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# ISSUES UNDER FEDERAL RULE OF EVIDENCE 803(18): THE “LEARNED TREATISE” EXCEPTION TO THE HEARSAY RULE

ROBERT F. MAGILL, JR.\*

The Federal Rules of Evidence contain an exception to the hearsay rule which was not generally found at common law—an exception for learned treatises. The exception, Federal Rule of Evidence (“Rule”) 803(18) reads:

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.<sup>1</sup>

This carefully drafted rule appears to work well in practice. Only a few dozen federal and state cases have addressed issues under this provision, since it was introduced in 1976. Some of these issues, however, have been settled, while others have not. In particular, the following types of issues have not been fully settled under Rule 803(18): visual evidence; procedure; the relationship with the other evidence rules; and the meaning of “reliable authority.”

## I. VISUAL EVIDENCE

Rule 803(18) allows “statements contained in published treatises, periodicals, or pamphlets” to be admitted under the conditions of the Rule. What about charts and diagrams contained in

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<sup>1</sup> FED. R. EVID. 803(18).

books or periodicals? What about published films? There seems to be little problem with defining "statements" as including charts and diagrams taken out of published written work and in defining "read into evidence" as including "displayed in evidence."<sup>2</sup>

More troublesome, however, is the use of films. Films are clearly not "periodicals" or "pamphlets" nor are they "treatises" in the traditional sense. Some courts have, in effect, defined "treatise" to encompass films and thus allowed the display of all or portions of films as "statements." Other courts have refused to do so. In *Morrison v. Stalworth*,<sup>3</sup> a medical malpractice case, the trial court rejected plaintiff's proffer of a film by the American Cancer Society on the early detection of cancer.<sup>4</sup> The North Carolina Court of Appeals reversed on other grounds, but approved the film's exclusion.<sup>5</sup> The court was not persuaded that "showing the film" would constitute "reading" under Rule 803(18). However, the court was concerned about how defendant's experts would be able to rebut the film "as they would with a printed text."<sup>6</sup> Perhaps the court would have been more liberal had the plaintiff explained to the court that the film was to be presented along with expert testimony. These omissions were specifically mentioned in the court's opinion.

The more expansive view was taken in *Schneider v. Cessna Aircraft Co.*<sup>7</sup> At issue was a film prepared by the Federal Aviation Administration showing that airplane stall spins were often caused by pilot inattention.<sup>8</sup> The Arizona Court of Appeals, resolving a "close question," held that the film could be shown since testimony established the reliability of FAA films in general.<sup>9</sup> The court noted that while a film does not lend itself as easily as a book to a running commentary by an expert on the stand, an appropriate procedure would be to have the film shown to the jury, while the expert was available, and then have the expert explain

<sup>2</sup> See *United States v. Mangan*, 575 F.2d 32, 48 (2d Cir.) (charts extracted from learned treatise on handwriting), *cert. denied*, 439 U.S. 931 (1978); see also *Alexander v. Conveyers & Dumpers, Inc.*, 731 F.2d 1221, 1229 (5th Cir. 1984) (involved photographic enlargements of portions of safety code).

<sup>3</sup> 326 S.E.2d 387 (N.C. Ct. App. 1985).

<sup>4</sup> *Id.* at 392.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 722 P.2d 321 (Ariz. Ct. App. 1985).

<sup>8</sup> *Id.* at 329. The videotape contained scenes of plane crashes and came under the learned treatise exception to the hearsay rule. *Id.*

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

or critique the film.<sup>10</sup> "The tape can be stopped at points where the expert wishes to explain or amplify what is depicted."<sup>11</sup>

Of course, films may be introduced under other exceptions to the hearsay rule. For example, Rule 803(24), the "other exceptions" provision, was used to admit a film in *United States v. Sanders*.<sup>12</sup> The *Sanders* court permitted the government to show tapes made for the visitors center at the Chicago Board of Trade, in order to provide the jury with background information on commodities trading.<sup>13</sup> The court analogized the film to a "day in the life" film.<sup>14</sup>

## II. THE PROCEDURE

### A. Jury Contact with Learned Treatises

Rule 803(18) specifically prohibits learned treatises from being "received as exhibits." In some cases, the treatise has been received into evidence as an exhibit, but not allowed to be taken by the jury into the jury room. Courts have held this to be harmless error, since the purpose of the prohibition is to avoid a jury reviewing and relying on the treatise apart from the expert. The purpose of the expert's testimony is to screen, amplify, and explain the treatise.<sup>15</sup> In other cases, treatises have actually been taken into the jury room in violation of Rule 803(18). While some courts have found this to be harmless error, others have held that a party's substantial rights have been affected.<sup>16</sup>

In *Rossel v. Volkswagen*,<sup>17</sup> a visual display was admitted as an exhibit, and allowed to be taken by the jury into the jury room.<sup>18</sup> The Arizona Supreme Court found no error, since the instructions

<sup>10</sup> *Id.* The court distinguished between a transcript of comments made during a symposium and the videotape. *Id.* In the transcript, the speakers were not identified. *Id.* The tape, on the other hand, was "produced under the auspices of an agency which one would expect to have expert knowledge of the subject. . . ." *Id.*

<sup>11</sup> *Id.* at 330.

