time of trial. At times, plaintiffs have chronic conditions that require ongoing treatment and new diagnoses. If the defendant had a physical or mental examination of the plaintiff conducted early in the case, it may be desirable to obtain a re-examination of the plaintiff that is more contemporaneous with the trial than the first examination. Plaintiffs can voluntarily consent to a re-examination by one or more of the defendant's experts. If plaintiff does not consent, however, a court order is required for re-examination. N.J. Ct. R. 4:19.

Forms: Form CLD 6.617.10, Notice of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.11, Affidavit in Support of Motion to Dismiss for Failure to Submit to Physical Examination

Form CLD 6.617.12, Order to Dismiss for Failure to Submit for Physical Examination

§ 6.21 Having Counsel Present for Examination or Having Examination Recorded

Because statements made by plaintiffs during the course of a physical or mental examination, under certain circumstances, may be admissible in evidence as admissions of a party, plaintiffs' counsel will frequently attempt to either be present for the examination or have a means to memorialize the plaintiff's statements to the examining expert. Several cases have rejected the right of counsel, or other persons, to be present during an examination of the plaintiff absent a request and a showing of special circumstances. *See Briglia v. Exxon Co. U.S.A.*, 310 N.J. Super. 498 (Law Div. 1997) (in four consolidated motions on four separate actions, trial court held that no compelling reason was shown by any plaintiff as to why attorney or tape recorder should be permitted at defense medical examinations); *Stoughton v. B.P.O.E. No. 2151*, 281 N.J. Super. 605 (Law Div. 1997) (plaintiff in assault and battery case not permitted to bring

attorney or tape recorder for defense psychiatric examination). However, the Appellate Division has permitted a plaintiff to utilize a recording device during an examination in *B.D. v. Carley*, 307 N.J. Super. 259 (App. Div. 1998) (defense psychological examination is discovery examination and not one in which plaintiff is being treated; therefore, plaintiff's right to preserve evidence of nature of examination outweighs examiner's preference for exclusion of recording device; *Stoughton* decision specifically overruled).

PART VI: CONSIDERING AFFIDAVIT OF MERIT REQUIREMENT IN PROFESSIONAL LIABILITY CASES

§ 6.22 CHECKLIST: Considering Affidavit of Merit Requirement in Professional Liability Cases

☐ Determine, prior to filing complaint, whether case includes professional liability claim that requires affidavit of merit.

○ Consider statutory list of professionals to whom affidavit of merit applies.

Authority: NJS 2A:53A-26, 2A:53A-27.

Forms: Form CLD 6.622.01, Affidavit of Merit

Discussion: *See* § 6.23 *below*.

☐ Determine if case meets statutory criteria for affidavit of merit if complaint sets forth claim against one of applicable professionals.

○ Ascertain whether complaint seeks damages for personal injuries, wrongful death, or property damage.

○ Ascertain whether damages sought result from act of malpractice or negligence by licensed person in profession or occupation.

Authority: NJS 2A:53A-27.

Discussion: *See* § 6.24 *below*.

☐ Determine applicability of any exceptions to affidavit of merit requirement.

○ Be aware that affidavit of merit must be served within 60 days of date defendant filed answer to complaint.

○ Ascertain whether or not expert is needed to prove underlying claim against professional (that is, contract claim or common knowledge exception).

○ Ascertain whether or not affidavit is needed for cross-claims and third-party complaints.

Authority: NJS 2A:53A-27.

Discussion: *See* §§ 6.24[1], [2], [5], 6.35 *below*.

☐ Investigate whether any records or documents are needed from licensed defendant to obtain affidavit of merit.

- ○ Be aware that affidavit of merit will not be required if defendant fails to provide appropriate records needed for affidavit of merit within 45 days of request.

Authority: NJS 2A:53A-28.

Discussion: *See* § 6.24 *below*.

☐ Determine propriety of expert chosen to execute affidavit of merit.

