

## REPORT BY THE PRODUCTS LIABILITY COMMITTEE<sup>1</sup>

### New York Should Adopt the Learned Treatise Exception

#### I. INTRODUCTION

“Learned treatises”—i.e., published scientific literature—are an essential piece of evidence in modern civil litigation, particularly in the areas of products liability, intellectual property, environmental law, and medical malpractice. Unfortunately, for over a century, while relying on learned treatises at trial has become the norm in virtually every jurisdiction, New York has adhered to the traditional common-law rule that all such works are improper hearsay except in the narrowest of circumstances.

The net effect is that when trying a case in New York, both plaintiffs and defendants who seek to introduce published scientific literature are forced to jump through a series of highly legalistic—and incredibly inefficient—hoops to present this evidence to the juries, even when the substance of that science is directly relevant to the questions of fact that the jury is asked to resolve. Ultimately, New York’s traditional approach to learned treatises wastes time, is needlessly confusing for everyone involved, often results in central issues of complex cases being presented *without* scientific evidence, and—in the most extreme cases—allows juries to reach conclusions that are directly contradicted by established science.

For all of these reasons, and as discussed below, it is the recommendation of this Committee that the time has come for New York’s Legislature to amend CPLR Article 45 to include a hearsay exception for learned treatises akin to Federal Rule of Evidence 803(18).

#### II. BACKGROUND

##### a. The Majority Rule

The vast majority of states recognize a hearsay exception for learned treatises.<sup>2</sup> Most jurisdictions closely track Rule 803(18), which allows parties to use statements from learned treatises as substantive evidence on both direct and cross-examination.

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<sup>1</sup> This report has been reviewed and is supported by the New York City Bar Association’s Council on Intellectual Property, Council on Judicial Administration, and State Courts of Superior Jurisdiction Committee.

<sup>2</sup> See, e.g., Edward J. Imwinkelried, *Rationalization and Limitation: The Use of Learned Treatises to Impeach Opposing Expert Witnesses*, 36 Vt. L. Rev. 63, 64 (2011) (“Today the majority of jurisdictions recognize a hearsay exception for learned treatises.”); Michael W. Kessler & Christine A. Caputo, *Appropriate Use of Scientific Literature at Trial in New York and Other Jurisdictions: Is “Authoritative” a Magic Word?*, 61 Alb. L. Rev. 181, 198 (1997)

Specifically, Rule 803(18) allows for learned treatises to be used as follows:

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. 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 on 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.

The reasons for this exception are simple and sound. First, as the commentary to Rule 803(18) explains, learned treatises tend to carry “a high standard of accuracy”—they are “written primarily and impartially for professionals” and “subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake.”<sup>3</sup> Second, learned treatises hold experts accountable when their opinions stray from well-established principles in the relevant field. As the federal commentary also recognizes, the “testing of professional knowledge [is] incomplete without exploration of the witness’ knowledge of and attitude toward established treatises in the field.”<sup>4</sup> The Illinois Supreme Court put it plainly: “To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness.”<sup>5</sup>

#### **b. New Jersey’s Example**

Since the enactment of Rule 803(18) in 1975, a rising chorus of states have adopted the rule in whole or in part. New Jersey is a good example. Until 1992, New Jersey viewed learned treatises as inadmissible hearsay. Parties could refer to a treatise only on cross-examination, and then only if the opposing party’s expert agreed that the treatise was authoritative in the field. Citing “pervasive problems” with its own doctrine, the Supreme Court of New Jersey abandoned this rule in *Jacober v. St. Peter’s Medical Center*.<sup>6</sup>

The *Jacober* court emphasized the “the danger that an expert need only say that he is not acquainted with the book or its author to prevent its use in testing his qualifications, no matter how

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(“[T]he vast majority of jurisdictions and the Federal Rules of Evidence have . . . expanded the right to use published sources in cross-examination and as direct proof.”).

<sup>3</sup> Fed. R. Evid. 803(18) advisory committee’s note.

<sup>4</sup> *Id.*

<sup>5</sup> *Darling v. Charleston Community Memorial Hosp.*, 33 Ill.2d 326, 336 (1965).

<sup>6</sup> 128 N.J. 475, 498 (1992).

eminent or accepted the author may be.”<sup>7</sup> By giving experts unrestrained “veto power” over treatises that called their conclusions into question, the rule invited gamesmanship by experts who preferred to avoid discussion of contradictory opinions and data.<sup>8</sup> New Jersey thus rejected its outdated rule and, joining the majority of states, adopted Rule 803(18).<sup>9</sup>

### III. LEARNED TREATISES IN NEW YORK

#### a. New York’s Current Rule

Although most jurisdictions now reject hearsay objections to learned treatises, New York is an exception. Over 40 years after the enactment of Rule 803(18), New York still adheres to a 19<sup>th</sup> century rule that prohibits the admission—or, in most cases, the discussion—of learned treatises at trial. In fact, New York’s rule is the same one that New Jersey rejected almost 30 years ago. Litigants in New York may refer to statements from a learned treatise only on cross-examination, and then only if the opposing party’s expert concedes that the treatise is authoritative in the field.<sup>10</sup>

New York’s rule has changed little since 1896, when the first New York court discussed the use of learned treatises at trial. In *Egan v. Dry D., E. B. & B. R. Company*, the First Department noted that “it has been the custom, in this State at least, to call the attention of an expert witness, upon cross-examination, to books upon the subject, and ask whether authors whom he admitted to be good authority had not expressed opinions different from that which was given by him upon the stand.”<sup>11</sup> Over 120 years later, New York courts still follow *Egan*’s limitation that parties may only cross-examine experts with literature “admitted to be good authority” by the experts themselves.