<sup>12</sup> 696 F. Supp. 334 (N.D. Ill. 1988), *cert. denied*, 496 U.S. 907 (1990).

<sup>13</sup> *Id.* at 335.

<sup>14</sup> *Id.*

<sup>15</sup> See *Schneider v. Cessna Aircraft Co.*, 722 P.2d 321, 330 (Ariz. Ct. App. 1985) (film received as exhibit, but not given to jurors in jury room); see also *Dawson v. Chrysler Corp.*, 630 F.2d 950, 960-61 (3d Cir. 1980) (where two government reports admitted into evidence as exhibits, but not allowed into jury room), *cert. denied*, 450 U.S. 959 (1981).

<sup>16</sup> For harmless error, see *Dawson*, 630 F.2d at 955; *Garbincius v. Boston Edison Co.*, 621 F.2d 1171, 1175 (1st Cir. 1980); *Gordy v. City of Canton*, 543 F.2d 558, 564 (5th Cir. 1976). For reversible error, see *Dartez v. Fiberboard*, 765 F.2d 456 (5th Cir. 1985).

<sup>17</sup> 709 P.2d 517 (Ariz. 1985), *cert. denied*, 476 U.S. 1108 (1986).

<sup>18</sup> *Rossel*, 709 P.2d at 530.

to the jury were that the charts were not substantive evidence, but only "illustrative" evidence. This meant that the visual exhibits could be used to illustrate the expert witnesses' opinions.<sup>19</sup> This distinction, however, is not supported by the Advisory Committee's note which spoke against the "unreality" of admitting evidence for impeachment only and not as substantive evidence.<sup>20</sup>

What about jury deliberations? What should the court do if the jury requests that the learned treatise that has been admitted into evidence be brought into the jury room? The Second and Ninth Circuits have different answers. In *United States v. Mangan*,<sup>21</sup> Judge Friendly stated: "if the jury had wanted the charts during its deliberations, it could have asked for a reading of the relevant portion of Cromwell's [the expert] testimony including their display."<sup>22</sup> However, in *United States v. An Article of Drug*,<sup>23</sup> the Ninth Circuit upheld the trial courts refusal of a request by the jury to review, either the treatise or the transcript of the expert testimony concerning the treatises. The Ninth Circuit was clearly troubled by this, but held that the trial judge had broad discretion to determine what would be allowed in the jury room.<sup>24</sup> The court explained that the trial judge was in a better position to determine whether or not there was any risk that the jury would give the treatise undue weight.<sup>25</sup> Upon review of these two positions, *United States v. Mangan* appears to be the better procedure.

### B. Pretrial Disclosure

Unlike Rule 803(24), which requires the proponent to notify the adverse party in advance of trial of the proposed exhibit, Rule 803(18) does not require advance notice to the opponent. Disclosure, however, often takes place under the pretrial statements,<sup>26</sup> requests for admission,<sup>27</sup> or orders to compel disclosure.<sup>28</sup> Of course, simply listing a learned treatise item on a pretrial summary does not make it admissible. The listing party may still ob-

<sup>19</sup> *Id.*

<sup>20</sup> FED. R. EVID. 803 advisory committee's note.

<sup>21</sup> 575 F.2d 32 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978).

<sup>22</sup> *Mangan*, 575 F.2d at 48.

<sup>23</sup> 661 F.2d 742 (9th Cir. 1981).

<sup>24</sup> *Id.* at 746.

<sup>25</sup> *Id.*

<sup>26</sup> FED. R. CIV. P. 16.

<sup>27</sup> FED. R. CIV. P. 36.