- ○ Ensure that expert who signs affidavit of merit is duly-licensed in one or more states in profession or occupation that is subject of lawsuit.
- ○ Ensure that expert is board certified (for physician experts) or has at least five years of practice devoted to relevant specialty.
- ○ Be certain that expert has no financial interest in outcome of case.

Authority: NJS 2A:53A-27.

Discussion: *See* § 6.25 *below*.

☐ Ascertain contents of affidavit of merit.

- ○ Be sure that affidavit of merit is based on reasonable probability.
- ○ Understand that care, skill, or knowledge of defendant in treatment, practice, or work that is subject of complaint must fall outside of acceptable professional or occupational standards.

Authority: NJS 2A:53A-27.

Discussion: *See* § 6.25 *below*.

☐ Consider applicability of special criteria for medical malpractice cases.

- ○ Ensure that affidavit of merit is signed by board certified physician in same specialty as defendant-physician.
- ○ Be aware that physician signing affidavit must be credentialed in hospital to treat patients or perform procedures for medical conditions that form basis of lawsuit.

Authority: NJS 2A:53A-27, 2A:53A-41.

Discussion: *See* § 6.26 *below*.

§ 6.23 Identifying Professionals to Whom Affidavit of Merit Applies

An affidavit of merit is a statutorily required affidavit by an expert that must be provided by plaintiff's counsel to defendant's counsel at the very outset of the case. The affidavit of merit must indicate that the expert:

1. Is qualified to render an opinion regarding the claim that is the subject matter of the complaint; and
2. Maintains an opinion based upon reasonable probability that the professional defendant deviated from the standards of accepted care for the specialty or expertise at issue in the case.

NJS 2A:53A-29.

The failure to provide the affidavit in a timely manner as required by the statute will eventually result in the dismissal of the complaint or claim with prejudice. NJS 2A:53A-29.

The affidavit of merit statute, NJS 2A:53A-27, applies to licensed persons listed in NJS 2A:53A-26. This list includes the following:

1. Accountants;
2. Architects;
3. Attorneys;
4. Dentists;
5. Engineers;
6. Physicians;
7. Podiatrists;
8. Chiropractors;

9. Registered professional nurses;
10. Health-care facilities;
11. Physical therapists;
12. Land surveyors;
13. Registered pharmacists;
14. Veterinarians; and
15. Insurance producers.

NJS 2A:53A-26, 2A:53A-27.

Exception: An affidavit of merit is not required in cases in which proof of the malpractice does not require expert testimony. *Popwell v. Law Offices of Broome & Horn*, 363 N.J. Super. 404 (Law Div. 2002) (no affidavit of merit necessary where jurors' common knowledge was adequate to permit them to determine negligence).

Forms: Form CLD 6.622.01, Affidavit of Merit

§ 6.24 Following Criteria for Complying with Affidavit of Merit Statute

[1] Ensuring that Action Is for Damages for Personal Injury, Wrongful Death, or Property Damage

An affidavit of merit is not required in contract claims arising out of the client's written agreement with the professional. *See Levinson v. D' Alfonso*, 320 N.J. Super. 312 (App. Div. 1999) (affidavit of merit not required when client sued attorney for settling client's negligence case without client's consent, contrary to terms of retainer agreement); *Palanque v. Lambert-Wooley*, 168 N.J. 398 (2001) (where professional liability issue is within common knowledge of jury, no expert or affidavit of merit required). *See* NJS 2A:53A-27.

[2] Ensuring that Damages Result from Alleged Act of Malpractice or Negligence by Licensed Person in Profession or Occupation

Cross-claims and third-party complaints seeking statutory contribution

against a codefendant, or third-party defendant, as a joint-tortfeasor will not require an affidavit of merit if the cross-claim or third-party complaint does not set forth a new and independent claim of professional liability. *See e.g., Diocese of Metuchen v. Prisco & Edwards*, 179 N.J. 305 (2004) (architect defendant's third-party complaint against engineering consultant seeking contribution for professional liability claims asserted against architect by plaintiff does not require affidavit of merit).

