COMMON MEDICAL EVIDENCE ISSUES AT TRIAL

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Admitting medical proof at trial is a core skill of any lawyer trying personal injury and medical malpractice cases. The trial courts can face a range of evidentiary issues when ruling on this type of proof. As discussed below, these include the admissibility of medical records, reports and images, the bases of medical expert testimony, and the admissibility of hearsay documents associated with expert medical proof.

I. MEDICAL RECORDS, REPORTS AND IMAGES

A. Admissibility of medical records

There are three types of medical records that trial courts usually encounter in personal injury and medical malpractice cases: hospital records, the treating physician's office chart, and treating and examining physicians' narrative medical reports. (*Wilson v. Bodian*, 130 AD2d 221, 229–30 [2d Dept 1987]). We discuss each below.

1. Hospital record

Although hospital records are hearsay, they are admissible as business records under CPLR 4518(c) when they reflect acts, occurrences, or events that relate to diagnosis, prognosis, or treatment, or are otherwise helpful to an understanding of the medical or surgical aspects of the patient's hospitalization *(In re Luis P.*, 161 AD3d 59, 76 [1st Dept 2018]; *People v. Ortega*, 15 NY3d 610, 617 [2010], quoting *Williams v. Alexander*, 309 NY 283, 287–88 [1955]). Information that is irrelevant or not germane to the patient's treatment in a hospital record is always subject to redaction (*Ortega*, 15 NY3d at 623 [Pigott, J., concurring]; *Cooper v. Nestoros*, 159 AD3d 1365, 1367 [4th Dept 2018]; *People v. Santiago*, 156 Ad3d 1386, 1389 [4th Dept 2018] stating that plaintiff's statement that he did not know who shot him, found in medical record, was properly redacted because it had no relevance to the victim's diagnosis or treatment).

The hospital records must be certified to be admitted under CPLR 4518(c) (*People v. Blauvelt*, 156 AD3d 1333, 1334 [4th Dept 2017]; *see also, Gill v. Fingerman*, 2018 NY Slip

Op 32199[U], *10, [Sup Ct, Suffolk County 2018]; *Wesley v. Crown Masonry Constr, Inc.*, 2018 NY Slip Op 30608[U], *6 [Sup Ct, Suffolk County 2018]). A party may admit certified copies of the original chart in lieu of the original chart pursuant to CPLR 2306(a). The hospital record once admitted constitutes *prima facie* evidence of the facts contained therein *(see Westchester Med. Ctr. v. Progressive Cas. Ins. Co.,* 51 AD3d 1014, 1018 [2d Dept2008]).

A court will also admit out-of-state hospital records with a CPLR 4518(c) certification. A party may also admit certified records that a medical provider produces voluntarily rather than by subpoena. *(Joyce v. Kowalcewski,* 80 AD2d 27, 29 [4th Dept 1981]).

A party may admit a radiology reports as part of a certified hospital chart under CPLR 4518(c) *(see Lanpont v. Savvas Cab Corp., Inc.,* 244 AD2d 208, 211 [1st Dept 1997]).

1.a ***Hearsay statements in a certified hospital record***

Hearsay statements within certified hospital records are not, however, automatically admissible (*Ortega,* 15 NY3d at 617). To be admitted, those statements must qualify under an independent exception to the hearsay rule *(In re Leon RR,* 48 NY2d 117, 122 [1979], citing *Johnson v. Lutz,* 253 NY 124, 127–28 [1930]). As discussed above, this may be that the statement is germane to the care and treatment of the injured plaintiff. The point is that that the mere fact that a statement exists in a certified hospital chart does not end the admissibility inquiry as to that statement.

1. Is the speaker known?

The first question is whether the parties can identify the speaker of the hearsay statement. If they cannot, that ends the inquiry. A statement from an unknown source in a hospital chart is inadmissible hearsay. *(People v. Townsley*, 240 AD2d 955, 957 [3d Dept 1997]).

If the speaker is known, then there is an implied foundation requirement. For example, if the plaintiff states, "I woke up this morning with pain in my chest" there is no doubt that the plaintiff has the necessary foundation to make that statement. However, perhaps the plaintiff arrived at the emergency room with a friend that did not witness how the injury occurred. If the friend advised a medical provider how the injury occurred, and that statement made its way into the chart as how the

injury occurred, foundation questions would present. Even if the speaker friend was identified, she possessed no personal knowledge about how the injury occurred, and would be testifying only on speculation. Thus even if the statement was relevant to the care and treatment of the patient, it would appear inadmissible as lacking the necessary foundation and indicia of reliability. The outcome would likely differ if the speaker friend watched the entire event and provided a history based on such personal knowledge.

2. Is the statement germane to the plaintiff's care and treatment?

If the parties can identify the speaker of the statement, the next step is to determine if an independent exception to the hearsay rule applies.

In personal injury actions, the issue may concern the injured plaintiff or a third party stating how an injury occurred. Perhaps the plaintiff fell off a ladder, and the medical history in the admitting history and physical states that the patient had not taken his anti-vertigo medication on the day of the fall. In a medical malpractice action, the hospital chart may contain notations that the patient was advised to call to follow up but did not, or that the symptoms at issue started earlier than the plaintiff testified to at deposition.

The rule at bar is: Hearsay statements about the cause of an injury in a hospital chart are admissible under the business records exception if they are germane to the treatment or diagnoses of the plaintiff's injuries *(Benavides v. City of New York*, 115 AD3d 518, 519 [1st Dept 2014]); *see also, Mosqueda v. Ariston Development Group*, 155 AD3d 504, 504 [1st Dept 2017]).

In determining these issues, the courts will hear proof from medical providers testifying from recall that the plaintiff or another party made the statement. More commonly, these medical providers will testify based on their custom and practice that if they recorded the statement in the manner and place in the chart indicated, that it came from the plaintiff. For example, if the statement is in quotes, medical providers may testify that their use of quotes means that it came directly from the mouth of the plaintiff.

After the proponent of the admitting the statement identifies the speaker through such proof, the trial court then usually awaits proof that the statement is germane to diagnoses and treatment of the plaintiff. Usually the physicians treating the patient during the hospital stay at issue will testify to this. The cases go both ways

as might be expected.

3. Is the hearsay statement admissible if not germane to treatment and diagnoses?

A plaintiff may say something to medical providers recorded in a hospital chart that is not germane to her treatment and diagnoses in the hospital. The question then becomes, is this statement while not admissible under CPLR 4518(c), admissible under another exception to the hearsay rule?