<sup>28</sup> FED. R. CIV. P. 32.

ject should the *other* party intend to introduce the treatise.<sup>29</sup>

Although disclosure is not required by the Federal Rules of Evidence, the most equitable approach may be that urged by David W. Louisell and Christopher B. Mueller ("Louisell and Mueller").<sup>30</sup> These commentators suggest that a pretrial conference be used to determine which learned treatise will be presented along with any expert to testify with such treatise.<sup>31</sup> Advance disclosure allows the parties opportunity to test learned treatise material by a motion in advance of trial.<sup>32</sup>

### C. Other Procedural Questions

#### 1. Impeachment

Can a learned treatise be used for impeachment purposes *only*? If so, must it still qualify as "reliable" under Rule 803(18)? Case law is not settled in this area. In *Meschino v. North American Drager, Inc.*,<sup>33</sup> the First Circuit suggested that to use a learned treatise for impeachment purposes, the treatise *must* qualify under Rule 803(18).<sup>34</sup> This can be inferred from the Advisory Committee's comments about avoiding instructions to consider for "impeachment only" and not otherwise.<sup>35</sup> On the other hand, in *Maggipinto v. Reichman*,<sup>36</sup> and the subsequent district court case,<sup>37</sup> the Third Circuit did not require the establishment of reliability for treatise used for impeachment purpose, but held that the treatise could not be used as substantive evidence to avoid a directed verdict since it was not established as authoritative.<sup>38</sup>

#### 2. Admission for Nonhearsay Purposes

Some cases have admitted treatises as exhibits when offered not for the truth of the statement, but for a nonhearsay purpose, such

<sup>29</sup> See *Meschino v. North American Drager, Inc.*, 841 F.2d 429, 434 (1st Cir. 1988).

<sup>30</sup> 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 466 (1980).

<sup>31</sup> *Id.*

<sup>32</sup> See *United States v. Sanders*, 696 F. Supp. 334, 335 (N.D. Ill. 1988), *cert. denied*, 496 U.S. 907 (1990); *Conde v. Velsicol Chemical Corp.*, 804 F. Supp. 972, 990 (S.D. Ohio 1993). Both of these cases involved motions in limine which sought to exclude the materials.

<sup>33</sup> 841 F.2d 429 (1st Cir. 1988).

<sup>34</sup> *Id.* at 434. The *Meschino* court also explained that the defendant could impeach the witness and not waive his right to refute the authoritative value of the learned treatise. *Id.*

<sup>35</sup> FED. R. EVID. 803 advisory committee's note.

<sup>36</sup> 607 F.2d 621 (3d Cir. 1979).

<sup>37</sup> *Maggipinto v. Reichman*, 481 F. Supp. 547 (E.D. Pa. 1979).

<sup>38</sup> *Id.* at 624.

as showing that a manufacturer had notice of the potential danger of a product.<sup>39</sup> An innovative variation of the proffer for a non-hearsay purpose occurred in *Stachowiak v. Subczynski*.<sup>40</sup> In *Stachowiak*, medical texts were cited, read into evidence, and blown up photographically.<sup>41</sup> These photographs were shown to the jury as demonstrating, not their truth, but rather that they were the "reasons" why a medical doctor relied on these particular treatises.<sup>42</sup> The trial court took some precautions which were approved by the Michigan Supreme Court: the charts could not be given to the jury; everything was excised from the charts which would indicate that they were from medical textbooks; and a limiting instruction was given that the exhibits were not for the truth—but only to show the doctor's claim that he relied on this information as his reasons for choosing his particular course of treatment.<sup>43</sup>

### 3. Multiple Labelling

Can a learned treatise be offered under several exceptions at once? Apparently, this is no problem. In fact, proponents of learned treatise material increase the chances for admission by claiming admissibility under Rules 803(8), 803(17), or 803(24), as well as Rule 803(18). In *Johnson v. William C. Ellis*,<sup>44</sup> the Fifth Circuit found that the safety codes could have been admitted under either Rule 803(24) or 803(18).<sup>45</sup> Multiple labelling apparently aided the government's successful prosecution in *United States v. Mount*.<sup>46</sup> The First Circuit did not have to make a dispositive decision under Rule 803(18), since it found that the treatises also "comfortably fit" within the hearsay exception in Rule 803(17).<sup>47</sup> It is, of course, in the proponent's interest to admit trea-

<sup>39</sup> See *Marsee v. United States Tobacco Co.*, 866 F.2d 319, 325 (10 Cir. 1989).

<sup>40</sup> 307 N.W.2d 677 (Mich. 1981).

<sup>41</sup> *Id.* at 678.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 680. Michigan restricts the use of learned treatises to impeachment. See MICH. R. EVID. 707 (1994).

<sup>44</sup> 609 F.2d 820 (5th Cir. 1980).

<sup>45</sup> *Id.* at 823. The test emphasized by the *Johnson* court seemed to be under Rule 803(18) was whether the sources were "reliable authorities." *Id.*

<sup>46</sup> 896 F.2d 612 (1st Cir. 1990).