[3] Providing Each Defendant with Affidavit within 60 Days of Filing Answer to Complaint

The New Jersey Supreme Court has qualified the absolute statutory requirements by imposition of the "substantial compliance" doctrine. *Cornblatt v. Barow*, 153 N.J. 218 (1998) (certification containing all statutory requirements, in lieu of statutorily required affidavit, constituted substantial compliance with statute). Even if a plaintiff has a professional liability expert report against a defendant-professional prior to filing of the lawsuit, failure to serve the affidavit of merit within 60 days will require dismissal of the lawsuit with prejudice. *See Palanque v. Lambert-Woolley*, 327 N.J. Super. 158 (App. Div. 2000), *rev'd on other grounds,* 168 N.J. 398 (2001) (medical malpractice case dismissed with prejudice for failure to serve expert's affidavit of merit). *Compare Knorr v. Smeal*, 178 N.J. 169 (2003) (defendant-physician who waited more than 14 months to act on plaintiff's failure to provide affidavit of merit is equitably estopped from seeking dismissal of malpractice lawsuit).

[4] Timely Seeking Extension of Time to File Affidavit

While the statute is silent as to whether the motion to extend the time to file the affidavit of merit by 60 days must be made prior to expiration of the initial 60-day period, as with other motions to extend deadlines, it is always advisable to file this motion and have it returnable prior to expiration of the original deadline. *Burns v. Belafsky*, 166 N.J. 466 (2001) (plaintiff's submission of affidavit of merit after expiration of initial 60-day period, but within 60-day extension period, avoided dismissal of lawsuit even though application for extension not filed within initial 60 days).

[5] Failing to Provide Appropriate Records for Affidavit within 45 Days of Request

To avoid the affidavit of merit requirement on grounds that defendant/

professional has failed to provide records, the plaintiff must provide a sworn statement stating the following:

1. The defendant has not provided the plaintiff with medical records, other records, or information having a substantial bearing on preparation of the affidavit;
2. A written request for the records or information, accompanied by a signed authorization by the plaintiff, if necessary, was made by certified mail or personal service; and
3. At least 45 days have elapsed since the defendant received the plaintiff's request for records or information.

NJS 2A:53A-28. *See Scaffidi v. Horvitz,* 343 N.J. Super. 552 (App. Div. 2001) (to invoke 45-day requirement of statute, plaintiff's request for records or information must specifically state that requested records are needed to prepare affidavit of merit).

§ 6.25 Complying with Requirements Regarding Contents of Affidavit of Merit

[1] Ensuring that Affidavit of Merit Is Signed by Appropriately Licensed Individual

The statute requires that the expert who executes the affidavit comply with the following requirements:

1. Must be licensed in New Jersey or any other state;
2. Must have particular expertise in the general area or specialty involved in the action; and
3. Must have expertise as evidenced by board certification or devotion of practice substantially to the general area or specialty involved in the action for a period of at least five years.

NJS 2A:53A-27.

[2] Stating Reasonable Probability that Professional's Treatment Fell Outside Acceptable Professional or Occupational Standards

The affidavit of merit must state with reasonable probability that the defendant's care, skill, or knowledge that is the subject of the complaint fell

outside accepted professional or occupational standards. NJS 2A:53A-27. Courts will allow some leniency under the doctrine of "substantial compliance" as to what comports with statutory requirements. *See Medeiros v. O'Donnell & Naccarato*, 347 N.J. Super. 536 (App. Div. 2002) (affidavit of merit need not specifically identify alleged malpractice of each defendant separately, and generic allegation of professional liability against group of defendants, architects and engineers, constitutes substantial compliance with statute); *Galik v. Clara Maas Medical Center*, 167 N.J. 341 (2001) (unsworn expert report of board certified neurosurgeon as later clarified by untimely affidavit of merit was sufficient to constitute substantial compliance with statute).

[3] Signing of Affidavit by Expert

The affidavit must actually be signed by the expert. *Compare Ricra v. Barbera,* 328 N. J. Super. 424 (App. Div. 2000) (plaintiff's unsworn and uncertified expert report does not comply with statutory requirements) *with Mayfield v. Community Med. Assoc., P.A.,* 335 N. J. Super. 198 (App. Div. 2000) (physician expert's signed but unsworn report constitutes substantial compliance with statute). NJS 2A:53A-27.

