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June 3, 2015

George F. Carpinello, Esq.
Chair, Advisory Committee on Civil Practice
c/o Office of Court Administration Counsel's Office
25 Beaver Street
New York, NY 10004

Re: Amending an Exception to the Rule against Hearsay to Address Business Records Relied upon by Experts in Civil Trials (CPLR 4549)

Dear Mr. Carpinello,

The Committee on State Courts of Superior Jurisdiction of the New York City Bar Association (the "Committee") supports the amendment of CPLR 4549 proposed in the January 2015 Report of the Advisory Committee on Civil Practice concerning the admissibility of expert opinions (the "Amendment"), but the Committee does not agree with the rationale provided by the Advisory Committee in its interpretation of the appellate authority and believes that the Amendment would be more useful with additional language that we suggest below.

As stated in the Advisory Committee's report, *Hambsch v. New York City Transit Authority*,[1] permits admission into evidence of expert opinions that are based on inadmissible sources, as long as those sources are "of a kind accepted in the profession [in which the expert practices] as reliable in forming a professional opinion." *Hambsch* thus creates an exception to the rule that "opinion evidence must be based on facts in the record or personally known to the witness."[2]

Hambsch has been the subject of frequent misinterpretation by trial courts, which have occasionally ruled that it permits the introduction not only of the expert opinion, but also of the underlying sources, even if those sources are not admissible. Those trial courts have treated "professional reliability" not as an exception to the rule on the bases for expert opinions, but as superseding all of the rules of evidence, including the hearsay and best evidence rules. *Wagman v. Bradshaw*,[3] and similar appellate decisions, however, have consistently reversed trial courts

[1] 63 N.Y.2d 723, 725 (1984).

[2] *Id. See also* Hon. John M. Curran, *The "Professional Reliability" Basis for Expert Opinion Testimony*, 85-Aug N.Y.St. B. J. 22, 22 (2013).

[3] 292 A.D.2d 84 (2d Dep't 2002),

that misinterpreted *Hambsch* in permitting the introduction of hearsay on the sole basis that an expert relied on it and it was professionally reliable.

Contrary to the OCA memorandum's characterization, those appellate decisions did not hold that expert witnesses could not rely on such documents (frequently, MRI reports), rendering the expert opinions inadmissible; they held only that the underlying sources or summaries thereof were inadmissible.[4] Appellate courts have consistently adhered to this distinction by refusing to admit the contents of the underlying documents while permitting experts to testify as to their reliance on such documents in forming an opinion.[5] Other cases have permitted experts to testify about MRI *films*, which, unlike MRI reports, are admissible—they are not hearsay, and their admission does not violate the best evidence rule.[6] All of these decisions are consistent with *Hambsch*.

Likewise consistent with *Hambsch* are decisions holding that expert opinions are inadmissible where the proponent did not establish professional reliability, even though those cases sometimes involve the kind of sources that other courts have found, based on a more adequate record, to be professionally reliable.[7] *Fleiss v. South Buffalo Railway Co*. stated that a witness "was properly permitted to testify *regarding* the reports," leaving it unclear whether the expert had testified about what the reports said or merely as to the fact that he relied on the reports, the latter holding being consistent with *Wagman*.[8] *Torregrossa v. Weinstein* does appear to depart from that rule, but it was expressly abrogated in *Wagman*, leaving no inconsistency in the Second Department.[9]

Although we do not believe that *Wagman* and its progeny are either inconsistent with *Hambsch* or bad policy, we do not oppose the Amendment, because it does not overturn *Wagman*. The amendment states only that "[e]xpert opinion . . . shall not be rendered inadmissible" by the expert's reliance on inadmissible documents. That is a codification of *Hambsch*, not a repudiation of *Wagman*'s corollary holding that the introduction of the expert opinion does not make the underlying sources admissible as well.

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[4] *See Schwartz v. Gerson*, 246 A.D.2d 589, 589 (2d Dep't 1998) ("Even assuming that the report was subject to the 'professional reliability' exception to the rule that opinion evidence must be based on facts in the record or personally known to the witness, and that it was not improper to permit the plaintiff's surgeon to testify that he *reviewed and, in part, relied on* the report, in determining that the plaintiff required surgery, in the instant case the testimony regarding the report went substantially beyond this limited usage") (emphasis added).

[5] *Compare, e.g., Elshaarawy v. U-Haul Co. of Miss.*, 72 A.D.3d 878, 882 (2d Dep't 2010) ("Supreme Court erred in permitting the plaintiff's treating neurologist to testify *as to the contents of a report* interpreting magnetic resonance imaging") (emphasis added) *with O'Brien v. Mbugua*, 49 A.D.3d 937, 938-39 (3d Dep't 2008) (expert "should be permitted to testify *how the results of that test bore on his or her diagnosis*") (emphasis added).

[6] *See Trombin v. City of New York*, 33 A.D.3d 564, 564 (1st Dep't 2006) (expert could testify "as to *his* interpretation of the MRI films . . . since he had reviewed the actual films and plaintiffs had notified the court of their intention to *introduce the films into evidence*" pursuant to C.P.L.R. § 4532-a) (emphasis added).

[7] *See Kovacev v. Ferreira Bros. Contracting*, 9 A.D.3d 253, 253 (1st Dep't 2004) ("there is no proof that the interpretation [in the MRI report] is reliable"); *D'Andraia v. Pesce*, 103 A.D.3d 770, 771-72 (2d Dep't 2013) ("[h]ere, there was no proof that the report was reliable").

[8] 291 A.D.2d 848, 848 (4th Dep't 2002).

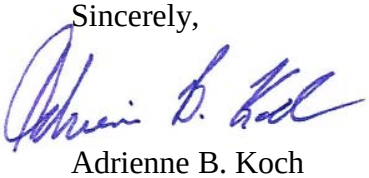
[9] 278 A.D.2d 487, 488 (2d Dep't 2000).

The fact that *Wagman* has led to such differing interpretations, however, does illustrate the difficulties that trial courts continue to have in applying *Hambsch*. In particular, the misconception that *Hambsch* permits hearsay sources to be admitted continues to be a source of confusion. Accordingly, we recommend that the Amendment be modified by inserting the below underlined text following the first full sentence:

> § 4549. Admissibility of certain expert testimony. Expert opinion that is otherwise admissible in evidence shall not be rendered inadmissible by virtue of the expert's reliance on a report or other date which is not itself in evidence if that report or data is of a kind routinely accepted in the profession as reliable in forming a professional opinion. **An expert's reliance on a report or other data in forming an opinion does not, however, permit the court to admit into evidence the contents of the report or other data, if such report or other data would otherwise be inadmissible.** The rule set forth in this section shall apply irrespective of whether the author or source of the predicate report or data is in court or available for cross-examination. The rule set forth in this section shall not apply to a predicate report or opinion prepared for purposes of litigation. This section does not render inadmissible any evidence that is otherwise admissible by statute or common law.

Thank you for your consideration.

Sincerely,



Adrienne B. Koch

Cc: Hon. John Bonacic, Chair, NYS Senate Judiciary Committee
Hon. Helene Weinstein, Chair, NYS Assembly Judiciary Committee
Holly Lutz, Esq., Counsel to the Advisory Committee on Civil Practice