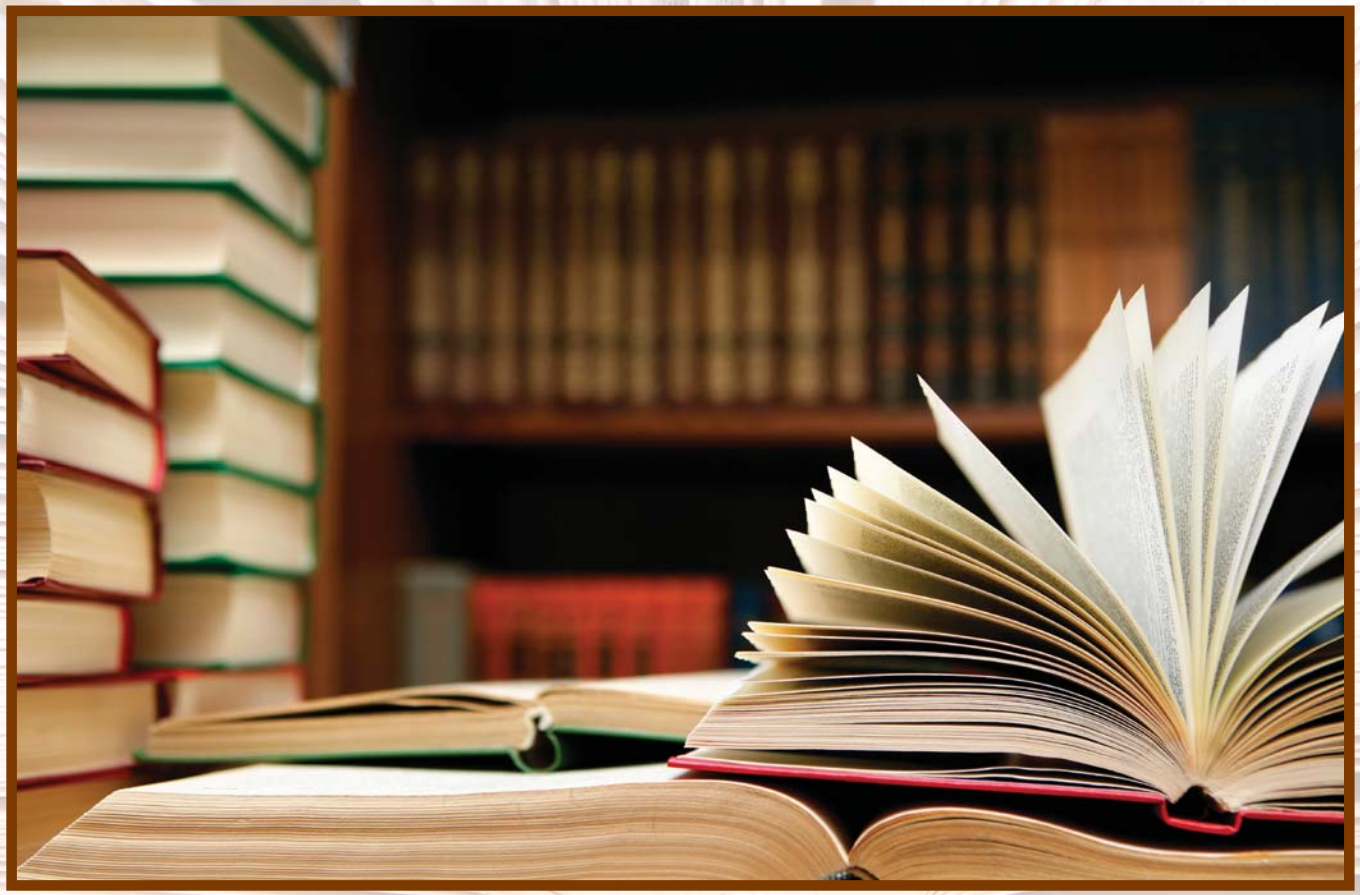
I Don't Need Your Authority

The Use of Learned Treatises in New York State Courts

By Eric Dinnocenzo



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You are about to go to trial and have just discovered a passage from a learned treatise that you believe can be used to discredit an opposing expert witness during cross-examination. You picture yourself reading aloud from the text and the expert suddenly at a loss for words on the witness stand, everyone in the courtroom realizing that the expert's opinion has been exposed as false.

