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Learned Treatises Can Be Effective Trial Tools

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I. GEORGIA LAW

A. Evidentiary Requirements

In Georgia, a learned treatise may be used to impeach a hostile expert if the expert recognizes a book or article as "authoritative." Immediately, we are faced with the problem of defining "authoritative." The definition adopted by the courts is not as narrow as it first appears.

The restrictions placed on the use of learned treatises by the courts are the result of the hearsay rule—scientific books and articles are hearsay.[2] They cannot be read into evidence or otherwise used as proof in a party's case-in-chief.[3] However, an expert may form and render an opinion relying on such hearsay.[4] This does not allow the expert to recite the hearsay in court, but allows him to rely on it in forming his own opinion, which must be expressed in his own words.

Even though an expert's opinion may be based on learned treatises which are recognized hearsay, his opinion is not double hearsay because it's personal opinion. However, the learned treatise itself is still inadmissible as hearsay.

The rationale articulated by the Georgia Supreme Court in 1894 for disallowing the actual admission of learned treatises is still applicable today. This rationale is three-pronged:

(1) Science and medicine are quickly changing so that facts written in one year may not be true later;
(2) The treatise may be a compilation of other treatises and so may be double hearsay; and
(3) The authors of the treatises do not write under oath and so cannot be cross-examined.[4]

A conflict exists between the inadmissibility of learned treatises based on the hearsay rule and a party's right to a thorough and sifting cross-examination.[5] The right to a thorough and sifting cross-examination has necessitated exceptions to the hearsay rule's restrictions[6], based on the trustworthiness of the book or article which is shown to be authoritative.

The term "authoritative" means that the treatise is a standard on the subject at issue.[7] If the hostile expert relies on a treatise, he implies it is authoritative and his credibility can be attacked on cross-examination. If the hostile expert does not rely on treatise, then he must testify to facts necessary to lay a foundation of the treatises' trustworthiness before cross-examination.

The Georgia Supreme Court does not require that the expert utter the words "authoritative" before cross-examination.[8] The issue is whether sufficient foundational facts have been elicited from the witness. In the past, the Court has found foundation sufficient which consisted of the following facts:

(1) The expert had studied the book;
(2) The expert was familiar with it;
(3) The expert had studied under the book's editor:
(4) The expert had used the book in his studies; and
(5) The book was as acceptable as many books in his field.[9]

The necessary foundational facts will differ according to the circumstances, however, any fact which enhances a treatises' trustworthiness should be considered by the court in its ruling.

When a journal or other publication has been adopted as a standard on the subject at issue, the articles may be used in cross-examination.[10] In effect, the foundational requirements for a specific article are met by laying the foundation for the entire publication. An attorney is not required to establish that the specific article is a standard on the subject at issue prior to cross-examination.

The Court of Appeals has considered this situation in *Pound v. Medney*.[11] The subject at issue in *Pound* was the medical procedure for transplanting hair. The hostile expert's testimony established the following facts:

(1) that the Journal of the American Medical Associatoin (JAMA) was one of the best learned treatises in medicine;
(2) that it was authoritative in most areas; and
(3) that A.M.A. publications should be authoritative.

The hostile expert never agreed that the particular article used in the cross-examination was authoritative. In fact, he maintained that the article concerned a procedure different from the one at issue and that the article was written two years after the incident in question.

The Court held that JAMA had been established as a standard in the field of the expert's special knowledge and could be used to test his credibility. The question of whether it concerned the medical procedure at issue was considered a jury question. Also, the relevance of the article, considering its time of publication, was a jury issue.

B. Trial Considerations and Strategy

The effectiveness of learned treatises at trial will be determined by what occurs in the hostile expert's discovery deposition. At this time, counsel should question the future trial witness on his opinion of various treatises. By knowing which treatises the expert will accept and reject as authoritative at trial, counsel can plan for an effective cross-examination.

If the expert witness will not agree to facts

necessary to establish the credibility or trustworthiness of learned treatises, an attorney can still use them in a different way However, the effectiveness of this tactic depends on how well-known the authors, books, or articles are to the jury and the number of treatises used The purpose of the tactic is to impeach the hostile expert on voir dire

At voir dire, the hostile expert may be cross-examined on his familiarity with specific authors, books or articles.[12] The most effective voir dire establishes the expert's lack of knowledge by producing numerous treatises which the expert refuses to acknowledge as standards on the subject at issue The purpose of this tactic is to attack the qualifications of the expert rather than his credibility It is reversible error to disallow such voir dire [13]

II. FEDERAL LAW

A. Evidentiary Requirements

The foundation requirements for use of learned treatises under the Federal Rules is similar to Georgia's evidentiary rules, at least with regard to the character of the foundation that must be laid. As with state evidentiary law, FED. R EVID. 803(18), requires that the treatise in the article in question be established as "authoritative" or "reliable" in some fashion as a prerequisite to its use.[14] The Eleventh Circuit has held that counsel was properly permitted to use an article from a professional trade journal, the *Fire Arson Investigator,* in cross-examining an opposition expert. The expert conceded that he used the journal in keeping up to date in fire scene investigation. The expert further conceded that the journal's articles were generally "somewhat" authoritative and that the author of the particular article was associated with a well-respected institution [15]

The federal rules differ from state law in how the foundational requirement may be satisfied and in how the treatise may be used as evidence. The federal rules are less stringent. Under Rule 803(18), a party may establish the authoritativeness of a treatise through either (a) a hostile expert whom counsel wishes to impeach through use of the article, or (b) by the party's own expert in the course of direct examination.