<sup>47</sup> *Id.* at 625; see FED. R. EVID. 803(17). This rule provides that "market quotations, tabulations, lists, directories or other published compilations, generally used and relied upon by the public or by persons in particular occupations," are not excluded by the hearsay rule, even though the declarant is available. *Id.*

tise evidence under some other exception of the hearsay rule, because Rule 803(18) has two limitations that another category would not: (1) an expert must be on the stand when the treatise is read and (2) the statements cannot be given to the jury.

### III. THE RELATIONSHIP OF RULE 803(18) TO OTHER FEDERAL RULES OF EVIDENCE

Since Rule 803(18) is only a part of the Federal Rules of Evidence, it is subject to the definitions, conditions, and general policy considerations contained in Articles I thru IV of the Federal Rules. Thus, errors of admission or exclusion of learned treatises are not reversible, unless a "substantial" right of the party is affected.<sup>48</sup> Of course, the overarching Rules of 401, 402, and 403 control any admission or exclusion under Rule 803(18). If a treatise is not relevant, it is not to be admitted even if it could be qualified under Rule 803(18). Lastly, if a treatise's probative value is outweighed by the danger of confusion, prejudice or delay, it could likewise be excluded under Rule 403.<sup>49</sup>

It should also be noted that Rule 612<sup>50</sup> also applies to learned treatises.<sup>51</sup> The "fairness" doctrine of Rule 106 may also come into play to admit additional parts of treatises if necessary for balance.<sup>52</sup>

The major relationship issues to be resolved are those arising in the context of the expert witness under Rules 702 to 705.

#### A. *Relationship with Expert Witness Rules—Federal Rules 702 to 705*

##### 1. Use of Treatises Without Using Rule 803(18)

Some cases have considered the possibility of experts reading

<sup>48</sup> See FED. R. EVID. 103(a). This rule provides that an "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." *Id.*

<sup>49</sup> See *Ellis v. International Playtex*, 745 F.2d 292, 306 (4th Cir. 1984); *Hawkinson v. A. H. Robbins*, 595 F. Supp. 1290, 1337 (D. Colo. 1984).

<sup>50</sup> FED. R. EVID. 612. This rule provides that a writing used to refresh the memory of a witness may be used by the adverse party for cross-examination or as admissible evidence.

<sup>51</sup> See *In Re Richardson-Merrell, Inc.*, 624 F. Supp. 1212, 1227 (D. Ohio 1985). The *Richardson-Merrell* court allowed a technical article to be used to cross-examine one expert who had admitted to having reviewed the article, but not to cross-examine another witness who did not make such an admission. *Id.*

<sup>52</sup> See *Marsee v. United States Tobacco Co.*, 866 F.2d 61 (10th Cir. 1981). More problems arise in the context of the expert witness under Rules 702 to 705.

learned treatises into evidence without going through the qualifying procedure of Rule 803(18). Rule 703 allows an expert to base his opinion on "facts or data in the particular case" if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences." These facts or data "need not be adverse."<sup>53</sup> In addition, Rule 705 allows a testifying expert to "give reasons" for an opinion.<sup>54</sup> Thus, arguably, learned treatises could constitute either "facts or data" in a particular case under Rule 703, or more likely, the "reasons" for an expert's opinion. It has thus been suggested that the expert witness rules provide a "back-door exception" to the hearsay rule.<sup>55</sup>

There are at least four cases which have followed this line of thought. In two cases, the courts held that learned treatises were "facts or data" which the expert could use without independent admissibility.<sup>56</sup> In *In re Japanese Electronic Products*,<sup>57</sup> the Third Circuit held that the district court erred in excluding a portion of an economic expert's report.<sup>58</sup> The portion excluded was based on a scholarly Japanese article prepared by a group of economists, written in Japanese.<sup>59</sup> The appeals court held that the Japanese article relied on by the expert was the type of data upon which experts in the field, economists, reasonably relied.<sup>60</sup> Thus the Japanese article did not need to be independently admissible under Rule 803(18).

In an earlier case, *Fraser v. Continental Oil Company*,<sup>61</sup> the Fifth Circuit reversed the trial court's rejection of the entire testimony of plaintiff's expert.<sup>62</sup> The expert had attempted to support his opinion by referring to the National Fire Protection Association safety code. The court, relying only on Rule 703, held that the code was "facts or data" and need not be independently admissible.<sup>63</sup>

<sup>53</sup> FED. R. EVID. 703.

<sup>54</sup> FED. R. EVID. 705. This rule provides that an expert "may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data . . ."

<sup>55</sup> *Id.*

<sup>56</sup> See Faust Rossi, *Modern Evidence and the Expert Witness*, 12 LITIG. 18, 23 (1985).

