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Rule 803(18): Learned Treatises

RULE 803(18): LEARNED TREATISES

Federal Rule of Evidence 803(18) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.[1]

Federal Rule 803(18) provides a hearsay exception for statements contained in learned treatises. The writings can be used as substantive evidence if an expert witness, either on direct or cross-examination, testifies to the authoritativeness of the treatise.[2] The rule is based on the supposition that learned treatises are of "a high standard of accuracy [which] is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake."[3] The rationale for admitting learned treatises as substantive evidence is to aid the trier of fact's understanding of the subject.[4] Hence, the trier of fact can benefit from the

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1. FED. R. EVID. 803(18).

2. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(18)[02], at 375 (Joseph M. McLaughlin ed., 1995) ("Rule 803(18) admits only those treatises whose existence is disclosed while an expert is on the stand, either by the expert on direct examination or by the questioner in the course of cross-examination.").

3. FED. R. EVID. 803(18) advisory committee's note.

4. *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 803(18)[02], at 379 ("Since the object of this rule is to make valuable information available to the trier of fact, trial judges should not destroy the exception by insisting on a quantum of proof for establishing the treatise's authoritativeness that the proponent cannot meet.").

trustworthiness of a learned treatise in addition to the live testimony of an expert witness.[5]

The Rule provides that the proponent of evidence must establish the work's reliability as an authority on the subject before it is actually read to the fact finder.[6] This requirement may be fulfilled two ways. First, an expert witness may testify as to whether the treatise is an authority.[7] Second, the authoritativeness of the treatise may be established by judicial notice.[8] Once the statements from the treatise are established as reliable and addressed on direct or cross examination, the jury may consider them as substantive evidence.[9] Thus, Federal Rule 803(18) recognizes that an opportunity may exist for a fact finder to misapply evidence without expert guidance.[10]

Traditionally, material from learned treatises was only used to impeach a witness, and thus, was not admissible as substantive

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5. *See* MCCORMICK ON EVIDENCE § 321, at 350 (John William Strong ed., 4th ed. 1992) ("[A]dmitting the sources would greatly improve the quality of information presented to trial courts in litigated cases.").

6. *See* Schneider v. Revici, 817 F.2d. 987, 991 (2d Cir. 1987) ("Failure, therefore, to lay a foundation as to the authoritative nature of a treatise requires its exclusion from evidence because the court has no basis on which to view it as trustworthy.").

7. *See* MCCORMICK, *supra* note 5, § 321, at 352. ("A significant limitation is that the publication must be called to the attention of an expert on cross-examination or relied upon by the expert in direct examination.").

8. *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 803(18)[02], at 379 ("[A] court might take judicial notice of books admitted in the course of other litigation."); *see* FED. R. EVID. 201. FED. R. EVID. 201 governs a court taking judicial notice of adjudicative facts. *Id.* The kinds of facts a court may take judicial notice of are those which are "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." *Id.*

9. *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 803(18)[02], at 379-80 ("The court will not . . . instruct the jury to accept the treatise as authoritative, but will leave its weight for the jury to determine based upon the evidence and comments of counsel and the court.").

10. *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 803(18)[02], at 375. ("Limiting the admission of treatises to situations when an expert is testifying guarantees that the trier of fact will have the benefit of expert evaluation and explanation of how the published material relates to the issues in the case.").

evidence.[11] However, in *Reilly v. Pinkus,*[12] the United States Supreme Court held it was a prejudicial error not to permit cross-examination of an expert witness, even though the cross-examination consisted of statements contained in books other than those in which the experts based their testimony.[13] The Court explained that "this was an undue restriction on the right to cross-examine," since the expert witness relied on comparable textbooks and publications.[14] Although the Court recognized that learned treatises do not have the usual hearsay danger of

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11. *See* Egan v. Dry Dock, E.B. & B.R.R. Co., 12 A.D. 556, 571, 42 N.Y.S. 188, 200 (1st Dep't 1896). Egan involved a personal injury action, which was the result of a boiler exploding in which the defendant, a street railroad company who was responsible for maintaining and inspecting such a boiler "to see that . . . [it] was in a reasonably safe condition," sought to introduce evidence of an expert witness at trial. *Id.* at 557-59, 570; 42 N.Y.S. at 189-90, 199. During the cross-examination, the expert witness was presented with "certain books on the design, construction, and operation of boilers." *Id.* at 570; 42 N.Y.S. at 199. One of the books was written by an expert testifying on behalf of plaintiff and it described a test for inspecting boilers which ran contrary to defendant's expert's beliefs and opinions on the subject. *Id.* When asked about certain passages in the book, the defense objected and the court overruled the objection finding that:

> [I]f the witness admitted that text writers of acknowledged authority had expressed opinions contrary to that one which he gave in regard to the matter under examination, that might go to detract from the weight to be given to such testimony. Therefore, it has been the custom, in this state at least, to call the attention of expert witness, upon cross-examination, to books upon the subject, and ask whether or not authors whom he admitted to be good authority had not expressed opinions different from that which was given by him upon the stand. The reference to books in such cases is not made for the purpose of making the statements in the books evidence before a jury, but solely for the purpose of ascertaining the weight to be given to the testimony of the witness.

Id. at 571, 42 N.Y.S. 199-200.

12. 338 U.S. 269 (1949).