In plaintiff's personal and medical malpractice cases, this issue arises often when a defendant argues that the statements constitute an admission against the interest of the injured plaintiff, assuming evidence connects her to the statement (*Butler v. Bruntel Realty Corp.*, 2018 NY Slip Op 32517[U] *10 [Sup Ct, New York County 2018]).

The case law is mixed in this area.

Some courts hold that an admission against interest in a hospital chart to be admitted need not be germane to the diagnoses and treatment of the injured plaintiff. This is because the admission against interest exception to the hearsay rule exists as an independent exception to the hearsay rule. So if the proponent of the evidence establishes that the plaintiff made the statement, that statement could be received as an admission against interest despite having no relevance to the care and treatment of the plaintiff *(see Berkovits v. Chaaya*, 138 AD3d 1050, 1052–53 [3d Dept 2016]; *Grant v. New York City Tr. Auth.*, 105 AD3d 445, 446 [1st Dept 2013]; *Coker v. Bakkal Food, Inc.*, 52 AD3d 765, 766 [2d Dept 2008], *cert denied* 11 NY3d 708).

Other courts appear to foreclose the use of any other independent exception to the hearsay rule for statements in a hospital chart unless they are germane to care and treatment. Thus, in *Passino v. DeRosa* (199 AD2d 1017, 1017–18 [4th Dept 1993]), the Fourth Department reversed a trial court order which had allowed a statement attributed to plaintiff in a hospital chart that plaintiff fell on her icy driveway. The issue was important because plaintiff testified at trial that she fell on defendant's property when she tripped on a raised portion of the defendant's walkway causing her foot to land in a four-inch gully on the edge of the driveway. (*Id.* at 1017).

The Fourth Department reversed the trial court, and vacated a defense verdict based on lack of proximate cause. It found plaintiff's statement inadmissible

as it was not relevant to diagnoses and treatment. Similarly, in *Benavides* (115 AD3d at 519), the First Department excluded a statement in the hospital record that plaintiff fell off a fence. The statement was not relevant to diagnoses and treatment, and defendant had proven that plaintiff made the statement.

2. Hospital Bills

CPLR 4518(b) makes a hospital bill admissible as *prima facie* evidence of the facts contained therein, if it bears a certification by the head of the hospital or by a responsible employee in the comptroller's or accounting office that the bill is correct, that each of the items was necessarily supplied, and that the amount charged is reasonable.

3. Treating physician's office records

Records containing a treating physician's day to day business entries qualify as business records under CPLR 4518(a) *(see Daniels v. Simon*, 99 AD3d 658, 660 [2d Dept 2012]; *Wilson,* 130 AD2d at 231; *see also Williams v. Alexander,* 309 NY 283, 286−88 [1955]). This is because the records contain the physicians' business entries for their examination of patients, and are not created to serve as proof for expert witness testimony *(Feliz v. Jimenez*, 2013 NY Slip Op 31505 [U], *10−11, 2013 NY Misc LEXIS 2973, *10−11 [Sup Ct, New York County 2013]).

However, if office notes that otherwise qualify as business records under CPLR 4518(a) contain a medical opinion about causation, some cases hold that the opinions in those notes cannot be considered unless the treating physician is available for cross-examination *(Donoso v. Motor Veh. Acc. Indem. Corp.*, 118 AD3d 461, 462 [1st Dept 2014]).

Other cases, however, have held that office notes that qualify as business records are admissible even if they contain opinions of the treating physicians *(see Murray v. Weisenfeld*, 37 AD3d 432, 433−34 [2d Dept 2007]; *Bruce-Bishop v. Jafar,* 302 AD2d 345, 345 [2d Dept 2003]; *Wilson,* 130 AD2d at 231). According to one court, the difference turns on whether, the record was made in the ordinary course of business under CPLR 45l8(a) (*see Carter v. Rivera,* 24 Misc3d 920, 922−26 [Sup Ct, Kings County 2009]).

The Second Department in *Wilson* (130 AD2d at 231) discussed these differing holdings. It found a court could admit opinions of physicians in office charts, as those opinions related to the care and treatment of the patient. It equated the office chart with a hospital record, in which the medical opinions admit into evidence through that record *(Id.* at 231). The Second Department in another decision also held that plaintiffs'

experts could rely on the facts in the office chart, but properly did not rely on the opinions of the physicians in that chart *(Murray,* 37 AD3d at 434).

In light of these cases, litigants should not solely rely on the business records exception to the hearsay rule to get medical proof in medical records into evidence. For a variety of reasons beyond the scope of this article, treating or examining provider proof generally is the coin of the realm for submitting medical proof to the jury.

Sometimes neither side can read the handwritten scribbles or symbols in an office chart. This is nothing new. A court will not admit symbols or notations in a physician office charts if they are illegible, or the jury cannot understand them without expert proof. If the physician has made legible entries in the office chart that require expert interpretation, the proponent of the evidence must lay a specific foundation for those entries before a court will admit them. (*Wilson*, 130 AD2d at 231−34). Excluding the specific notations or symbols will not affect the admission of the remaining office chart (*see Matter of Fortunato v. Murray*, 101 AD3d 872, 874 [2d Dept 2012]).

4. Medical test and imaging reports contained in a treating physician's office record

A question that often arises is whether lab test reports and imaging reports contained in the treating physician's office chart, and relied on by the treating physician in the care and treatment of the patient, are admissible as part of the office chart offered as a business record under CPLR 4518(a). In *Freeman v. Kirkland* (184 AD2d 331, 332 [1st Dept 1992]) the First Department held that they were, if those records were germane to the diagnoses and treatment of the patient *(Id.; see also Cohn v. Haddad,* 244 AD2d 519, 520 [1st Dept 1997]).

The Third Department has reached a similar holding. In *Stein v. Lebowitz-Pine View Hotel, Inc.* (111 AD2d 572, 575 [3d Dept 1985]) it held that x-ray, EKG, and laboratory test reports "entered" into the plaintiff decedent's physician's office treatment chart by the physician or his staff could be admitted as a business record under CPLR 45l8(a). The fact that other persons had prepared these records went only to the weight, not the admissibility *(Id.* at 575). In both of these cases the courts found an objective measure of reliability that would justify admitting the records under the business records exception to the hearsay rule.

What if the treating provider received as a matter of course multiple consult reports, imaging studies, and lab work and she does not testify that she relied on them

specifically in the care and treatment of the specific injury before the jury? It would seem that this would be much harder road to hoe, as no indicia of reliability would present. Rather, this would appear to constitute conduit hearsay, which as discussed below is inadmissible.

