SCIENTIFIC LITERATURE IN THE COURTROOM

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Scientific literature, whether in the form of treatises, textbooks, manuals, or articles, are often cited by experts either on direct or during cross examination. This material can be a powerful tool to bolster or undermine an expert's credibility. But referencing scientific literature in front of a jury can raise difficult problems. In many cases, while an expert may believe a particular text or periodical is reliable, the author or researcher is not in the courtroom. Why is it then appropriate for an expert to testify about the content of a publication she did not author and about results she did not perform? It is as if the article itself becomes the witness.

This paper discusses the basic requirements of what lawyers refer to as the "learned treatise" exception to the rules against hearsay. Admissibility or even just the use of scientific literature under this exception is often misunderstood. Hopefully, this short paper will provide some clarity.

The Learned Treatise Exception

Rule 803(18) of the Federal Rules of Evidence permits statements from published treatises, periodicals, or pamphlets to be admitted for the truth of the matters asserted. This hearsay exception is based on the "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." Advisory Committee Note to Rule 803(18). The treatise must be established as a reliable authority by an expert (either on direct or cross examination) or by judicial notice. Because of the likelihood, however, "that the treatise will be misunderstood and misapplied" by the jury, Rule 803(18) limits use of the learned treatise exception to situations in which the expert is testifying so the expert can explain. *See id*. Further, the rule does not permit the treatise itself to be received as exhibit if admitted; it instead is read into evidence. This ensures that the treatise is not given more weight than trial testimony.

Rule 803(18) works along with expert rules, specifically Rules 702 and 703. It has three basic requirements. First, the publication must be "called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination." Fed. R. Evid. 803(18)(A). In other words, an expert must lay the foundation, not a lay witness. According to the advisory committee, "the rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired." Advisory Committee Note to Rule 803(18).

Second, the statement must be "contained in" some published work. The precise contours of what qualifies as a published work is still being defined. While written texts clearly would fall within the rule, the Second Circuit held that a videotape put out

by the American College of Obstetricians and Gynecologists to educate physicians on various medical procedures also constituted a learned treatise. *See Costantino v. David M. Herzog, M.D., P.C.*, 203 F.3d 164 (2d Cir. 2000). By comparison, the Supreme Judicial Court of Massachusetts, applying Massachusetts' counterpart to Rule 803(18), held that unauthenticated website pages from the Mayo Clinic and Johns Hopkins Medical Center, were not learned treatises. *See Kace v. Liang*, 472 Mass. 630, 36 N.E.2d 1215 (2015).

Third, the publication must be "established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice." Fed. R. Evid. 803(18)(B). It is insufficient that the statement is found in an authoritative journal or book. You must, instead, show that the work from which the statement is derived (that is, the article, not the journal or book) is authoritative in the field.

Use of The Scientific Publication

An expert can be asked about a scientific publication on direct or cross. As noted, the threshold for both is establishing that the publication is reliable authority. This can be done in three ways. Your expert can identify the publication as reliable on direct. Or, the opposing expert may testify that it is reliable on cross. If the opposing expert, however, refuses to recognize the article or chapter as reliable, as long as your expert has done so, you have enough of a foundation to ask about the publication on cross.

The third way to lay the foundation of reliability is through judicial notice. Rule 201 provides that judicial notice is proper when a fact is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Judicial notice of reliability is rare, however. It is usually reserved for "standard reference works" or "cases in which the judge has other indicia of reliability." *Milward v. Acuity Specialty Prods. Group, Inc.*, 969 F.Supp.2d 101, 113 (D. Mass. 2013).

If reliability is established, the text or publication may be offered for the truth of the matter asserted. But it is read into evidence, not received as an exhibit. The treatment is similar to past recollection recorded under Rule 803(5). Rule 803(18) prohibits admission of the publication as an exhibit to ensure "that the jurors will not be unduly impressed by the treatise and that they will not use the text as a starting point for conclusions untested by expert testimony." *Graham v. Wyeth Labs.*, 906 F.2d 1399, 1414 (10th Cir. 1990) (quoting J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 803(18)[02]).