<sup>57</sup> See *infra* notes 57-63.

<sup>58</sup> 733 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

<sup>59</sup> *In re Japanese Electronic*, 733 F.2d at 275.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 568 F.2d 378 (5th Cir. 1978).

<sup>63</sup> *Id.* at 385.

<sup>64</sup> *Id.* at 383.

Learned treatises may also qualify as the "reasons" for an expert's opinion under Rule 705.<sup>64</sup> A federal case which supported this possibility, although treatises were not involved, was *Worthington Trust v. Manufacturer's Life Insurance Co.*<sup>65</sup> In *Worthington Trust*, plaintiffs experts were allowed to testify at length about how and why they had ruled out homicide as an explanation for the cause of death of the insured.<sup>66</sup> The court ruled that their testimony, as to their rationale, was admissible since "the experts are entitled to give the reasons for their opinions and to explain how and why they arrived at that result."<sup>67</sup>

It appears likely that more exploration of this area will occur in future cases. Certainly under Rule 703, the "facts or data" are supposed to be those that are "in the particular case." This may limit using Rule 703 as a backdoor exception to situations where the treatise is, in effect, assembling the facts in issue in the case itself, such as in *In re Japanese Electronic Products*.

Arguments in favor of using Rule 703 or 705 are bound to encounter challenges under Rule 403,<sup>68</sup> and might be granted only in situations where there is a *need* to use the materials and where there is proof that the materials are trustworthy—perhaps as trustworthy as the "reliable authority" which Rule 803(18) envisions. If that is the case, then is there simply an overlap of Rule 803(18) with Rules 703 and 705, rather than an additional exception? Certainly, in the three cases above involving learned treatises, the items appear to be reasonably reliable and might have met the tests of Rule 803(18) had the formalities been observed. The witness could probably testify that the treatise was "reliable authority" and that is why he relied on it in forming his opinion. Clarification of this issue awaits further decision.

## 2. Relating the Treatise to the Expert Under Rule 803(18)

Assuming that Rule 803(18) is going to be used to qualify a treatise, then it is inexorably tied to the restrictions placed on who may give expert testimony contained in Rule 702. Rule 803(18)

<sup>64</sup> See *Stachowiak v. Subczynski*, 307 N.W.2d 677, 679 (Mich. 1981).

<sup>65</sup> 749 F.2d 694 (11th Cir. 1985).

<sup>66</sup> *Id.* at 698.

<sup>67</sup> *Id.*

<sup>68</sup> FED. R. EVID. 403. This rule provides "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." *Id.*

requires that the treatise be established as "a reliable authority" by expert testimony, unless the court would take judicial notice, which seems to happen rarely.

The initial hurdles to reception under Rule 803(18) are therefore, the Rule 702 issues: whether there is special knowledge; whether it will help; and whether the witness is qualified as an expert with this special knowledge. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>69</sup> the Supreme Court acknowledged an additional "gatekeeping role" for the judge, with respect to science experts, to determine whether a "theory or technique is scientific knowledge."<sup>70</sup>

For this latter determination, one line of inquiry suggested by the Supreme Court is "whether the theory or technique has been subjected to peer review and publication."<sup>71</sup> Thus, since the Court rejected the old "general acceptance" test of a theory, the admissibility of the expert's theory may depend on the existence of "learned treatises" supporting the theory. These treatises, in turn, may subsequently be used as evidence. How often this circle of reliability will occur, and how it will be played out is not yet apparent. The Supreme Court did not explore this possible scenario. But the idea can be partly seen in the cases. In *Conde v. Veliscol Chemical Corp.*,<sup>72</sup> the fact that a proposed witness had co-authored a peer-reviewed paper on the chemical in question helped the court to allow the witness as an expert.<sup>73</sup>

#### IV. THE STANDARD OF "RELIABLE AUTHORITY"

A key element of Rule 803(18) is whether the proposed evidence can be established as "a reliable authority." What precisely is the object of the test of reliability? The author? The book? The statements in the book? What do the words "reliable authority" mean as a standard? Does it mean "generally accepted" or some lesser standard? And who decides—does the court decide if it is reliable or is the expert's testimony of reliability sufficient?

The theory behind Rule 803(18) is to let "the treatise speak," without cross-examination and through another party, because "a

<sup>69</sup> 113 S. Ct. 2786 (1993).

<sup>70</sup> *Id.* at 2799.

<sup>71</sup> *Id.*

<sup>72</sup> 804 F. Supp. 972 (D. Ohio 1992).