For a trial lawyer such moments are priceless. But for those who happen to litigate in the New York state courts, they are exceedingly rare.

New York law only permits a learned treatise to be used during the cross-examination of an expert, and only – and this is key – if the expert concedes that it is authoritative.[1] As you may have already surmised, the seasoned expert witness will rarely, if ever, make that concession.

In fact, trial practice commentators have set forth methods to cope with the expert witness who is programmed to deny that any literature is authoritative. These include asking questions that establish that a text is used by professionals in the field, while avoiding the use of buzzwords like "authority" or "authoritative," and also pulling out the article or book, holding it aloft before the jury, and asking the expert if it is an authority on a particular issue, all the while anticipating that the expert will say no and the judge will not allow the attorney to read aloud from it.[2]

Seasoned experts routinely testify that while certain literature in the field may serve as a guide to formulating opinions, none is authoritative. For instance, some physicians claim that medicine is a constantly evolving science and that shortly after a text or article is published it becomes outdated. In a sense, who can blame them? Why should they open themselves up to cross-examination concerning unfavorable literature when other experts in the case will avoid it by refusing to agree that it is an authority? Especially considering that the law does not allow them during direct examination to refer to literature that actually supports their opinion.

In the federal courts or the state courts in the majority of other jurisdictions, the evidentiary rules regarding learned treatises are much different. Parties may read aloud from them, as well as show statements contained in them to the jury, during either direct or cross-examination of an expert witness. All that is required as a foundation is that the text must be shown to be a reliable authority, which can be accomplished by any testifying expert, not just the one who happens to be on the witness stand, as well as through judicial notice.[3]

New York Law

In recent years, New York law has slowly inched toward the federal rule, though its roots still remain firmly in the 19th century. In the 1896 case *Egan v. Dry Dock, E.B. & B.R. Co.*, the First Department held that a party may read aloud from a learned treatise to an opposing expert and ask if the expert agrees with certain statements. But the court was careful to qualify that, first, the witness must deem the writing to be an authority in the field.[4] Moreover, a learned treatise could be used in this manner only for the purpose of ascertaining the weight to be given to the testimony of the expert witness, not for the literature to be evidence for the jury to consider.[5]

New York state courts have consistently upheld this rule, as well as the principle that a party may not introduce learned treatises into evidence or read aloud from them during the direct examination of an expert on the grounds that they are inadmissible hearsay.[6] For example, the Second Department has held that a questioning attorney cannot read directly from his notepad to ask questions that were obviously taken from literature in the expert's field.[7] The Third Department has determined that an expert is not permitted to testify as to the results of his independent research of medical literature.[8]

The rationale for limiting the use of learned treatises during the cross-examination of experts is to prevent the expert from being ambushed by opposing counsel armed with books and articles of questionable legitimacy, and who, furthermore, could cause the trial to be overwhelmed by a scholarly debate about the relevant (or irrelevant) literature. As is evident, there is a certain trust in this equation that the expert will forthrightly admit or deny whether a text or article is an authority. The expert is the gatekeeper, and the law presumes that he or she is an honest one.

The unfortunate consequence of the rule that exists in New York is that experts have grown adept at protecting themselves from questioning that concerns any scientific literature that challenges or contradicts their opinion. The expert can be questioned concerning his or her opin-

ion and the basis for it, but not about the literature that diverges from it. As a result, the truth-seeking function of a trial suffers.

Problems With Application

The New York rule can be vague and amorphous in its application because, as a practical reality, individual judges interpret it differently. Expert testimony during direct examination can range from discussing particular texts, to speaking generally about the body of literature, to not being permitted to discuss the literature at all. Similarly during cross-examination, although judges will not allow statements to be read from learned treatises unless deemed authoritative by the witness, some judges will allow attorneys to ask the expert if he or she agrees with the conclusions of specific texts or ask about general principles stated in the literature.