An office secretary can provide the necessary foundation to admit a treating physician's office chart into evidence as a business record under CPLR 4518(a) *(see McClure v. Baier's Automotive Service Center Inc.,* 126 AD2d 610, 610−11 [2d Dept 1987]). That holding may be limited to the office notes made by the physician, although the Court does refer to "information in the medical records [that] appeared elsewhere in the record" [material in brackets added] *(Id.).* It is unlikely that an office secretary could lay the foundation as to what the treating provider relied on in the diagnoses and treatment of the patient.

In light of these and later cases discussed below, a practitioner should anticipate objections when she offers an office record of a treating physician containing radiology and laboratory test reports from non-testifying healthcare providers not available for cross-examination as a business record under CPLR 4518(a).

If admitted, the basis for any such admission will most likely lie in the fact that such records were relevant to the care and treatment of the patient, and that the treating physician relied on them as such, the treating provider testifies as such. It is also possible that certain sections of the records, containing opinions on causation or prognosis, could be excluded based on some of the cases cited above. This inquiry also differs from whether a treating provider can rely on the received radiology and lab reports in providing opinions to the jury, as a reliable basis for his opinion. We discuss that topic below.

A deceased physician's office records, including his opinions as to the patient's condition, can be admitted as a business record, on a proper foundation, as germane to the care and treatment of the patient *(Jezowski v. Beach,* 59 Misc2d 224, 225−26 [Sup Ct, Oneida County 1968]). In that case, the trial court excluded the treating physician's handwritten opinions of EKGs written on the back of the written EKG reports the treating physician ordered. The trial court found that such opinions and diagnoses were hearsay expert opinion, thus, not subject to cross-examination *(Id.* at 225). However, the Court admitted the EKG reports and the physician's office cards as business records after the physician's wife had authenticated them as such.

It is not immediately clear why the court admitted the deceased physician's opinions and diagnoses contained in his office cards while excluding his handwritten opinions on the backs of the EKG reports. Perhaps the foundation offered by the proponent differed, but it would be expected that the decedent's provider's wife could authenticate his signature, and presumably, any practice of handwriting on the back of the EKG reports. And both the opinions on the office cards, and those on the back of the EKG reports would appear relevant to the diagnoses and treatment of the patient. This case illustrates how closely the cases turn on the specific foundation and proof before the court.

5. Narrative medical reports

Physicians often prepare reports at the request of counsel on behalf of the parties. Such reports are generally material prepared for litigation and are not the systematic, routine, day-by-day records envisioned by the business records exception. Therefore, courts will not generally admit in evidence physicians' reports prepared for litigation under the business records exception to the hearsay rule (*In the Matter of Akayla M. Wilson*, 130 AD2d at 229–30). The rule is the same for a treating or examining physician's letter report prepared at the request of counsel for a litigation. It constitutes inadmissible hearsay. *(Gaudio v. Staring*, 2013 NY Slip Op 50085[U], 2013 NY Misc LEXIS 161 [Sup Ct, Albany County 2013], citing *Daniels*, 99 AD3d at 660; *Matter of Bronstein-Becher v. Becher*, 25 AD3d 796, 797 [2d Dept 2006]; *Komar v. Showers*, 227 AD2d 135, 136 [1st Dept 1996]).

Thus, in *Sabatino v. Turf House, Inc.* (76 AD2d 945, 946 [3d Dept 1980]) the Third Department affirmed the exclusion of two narrative medical reports prepared by physicians which detailed the plaintiff's condition and diagnoses. Although both physicians were available to testify, the plaintiff attempted to admit the reports as business records through another physician with no personal knowledge of the reports or how they were created. This was improper. The Court also called the argument that the medical reports could qualify as business records "a doubtful proposition" *(Id.).*

However, an evaluation report made in the ordinary course of business of a medical provider can be admitted as a business record *(see Wilbur v. Lacerda*, 34 AD3d 794, 795 [2d Dept 2006]). An example might be a functional capacity evaluation of a plaintiff that a physical medicine and rehabilitation physician performed on all of his patients suffering a particular injury, irrespective of whether that injury was being litigated.

6. Imaging

CPLR 4532−a provides that a graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test is admissible in evidence with the proper foundation and notice set out in that section. All practitioners should know how to admit this type of evidence under CPLR 4532−a. CPLR 4532−a only applies to images, not reports interpreting those images. Therefore, CPLR 4532−a does not make radiology or imaging reports admissible, as further discussed below.

As to the images themselves, failing to introduce the original image or a certified copy of the image under CPLR 4518(c) or CPLR 4532−a violates the best evidence rule and the requirement for a foundation *(see Schozer v. William Penn Life Ins. Co.,* 84 NY2d 639, 644 [1994]). Thus, an MRI report cannot be introduced into evidence until the MRI films are admitted, unless the films were destroyed and therefore unavailable *(Wagman v. Bradshaw,* 292 AD2d 84, 88−89 [2d Dept 2002]).

Ordinarily, an expert witness cannot testify to his interpretation of diagnostic imaging if that imaging is not in evidence at trial (*Mosley v. E.H.J. LLC*, 159 AD3d 434, 435 [1st Dept 2018]; *O'Brien v. Mbugua,* 49 AD3d 937, 938 n2 [3d Dept 2008], citing *Schozer*, 84 NY2d at 646−47; *Hambsch v. New York City Tr. Auth.,* 63 NY2d 723, 725−26 [1984]). However, as discussed below, the *Hambsch* exception does allow a physician in certain circumstances to testify about an imaging test or report without that item being admitted into evidence (*see Ahumada v. Drogan*, 152 AD3d 439, 440 [1st Dept 2017]). This does not mean that relying on *Hambsch* should be counsel's preferred strategy, as opposed to having the full medical record admitted into evidence.

7. Medical Reports interpreting imaging or other tests

A written report authored by a non-testifying healthcare professional, interpreting a medical test, is patent hearsay, as the declarant, the preparer of the report, cannot be cross-examined *(Wagman,* 292 AD2d at 88−9, citing *Schwartz v. Gerson,* 246 AD2d 589, 590 [2d Dept 1998]). Therefore, a written report prepared by a non-testifying doctor interpreting the results of a medical test is not admissible into evidence for the truth of the matter *(D'Andraia v. Pesce,* 103 AD3d 770, 771−72 [2d Dept 2013]).