§ 6.26 Adhering to Special Requirements for Malpractice Affidavits of Merit

[1] Requiring Board Certified Physician in Same Specialty as Defendant

Effective after June 2004 the affidavit of merit statute (NJS 2A:53A-27) was amended to require that in medical malpractice cases, the expert executing the affidavit must comply with the requirements of NJS 2A:53A-41, which was also enacted in June 2004, and relates to the qualifications of experts who testify in medical malpractice cases. The case law interpreting the requirements of NJS 2A:53A-27, prior to its amendment in 2004, did not mandate that experts have the same qualifications as the defendants. *See Burns v. Belasky,* 166 N. J. 466 (2001) (credentialed neurosurgeon deemed qualified to provide affidavit against defendant radiologist). Under the new requirements for medical malpractice experts, the expert (and, therefore, the person executing the affidavit of merit) must practice in the same specialty as the party against whom or on whose behalf the testimony is being offered. Additionally, the expert must either be:

1. Credentialed by a hospital to treat patients for the medical condition or perform the procedure that forms the basis of the lawsuit; or
2. Board certified in the same specialty that forms the basis for the lawsuit and have devoted a majority of professional time for one year prior to the date of the underlying occurrence to active clinical practice or instruction at an accredited medical school in the relevant specialty.

NJS 2A:53A-41.

A party may seek a waiver from this specialty expert requirement by filing a motion in which it is demonstrated that a good-faith search to identify a same-specialty expert was unsuccessful. NJS 2A:53A-41.

[2] Utilizing Hospital Credentials as Alternative to Same Specialty Requirement

As an alternative to the requirement that parties must have a same-specialty expert, the expert may be a physician credentialed by a hospital to treat patients for medical conditions or perform procedures that form the basis of the lawsuit. NJS 2A:53A-27, 2A:53A-41.

PART VII: PREPARING FOR EXPERT TESTIMONY AT TRIAL

§ 6.27 CHECKLIST: Preparing for Expert Testimony at Trial

☐ Determine need for pretrial motions relating to expert testimony and evidence at trial.

- ○ Consider whether case has type of novel scientific theory to warrant *Daubert* motion and hearing.
- ○ Determine whether it is substantively and strategically appropriate to file motion in limine to bar or restrict expert testimony or evidence at trial.

  Authority: N.J.R.E. 104(a), 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

  Discussion: *See* §§ 6.28, 6.36 *below*.

☐ Anticipate and determine, as part of preparation for trial, need to object to expert testimony and evidence.

- ○ Evaluate sufficiency of qualifications of opposing expert.
- ○ Consider reliability of data and information relied upon by expert to formulate opinions.
- ○ Determine need to bar expert's reliance upon hearsay statements to support opinions.
- ○ Investigate need to bar expert from recounting opinions of other experts who have not testified at trial.
- ○ Determine whether expert's scientific methodology is generally accepted by scientific community in particular field or specialty.

  Authority: N.J.R.E. 104(a), 702, 703, 705.

  Discussion: *See* §§ 6.28, 6.36 *below*.

☐ Decide if expert testimony is admissible or necessary.

- ○ Determine whether expert's testimony invades province of matters properly within common knowledge of jury.

- ○ Determine whether expert's testimony invades province of matters that are purely questions of law for trial judge.
- ○ Determine whether expert's testimony embraces ultimate outcome of case.

Authority: N.J.R.E. 104(a), 702, 704.

Discussion: *See* §§ 6.29, 6.30, 6.31 *below*.

☐ Determine whether expert's opinion is inadmissible "net opinion."

Authority: N.J.R.E. 703.

Discussion: *See* § 6.32 *below*.

☐ Ascertain need to raise expert evidentiary issues, before or during trial in hearing outside presence of jury.

Authority: N.J.R.E. 104(a).

Discussion: *See* § 6.36 *below*.

☐ Consider whether objectionable portions of expert's testimony go to weight or admissibility of testimony.