<sup>73</sup> *Id.* at 1018.

high standard of accuracy 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."<sup>74</sup> Thus, the focus must be on the treatise's reliability. Dean John Wigmore's focus was on the author; it was the reliability of the author to which he looked for the mark of trustworthiness. A professional author had no motive to misrepresent, was publishing primarily for his profession, with his reputation depending on the correctness of his data and the validity of his conclusion, and was writing "with no view to litigation."<sup>75</sup> These factors Dean Wigmore thought, gave rise to a "sufficient circumstantial probability of trustworthiness."<sup>76</sup> Nevertheless, he wanted the court to exercise its discretion to "exclude writings which for one reason or another do not seem to be sufficiently worthy of trust."<sup>77</sup>

The recent *Daubert* decision, suggests that the Supreme Court would assign a similar gate-keeping function for treatises as did Dean Wigmore—the *court* is to be the ultimate arbiter as to reliability, and not the expert. And there is some argument that the question really is whether an *expert* would rely on the treatise, not the court. This argument is certainly true for the requirement of "facts or data" in Rule 703 which are those "reasonably relied upon by experts." As the court in *In re Japanese Electronic Products* stated: "the proper inquiry is not what the court deems reliable but what experts in the relevant discipline deem it to be."<sup>78</sup>

But Rule 803(18) does not contain the same phrase used in Rule 703—"relied upon by experts." Further, Rule 803(18) actually admits the treatise into evidence, whereas Rule 703 says that the facts "need not be admissible" for the expert to use them. Thus, it is far more reasonable that the court, and not the expert, should decide whether the treatise has been "established as a reliable authority." "Reliable" would mean more than just "relied upon by the experts"; rather, it would mean that it is an authority which can be relied upon by the trier of fact—so reliable that the rule

<sup>74</sup> FED. R. EVID. 803 advisory committee's note (citing 6 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1692 (1980)).

<sup>75</sup> 6 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1692 (1980).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *In re Japanese Electronic Products*, 733 F.2d 238, 278 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

against hearsay will not be applied to exclude it and that the treatise escapes cross-examination. This screening appears to be a judicial function that cannot be delegated to an expert.

This judicial scrutiny is justified further "not only because of the likelihood of jury misunderstanding, but also because expert witnesses are not necessarily always unbiased scientists. They are paid by one side for their testimony."<sup>79</sup>

But while the court must decide what is reliable, its decision is to be based, according to the rule, on "the testimony or admission of the witness" (unless judicial notice is taken). And this testimony need not be more than a few words that the court will want to hear.

So, what standards will the courts want met before they hear reliability established? The wording in the cases varies widely. The Fifth Circuit in *United States v. Jones*,<sup>80</sup> established a formula for reliability for works which "have been subjected to widespread collegial scrutiny."<sup>81</sup> In *Burgess v. Premier Corp.*,<sup>82</sup> the Ninth Circuit apparently established the standard that a book must be determined an authority "accepted" within the industry.<sup>83</sup> In *Allen v. Safeco Insurance Co.*,<sup>84</sup> the Eleventh Circuit allowed articles established by an adverse witness as "somewhat authoritative," where the author was the director of a well-respected forensic science department, and the expert used the periodicals "in keeping up to date."<sup>85</sup>

In another case, *Ward v. United States*,<sup>86</sup> two medical articles were admitted when the expert witnesses recognized them as "the most important papers" regarding surgical technique.<sup>87</sup> In another Sixth Circuit case, *Grossheim v. Freightliner Corp.*,<sup>88</sup> the court refused to admit under Rule 803(18) a report of design recommendations from a common carrier's conference.<sup>89</sup> The court agreed with the district court that the article should not be admit-

<sup>79</sup> *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1355 (6th Cir. 1992).

<sup>80</sup> 712 F.2d 115 (5th Cir. 1983).

<sup>81</sup> *Id.* at 121.

<sup>82</sup> 727 F.2d 826 (9th Cir. 1984).

<sup>83</sup> *Id.* at 834.

<sup>84</sup> 782 F.2d 1517 (11th Cir. 1986).

<sup>85</sup> *Id.* at 1519.

<sup>86</sup> 838 F.2d 182 (6th Cir. 1988).

<sup>87</sup> *Id.* at 187.

<sup>88</sup> 974 F.2d 745 (6th Cir. 1992).

<sup>89</sup> *Id.* at 754.

ted into evidence because it was not considered authoritative by the relevant industry: it had not been "adopted . . . as a custom or standard" by the industry.<sup>90</sup>

A much lower standard was employed in *Conde v. Velsicol Chemical Corp.*, for admitting one article for the plaintiff under Rule 803(18). It was a letter to the editor of a professional journal.<sup>91</sup> The letter critiqued a study done by defendant's experts.<sup>92</sup> It did not appear that any expert testified that this article was "reliable authority."<sup>93</sup> Instead, it appears to have been admitted because it was relevant and provided evidence against assertions made by the defendant.