This bar does not apply to reports that are admitted as part of a hospital chart under CPLR 4518(c) (*see Ventura v. Martinez*, 2018 NY Slip Op 30020[U], *4, [Sup Ct, New York County 2018]). Rather the courts are concerned about, for example, an

office radiology report that may be in the office file of a treating provider, or an examining physician's file. The question is whether this constitutes conduit hearsay, or whether a specific exception to the hearsay rule exists. In the case of a report in a hospital chart, that exception exists pursuant to CPLR 4518(c). In the case of a radiology report contained in a treating provider's office chart, it may be admissible under the business records rule of CPLR 4518(a) under the cases cited above, or it may not be. This would also be true if the radiologist's office chart containing the radiology report is subpoenaed or voluntarily provided with certification. The same issues as to opinions relating to the treating providers records and opinions in those provider's office notes would appear to present with non-hospital office radiology reports.

The proponent seeking to admit the radiology report must ask under what exception to the hearsay rule the court would admit the reports, and the specific foundation needed to admit the records. If the answer is not immediately apparent, early resort to an alternative strategy – well before trial – will be necessary. A medical expert may rely on a medical record as being professionally reliable in her field of medicine and that she therefore properly relied on such record. That testimony, however, does not make the record admissible. It remains a hearsay document without an independent basis for admission into evidence *(Neumire v. Kraft Foods, Inc.*, 291 AD2d 784, 785−86 [4th Dept 2002]; *Borden v. Brady*, 92 AD2d 983, 985 [3d Dept 1983]).

Thus, even if a treating neurologist properly testified that he relied on MRI and nerve conduction reports when caring for the plaintiff, the trial court committed reversible error by admitting into evidence the written reports of the non-testifying physicians that interpreted the MRI films. This was so, even though the court below had properly admitted the MRI films into evidence pursuant to CPLR 4532−a. The error was not harmless because the defendants could not cross-examine the authors of the reports *(Clevenger v. Mitnick*, 38 AD3d 586, 587 [2d Dept 2007]). Query why the reports were not admissible as part of the treating neurologist's office chart under the business records exception to CPLR 4518(a). As with many of these cases at the appellate level, the record, or the split among various courts on this issue, likely was determinative.

8. The examining physician IME report

a. The defense IME reports

The reports of physicians employed by insurance carriers to evaluate an injured person - such as an "independent medical examination" (IME), workers compensation, or no-fault examination reports - constitute inadmissible hearsay. The reports are not business records and the physicians authoring the reports were not available for cross-examination in the cases cited (see *Daniels,* 99 AD3d at 660 [and cases cited there]; *Wilson,* 130 AD2d at 229–30; *Flaherty v. American Turners New York, Inc.,* 291 AD2d 256, 258 [1st Dept 2002] [excluding disability report as non-business record hearsay]). If the physicians do appear at trial, then they testify as to their examination and findings and the report is cumulative, and not generally admitted (*Knight v. Barsch*, 154 AD3d 834, 836 [2d Dept 2017]).

Note, however, that even though the court might exclude the defense IME report, the examining defense physician can testify to the history given by the plaintiff to such physician, as the relationship is presumed to be adverse, thus conferring sufficient reliability to satisfy the hearsay rule (*see Id.*).

b. The Plaintiffs' Use of the defense IME report

A defense IME report may favor the injured plaintiff, by documenting existing or new injuries, the need for future medical care, permanency of injury, or functional or vocational disability. In such cases, the Court of Appeals has ruled that the plaintiff may call the defendant's IME physician as part of plaintiffs' case to testify about the contents of the report (s*ee Gilly v. New York*, 69 NY2d 509, 513 [1987]). However, this can present certain risks to the plaintiff. The defense IME physician may change, modify or explain away the report, and otherwise do more damage than good. In addition, the plaintiff will generally have to pay the defense IME physician to appear, (*see People ex rel. Kraushaar Bros. & Co. v. Thorpe*, 296 NY 223, 225 [1947]) and in smaller cases, this might constitute a significant burden.

Plaintiffs' attorneys have therefore sought to admit the defense IME physician's report on the plaintiffs' case without calling such physician. They allege that the defense IME physician report is an admission against interest, adopted by the defendant by service of the report by his attorneys in the litigation. This argument has met with differing levels of success. (*See People v. Oliver*, 45 Misc. 3d 765, 771–72 [Sup Ct, Kings County July 9, 2014]; *A.B. Med. Servs., PLLC v. Travelers Prop. Cas. Corp.*, 5 Misc. 3d 214, 219 [Civ Ct, Kings County 2004]).

If the defense IME physician testimony or her report are not admitted, or otherwise available, the plaintiffs' attorney may use the report to cross-examine other defense physicians who may offer contrasting opinion testimony. (*See Gilly v. New York*, 69 NY2d at 510–12; *Hughes v. Webb*, 40 AD3d 1035, 1037 [2d Dept 2007]).

c. The admissibility of the plaintiff's examining physician report

What is good for the goose is good for the gander. Plaintiff's examining physician reports are just as inadmissible as the defense IME physician reports, for the same reasons. (*Flaherty v. Am. Turners NY, Inc.*, 291 AD2d at 258).

Furthermore, a trial court committed reversible error when it allowed a plaintiff's treating physician to testify about the findings of non-testifying medical professionals who conducted IMEs of the plaintiff, and the contents of their reports (*Seawright v. Crooks*, 87 AD3d 1345, 1346 [4th Dept 2011]).

I. EXPERTS

A. Expert opinions

Expert opinions are admissible on subjects involving professional or scientific knowledge or skill not within the range of ordinary training or intelligence (*Matter of City of New York*, 18 Misc3d 1118[A], *45–47, 2008 NY Slip Op 50124 [U], *18, [Sup Ct, Kings County 2008], citing *In re Nicole V.*, 71 NY2d 112, 120 [1987]; *People v. Cronin*, 60 NY2d 430, 432 [1983]; *De Long v. County of Erie*, 60 NY2d 296, 307 [1983]; *Dougherty v. Milliken*, 163 NY 527, 533 [1900]).

An expert may proffer an opinion if he or she is possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted, or the opinion rendered is reliable (*Matott v. Ward*, 48 NY2d 455, 459 [1979]; *Superhost Hotels Inc. v. Selective Ins. Co. of Am.*, 160 AD3d 1162, 1164 [3d Dept 2018]). The competence of an expert in a particular subject may derive from long observation and real-world experience. It need not depend upon formal training or attainment of an academic degree in the subject (*see Price by Price v. New York City Hous. Auth.*, 92 NY2d 553, 559 [1998]); *Narvaez v. Wadsworth*, 2018 NY Slip Op 50309[U] *24 [Sup Ct, Bronx County 2018]; *People v. Johnson*, 153 AD3d 1606, 1606–07 [4th Dept 2017]; *Matter of City of New York*, 18 Misc3d 1118[A] at *18).