Authority: N.J.R.E. 703.

Discussion: *See* § 6.33 *below*.

☐ Establish, as part of trial preparation, scope and content of questions necessary to ask to properly qualify witness as expert in particular field.

- ○ Decide specific area or areas of expertise in which expert will be qualified.

Authority: N.J.R.E. 705.

Discussion: *See* § 6.34 *below*.

☐ Prepare, as part of trial preparation, list of questions to cross-examine adverse experts.

- ○ Consider methods to impugn expert's credibility without alienating jury.

Authority: N.J.R.E. 705.

Discussion: *See* § 6.35 *below*.

§ 6.28 Determining Admissibility of Expert Testimony at Trial Under New Jersey Rules of Evidence

[1] Evaluating Qualifications of Expert if Disputed

N.J.R.E. 104(a) deals with questions of admissibility of evidence, and provides, in pertinent part, that: "[w]hen the qualification of a person to be a witness, or the admissibility of evidence . . . is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. . . [who] may hear and determine such matters out of the presence or hearing of the jury."

⛛ **Strategic Point:** When challenging an aspect of the expert's qualifications or testimony, the attorney should advise the trial judge either before commencement of the trial (by letter or by motion in limine, among others), or as soon as possible thereafter, that he or she will request a hearing outside the presence of the jury on a particular issue, in accordance with N.J.R.E. 104(a).

If technical, scientific, or other specialized knowledge will assist the trier of fact in understanding the evidence, a witness may testify in the form of expert opinion provided the witness qualifies as an expert based upon knowledge, skill, experience, training, or education. For example, an engineer accident reconstruction expert is typically unqualified to testify that a motor vehicle collision caused a particular injury. *Suarez v. Egeland*, 353 N.J. Super. 191 (App. Div. 2002) (excluding mechanical engineer's testimony that plaintiff's herniated disc resulted from low speed motor vehicle collision). If there is a question concerning the qualifications of a proposed expert to offer an opinion on a specific topic, this should be decided by the trial judge at a N.J.R.E. 104(a) hearing either before trial or before the expert testifies at trial. N.J.R.E. 702.

[2] Objecting to Admissibility of Expert Testimony

There are various reasons for objecting to the admissibility of expert testimony at trial, including whether:

1. The expert report and opinions have not been properly disclosed (*see* §§ 6.13, 6.14, 6.15 *above*);
2. The expert will be permitted to testify beyond the four corners of the expert report;
3. A party can call an adversary's non-testifying expert (*see* § 6.06 *above*);
4. The testimony is not expert testimony because it is within the common knowledge of the jury (*see* § 6.30 *below*); or
5. The expert's testimony encompasses a matter of law exclusively for decision by the court (*see* § 6.30 *below*).

While these are only some of the more routine examples of legitimate objections to the admissibility of expert testimony at trial, under most circumstances, a challenge to admissibility of expert testimony for these reasons, or any other reason, is best accomplished by bringing it to the attention of the trial judge as soon as possible, which will likely result in a N.J.R.E. 104(a) hearing before that judge, either before or during trial, outside the presence of the jury. N.J.R.E. 104(a), 702.

[3] Determining Admissibility of Opinions by Expert Who Relies on Reports of Another Party's Expert

When an expert bases an opinion on facts or data, if those facts or data are the type reasonably relied on by experts in the particular field, then the facts or data do not have to be admissible in evidence. Occasionally, experts will give trial testimony for which they have relied, in part, upon the opinion of experts not called to testify at trial, and whose opinions are not otherwise admissible into evidence. Typically, if opinions of the other experts are the type of data and information reasonably relied on by experts in the field, then the testimony of the testifying expert about those other opinions may be admissible. *State v. Smith*, 262 N.J. Super. 487 (App. Div. 1998) ("an expert witness should not be allowed to relate the opinions of a nontestifying expert merely because those opinions are congruent with the ones he has reached."); *Jacober v. St. Peter's Medical Center*, 128 N.J. 475 (1992) (learned treatises reasonably relied upon by experts in field will be admissible on direct examination; recommending Rule 8 (predecessor to N.J.R.E. 104(a)) hearing if reliability of learned treatise is called into question). N.J.R.E. 703, 705.

