COLUMBIAN LAWYERS ASSOCIATION

Continuing Legal Education program
February 5, 2020
"Evidence: Greatest Hits"

Hon. Barbara Jaffe, Supreme Court, New York County
Outline based on "Overcoming Hearsay Objections to Documentary Evidence,"
by Hon. Judith Gische; contributions from Hon. Kelly O'Neill Levy

1. Resources

Article 45 of the Civil Practice Law and Rules (CPLR)
Article 60 of the Criminal Procedure Law (CPL)
Guide to Evidence at www.nycourts.gov/judges/evidence
New York Pattern Jury Instructions (PJI3d) Civil (Committee of the Association of Justices of the Supreme Court of the State of New York)
New York Criminal Jury Instructions (CJI2d)

2. What is documentary evidence?

a. tangible evidence containing recorded information

b. recorded on paper or in electronic format

i. *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283 (2007) (cause of action for conversion applies to intangible electronic records stored on a computer which are indistinguishable from printed documents)

ii. CPLR 4518(a) (business records) includes electronic records "as defined in section [302] of the state technology law, used or stored as such a memorandum or record," and are deemed admissible when contained within "a tangible exhibit that is a true and accurate representation of such electronic record."

Such a record is admissible only if it was the regular practice of the business to create it. *Dyer v 930 Flushing, LLC*, 118 AD3d 742 (2d Dept 2014) (computer printouts must be supported by foundation sufficient to demonstrate admissibility as business records).

3. Authentication

New York v Patterson, 93 NY2d 80, 84 (1999) (although Court of Appeals recognized that tried and true methods of authenticating documents and photographs "should ordinarily allow for and promote the general, fair and proper use of new technologies, which can be pertinent truth-yielding forms of evidence," it warned that "the obligation and need for responsible accuracy and careful reliability should not be sacrificed to some

of the whims and weaknesses of fast moving and rapidly changing technology.")

People v Price, 23 NY3d 472 (2017) (foundation to establish authenticity may differ according to nature of evidence sought to be admitted; "In our view, it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts.")

a. Before a document may be offered in evidence, it must be authenticated.

b. Traditionally, to authenticate a document, the author must testify about what it is and how it was made.

> Eg, evidentiary foundation for a check or contract:
>
> Do you recognize that document?
> Who prepared it?
> Do you recognize the signatures on it on it?
> How do you recognize the signatures?

c. As it is not always possible to obtain the presence in court of the author of a document, the Legislature passed a series of statutes that provide alternative ways to authenticate documents. These statutes may or may not overcome hearsay objections to the information contained therein.

Examples of documents deemed authentic by statute:

> CPLR 4518(a) business records (if not certified pursuant to CPLR 3122-a, *infra*, at 4), also exception to hearsay rule; applicable to criminal proceedings through Criminal Procedure Law (CPL) ' 60.10. *People v Ortega*, 15 NY3d 610 (2010).
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> *Montes v New York City Transit Auth.*, 46 AD3d 121, 124 (1st Dept 2007), citing *Bostic v State of New York*, 232 AD2d 837, 839 (3d Dept 1996), *lv denied* 89 NY2d 807 (1997) (well-settled that business records exception to hearsay rule does not overcome any other viable objection to admissibility of record such as relevance and materiality)
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> At least three questions must be asked to lay a foundation establishing the reliability of a document for admission in evidence of a business record. *People v Cratsley*, 86 NY2d 81 (1995); *People v Kennedy*, 68 NY2d 569 (1986):
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> - Was the document made in the ordinary course of business? *Eg*, as part of a business routine and regularly conducted business activity, needed and relied

upon in the performance of business functions;
- Was it the ordinary course of business to make such a document? *Eg*, it was created pursuant to an established procedure for the routine, habitual, and systematic making of such a record; and
- Was the document made contemporaneously with the act or transaction indicated or within a reasonable time thereafter?

Failure to ask any of these three questions and/or elicit a positive response constitutes a basis for sustaining an objection.

Even if the foundation is laid, an effective *voir dire* by your adversary may compromise the admissibility of the business record. *Eg*, the *voir dire* may challenge whether the witness was the author of the document and/or how familiar the witness is with the business practices giving rise to the document.