The expert's opinion must be based on (1) facts personally known to the expert, (*see Pascocello v. Jibone*, 161 AD3d 516 [1st Dept 2018]) or (2) in the trial

record, or (3) material not in evidence, provided that the out-of-court material is derived from a witness subject to full cross-examination, or (4) material not in evidence that is deemed professionally reliable in the field at issue (*Tornatore v. Cohen*, 162 AD3d 1503, 1505 [4th Dept 2018]; *In the Matter of Jazmyne II*, 151 AD3d 1123, 1126 [3d Dept 2017]). This last category, generally called the *"Hambsch* exception," is discussed more fully below.

Unlike fact witnesses, experts may observe the opposing expert's trial testimony *(see People v. Santana,* 80 NY2d 92, 100 [1992]; *Drago v. Tishman Constr. Corp.,* 4 Misc3d 354, 356 [Sup Ct, New York County 2004]).

1. The *Hambsch* professional reliability exception

At trial, "the professional reliability exception to the hearsay rule . . . enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession" *(Hinlicky v. Dreyfuss,* 6 NY3d 636, 648 [2006], citing *Hambsch,* 63 NY2d at 726); *Tornatore v. Cohen*, 162 AD3d 1503, 1505 [4th Dept 2018] . Stated differently, "[t]he general rule that opinion evidence 'must be based on facts in the record or personally known to the witness' is subject to an exception where . . . the opinion is based upon data of a kind accepted in the profession as reliable in forming a professional opinion" (*Greene v. Xerox Corp.,* 244 AD2d 877, 877–78 [4th Dept 1997], *cert denied* 91 NY2d 809 [1998]; *Matter of City of New York,* 18 Misc3d 1118[A] at*18–19).

Thus, hearsay testimony given by a medical expert for the limited purpose of informing the jury of the basis of her opinion and not for the truth of the matters related is admissible *(O'Brien,* 49 AD3d at 938, citing *People v. Wlasiuk,* 32 AD3d 674, 680–81 [3d Dept 2006]). The scope of the *Hambsch* exception, in other words, how fully the expert may describe and convey the out of court material to the jury through her testimony, remains in flux.

2. Establishing the reliability of the out-of-court material under Hambsch

The reliability of the out-of-court material is critical to a court determining whether a medical expert can testify that such expert relied on that material, or discuss it in any fashion *(Borden,* 92 AD2d at 984 [Yesawich, J., concurring]). Without the reliability of a medical report being established at trial, an expert cannot rely on it when testifying *(see D'Andraia,* l03 AD3d at 771–72 [reversing plaintiff's verdict because plaintiff's standard of care expert testified that he relied on a prostate biopsy report without establishing that it was accepted as reliable in

the field]).

The courts remain skeptical about experts testifying to out of court material. They fear that the expert testifying about it to the jury will merely be a conduit for hearsay. In other words, inadmissible hearsay will get in through the expert, thereby tainting the trial, and likely requiring a retrial at considerable expense to the judicial system and all involved. This is known as conduit hearsay. Conduit hearsay by definition is unreliable and the courts will not allow it. We discuss it in more detail below.

On the other end of the spectrum, does the out-of-court material constitute simply one link in the chain of data, by which an expert formed and is expressing an opinion? These courts are likely to consider these materials reliable and allow them as a subject of expert testimony assuming a proper foundation. *(See Matter of Greene v. Robarge,* 104 AD3d 1073, 1074–75 [3d Dept 2013]).

The touchstone is reliability. There must be evidence in the record establishing the reliability of the out-of-court material (*Wagman,* 292 AD2d at 89). The proponent attempting to establish the reliability of the out of court material should establish the industry wide reliability of the test, or thing being relied on.

The proponent of the expert testimony must demonstrate that the out-of-court medical material was accepted as professionally reliable in the medical treatment process at issue *(Matter of Dakota F. (Angela F),* 110 AD3d 1151, 1153–54 [3d Dept 2013]). Thus, for example, a party may seek to have a medical expert testify about the results or the expert's reliance on an imaging report not in evidence. Under the above cases, the offering party might establish through her expert that doctors all over the country practicing in her specialty are trained to rely on such reports in medical school, and that recognizing this was part of her residency and board certification, and constitutes a necessary and systemic part of her private practice.

The medical expert if an examining physician should also be able to testify that he uses the same methodology in his private non-litigation practice when reviewing and radiology reports as she did when reviewing and relying on the injured plaintiff's imaging reports as part of her examination process. The expert might also discuss the difference between a preliminary and final report, and the indicia of reliability built into the final report.

In a private practice setting, the medical expert, if a treating physician, might also how imaging reports are conveyed to and reviewed by her office, her knowledge of the processes of the radiology group sending the imaging report to her, and whether she relies on that group's radiology reports for all of her patients, not just the plaintiff, and not just because a litigation exists.

Many of the factors that may qualify an imaging report as a business record under CPLR 4518(a) – subject to caveats and law discussed above – also would appear to demonstrate the reliability of an out of court document such as a radiology report.

Thus, with medical witnesses, and out-of-court medical records or reports, the courts will scrutinize whether the expert merely relied on the MRI report to confirm an already established diagnoses, or whether he relied on it to form his diagnoses *(Id.* at 89–90; *see also Matter of Chilson v. Chilson,* 22 Misc 3d 1129[A], *3–4, 2009 NY Slip Op 50360 [U], *2 [Fam Ct, Yates County 2009]). The former shows a valid opinion and a chain and the link of data, and the latter shows conduit hearsay. With conduit hearsay, the expert is not doing anything but introducing the inadmissible MRI report to the jury.

Other factors that demonstrate reliability or its absence include whether external circumstances guaranteeing the reliability of the medical report or record existed, and whether the record was created for litigation or in the normal course of treatment *(see Borden,* 92 AD2d at 984).

Thus, a court appointed forensic psychologist in a custody dispute in family court was allowed to testify in part based on out-of-court information she received from DSS caseworkers who were not subject to cross-examination. The psychologist testified without contradiction that such information from collateral sources was commonly relied upon in her profession when conducting a forensic psychological evaluation in custody proceedings. Additionally, the primary source of her opinion was extensive interviews with the mother, father, and children. The collateral source information was but a "link in the chain of data" that assisted her in forming her opinion *(Matter of Greene v. Robarge,* 104 AD3d 1073, 1074–75 [3d Dept 2013]).

A statute may establish out-of-court material as reliable. An expert in a civil confinement hearing did not need to testify that he considered certain out-of-court statements that he relied on to be reliable in his profession. The expert testified that such statements - of uncharged and unproven acts of sexual abuse committed by respondent

- were deemed reliable under Mental Hygiene Law § 10.03(i) *(see Matter of State of New York v. Fox,* 79 AD3d 1782, 1783−84 [4th Dept 2010]).