[4] Ascertaining Whether Information Relied Upon by Testifying Expert Is Generally Relied Upon by Experts in Field

There are two broad categories relating to the types of data, facts, and information relied upon by experts. First, if the expert did not make a sufficient inspection, observation, or review of certain information, the expert opinion may be an inadmissible "net" opinion (*see* § 6.31 *below*). Second, the facts or data must be those that are reasonably relied upon by experts in the field. *Ryan v. KDI Sylvan Pools, Inc*. 121 N.J. 276 (1990) (reversing trial court's exclusion of testimony from defendant's pool design expert about number of diving accidents during previous 17 years because of judge's failure at Rule 8 (now N.J.R.E. 104(a)) hearing to "focus upon what the experts in fact rely on, not whether the court thinks they should so rely"). N.J.R.E. 703, 705.

[5] Determining Admissibility of Hearsay Statements Relied Upon by Expert in Formulating Opinions

An expert may rely on hearsay evidence that is otherwise inadmissible if the court finds that the hearsay evidence is the type of information reasonably relied on by experts in the particular field. If an expert's opinion is permitted based on hearsay sources, the hearsay does not become independently admissible as affirmative evidence, but is only admissible for the limited purpose of providing the underlying basis for the expert's testimony. Biunno, Comment 7 to N.J.R.E. 703 (Gann).

[6] Establishing Whether Scientific Methodology Relied Upon by Expert Is Generally Accepted by Scientific Community (*Daubert/Frye* Motion)

Particularly in toxic tort cases, there are complications surrounding criteria for the scientific methodologies reasonably relied upon by experts. *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421 (1991) (specifically in toxic tort cases, scientific theory of causation not yet generally accepted by scientific community may nonetheless reach level of reliability and become admissible evidence if based upon established scientific methodology, data, and information of type reasonably relied upon by experts in field); *Landrigan v. Celotex Corp.*, 127 N.J. 404 (1992) (reversing trial court's exclusion of testimony by plaintiff's epidemiology expert that asbestos exposure caused colon cancer, because trial judge did not properly analyze

witness's qualifications or scientific methodology during Rule 8 (now N.J.R.E. 104(a)) hearing).

§ 6.29 Determining if Expert Testimony Is Admissible or Necessary

Expert testimony is "admissible" (although perhaps not necessary) when it will assist the trier of fact to understand the evidence or determine a fact in issue that relates to some scientific, technical, or other specialized knowledge, and is presented by an expert witness duly qualified by knowledge, skill, training, experience, or education.

Expert testimony is "necessary" when it is essential to an element of proof related to a claim or defense. For example, expert testimony, with some minor exceptions, is usually required to establish a standard of care in professional liability cases, to prove a design defect in a product liability case or to prove causation between occurrence and injury, and to establish permanent injury in personal injury cases. N.J.R.E. 702.

§ 6.30 Utilizing Exceptions to Admissibility of Expert Testimony

[1] Testifying to Matters within Common Knowledge of Jury

Expert testimony is generally not required on subject matter within the common knowledge and experience of a jury. *Campbell v. Hastings*, 348 N.J. Super. 264 (App. Div. 2002) (it is common knowledge for jury to determine whether homeowner owed duty to social guest who fell on steps leading to foyer, and whether foyer presented dangerous condition). N.J.R.E. 702.

[2] Considering Matters of Law

Matters that are solely questions of law are for consideration exclusively by the trial judge, and not for consideration by an expert. N.J.R.E. 702.

§ 6.31 Eliciting Expert Testimony Regarding Ultimate Issue to Be Decided by Jury

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." N.J.R.E. 704. While an expert can provide opinions concerning the ultimate outcome of the case, the expert should not tell the jury how to decide the case. N.J.R.E. 704.