While the witness need not be the author, if she cannot competently testify about the business practices giving rise to the document, the document remains inadmissible. *Bank of New York Mellon v Weber*, 169 AD3d 981, 984 (2d Dept 2019) (records of loan servicer not admissible as business records because witness lacked personal knowledge of servicer's "record-keeping business practices and procedures"); *Lodato v Greyhawk North Am., LLC*, 39 AD3d 494 (2d Dept 2007) (payroll records not admissible as business records because received from other entities even though retained in regular course of business; tax returns or W2 forms could have been used to determine past/future earnings).

But see West Val. Fire Dist. No. 1 v Village of Springville, 294 AD2d 949 (4th Dept 2002) (proper foundation may also be provided where entity shows that it routinely relies on business records of another entity in performance of its own business), and cases cited therein.

no-fault case: *Andrew Carothers, MD, PC v GEICO Indem. Co.*, 79 AD3d 864 (2d Dept 2010), *overruled on other grounds Viviane Etienne Med. Care, PC v Country-Wide Ins. Co.*, 114 AD3d 33 (2d Dept 2013) (although proper foundation may be established by recipient of records who does not have personal knowledge of maker's business practices and procedures, there must still be showing that recipient either incorporated records into its own records or relied on them in its day-to-day operations).

loan enforcement, foreclosure action: *Bank of Amer., Nat. Assn v Brannon*, 156 AD3d 1 (1st Dept 2017), citing *State of NY v 158th St. & Riverside Drive Housing Co., Inc.*, 100 AD3d 1293 (3d Dept 2012), *lv denied* 20 NY3d 858 (2013) (mere filing of papers received from other entities insufficient to qualify documents as business records; such records may be admitted in evidence if recipient establishes personal knowledge of maker's business practices and procedures, or

that records provided by maker were incorporated into recipient's own records or routinely relied upon by recipient in its business)

and One Step Up, Ltd. v Webster Bus. Credit Corp., 87 AD3d 1 (1st Dept 2011) (third party's obligation to provide certificate of defendant's entitlement to funds drawn by it on letter of credit, along with defendant's reliance on certificate, and third party's business duty to prepare certificate, rendered certificate, offered by defendant, admissible as business record).

CPLR 3122-a Business records are deemed authentic when produced pursuant to a subpoena and accompanied by a certification. Such certification may be an affidavit attached to the record, sworn to and signed by the custodian of the document or other qualified witness responsible for maintaining the record. There are notice requirements. Again, even if authentic, they are subject to preclusion for other evidentiary reasons. *Karen E.A. ex rel. Mercedes M. v 545 West 146th Street, Inc.*, 148 AD3d 464 (1st Dept 2017) (defendant's failure to comply with CPLR 3122-a did not prevent it from objecting to admissibility of plastic surgeon's report based on other rules of evidence, although objection not preserved for appellate review)

CPLR 4518(b) hospital bills

Hospital bills are admissible and constitute *prima facie* evidence if certified as correct by the head of the hospital or by a responsible employee in the comptroller or accounting office, that each of the items was necessarily supplied, and that the amount charged is reasonable.

NB: The statute does not apply in "any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital," unless in a proceeding pursuant to Lien Law ' 189 to determine the validity and extent of the hospital's lien. In such an instance, certified hospital bills "are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients."

CPLR 4518(c) other records

This statute provides a mechanism for establishing records as business records without the necessity of calling a live witness. The records must be certified. This includes hospital records; there are special considerations for criminal cases.

CPLR 4523 search by a title insurance or abstract company

A title search conducted by a New York State title insurance, abstract or searching company may be admitted in evidence if certified by the company. *Miller-Francis v Smith-Jackson,* 113 AD3d 28 (1st Dept 2013) (defendant failed to set forth *prima facie* case where proffered title search was neither official nor certified by searching company).

CPLR 4526 marriage certificates

An original or certified copy of a marriage certificate is *prima facie* proof of its contents. *In Re Estate of King,* 38 Misc 3d 1204(A) (Sur Ct, Bronx County 2012) (marriage certificate admissible on issue of bigamy).