Expert reports hold no inherent patina of reliability. Therefore, the proponent of the witness testifying that he relied on an expert report must lay a full foundation demonstrating the reliability of the report *(see McAuliffe v. McAuliffe,* 70 AD3d 1129, 1132−33 [3d Dept 2010]).

The courts determine whether a particular opinion or piece of out-of-court material possesses the necessary reliability foundation. In *A-Tech Concrete Co., Inc. v. Tilcon N.Y. Inc.* (60 AD3d 603, 603−04 [2d Dept 2009]) the Second Department affirmed rulings by the trial court that excluded a laboratory report, an expert report, and that part of an expert's opinion based on the laboratory report.

The record indicated that plaintiff's expert sent samples of material to an independent laboratory. He did not conduct, supervise, or observe the testing, and he did not testify about the laboratory's testing procedures, or indicate that he personally knew of the specific tests that the laboratory conducted. Despite this, the expert testified that laboratory test reports issuing from the laboratory were generally reliable. The Court rejected this testimony. It did not accept the expert's opinion about the reliability of the laboratory results *(Id.* at 603−04).

3. Conduit Hearsay

The courts show a healthy concern when considering the admissibility of testimony conveying the bases of expert testimony under *Hambsch.* If the expert is simply testifying to someone else's opinions, findings, or data, then the true speaker is not in the courtroom, the testimony violates the hearsay rule. The courts label this testimony "conduit hearsay." The expert is simply the conduit for the real speaker holding the real opinion. The problem with this, of course, is that the real speaker – not in the courtroom - cannot be cross-examined.

The Third Department therefore has instituted another step to block conduit hearsay. It requires that even after the out-of-court materials pass the *Hambsch* test, they not be the sole basis for the expert's opinion on an ultimate issue in the case *(Borden,* 92 AD2d at 984; *see also Tornatore*, 162 AD3d at 1505). Rather, such materials may only form a link in the chain of data that led the expert to the opinion *(O'Brien,* 49 AD3d at 938). In *Wlasiuk* (32 AD3d at 680−81) the Court explained the dangers of conduit hearsay and reversed a murder conviction in part because it found that

such hearsay had gotten to the jury, and the error was not harmless *(Id.)*.

The First and Second Departments have been if anything more vigilant in gatekeeping against this type of hearsay. In the *Wagman* line of cases, discussed above, the Court stressed the need to prevent one side from entering into evidence or reading into evidence the contents of out-of-court material because such material was not amenable to cross-examination. It held that the out-of-court information must not be the "primary basis for the opinion" (*Wagman*, 292 AD2d at 89). While not specifically referring to conduit hearsay, the concept appears similar.

It can be difficult to distinguish between improper conduit hearsay, and the proper "link in the chain of data." Is the hearsay source the entire opinion, or a small part of data that is supporting an expert's independent opinion resting on a multiple group of other in court sources? As we discuss below, the out-of-court MRI report has been a lightning rod on this topic.

4. The out-of-court MRI report and conduit hearsay

The appellate divisions show different views on whether medical experts can testify about out-of-court MRI reports that they relied on in forming their opinions.

The Third Department has held that a treating neurologist who testified as to his care and treatment of an injured plaintiff may testify to the contents of an MRI report he ordered during his treatment of the plaintiff. This was true even though the MRI report and images were not in evidence. Implicitly, the Third Department appears to have found the MRI report reliable because the neurologist routinely relied on it in treating and diagnosing the injured plaintiff, and the neurologist ordered it as part of such care and treatment (*O'Brien*, 49 AD3d at 938–39).

The neurologist was not acting as a conduit for the radiologist's MRI findings. Rather the neurologist discussed the contents of the MRI report in the context of his independent findings and opinions as to the plaintiff's condition. Thus, the MRI report findings were just one link in the chain of data on which the neurologist relied in treating the patient and forming his opinions *(Id.* at 939).

The Second Department has followed a more restrictive view on out of court medical imaging reports. In *Wagman* (292 AD2d at 85–88) it held that the professional reliability exception did not permit an expert witness to offer opinion testimony based upon out-of-court material for the truth of such material. This

constituted reversible error.

The issue in *Wagman* was whether plaintiff's treating chiropractor could testify to the contents of an out-of-court MRI report. At trial, the chiropractor did not limit his testimony to stating that he relied on the out-of-court MRI report in part to form his opinion. He testified over objection as to the ultimate conclusion in the MRI report.

The Second Department in *Wagman* found that such testimony exceeded the *Hambsch* boundaries. This was fatal to the plaintiffs cause. The defendant could not cross-examine the author of the written MRI report, or otherwise controvert or rebut it. Therefore, the jury potentially could give undue probative value to it. The Second Department therefore reversed the plaintiff's verdict and ordered a new trial *(Id.* at 91).

In *Elshaaawy v. U-Haul Co. of Miss.* (72 AD3d 878, 882 [2d Dept 2010]) the Second Department in similar circumstances again reversed a plaintiff's verdict and ordered a new trial. The plaintiff's treating neurologist testified about an out-of-court MRI report that he relied on in treating the plaintiff. The Court reversed the verdict because (1) the radiologist that prepared the report did not testify at trial, (2) the MRI films were not in evidence, (3) the plaintiff did not demonstrate that the MRI report interpreting the films was reliable, and (4) the defendants could not cross-examine the radiologist who prepared the report *(Id.* at 882).

It is not clear whether the Second Department would have allowed the neurologist to testify about the out-of-court MRI report as a basis of his opinion if the plaintiff had established its reliability. In other words, was the Second Department requiring that the plaintiff meet all four prongs that grounded the reversal? If so, then it would seem that the fourth prong - the inability to cross-examine the radiologist - would usually prove fatal to the plaintiff's expert's attempt to testify about the out-of-court MRI report even within the *Hambsch* parameters.

The First Department has aligned with the Second Department on this issue. In *Kovacev v. Ferreira Bros. Contr. Inc.* (9 AD3d 253, 253 [1st Dept 2004]), it affirmed a defense verdict and ruling by the trial court that precluded the plaintiff's treating physician from referring to hearsay MRI reports when testifying about plaintiff's neck and back injuries. It held that a treating physician's opinion at trial could not rest on an out-of-court interpretation of MRI films authored by a radiologist not subject to cross-examination. The MRI films were not in evidence and the plaintiff did not demonstrate that the radiology interpretation was reliable *(Id.* at 253).