§ 6.32 Applying Net Opinion Rule and Underlying Basis for Expert Testimony

An expert opinion that is not based on reliable facts and data reasonably relied on by experts in the field is an inadmissible "net opinion." The net opinion rule has its genesis in the failure of a medical expert to provide testimony regarding causation between an act of negligence and a plaintiff's injuries or damages. *Parker v. Goldstein*, 75 N.J. Super. 472 (App. Div. 1963) (failure of plaintiff's expert to explain how defendant physician's delay in ordering cesarean section for decedent caused pulmonary embolism that resulted in death was net opinion).

The net opinion rule currently derives from the requirement of N.J.R.E. 702 that expert opinions be based upon facts and opinions reasonably relied upon by experts in a particular field. Therefore, an expert's failure to provide any facts or basis for an opinion will result in finding an inadmissible net opinion. *Nolan v. First Colony Life Ins*., 345 N.J. Super. 142 (App. Div. 2001) (doctor's certification on motion for summary judgment that stated opinion based upon reasonable medical probability was net opinion as no facts or basis for opinion were provided, only conclusory statements).

In some instances, an expert's opinion based upon facts and data supplied by others, and the expert's own training and experience, will not be considered a net opinion. *Bellardini v. Krikorian*, 222 N.J. Super. 457 (App. Div. 1988) (physician permitted to testify about standard of care with no supporting manuals or treatises). In other instances, absence of any supporting standards or treatises to bolster an expert opinion will result in exclusion of the expert testimony. *Kaplan v. Skoloff & Wolfe*, 339 N.J. Super. 97 (App. Div. 2001) (expert opinion of attorney in legal malpractice cases that is not supported by any published treatises, standards, custom, etc., and is only personal opinion of expert, is net opinion). N.J.R.E. 702.

§ 6.33 Balancing Weight Versus Admissibility of Expert Testimony

Responding to many evidentiary objections that pertain to expert testimony at trial, a trial judge is frequently heard to overrule an objection, stating that the purportedly objectionable evidence goes to the weight to be given by the jury to the expert's testimony, not to the threshold admissibility of the evidence. Consequently, all reasons set forth in § 6.28 *above* as to why admissibility of expert testimony can be properly challenged, even if unsuccessful at the N.J.R.E. 104(a) hearing, can still be used to

attack the weight to be given the expert testimony by the jury. For example, an expert's marginal qualifications, hearsay sources and questionable facts, data, or scientific methodology can all be used to diminish the weight given by the jury to an expert's testimony.

⛝ **Strategic Point:** Convincing a jury that little or no weight should be given to an adversary's expert is accomplished first by specific cross-examination of the expert regarding qualifications, methodology, etc., and then by utilizing the expert's testimony in summation. If an attorney uses expert testimony favorable to his or her position during summation, it is helpful to craft arguments around the model jury charges pertaining to expert witnesses that trial judges read to the jury at the conclusion of the case. If, for example, the attorney has successfully cross-examined an adversary's expert regarding the reliability of the factual basis for the expert opinions proffered, certain principles of law from the charge may ring true with a jury, including that an expert's testimony should be given no more weight than the underlying facts supporting it, and that the jury is not bound to accept even uncontested expert testimony.

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§ 6.34 Qualifying Expert Witness at Trial

For an expert to be permitted to provide expert opinion testimony at trial, the proponent of the witness must first ask a series of questions that elicit the witness's qualifications, education, training, and experience in the field of expertise for which the expert is being offered. This can be an opportunity to impress the jury with an expert's credentials. The procedure for qualifying an expert usually begins with the expert's education, training, and relevant work experience, and continues with any relevant publications, teaching positions, professional affiliations, awards or designations, and prior experience as an expert. A chronological recitation of an expert's education, work history, etc., is usually best. Once this "qualification" questioning is complete, the proponent of the expert offers the witness as an expert in a particular field.

When selecting the specific field of expertise in which to offer an expert, it is best to choose, in consultation with the expert, the most precisely recognized area of specialty that is consistent with the expert's actual qualifications and specific subject matter that is the subject of the expert

testimony. Prior to permitting an expert to testify about his or her opinions, the trial judge will allow opposing counsel to cross-examine the expert regarding his or her qualifications. If the trial judge is satisfied with the expert's credentials, that judge will instruct the jury that the witness will be allowed to offer opinions as an expert in the particular field for which the expert has been qualified.