CPLR 4527 death certificates

A death certificate is admissible to prove the fact of the death and the cause of death. *Begley v City of New York,* 111 AD3d 5 (2d Dept 2013), *lv denied* 23 NY3d 903 (2014) (death certificate admitted as proof that child died from allergic reaction).

CPLR 4528 weather conditions

Any record of the observations of the weather, taken under the direction of the United States weather bureau, constitutes *prima facie* evidence of the facts stated therein. *Weinberger v 52 Duane Assoc. LLC*, 102 AD3d 618 (1st Dept 2013) (defendant established *prima facie* entitlement to summary judgment by submitting certified climatological data, showing storm in progress when plaintiff fell).

CPLR 4532-a admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests, *eg*, x-rays, MRIs, CT scans

Such a representation is admissible if (1) it contains the name of the injured party, (2) the date the information was taken, and (3) such other identifying information as is customarily inscribed by the medical practitioner or facility, and (4) if it has been received or examined by the opposing party, or at least 10 days before trial, the proponent serves on the opposing party a notice of intention to offer the representation and that it is available for inspection, and (5) there is a statement by the doctor attesting "that the identifying information inscribed thereon is the same as is customarily inscribed by the medical practitioner or facility, and further attesting that, if called as a witness in the action, he or she would so testify." *Dwight v New York City Transit Auth.*, 30 AD3d 270 (1st Dept 2006) (x-ray films properly excluded as plaintiff failed to comply with notice

requirements).

CPLR 4532-b judicial notice of image, map, location, distance, etc. *New!*

An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.

CPLR 4533-a *prima facie* proof of damages not exceeding $2,000

An itemized bill for services or repairs that is marked paid and does not exceed $2,000 is admissible and constitutes *prima facie* evidence of the reasonable value and necessity of the services or repairs provided it bears a proper certification from the provider of services that it is the bill and reflects usual and customary charges and that no part will be refunded. This rule also requires 10 days' prior notice of intention to introduce the bill into evidence at trial. It is often useful in small claims actions.

CPLR 4540 official record of a US court or governmental office

An official publication, or a properly certified copy of it, is admissible and constitutes *prima facie* evidence of its contents. *People v Redmond*, 41 AD3d 514 (2d Dept 2007) (certification of out-of-state conviction admissible)

CPLR 4540-a disclosure materials authored or created by adverse party *New!*

Materials authored or otherwise created by an adverse party and are produced in response to a discovery demand are presumed authentic. *Maresca v Ma*, 2019 WL 2088444, *2, 2019 NY Slip Op 31359(U) (Sup Ct, NY County 2019) (documents sought to be introduced by defendant not presumed authentic because defendant, not adverse party, produced the documents). The presumption may be rebutted by

a preponderance of evidence that the material is not authentic.

d. "Best evidence rule" The document must also be an original and not a copy. However, if a satisfactory excuse is provided for not producing the original, secondary evidence such as a copy of the document or testimony about its contents may be admitted. *Schozer v William Penn Life Ins. Co. of NY*, 84 NY2d 639 (1994) (setting forth threshold findings); *Dependable Lists, Inc. v Malek*, 98 AD2d 679 (1st Dept 1983), *app dism* 62 NY2d 645 (1984).

Pursuant to CPLR 4539, if, in the regular course of business or activity, a copy is made by an accurate reproduction process and is satisfactorily identified by a knowledgeable witness, then the copy may be admitted, *even if the original otherwise exists*. Applicable to businesses, institutions, and members of a profession. It does not apply to individuals *per se*.

e. "self-authenticating" records: a matter for judicial notice

Elkaim v Elkaim, 176 AD2d 116 (1st Dept 1991), *app dism* 78 NY2d 1072 (in divorce action, trial court properly admitted in evidence, without foundation, records of husband's European bank accounts. "To be sure, business records are not self-proving and are customarily offered through a custodian or employee of the business organization that created them who can explain the record keeping of his organization; but, it is also true that judicial notice can provide a foundation for admitting the records of a particular business when the records are so patently trustworthy as to be self authenticating.") (internal citations omitted). *Thomas v Rogers Auto Collision, Inc*., 69 AD3d 608 (2d Dept 2010) (trial court did not err in allowing admission in evidence of self-authenticating bank statement).

