Learning the Learned Treatise Exception

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“Everything must be made as simple as possible. But not simpler.”

-Albert Einstein

After months or (more likely) years of toiling over fact discovery and motions practice, you find yourself where drug and device litigators long to be – preparing for trial. And as a drug and device litigator, you know that science and experts are the keys to your defense. So of course you identified (and your client retained) a top-flight scientific expert to testify. Among other things, this expert has spent countless hours compiling, reviewing, and applying the relevant scientific literature and has meticulously cited each and every article on which she relied in her report. For your part, you have spent countless hours on PubMed searching and scouring the literature to find those few lines that will help you deliver a kill shot on cross of the plaintiff’s expert. You have the literature, and the literature makes your case. The question is how are you going to use it?

And that is a very good question, because medical literature is technically hearsay. You remember the hearsay rule. It’s the one with the exceptions and exclusions that never quite lent itself to an easy mnemonic. You cursed that hearsay rule in Evidence and again when you took the bar. Lucky for you trial can be an open book test, and one of those exceptions – the “learned treatise” exception – is on point. Federal Rule of Evidence (FRE) 803 reads, in relevant part:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

[. . .]

(18) A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied upon by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

You look at your stack of literature. You read the rule again, and again you ask yourself how am I going to use this?
First thing first: What is a “learned treatise?”

The Bouvier Law Dictionary defines a learned treatise as a “statement in a publication of scholarly authority.” In this context, “[t]he learned treatise doctrine is confined to published works that have been subjected to widespread collegial scrutiny.” *United States v. Jones*, 712 F.2d 115, 121 (5th Cir. 1983) (emphasis added). Practically speaking, we are talking about peer-reviewed publications. Sometimes it will be tempting for you or opposing counsel to attempt to have experts testify about favorable op-ed articles, which are mere opinion pieces often published in reputable medical journals. These articles are subjected to a substantially less intense level of peer review than actual articles in these journals if they are peer-reviewed at all, and they generally present no data. And even among peer-reviewed literature, not all articles are created the same. A poster is not an article, and a case report is different than a double-blind prospective study. Think of peer-reviewed articles as snacks in your pantry – you have to read the ingredient labels before consuming them.

Indeed, “the fact that a magazine is ‘highly regarded’ does not mean that every article it publishes can be read into evidence under Rule 803(18).” 4–803 Federal Rules of Evidence Manual § 803.02 (2017). “In these days of quantified research, and pressure to publish, an article does not reach the dignity of a ‘reliable authority’ merely because some editor, even a most reputable one, sees fit to circulate it. Physicians engaged in research may write dozens of papers during a lifetime. Mere publication cannot make them automatically reliable authority.” *Meschino v. N. Am. Drager*, 841 F.2d 429, 434 (1st Cir. 1988). As such, each article in a journal must be considered in its own right, and opinion pieces are significantly less reliable than their more heavily-vetted counterparts.

As if all of this is not complicated enough, you must also consider new formats for scientific discourse. As technology evolves, questions have arisen about whether information in formats other than print are subject to FRE 803(18). On its face, the rule refers to a “statement contained in a treatise, periodical, or pamphlet” that can be “read into evidence.” However, courts have accepted “treatises” in other formats. For example, in *Constantino v. Herzog*, 203 F.3d 164 (2d Cir. 2000), the defense sought to justify an obstetrician’s management of the plaintiff’s delivery, which left her with Erb’s Palsy, by introducing a 15-minute videotape from the American College of Obstetrics and Gynecologists. The tape was made to educate physicians, and it portrayed the techniques recommended to remedy shoulder dystocia, which the plaintiff exhibited during her delivery. The court agreed with the trial judge that it was “‘overly artificial’ to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape.” *Id. at 171.*

But just as articles are not all of the same caliber, neither are videos. In *United States v. Martinez*, 588 F.3d 301 (6th Cir. 2009), the court ruled that a videotape of a doctor performing a procedure was impermissible hearsay because the tape “was prepared for and given to the [plaintiff] for litigation purposes, it was not subjected to peer review or public scrutiny, and it was not written primarily for professionals . . . with the reputation of the writer at stake.” *Id. at 312* (internal quotations omitted). Thus, the videotape did not have the necessary qualities of reliability that learned treatises should have. The practical takeaway here is that the relevant inquiry for the purposes of FRE 803(18) is not the format so much as it is substance.
How do I use it at trial?

FRE 803(18) limits the use of treatises—or scientific literature—as substantive evidence to situations in which an expert is on the stand and available to explain the contents to the jury. This avoids the futility of using evidence for impeachment purposes only, with an instruction to the jury not to consider it otherwise. To do so, Rule 803(18) permits statements from medical literature to be used as evidence (i.e., for the truth of the matters asserted) rather than solely for impeachment purposes if the expert relies on it or it is presented to the expert on cross-examination and the publication is established as a reliable authority. That means that the proponent of the evidence must establish both elements in order for the medical literature to be read into evidence.

The first element is easy. An expert can rely on it or be crossed on it. Maybe both. Either way—element one is satisfied. The second element requires the proponent on direct to secure the expert’s testimony that the treatise is, in fact, a reliable authority and why. That should not be too hard, considering the witness relied on it. But getting an expert on cross to admit to the authority of a treatise that you are about to hit her in the head with takes a bit more finesse. Do not leave this element to chance. Secure deposition testimony from your expert or the opposition about the reliability and authority of the author, journal, or text. Find your kill shot in articles from unassailable sources that an opposing expert could not disavow if she tried. But whatever you do, do not forget to establish element two. You have to establish both of these elements before you ever start reading the literature out loud in trial.

And even then the Federal Rules limit the use of the learned treatise. The proponent can read it into evidence, but it cannot be admitted as an exhibit. That is because the purpose of this rule is to prevent a jury from giving a particular treatise too much weight at trial. Even after requests that it amend the rule, the Advisory Committee adhered to original language, because “treatises may be given undue weight if they are admitted as trial exhibits.” Advisory Committee Minutes, April 2000. Yes, the parties can agree to waive that last sentence of FRE 803(18), but do not count on it. See 4-803 Federal Rules of Evidence Manual § 803.02 (2017). The odds of the parties agreeing that a particular treatise is beneficial to both of their cases are probably pretty slim. Better to be prepared and knock out the elements of Rule 803(18).

Keep in mind, however, that each judge has his or her own preferences as to the practical application of this rule at trial. For example, some judges will allow the literature to be displayed in the court room as a demonstrative aid while portions of it are read into evidence. Other judges will only allow the actual reading of the literature into evidence and will prohibit actual display of the article. Whether the literature is read out loud or displayed, it still cannot be admitted as an exhibit.

Conclusions and Takeaways

You’ve done the work. You’ve found the expert, the literature, and the opposition’s weak spot. Just make sure that you can use it. Getting there is as easy as 1, 2, 3:

1. Make sure your literature is the real deal. Do not waste your time on op-eds, posters, or articles that have not been subjected to peer review. And if your opponent breaks this rule, have your objections and cross questions ready.
2. Establish the authority. Use your expert, deposition testimony, or judicial notice – but make sure you do not leave this to chance.

3. Think about presentation. We all have dreams of a dramatic cross examination worthy of a movie scene, but understand that the judge controls the courtroom. Find out in advance how he or she will allow medical literature to be used, and follow those rules. Nothing destroys the drama of a great cross like a sustained objection or, worse, an admonishment from the judge.

Now you are ready to put the learned into learned treatise. Go get ‘em!

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