Thus, it appears that the standard of "reliable" may be:

- (1) very high if the proponent's witness is testifying; or
- (2) somewhat lower if a hostile expert is testifying; or
- (3) lower still if the treatise is somehow needed very much and the judge thinks it would be just to admit it.

Although it has been said that there are no "magic words"<sup>94</sup> this variety in the standard is somewhat larger than one would expect just looking at the rule.<sup>95</sup> Louisell and Mueller have argued that anything not meeting a very high standard should not be allowed under Rule 803(18). For these commentators, the standard should be:

Testimony from the expert (i) that he knows professionally and respects the author of the work in question and considers the work reliable, or (ii) that experts in the field generally accept the author and the work in question as authoritative, even if the witness himself might differ with this assessment.<sup>96</sup>

The *Daubert* decision has no directions specifically for this question. But if the standard for admissibility of a scientific theory under *Daubert* is analagous to the standard for reliability under Rule 803(18), then the decision would mean that, just as for a scientific theory, "general acceptance" is not a pre-requisite to estab-

<sup>90</sup> *Id.*

<sup>91</sup> *Conde v. Velsicol Chemical Corp.*, 804 F. Supp. 972, 990 (D. Ohio 1992).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Schneider v. Cessna Aircraft Co.*, 722 P.2d 321 (Ariz. Ct. App. 1985).

<sup>95</sup> *Id.* at 329.

<sup>96</sup> LOUISELL & MUELLER, *supra* note 30, § 466.

lishing the reliability of a treatise under Rule 803(18) and that a "flexible" approach may be used. However, *Daubert* also seems to imply that the standard of reliability would be a high one: "widespread acceptance can be an important factor in ruling particular evidence admissible."<sup>97</sup> The Supreme Court's description of a "gatekeeping" role for the trial judge to screen for "evidentiary reliability" also supports this inference. The opinion may thus serve to tighten up the standards used by circuit and district courts in reviewing Rule 803(18) material, and therefore, encourage the use of a "measuring rod" very close to the language of Louisell and Mueller.

But it could be better argued that *Daubert* should have little impact on the standard for Rule 803(18). *Daubert* dealt only with the admissibility of scientific testimony. It assigned a substantial role for the trial judge to see if the "science" has "evidentiary reliability." Once a trial court has found the expert and the subject qualified under Rule 702 and *Daubert*, then the court can simply listen to the expert's testimony as to whether a treatise is "reliable authority" under Rule 803(18). And while the vouching by the expert needs to be strong for the treatise to be admitted, the court need not be conducted on the treatise the four gatekeeping tests *Daubert* suggested for scientific knowledge. The expert's vouching testimony can be simply stated. Thus, *Daubert* may have no impact on Rule 803(18) other than its effect on qualifying the expert who qualifies the treatise.

What does the judge need to hear the expert say before the judge finds the proposed material "reliable authority"? The standard of reliability should be higher, many say, other than that for a live expert witness who can be cross-examined, unlike the treatise. But the vouching expert can give the high accreditation very simply. The First Circuit used words similar to those of Louisell and Mueller in its persuasive opinion, *Meschino v. North American Drager, Inc.*<sup>98</sup>

The price for escape from cross-examination for a treatise is a higher standard than the "qualified" standard set for live witnesses. A treatise can be admitted as a "reliable authority" by establishing the recognition of the authoritative stature of the

<sup>97</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2800 (1993).

<sup>98</sup> 841 F.2d 429 (1st Cir. 1988).

writer or the affirmative acceptance of the article itself in the profession.<sup>99</sup>

## V. THE SPECIAL PROBLEM OF PERIODICALS

A special question as to the meaning of "reliable authority" occurs with periodicals. Rule 803(18) allows the admission of "statements" which are in "periodicals . . . established as a reliable authority."<sup>100</sup> The periodical and not the statements contained therein are "established." But what about a periodical which (a) contains several articles in each issue and (b) has many issues over time? Is it the periodical, as a whole over time, that needs to be established as reliable? Or is it issue? Or is it the particular article? The cases do not agree.

In *Allen v. Safeco Insurance Co.*,<sup>101</sup> the plaintiff's counsel, while cross-examining defendant's expert, read statements out of an article in a magazine entitled the *Fire Arson Investigator*.<sup>102</sup> The expert had admitted the reliability of the magazine generally, stating that the magazine was one of the sources he used in keeping up-to-date and that the articles in that magazine were generally considered "somewhat authoritative."<sup>103</sup> The expert also acknowledged the reliability of the forensic science department where the author of the specific article taught. The court made no distinction between these two admissions and used them both as proof of a sufficient foundation.