But see People v Ramos, 13 NY3d 914 (2010) (error to admit without proper foundation copies of bank account statements faxed by bank; witness unable to testify that she received document or documents like it in regular course of business or that it was regular course of business to make them); *Progressive Classic Ins. Co. v Kitchen*, 46 AD3d 333 (1st Dept 2007) (error to admit uncertified report downloaded from Department of Motor Vehicle web site proffered by insurance company as proof it had notified DMV that it had cancelled insured's policy)

Portfolio Recovery Assocs., LLC v Lall, 127 AD3d 576 (1st Dept 2015) (plaintiff's proof of underlying debt obligation shown through defendant's testimony that he used credit card issued by plaintiff's assignor and by self-authenticating account statements); *Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc.*, 30 AD3d 336 (1st Dept 2006), *lv denied* 7 NY3d 715 (2006) (amount of indebtedness established by "self-authenticating monthly statements

of account sent to defendants and setting forth the balance due on the loan," citing *Elkaim*, *supra*)

f. "ancient documents"

Tillman v Lincoln Warehouse Corp., 72 AD2d 40 (1st Dept 1979) ("ancient document" is a record or document, found to be more than 30 years old and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity)

4. Hearsay

a. Hearsay is an out of court statement offered to prove the truth of its contents. *Nucci ex rel. Nucci v Proper*, 95 NY2d 597, 602 (2001); *People v Romero*, 78 NY2d 355 (1991). It may be written, oral, or expressive conduct.

b. A statement made outside of court that is *not* offered for the truth is nonhearsay.

People v Reed, 169 AD3d 573 (1st Dept 2019), *lv denied*, 33 NY3d 1107 (2019) ("state of mind"; court providently exercised discretion in admitting testimony that shortly before homicide in issue, during an argument at a party in defendant's building (not attended by defendant), a nontestifying witness told victim and others that he (declarant), could have them all killed simply by making a telephone call; as testimony not admitted to show that declarant actually had power to compel someone to kill victim, or that uncharged declarant actually solicited defendant to do so; rather, statement admitted to show the declarant's state of mind, that is, anger at victim on that occasion; context of the statement made it relevant)

c. Hearsay is not admissible unless it falls within a recognized exception, and then, only if it is reliable. *Nucci*; *People v Brensic*, 70 NY2d 9 (1987).

d. Common exceptions to the hearsay rule include admissions, declarations against interest, present sense impressions, and excited utterances.

Some statements are excepted from the rule against hearsay because it is recognized that even if rendered out of court, they are deemed sufficiently reliable due to their nature. Thus, as people generally do not admit to having committed a bad act or crime, admissions and declarations against interest are admissible even though uttered out of court.

People v Cantave, 21 NY3d 374 (2013) ("To qualify as a present sense impression, the out-of-court statement must be (1) made by a person perceiving the event as it is unfolding or immediately afterward, and (2) corroborated by

independent evidence establishing the reliability of the contents of the statement") (citations omitted)

People v McDaniel, 81 NY2d 10, 18 (1993) (hearsay exception for prior consistent statements rooted in fairness, as it "would be unjust to permit a party to suggest that a witness, as a result of interest, bias or influence, is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose")

Davis v Washington, 547 US 813 (2006) (Confrontation Clause violation applies onto to testimonial hearsay)

5. Hearsay within an authenticated document

a. An out-of-court statement that is included within an otherwise admissible document is admissible where it meets the requirements of a hearsay exception.

Johnson v Lutz, 253 NY 124 (1930) If a document contains multiple layers of hearsay, each must separately satisfy an evidentiary exception to be admissible. In *Johnson*, a police officer prepared an accident report containing statements provided by witnesses to an accident. Because the witnesses had no business duty to report what they had seen, the statements were held inadmissible.

However, a police report is admissible as proof of the facts recorded therein if the recorder was a witness to the event in issue or obtained the information from a person who had a duty to report it. Thus, the portion of the police report containing names of witnesses, observations of skid marks, or the position of cars would be admissible. *Pena v Slater*, 100 AD3d 488 (1st Dept 2012) (police report admissible when based on officers' personal observations at scene of accident while carrying out police duties); *Holliday v Hudson Armored Car & Courier Serv., Inc.*, 301 AD2d 392, 396 (1st Dept 2003), *lv dism in part, denied in part* 100 NY3d 636 (2013) (police report inadmissible where information contained therein came from witnesses not engaged in police business in course of which report was created).

b. The police report must be certified. *Torres v Kalloff*, 128 AD3d 1052 (2d Dept 2015) (uncertified police accident report inadmissible).

c. Whether a declarant has a business duty to provide information may be difficult to discern. To overcome any hearsay objection, the proponent should be prepared to argue that a duty to report exists.

