

1.13 EXPERT TESTIMONY¹ (Approved 12/2009; Revised 10/2015)

E. Optional Charge Concerning Experts Relying on Hearsay Statements of Non-Testifying Experts.²

NOTE TO JUDGE

See James v. Ruiz, 440 N.J. Super. 45, 75 (App. Div. 2015), for a discussion on the admissibility of the opinions of non-testifying treating physicians that may be contained in the plaintiff's medical records. The Appellate Division in James stated regarding the use of the opinions of non-testifying treating physicians' reports in cross examination as follows:

In particular, if the sole limited purpose of this portion of the cross was to show that the defense expert's review of the patient's records was skewed or incomplete, such a line of inquiry arguably would amount to simply impeachment of the defense expert's credibility, an attack that does not hinge upon the actual truth of the absent declarant's statements. Such impeachment to expose the weaknesses of an expert's testimony potentially might assist in the search for the truth, one of the recognized goals of our law of evidence.

Finally, MCJC 1.13E may need to be tailored or may not be appropriate in the situation where the opinions of non-testifying treating physicians are either not complex medical diagnoses or are not disputed by the parties.

¹ In the following instances, the Committee has approved specific charges on expert testimony and these charges should be given instead of the general charge on expert testimony:

5.50 Medical Negligence

5.51 Legal Malpractice

5.52 Professional Liability of an Architect/Engineer

9.10 Condemnation

² Agha v. Feiner, 198 N.J. 50 (2009); James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015); and N.J. Rule of Evidence 703.

In this case, you have heard that other non-testifying experts have *examined the plaintiff/ treated the plaintiff/ performed tests on the plaintiff/* and have rendered reports expressing opinions as to their findings.

Testifying experts may rely upon such out of court statements contained in such reports in formulating their opinions if they are of the type reasonably relied upon by experts, within that particular field in forming opinions or inferences upon the subject.

I instruct you, as the jury in this case, that you are not to consider any such out of court statements or opinions by any non-testifying experts as substantive proof and you should not speculate as to what those statements or opinions are or were.

The fact that a testifying expert [*relied upon or failed to rely upon*] reports of a non-testifying expert [*or considered and rejected such a report*] may be considered by you for the limited purpose of the witness explaining the basis of his/her opinion, if it is a factor in such opinion, and your assessing the quality of his/her testimony and for no other purpose.