In *McCarty v. Sisters of Mercy Health Corp.*,<sup>104</sup> the lower court's preclusion of plaintiff's counsel from impeaching defendant's expert with an article from a medical journal was reversed.<sup>105</sup> The expert stated that he found no journal to be "authoritative."<sup>106</sup> Since this would mean that "everything within that journal would be considered absolute truth, and that's not always the case."<sup>107</sup> However, this particular journal was one that his journal club considered "as reliable as anything we have in our literature" and he

<sup>99</sup> *Id.* at 434.

<sup>100</sup> FED. R. EVID. 803(18).

<sup>101</sup> 782 F.2d 1517, 1519-20 (11th Cir.), *vacated on other grounds*, 793 F.2d 1195 (1986).

<sup>102</sup> *Id.* at 1519-20.

<sup>103</sup> *Id.*

<sup>104</sup> 440 N.W.2d 417 (Mich. Ct. App. 1989).

<sup>105</sup> *Id.* at 419.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

agreed it was "as close to a bible as obstetricians have today."<sup>108</sup> The Michigan Court of Appeals decided that the expert's standard of "absolute truth" was a "tad higher than what the rule required."<sup>109</sup>

On the other hand, the First Circuit, in *Meschino v. North America Drager, Inc.*,<sup>110</sup> affirmed the exclusion of two articles in a magazine offered by the plaintiff.<sup>111</sup> This decision required that the particular author or article must be established, not just the periodical generally. The court held that not "all issues of a magazine may be qualified wholesale" just because there is testimony that the magazine *itself* is highly regarded:

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 . . . .<sup>112</sup>

While Rule 803(18) itself refers only to "periodical," the *Meschino* rationale is persuasive because not every article in a "reliable" journal should be considered reliable by that fact alone. The resolution of this question may depend on the method by which an article reaches publication in a learned journal. In many medical journals, for example, an article cannot be published without a "peer review" process: the author submits the article in draft form well in advance of publication so that it can be reviewed by as many as half a dozen or more colleagues whose names are not disclosed to him; these peers critique and ask questions and the article is then rewritten with the answers to those questions included. The journal's editorial board may further critique the article and demand more of the author before it is finally accepted and published.

If an article is "peer reviewed" and the journal is stated to be reliable, that might be enough to meet the standard suggested by the Advisory Committee: "the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake."<sup>113</sup> Such

<sup>108</sup> *McCarty*, 440 N.W.2d at 419.

<sup>109</sup> *Id.* at 420.

<sup>110</sup> 841 F.2d 429 (1st Cir. 1988).

<sup>111</sup> *Id.* at 434.

<sup>112</sup> *Id.*

<sup>113</sup> FED. R. EVID. 803 advisory committee's note.

“peer review” was endorsed by the Supreme Court in *Daubert*, as one possible test to admit a scientific theory or technique into evidence.<sup>114</sup>

If the journal does *not* have peer review, a court might employ its “gatekeeping” role and hold:

- (1) the journal’s reliability cannot be sufficiently established by itself without such a process;
- (2) the article itself must be considered the “treatise”; and
- (3) the article or its author must be established independently as “reliable authority.”

This problem of the foundational reference point, journal or article, can occur in any other situation where there is a series; *e.g.*, in *Schneider v. Cessna Aircraft Co.*,<sup>115</sup> where the series of FAA films were established as reliable, but the expert did not address the *specific* film which had been shown. The *Schneider* court held the foundation was sufficient because the *agency* which produced the specific film was recognized as authoritative.<sup>116</sup> This is similar to a focus on the author of an article.

#### CONCLUSION

The courts have had eighteen years to come up with and sort out the issues under Rule 803(18). For almost every issue, at least one court has arrived at an excellent solution which can be used as a model by others. Judge Friendly’s opinion in *United States v. Mangan* deftly solved many of the problems arising with visual evidence. It would be expected that the better-reasoned solutions will eventually hold sway in the opinions of the other courts, although a small drafting change with respect to articles in periodicals and a Supreme Court guideline as to the meaning of “reliable authority” might be helpful.

Issues under Rule 803(18) seem sufficiently complex to warrant treating them in advance of trial, and not in the heat and rush of a trial in progress. Disclosure of Rule 803(18) material at the pre-trial conference or otherwise, and testing by motion in advance of trial, should be encouraged.

<sup>114</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2800 (1993).

<sup>115</sup> 722 P.2d 321 (Ariz. Ct. App. 1985).

<sup>116</sup> *Id.* at 329.