More recent cases spotlight the practical problems with the *Egan* rule. For example, in *Lenzini v. Kessler*, the plaintiff argued that an expert was improperly “questioned about a medical text he had brought to court [and] made notes thereon.”<sup>12</sup> Although the expert admitted to relying on the text, he avoided calling it authoritative. But the First Department found that an expert who admits to relying on a publication “may not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative.”<sup>13</sup> A more vivid example is *Kearney v. Papish*, when the Second Department rejected a hearsay objection to a text that the expert had previously cited and described as “useful, clinically relevant, and . . . well researched.”<sup>14</sup> The plaintiff in *Kearney* insisted that this expert was immune from cross-examination because he had

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<sup>7</sup> *Id.* at 486 (quoting *Whitley v. Stein*, 34 S.W.2d 998, 1001 (Mo. App. 1931)).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 498.

<sup>10</sup> See, e.g., *Winiarski v. Harris*, 910 N.Y.S.2d 814, 816 (4th Dep’t 2010).

<sup>11</sup> 42 N.Y.S. 188, 200 (1st Dep’t 1896).

<sup>12</sup> 851 N.Y.S.2d 163, 165 (1st Dep’t 2008).

<sup>13</sup> *Id.* (quoting *Spiegel by Spiegel v. Levy*, 607 N.Y.S.2d 344, 345 (2d Dep’t 1994)).

<sup>14</sup> 24 N.Y.S.3d 708, 710 (2d Dep’t 2016) (internal brackets omitted).

also testified he “did not ‘think that anything that a human being does is authoritative.’”<sup>15</sup> Citing *Lenzini*, however, the Second Department affirmed that an expert cannot escape cross-examination “where he has already relied upon the text and testified in substance that he finds it reliable and trustworthy.”<sup>16</sup> While neither case rejected *Egan*’s rule outright, *Lenzini* and *Kearney* show New York courts struggling to apply a 19th-century rule in the present day.

Despite its shortcomings, most New York courts still summarily adopt the *Egan* rule without questioning, or even considering, its underlying rationale.<sup>17</sup> To the extent that courts have explained the rule’s utility, the reasoning appears to be that it discourages litigants from peppering expert witnesses with references to treatises of questionable credibility. As the First Department explained 70 years ago, the rule limits the universe of relevant material “only to treatises and to literature of recognized authority.”<sup>18</sup> By demanding that parties refer only to literature of such “high authority,” the reasoning goes, the rule stops litigants from bombarding experts with every contrary authority under the sun.<sup>19</sup>

Of course, this concern is belied by the experience of federal courts and the vast majority of states, all of which have adopted the federal rule without encountering the problems imagined by the First Department. This rationale ignores, moreover, the many constraints placed on counsel’s ability to bring excessive and/or dubious sources to an expert’s attention. As the commentary to the federal rule emphasizes, the realities of contemporary academic publishing—including robust peer review and online access to publications—already subject learned treatises to “a high standard of accuracy . . . with the reputation of the writer at stake.”<sup>20</sup> And even in cases where a litigant seeks to introduce a publication of questionable credibility, it is ultimately up to the court, not the litigant, to decide in the first instance whether the “publication is 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). If that were not enough, counsel may always use other tools at their disposal—e.g., objections to relevance and/or unduly cumulative, prejudicial, or confusing evidence—to limit the scope of examination.

#### **b. New York Should Adopt Rule 803(18)**

While New York’s rule perhaps made sense in 1896, today the doctrine is a mismatch with the realities of both modern trial practice and modern science. For all the reasons noted above, New York’s current rule allows testifying experts—who are often paid by the parties to advance very specific points of view—to essentially veto entire bodies of scientific literature that may not support their testimony. And though this risk can be off-set by each party hiring a competing expert, the resulting “battle of the experts” can lead to both sides advocating positions that are

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Labate v Plotkin*, 600 N.Y.S.2d 144, 145 (2d Dep’t 1993) (this rule “is well settled”).

<sup>18</sup> *Hastings v. Chrysler Corp.*, 77 N.Y.S.2d 524, 527 (1st Dep’t 1948).

<sup>19</sup> *Id.* at 528 (citation omitted).

<sup>20</sup> See *supra* note 3.

outside of the scientific mainstream. Taken together, this presents an affront to the search for truth that every litigant should have a vested interest in protecting.

Other courts and jurisdictions that have recognized this problem have developed a rather elegant solution—as embodied in Rule 803(18)—that strikes an appropriate balance between allowing for scientific advocacy, and also ensuring that experts whose opinions diverge from mainstream science must explain why. Indeed, by allowing learned treatises to be used both on direct examination as substantive evidence and on cross-examination to challenge expert opinions, the rule gives advocates as much as it takes away.

It is the opinion of this Committee that it is time for New York to follow suit.<sup>21</sup>

Products Liability Committee  
Thomas P. Kurland, Chair

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<sup>21</sup> Incidentally, at least one administrative body in New York already agrees. The Division of Military and Naval Affairs has codified a learned treatise exception in the State’s Military Rules of Evidence. *See* 9 NYCRR 517.8(18) (“To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert 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.”)