13. *Id.* at 275. The Court noted that "[i]t certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books." *Id.*

14. *Id.*

misapplication of evidence, the Court did not discuss whether the fact finder in this case required expert guidance.[15]

Following Federal Rule 803(18), the Second Circuit, in *Tart v. McGann*,[16] held that medical literature may be admitted as substantive evidence if an expert witness testifies as to its authoritativeness.[17] The court noted that the Advisory Committee on the Federal Rules of Evidence relied on the inherent reliability of such written works as the basis for an extension of the common law approach.[18] Further, in *Schneider v. Revici*,[19] the Second Circuit held that a book written by the defendant physician required expert testimony as to the book's authoritativeness.[20] The court explained that "Rule 803(18) explicitly requires that to qualify under the learned treatise exception, a proper foundation as to the authoritativeness of the text must be laid by an expert witness."[21]

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15. *Id.* at 275-76. The court discussed the purpose behind the use of certain materials on the cross-examination of an expert witness without ever addressing whether the fact finder would need expert guidance upon the admissibility of such evidence. *Id.*

> It is also contended that the error in restricting cross-examination was harmless here because the memorandum of the fact-finding official indicated that he had read the excluded materials and would have made the same adverse findings had the materials been held admissible. But the object of using the books on cross-examination was to test the expert's testimony by having him refer to and comment upon their contents. Respondent was deprived of this opportunity. The error of this deprivation could not be cured by having the fact-finder subsequently examine the material.

Id.

16. 697 F.2d 75 (2d Cir. 1982).

17. *Id.* at 78.

18. *Id. See also* FED. R. EVID. 803(18) advisory committee's note.

19. 817 F.2d 987 (2d Cir. 1987).

20. *Id.* at 991.

21. *Id.* In this medical malpractice action, the defendant physician sought to introduce into evidence a book which he authored on the topic of physiopathology as a treatment for cancer. *Id.* at 990. The trial court recognized that in order for the physician's book to be admitted into evidence as a learned treatise, defense counsel must lay the appropriate foundation; to wit:

In contrast, New York courts have not been as liberal in the admission of this type of evidence. In *People v. Feldman*[22] the New York Court of Appeals stated the New York rule as the following:

> In this State when an expert witness has given opinion testimony and on cross-examination has testified that a book called to his attention is *recognized* by him as an authority upon the subject as to which he has given an opinion, he may be confronted with a passage from the book which conflicts with the opinion he has expressed. This is permitted for the purpose of discrediting or weakening his testimony.[23]

Hence, the *Feldman* decision is premised on the notion that reference to treatises is "solely for the purpose of ascertaining the weight to be given to the testimony of the witness" rather than for offering the statements in the treatises as proof of the facts asserted.[24]

It is essential for an expert witness to acknowledge the authoritativeness of the treatise.[25] For instance, in *Florence v.*

> Get some expert to come in here and testify that it is a recognized treatise as the rule requires, . . . the proper question to the witness is whether the book is recognized in the medical profession as an authoritative book on the treatment of cancer.

Id. at 991 (citations omitted). Thus, the court of appeals found that the "[f]ailure . . . to lay a foundation as to the authoritative nature of a treatise requires its exclusion from evidence because the court has no basis on which to view it as trustworthy." *Id.*

22. 299 N.Y. 153, 85 N.E.2d 913 (1949).

23. *Id.* at 168, 85 N.E.2d at 920 (emphasis added). *See also* Hastings v. Chrysler Corp., 273 A.D. 292, 294, 77 N.Y.S.2d 524, 527 (1st Dep't 1948) ("[T]he reference to [learned treatises] has no bearing on their truth or validity; they are used only as tending to impeach the witness on the stand with respect to his knowledge of the subject on which he professes to be an expert.").

24. *Feldman*, 299 N.Y. at 168, 85 N.E.2d at 920. *See also* cases cited *supra* footnote 11.

25. Hastings v. Chrysler Corp., 273 A.D. 292, 294, 77 N.Y.S.2d 524, 527 (1st Dep't 1948). ("If the expert witness does not concede the authoritativeness of the literature attempted to be resorted to, it may not be used on cross-examination."). *See also* Roveda v. Weiss, 11 A.D.2d 745, 746.

Goldberg,[26] the court stated that "[i]t is well settled that, upon cross-examination, counsel may seek to discredit an expert witness by reference to texts or articles, but only insofar as they are recognized by the expert as authoritative upon the subject as to which he has expressed an opinion."[27] The court held that an expert witness in the area of neurology properly rejected texts as authoritative on the basis that they were outdated.[28]

New York's interpretation concerning the use of learned treatises is distinguishable from the federal approach. Federal Rule 803(18) permits the use of such learned treatises both for impeachment purposes and to assist the trier of fact in understanding of the subject. In contrast, New York's use of learned treatises may be used only to impeach expert testimony on cross examination. However, both Federal Rule 803(18) and New York's interpretation of the rule require the reliability of authority to be established by expert testimony.

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204 N.Y.S.2d 699, 701 (2d Dep't 1960) (reversing a decision of the Richmond County Supreme Court which had permitted the use of texts not previously accepted for their authoritativeness by the witnesses).

26. 48 A.D.2d 917, 369 N.Y.S.2d 794 (2d Dep't 1975).

27. *Id.* at 919-20, 369 N.Y.S.2d at 799 (citations omitted).

28. *Id.*