Similarly, the First Department reversed a plaintiff's verdict because the plaintiff's treating physician testified to the contents of an MRI report without establishing its reliability *(see Murphy v. Columbia Univ.*, 4 AD3d 200, 203 [1st Dept 2004]). The MRI also constituted the primary basis for the physician's diagnoses. This unavoidably affected the jury's view of the plaintiff's injuries *(Id.).*

The differences between the First, Second, and Third Departments in these cases may be one of degree, turning on whether the MRI report testimony was perceived as conduit hearsay, whether the expert improperly attempted to convey the substantive contents of the report, and whether the offering party established the reliability of the out-of-court material. Having said that, it does appear that the Second and First Departments adhere to a more demanding standard in this area.

B. The Open Question - Can the out-of-court material be admitted into evidence or simply discussed as a basis of the expert's opinion?

Whether evidence may be admitted because of its use as a basis for expert testimony remains an open question in New York *(Hinlicky*, 6 NY3d at 648). There is a distinction between the admissibility of an expert's opinion and the admissibility of the information underlying it *(People v. Goldstein*, 6 NY3d 119, 126 [2005], *cert denied*, 547 US 1159 [2006]). Without that distinction, "a party might effectively nullify the hearsay rule by making that party's expert a conduit for hearsay" *(Id.).*

When considering this issue, it is important to clarify what the proponent of the testimony or out-of-court material is attempting to do. Is she merely seeking to have an expert show the basis of his opinion by listing the out-of-court materials that the expert relied on and why? Is she seeking to have the expert convey the contents of the out-of-court material to the jury? Or, is she attempting to admit directly into evidence the out-of-court materials?

Another possibility is that the out-of-court material is being offered as demonstrative evidence to show how a particular physician treated a patient, or what the treating physician used to evaluate a patient *(Hinlicky*, 6 NY3d at 646–47).

In such cases, the court must carefully weigh the differing thresholds and requirements for allowing the out-of-court material to be heard, seen, or directly admitted. The Court should also ensure that the out-of-court material does not suffer "mission creep" and initially be introduced for one purpose and then morph

into another during the heat of trial. This is what happened in *Hinlicky* to the plaintiff's detriment *(Id.* at 647).

Careful and proper limiting instructions in a jury trial, and specific rulings clarifying the use of the out-of-court material, should keep the evidentiary record safe and avoid reversible error. The party offering the evidence should carefully adhere to the above precedents, as the courts will reverse verdicts if they find conduit hearsay.

When the lines blur, and out-of-court material is directly admitted into evidence, reversible error may result. In *Schwartz* (246 AD2d at 590) the plaintiff's surgeon testified that he reviewed and relied on a report from a non-treating physician that examined the plaintiff. That report was produced for the plaintiff's insurance carrier in determining that the plaintiff required surgery. However, the plaintiff exceeded the scope of this limited use by improperly admitting the examiner's report into evidence and then reading it to the jury during summation. As this was not harmless error, the Second Department reversed the plaintiff's verdict and ordered a new trial.

In 2013, the Court of Appeals in *Floyd Y (Matter of State v. Floyd Y,* 22 NY3d 95, 106–09 [2013]) considered the question of "basis hearsay" and its use at trial.

Floyd Y involved a Mental Hygiene Law article 10 civil management proceeding. The Court held that due process required that out-of-court materials relied on by experts both help the jury and meet a certain threshold of reliability *(Id.* at 106). These out-of-court materials - called "basis hearsay" by the Court - do not come into evidence for the truth of the matter, but rather to assist the jury in determining the basis of the expert's opinions *(Id.* at 107–08). The Court considered the potential prejudice of the jury considering the basis hearsay for the truth of the matter. It found that such prejudice could be cured by limiting instructions and the testimony of the opponent's experts *(Id.* at 108).

In *Floyd Y,* the Court held that the proponent must demonstrate through evidence that the hearsay is reliable, and that if so, the court must determine whether the probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect *(Id.* at 109).

Concurring Judge Smith would have reversed not on the due process clause, but because the basis hearsay was just that. It did not fall within any exception to

the hearsay rule *(Id.* at 110−12). He highlighted the open question in New York of whether basis hearsay could be admitted into evidence, or just mentioned as the basis for the opinion. In his opinion, it should be limited to stating the basis for the opinion. He also pointed out that the offenders on trial in article 10 proceedings should have at least as much protection from the rules of evidence barring hearsay as the defendant in a garden-variety automobile negligence case. Being allowed to refer to an MRI report, but then read the entire report into the record, would have committed reversible error.

A review of the above cases show that within the general rules lies a continuum of admissibility. A medical expert who testifies to his detailed course of treatment, supported by multiple visits, and objective findings, and other data, and who simply advised the jury that an MRI report was consistent with, or had confirmed his previously established diagnoses, most likely would have a safe harbor under *Hambsch*, assuming a sufficient foundation of reliability. A medical expert that simply tries to read an out of court MRI report into evidence without more will likely have that testimony stricken or excluded as conduit hearsay. Between these two ends of the spectrum lies a variety of different scenarios with not much predictability at trial or on appeal. We discuss in our practical considerations section below some thoughts on how to minimize the risk of reversal while still getting the necessary proof in.

II. HEARSAY MEDICAL DOCUMENTS ASSOCIATED WITH EXPERT PROOF

A. Clinical Medical Practice Guidelines

Clinical practice guidelines are hearsay that cannot be admitted directly for the truth of the matter.

Substantively, compliance with clinical medical practice guidelines does not, in and of itself, constitute good and accepted medical practice *(Halls v. Kiyici,* 104 AD3d 502, 503−04 [lst Dept 2013]). Guidelines are not standards of care. The jury must decide the case based on the complete trial record before it, not on guidelines alone. Allowing guidelines into evidence without the proper limiting instructions in a jury trial allows the jury to infer that a physician need not exercise professional judgment for individual patients *(Id.).* The error compounds when defense counsel suggests to the jury in opening statements and summation that that guidelines represent the standard of care. In such circumstances, the First Department has vacated a defense verdict and ordered a new trial *(Id.).*

Clinical guidelines can also assume substantive import and require the plaintiff to defend against them on summary judgment motion, if the plaintiff's experts rely on those clinical guidelines in opposing the motion *(Ellis v. Eng*, 70 AD3d 887, 891 [2d Dept 2010]).

However, as with the PDR, authoritative texts, and algorithms discussed below, experts may rely on clinical practice guidelines in forming their opinions under *Hambsch.* To that extent, a court may allow the expert to disclose them to the jury in some form consistent with *Hambsch*. A party may also use them as demonstrative exhibits subject to limiting instructions, as also discussed below.