In certain types of cases, the limitations imposed by the New York rule can have a tremendous impact on how a case is tried. For instance, in medical malpractice cases involving infants who suffer shoulder dystocia with resulting Erb's palsy at birth, the medical literature is sharply divided about what causes a permanent paralysis of the infant's arm – one camp claims, in accordance with the long-held belief in the medical community, that it is solely due to physician negligence, while the other (using what a number of experts say is a flawed scientific method) concludes that a substantial number of injuries are caused naturally by maternal expulsive forces. A thorough analysis of the literature presented to the jury can have a different impact on its decision-making process in this type of case and others, as opposed to a trial in which the literature is suppressed or otherwise expounded on by experts, according to how they see fit, with no ability to impeach them with contradictory sources.

A Shift in the Law

In recent years, the First Department has departed slightly from the established rule. In its 2008 decision *Lenzini v. Kessler*, the First Department held that an expert who testifies to having consulted a text and agreeing with much of it may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative."[9] Thus, an expert does not have to say the magic word "authoritative" as a prelude to being questioned about certain texts or articles during cross-examination, at least in the First Department.

In reaching its holding, however, the Appellate Division found it significant that the expert brought the subject medical text to court and had made notes in it, and that a limiting instruction was given to the jury that the literature was only to be used in evaluating the credibility of the expert. Further, the court reiterated the principle that a learned treatise cannot be offered for its truth or to establish a standard of care.[10]

Arguably, this decision is not a stark development; it is a familiar rule that experts can be cross-examined about any materials they review in preparing for their trial testimony. Yet it does represent a shift away from the long-established rule that literature can be used during the cross-examination of an expert witness only if he or she concedes that it is authoritative.

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Further muddying the waters, in 2006 the Court of Appeals held that it was permissible to show the jury, as a demonstrative aid, practice guidelines issued jointly by the American Heart Association and American College of Cardiology. The Court was careful to note that the guidelines were not introduced for the truth of their contents or to establish a per se standard of care, but instead to illustrate a defendant physician's decision-making process. Also significant was that the physician was a treating doctor and defendant in the case, rather than a retained expert, and when he referred to the guidelines during his testimony the plaintiff never requested a limiting instruction.[11]

Although the plaintiff argued that there was no meaningful distinction between offering the guidelines for their truth and using them to demonstrate a physician's decision-making process, the Court rejected this argument, adhering to the reasoning that the guidelines were not admitted to establish a standard of care, but rather to explain the physician's decision-making process.[12]

Thus, limited exceptions have grown out of the New York rule regarding how attorneys and expert witnesses may use learned treatises at trial. How to reconcile these exceptions with the rule poses a challenge to attorneys and judges in trials where scientific and other expert literature is poised to play a significant role.

The Federal Courts and Other States

The federal courts under Federal Rule of Evidence 803(18), along with a majority of states, allow the reading aloud from learned treatises at trial during both direct and cross-examination. To satisfy foundation requirements, any expert, whether called by the plaintiff or the defendant, must testify that it is a reliable authority in the field; or it can even be deemed such by judicial notice. Then it is open season to question any expert witness concerning statements contained in the treatise.

Still, certain rules apply. In federal court, the statements may be read into evidence, but may not be

received as exhibits.[13] In the context of a direct examination, experts may refer to literature to the extent that they relied upon it to arrive at their opinion.[14] To be clear, a learned treatise is not meant to be a substitute for expert testimony, but rather is to help the expert explain his or her opinion to the jury.

Historically, New Jersey law was nearly identical to New York law concerning the use of learned treatises at trial. But, finding the rule to have "pervasive problems," the New Jersey Supreme Court in 1992, in *Jacober v. St. Peter's Medical Center*,[15] adopted the more permissive scope allowed under Federal Rule of Evidence 803(18).

In *Jacober*, the court contrasted the merits of the federal approach with the drawbacks of its own rule and concluded that a more expanded use of authoritative treatises avoids the possibility for the expert to have "full veto power over the cross-examiner's efforts."[16] Preventing cross-examination upon the accepted literature in the field, the court reasoned, only serves to protect an ignorant or unscrupulous expert witness.[17] In short, a trial would be fairer if the expert witness was no longer the arbiter of the questions being posed and could be asked about divergent views expressed in the literature. As the court put it, "[a]doption of the federal rule will advance the goals of the adversarial system by enhancing the ability of juries to evaluate expert testimony."[18] The federal rule remedies the practical reality of admitting statements in learned treatises for the purpose of impeachment only, with an instruction to the jury that they are not to be considered for their truth.