In *Rubin v Rubin*, 134 AD3d 572 (1st Dept 2015), the Court affirmed the termination of a child support obligation based on the child's change of residence

from the mother to the father. An affidavit by which the daughter stated that she did not intend to move back to her mother's home was properly admitted, whereas her mother's affidavit by which she stated that her daughter would be returning to her home based on what the child told her was properly rejected as inadmissible hearsay and double hearsay.

Matter of Leon RR, 48 NY2d 117 (1979) The Court reiterated the rule in *Johnson*, holding that hearsay from outside sources contained within a social worker's case file was inadmissible in a proceeding to terminate parental rights. Although the file was a business record and it was routine for a social worker to consult outside sources, the outside sources had no business duty to report to the social worker.

Buckley v JA Jones/GMO, 38 AD3d 461 (1st Dept 2007) (in personal injury action brought under Labor Law, construction foreman working for subcontractor provided information in incident report made by general contractor's safety supervisor; although foreman not an employee of general contractor, he was nevertheless under business duty to furnish information about accident and thus, statement admissible as part of business record).

NB: While *Buckley* was rendered on a motion for summary judgment, as summary judgment motions must be supported by admissible evidence, such decisions are equally applicable to decisions addressing the admissibility of evidence at trial.

Pencom Systems v Shapiro, 237 AD2d 144 (1st Dept 1997) (head hunter's interview data form containing statements of job applicants held admissible; "the desire of the applicant to secure a better position, the recruiter's reliance on the information provided, and the applicant's awareness of that reliance created an equivalent business duty on the part of the applicant to accurately respond to the recruiter's inquiries regarding his or her reasons for changing jobs, job and salary requirements, and interest in the recruiter's offers of placement. These contemporaneous business duties gave the records in question sufficient indicia of reliability to qualify as business records.").

d. Many medical and hospital records contain hearsay statements of plaintiffs and/or others present during treatment when the record is made. Such information may be admitted in evidence if it is germane to the plaintiff's diagnosis or treatment. *Williams v Alexander*, 309 NY 283 (1955). If not germane, it is inadmissible. *Beecham v NYCTA*, 54 AD3d 594 (1st Dept 2008).

What is "germane to treatment" is addressed in *People v Ortega*, 15 NY3d 610 (2010). In two consolidated appeals, the Court of Appeals held that a notation in a medical record that the victim was "forced to" smoke a white powdery substance was germane to treatment as the medical treatment of such a patient may differ from that given a patient who has taken drugs voluntarily. In the other appeal, a

notation in a medical record that the case involved domestic violence and a safety plan for the victim was held germane to treatment.

Matter of Luis P., 161 AD3d 59 (1st Dept 2018), *affd*, 32 NY3d 1165 (2018) ("Statements in medical records that are sufficiently related to diagnosis and treatment are admissible.")

Benavides v City of New York, 115 AD3d 518 (1st Dept 2014) ("[t]here was simply no evidence supporting defendants' position that the medical doctors needed to know whether plaintiff jumped or was pushed from the fence in order for doctors to determine what medical testing he needed upon admission to the hospital. No medical expert provided such testimony.")

If the plaintiff is the source of information that contradicts her position on how an accident happened, then the information is admissible as an admission, even if not germane to treatment. *Smolinski v Smolinski*, 78 AD3d 1642 (4th Dept 2010); *Preldakaj v Alps Realty of NY Corp.*, 69 AD3d 455 (1st Dept 2010); *Coker v Bakkal Foods, Inc*., 52 AD3d 765 (2d Dept 2008), *lv denied* 11 NY3d 708 (2008)

If you cannot get the patient's statement as recorded in the medical records admitted in evidence, the recorder of the statement may be called to testify about the statement she heard if it constitutes an admission.

e. Other methods of getting hearsay within the document into evidence.

i. refresh recollection (although jury will be instructed that statement is not admitted in evidence)

If you have a live witness on the stand who at one time knew the information, but does not presently recall it, you may refresh her recollection with a document.