B. Authoritative Texts, Journals, Books, Studies

At trial, medical and scientific texts are not admissible when offered for their truth, or to establish a standard of care (*Spensieri*, 94 NY2d 321, 237 [1999]; *David v. Decter*, 2018 NY Slip Op 32366[U], *16–17 [Sup Ct, New York County 2018]). They are hearsay outside any recognized hearsay exception (*Lenzini v. Kessler,* 48 AD3d 220, 220 [1st Dept 2008]; *Brown v. Speaker,* 2008 NY Slip Op 32184 [U], *2, 2008 NY Misc LEXIS 9321, *9 [Sup Ct, New York County 2008]), *aff'd* 66 AD3d 422 [1st Dept 2009]).

However, an expert can testify that he relied on authoritative texts, journals, and studies, in forming his opinions as long as he establishes the *Hambsch* reliability criteria. This does not allow the admission in evidence of the authoritative text. It does allow the speaker to indicate that he relied on the source in forming his opinion.

An occasional flashpoint in this area is the Physician's Desk Reference (PDR). A litigant may offer expert testimony under *Hambsch* partially relying on the PDR. However, a litigant cannot offer excerpts of the PDR as stand-alone proof of a standard of care, as it is a hearsay document *(Hinlicky*, 6 NY3d at 647; *Spensieri v. Lasky*, 94 NY2d at 236–39; *Saccone Gross,* 84 AD3d 1208, 1209 [2d Dept 2011]); *Noler v. New York Univ. Med. Ctr. Hosp. for Joint Diseases,* 2010 NY Slip Op 31586 [U], *7–8, 2010 NY Misc LEXIS 2766, *8 [Sup Ct, New York County 2010]). A court can also admit the PDR for non-hearsay purposes, i.e. not for the truth of the matter *(see Martin v. Hacker,* 83 NY2d 1 [1993]).

1. Cross-examination of a medical expert on an authoritative text

A party may cross-examine an opposing expert on a scientific or medical text when the expert acknowledges that it is authoritative and when the text is demonstrated to be reliable in the relevant profession *(Lenzini*, 48 AD3d at 220; *Kirker v. Nicolla*, 256 AD2d 865, 867–68 [3d Dept 1998]). Experts may deny that a particular text is authoritative. However, an expert may not foreclose full cross-examination by the semantic trick of announcing that the text was not authoritative, when she relied on the text and testified that she agreed with much of it *(Lenzini*, 48 AD3d at 220).

The expert does not need to accept everything in the text for the text to be deemed authoritative for cross-examination purposes *(Id.; see also Brown*, 2008 NY Slip Op 32184[U] at *4–5). However, it is uncertain whether an expert can be cross-examined on an article in a journal that he did not read, even if he conceded that the journal was authoritative *(see Brown v. Speaker*, 66 AD3d 422, 424 [lst Dept 2009] [finding harmless error after assuming without deciding that the plaintiffs expert should not have been cross-examined about an article that he did not recognize as authoritative, having only recognized the journal from which the article came as authoritative]).

C. Algorithms

An algorithm explaining a clinical practice guideline is inadmissible hearsay if offered for the truth of the matter *(Hinlicky*, 6 NY3d at 645). If offered for a non-hearsay purpose, i.e. not for the truth of the matter, then the algorithm may be properly admitted *(Id.* at 645–46). Thus, in *Hinlicky*, an anesthesiologist that used clinical practice guidelines in his pre-surgery clearance of the decedent plaintiff, properly entered into evidence an algorithm showing - for demonstrative purposes only - that process. This aided the jury in understanding the decision-making process that the anesthesiologist followed when treating the plaintiff *(Id.).*

The Court recognized that jurors could draw unsupported inferences from demonstrative evidence, i.e. algorithms, excerpted from clinical practice guidelines and reproduced as an exhibit *(Id.* at 646). It stated however, on the facts of the case that the treating anesthesiologist, a fact witness, had testified that he used the algorithm in his practice.

At trial, the parties had blurred the line between the demonstrative purpose

for which the court received the exhibit, and the algorithm as a stand-alone piece of evidence showing the standard of care. The plaintiff did not request limiting instructions during trial to limit the jury from considering the algorithm solely for demonstrative purposes. Experts on both sides had discussed the algorithm in standard of care terms. As the Court noted, if plaintiff at trial was concerned that the purpose of admitting the algorithm was changing from demonstrative to substantive evidence, he surely could and should have said so (*Id.* at 648).

IV. SOME PRACTICAL CONSIDERATIONS

1. The evidence issues we discuss above are familiar to trial lawyers across the state. Most would agree that simply not considering the evidentiary strategy before trial has resulted in many of the issues that the Courts have decided. For example, if an MRI report needs to be in evidence, how is that going to happen? If the case cannot support calling the radiologist, the MRI report is not in a hospital chart, and the treating physician is not cooperating, what is plan B? Perhaps subpoenaing the radiology office to provide foundation testimony about the report, and then having the examining physician provide the reliability proof needed under *Hambsch*. There is no single answer. There are a menu of options considering the cost benefit of each option. The point is that the analysis has to be done and decisions made based on the above case while there is still time to get the proof needed to the courthouse and admitted. Many of the issues reviewed in the above cases could be avoided if a member of the trial team had reviewed the file and what needed to be in evidence for the party's case and for the experts 60 days or more before trial. Options narrow exponentially as trial approaches. We recommend a systems-based approach to reviewing and identifying evidentiary issues and creating a plan to admit evidence on each case with hard motion *in limine* dates.

2. Evidentiary issues are better addressed when the court receives early notice of them and can fully review the facts and law before ruling. Helpful suggestions include directing service of written motions *in limine* returnable at least one week before the start of proof, early disclosure of trial exhibit lists and objections to such exhibits, and early pre-trial conferences to address evidentiary issues relating to the expected testimony and medical exhibits. This should surface evidentiary issues that may otherwise lay dormant until mid-trial. While these items may not resolve all issues before the start of trial, the parties and the Court will certainly be better prepared to deal with them at that time.

2. Stipulations on exhibits reduce trial time spent laying foundations and the

number of evidentiary disputes on medical records and images. If the parties cannot agree on substantive admission, they may agree to waive foundation objections. This usually decreases the number of witnesses at trial.

3. It is very difficult in the heat of trial to pull back from getting in as much proof as possible to win the case. Certain victories however, are pyrrhic. It is expensive and difficult to re-try cases. We recommend a well-considered plan consistent with the above cases to admit the necessary proof.

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