Additional safeguards were erected by the New Jersey Supreme Court to ensure fairness at trial. The mere fact that a text has been published does not automatically render it admissible; rather, the text must be demonstrated by the expert to be one that qualifies as the type of material reasonably relied on by experts in the field. The trial judge has discretion to prevent the trial from being overwhelmed by the use of literature. Further, learned treatises may not be introduced into evidence as exhibits.[19]

Although it can reasonably be disputed, the court seemed confident that the rule it adopted would not likely be susceptible to abuse because attorneys have a strong incentive to direct the jury's attention to a few select, highly regarded texts or articles rather than overwhelming jurors with references to as many texts as possible.[20]

There is also a leveling effect that is created by the New Jersey and federal rule with respect to adversaries with unequal resources. A party who has less access to expert witnesses, or fewer financial resources, can bolster its expert testimony with the aid of literature, rather than simply being outmatched by a greater number of opposing expert witnesses, who perhaps are of greater stature.[21]

Frequently this is the case for plaintiffs in medical malpractice cases, who often have a smaller stable of experts to choose from, and who many times have to search for them out-of-state as physicians can be reluctant to testify against other physicians who practice in their state.

And, arguably, the federal rule keeps experts more honest. Since they are no longer the gatekeeper for the use of learned treatises at trial, the rule discourages them from straying too far from accepted principles in the field. Given that the purpose of a trial is to discover the truth of the matter being tried, this is a powerful policy reason for adopting the New Jersey and federal rule.

Conclusion

In federal and most state courts, the parties are allowed a much more liberal use of learned treatises at trial as opposed to the more than century-old rule that exists in New York. Nearly 20 ago, New Jersey transitioned from a rule similar to New York's and adopted Federal Rule of Evidence 803(18), which is applied in the majority of state courts. Given that over the past century society has become much more specialized in nature, with authoritative texts in professional fields growing exponentially in number and influence, it may be the case that New York will also at some point transition away from its restrictions on the use of literature at trial.

In 2008, the First Department took a step in this direction. Only time will tell if that momentum continues. ■

1. *Labate v. Plotkin*, 195 A.D.2d 444, 600 N.Y.S.2d 144 (2d Dep't 1993).
2. Ben Rubinowitz & Evan Torgan, *Authoritative Texts and Cross-Exam of Medical Experts*, NYLJ, June 7, 2007.
3. Fed. R. Evid. 803(18).
4. 12 A.D. 556, 571, 42 N.Y.S. 188 (1st Dep't 1896).
5. *Id.* at 571.
6. *See Kirker v. Nicolla*, 256 A.D.2d 865, 867, 681 N.Y.S.2d 689 (3d Dep't 1998); *Gunnarson v. State*, 95 A.D.2d 797, 463 N.Y.S.2d 853 (2d Dep't 1983).
7. *Labate*, 195 A.D.2d 444.
8. *Gushlaw v. Roll*, 290 A.D.2d 667, 670, 735 N.Y.S.2d 667 (3d Dep't 2002).
9. 48 A.D.3d 220, 220, 851 N.Y.S.2d 163 (1st Dep't 2008) (quoting *Spiegel v. Levy*, 201 A.D.2d 378, 379, 607 N.Y.S.2d 344 (1994)).
10. *Id.*
11. *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636, 815 N.Y.S.2d 908 (2006).
12. *Id.*
13. Fed. R. Evid. 803(18).
14. *Jacober v. St. Peter's Med. Ctr.*, 128 N.J. 475, 489, 608 A.2d 304 (1992).
15. *Id.*
16. *Id.* at 490 (quoting *Whitley v. Stein*, 34 S.W.2d 998, 1001 (Mo. App. 1931)).
17. *Id.* (quoting *Darling v. Charleston Cmty. Mem'l Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965)).
18. *Id.* at 494.
19. *Id.* at 491–95.
20. *Id.* at 496
21. *See id.* at 495.