Again, the document itself does not come into evidence, but should be marked for identification.

People v Mercedes, 182 AD2d 778 (2d Dept 1992), *lv denied* 80 NY2d 835 (otherwise inadmissible document properly used to refresh defendant's recollection on cross-examination, as long as not directly or indirectly put in evidence)

NB: Fact about which you seek to refresh witness' recollection must be as to a matter of his or her personal knowledge. *People v Johnson*, 31 AD2d 842 (2d Dept 1969).

and it must be relevant to a material issue in the case. *People v Nunes*,168 AD3d 1187 (3d Dept 2019).

ii. past recollection recorded

When events were recorded and the witness had personal knowledge of the events at the time they transpired and the record was made by the witness at or near the time the events occurred and the witness cannot recall the events notwithstanding an attempt to refresh her recollection, the witness may testify that the record correctly represents her recollection at the time and the document may be admitted in evidence.

Zupan v Price Chopper Operating Co., 132 AD3d 1211 (3d Dept 2015) In a personal injury action for damages for injuries allegedly sustained when plaintiff slipped and fell on water as she exited a grocery store, a cashier's statement, written at the time of the accident, was properly admitted as a memorandum of a past recollection when the cashier was unable to remember the particulars of the event.

People v Rodriguez, 77 AD3d 420 (1st Dept 2010), *affd* 19 NY3d 166 (2012) (testifying witness need not have authored document containing record of past recollection)

People v Lewis, 232 AD2d 239 (1st Dept 1996), *lv denied* 89 NY2d 865 (lack of sufficient recollection constitutes evidentiary foundation; no need to prove an entire lack of recollection)

6. Some practical considerations

a. Anticipate evidentiary issues sufficiently early to enable you to deal with them expeditiously; seek leave to file a motion *in limine* where the evidence may require special consideration or raises novel issues.

b. Keep an evidence treatise with you at trial. Judges do and your adversary might.

c. Consider using a notice to admit or stipulations with counsel to eliminate your need to lay a foundation for the authenticity of documents and/or to use photocopies.

d. Check the subpoenaed records room before you start trial to ensure that your documents have arrived.

e. If you must redact documents, come with an appropriate pen or tape so that once you and your adversary agree, or if the court rules, on the redactions, you can get your redacted documents before the jury expeditiously.

ADDITIONAL CITATIONS FROM ORAL PRESENTATION:

Frank M. Flower & Sons, Inc. v N. Oyster Bay Baymen's Assn., Inc., 150 AD3d 965, 965-966 (2d Dept 2017) ("lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process"; addressing lower court error in addressing issue not raised by parties)

In addition to the citations in Justice Scarpulla's outline on expert evidence:

Rivera v Montefiore Med. Ctr., 123 AD3d 424 (1st Dept 2014), *affd* 28 NY3d 999 (2016) (no error to deny as untimely plaintiff's midtrial motion to preclude defendant's expert testimony based on lack of specificity of CPLR 3101[d] notice as lack of specificity apparent)

Shah v Rahman, 167 AD.d 671 (2d Dept 2018) (court need not hold *Frye* hearing where it can rely on previous rulings in other court proceedings as aid in determining admissibility of proffered testimony, citing *People v LeGrand*, 8 NY3d 449, 458 [2007])

Lustenring v AC&S, Inc., et al., 13 AD3d 69 (1st Dept 2004), *lv denied*, 4 NY3d 708 (2005) ("the plaintiffs had worked all day for long periods in clouds of dust raised specifically by the manipulation and crushing of defendant's packing and gaskets, which were made of asbestos"; plaintiffs had offered valid expert testimony indicating that dust was raised from asbestos products and not just from industrial air in general, and that it "necessarily" contained enough asbestos to cause mesothelioma) (distinguished in *Matter of New York City Asbestos Litigation v AO Smith Water Prods., Co.*, 148 AD3d 233 [1st Dept 2017], *affd* 33 NY3d 1116 [2018])