§ 6.35 Impugning Expert's Credibility on Cross-Examination

All the reasons set forth in § 6.33 *above*, whereby the weight given to an expert's testimony can be successfully challenged, also constitute the principal material for successful cross-examination. Some of the most fertile ground for cross-examination includes an expert's qualifications, particularly with regard to forensic consultants in the sole business of providing opinions to attorneys for cases in litigation; and for a wide variety of technical issues, when the expert's actual education and experience have little connection to the expert issues presented by the facts. Also, the factual and technical background of an expert's opinions can be successfully undermined by the expert's reliance on only one set of facts presented in the trial testimony, reliance on only one view, or reliance on a minority view of a technical or specialized issue.

Learned treatises also can be effective tools in cross-examining an expert. Some experts have a track record that can usually be ascertained through discovery and may reflect a bias toward one point of view. To the extent that cross-examination of an expert has been successful, the expert's credibility will be undermined.

⛌ **Strategic Point:** Cross-examination of an expert should be concise, to the point, and usually no more than 15–20 minutes for any single witness.

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§ 6.36 Considering Trial and Pretrial Motions Relating to Experts

[1] Attacking Scientific Reliability of Expert's Opinions with *Daubert/Frye* Motion

A *Daubert* (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) or *Frye* (*Frye v. United States,* 293 F. 1013 (D.C. Cir.1923)) motion

is a pretrial motion that attacks the scientific reliability of an expert opinion, or the scientific methodology used to support an expert opinion. The attorney should prepare, brief, and file the *Daubert* or *Frye* motion well in advance of the trial date because it may result in an extensive pretrial hearing that could occur long before a jury is selected.

Daubert or *Frye* motions are usually reserved for toxic tort or chemical exposure cases where medical, scientific, or epidemiological experts present opinions that may not yet be mainstream, or not yet have general acceptance in the scientific community. These motions have been used in other types of cases presenting complicated, cutting-edge scientific, technical, or medical issues. For example, in the late 1990s, *Daubert* or *Frye* motions were substantially and successfully utilized in cases seeking damages for repetitive stress disorder relating to extended use of keyboard equipment.

⛒ **Strategic Point:** New Jersey uses the *Frye* standard of "general acceptance" in most cases involving novel expert opinions. However, New Jersey courts will apply the more liberal *Daubert* standard in cases involving toxic torts and relatively new theories of scientific or medical causation. For a thorough explanation of when the court will apply the *Daubert* or *Frye* standard, *see Kemp ex rel. Wright v. State*, 174 N. J. 412, 809 A.2d 77 (2002) (court held that plaintiff's medical expert did not offer scientifically acceptable basis for opinion that rubella immunization received by plaintiff caused congenital rubella syndrome, but remanded to trial court to conduct appropriate Rule 104 hearing). *See also* Biunno, Comment 3 to N.J.R.E. 702 (Gann).

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[2] Barring or Restricting Expert Testimony with Motion in Limine

If the expert issues presented in a case warrant a motion in limine, the attorney should brief the issue before trial and inform the trial judge as soon as possible to avoid disruption of the trial. Frequently, motions in limine to bar or restrict expert testimony must await the appearance of the expert at trial so the trial judge can hear the testimony directly from the expert in a N.J.R.E. 104(a) hearing outside the presence of the jury. However, in cases involving a potential net opinion, or another expert issue that has at least a 35 – 40 percent chance of resulting in dismissal of the

lawsuit after presentation to a trial judge, it may be advisable to contemporaneously file a motion in limine and a pretrial summary judgment motion to obtain a ruling before incurring the time and expense of trial and pretrial preparation. These motions should be filed after the discovery end date to avoid eleventh hour attempts by the proponent of the expert to cure deficiencies in the expert's opinions by providing either a revised expert report or report from a new expert.