Futhermore, counsel's own witness may refer to and discuss the text of a learned treatise in his testimony Under the Federal Rule, a learned treatise may be read into evidence as substantive evidence once the expert establishes that the treatise is reliable authority. Such treatises cannot, however, be admitted as exhibits to be viewed by the jury during deliberations.[16]

The most critical and meaningful way that the federal law on this issue differs from state law is the ability to meet the foundational requirements with counsel's own expert. In Federal Court, a hostile witness cannot block effective cross-examination with a publication which maintains positions contrary to his position by refusing to concede the reliability of the treatise.

Another requirement that counsel must keep in mind in attempting to use learned treatises is the general relevance requirements established by FED. R EVID 402 and 403 While the relevance of most treatises counsel wishes to use, either in his case-in-chief or for cross-examination, probably will be obvious from the text of the treatise itself, this cannot always be assumed by counsel This is especially the case in subject areas involving highly technical and complex matters. In one case, a treatise was found inadmissible where counsel did not show that Plaintiff suffered the specific injury discussed in the medical text in question In that case, Plaintiff had used the same allegedly defective product which was linked to injuries in the medical text which Plaintiff sought to enter into evidence.[17]

B. Trial Considerations and Strategy

As soon as an attorney begins investigating a case, he or she should begin searching for and collecting books, journal articles codes and other materials which focus on the issues which expert witnesses may address. Once an expert is located, counsel should forward the materials which provide support for the case to the expert. The expert should be encouraged to rely on and incorporate these materials into his opinions. At trial, there are at least two good reasons why such learned treatises should be referred to and incorporated into the testimony of counsel's experts.

First and foremost, the foundation of reliability and relevance of the treatises may be established through a friendly expert This procedure will pre-empt a hostile expert witness from avoiding effective impeachment by: (a) refusing to concede the reliability of the treatise; or (b) attempting to draw an artificial distinction between the facts and circumstances of your case and the standards described or assumed in the treatise. Impeachment through use of the treatise is also made much more effective if your expert has earlier explained how it is relevant to and supportive of your case. This is especially true when the language and text of the treatise contains highly technical information. Once the jury is educated in this regard, they will better understand how the hostile expert's opinions are inconsistent with positions taken by the author of your treatise.

Secondly, the use of a learned treatise by your expert witness in his direct examination bolsters the expert's credibility and, in effect, creates additional experts who support your case The incorporation of these treatises into your case allows counsel to call multiple experts for the price of one.

In this regard, your expert should not simply state that the treatise is "reliable and authoritative" when you are establishing the treatise's foundation. Rather, your expert should point out that the author of the text is a renowned expert in his field, or that the organization which promulgated the code or text is the leading professional society in the field of the subject at issue. If appropriate, be sure to confirm that the hostile expert is a member of the particular organization which promulgated the code[18] or text.

Thirdly, your expert's direct reference to the treatise can serve to establish its relevance. This direct testimony performs two functions. First, the testimony preserves the treatise's *admissibility* by preventing the opposing expert from avoiding cross-examination on the treatise by insisting that the treatise does not apply to the issues in your case. This closes an avenue of escape for the hostile expert who cannot avoid impeachment with the treatise by refusing to concede its relevances and thus, its reliability Secondly, the expert preserves the evidentiary *weight* of the treatise by educating the jury on how the treatise applies to the case.

Judicial notice is another alternative to establishing reliability of a treatise This is particularly important where you do not have an expert witness who can establish the reliability of the treatise. A factual foundation must still be established.

The hostile expert who refuses to admit to the reliability of a treatise may still establish facts which can be used in your request for judicial notice. In addition to the factors mentioned in the state law discussion (i.e., that the witness has studied or used the treatise, has it in his library, or knows that other experts in the field rely on the treatise), counsel may attempt to have the hostile witness concede supporting facts. These may include the fact that the treatise's authors, editors, and/or contributors are well-known and respected in their particular field of study or are associated with respected institutions The simple fact that the treatise has been subjected to peer review and approval may also be of major significance to the court in considering a request for judicial notice

It is strongly recommended that counsel have at trial the entire textbook, edition of the safety code, or periodically-published journal in which the relevant article is found This will look more impressive to the jury than a simple photocopy of the relevant material. Additionally, counsel should consider blowing up the pages of the text in which the most beneficial statements to the case are contained. It is by now a truism that a jury retains a much higher percentage of material that it views and hears as opposed to what it simply hears. Actually seeing the treatise itself in the courtroom during testimony will almost be as effective as having the treatise admitted as an exhibit to be viewed by the jury during deliberations.

Conclusion

Learned treatises can be effective tie-

breakers in the battle of experts in today's complex litigation. If counsel has a choice of forums, the liberalized use of learned treatises in Federal Court should be considered before filing.

Footnotes

Sources for learned treatises include public, academic, and hospital libraries, computer-search services such as *Medline* and the *Lawyers Desk Reference* by Henry M. Philo published by the lawyers Co-operative Publishing Co.

2 O.C.G.A. §24-3-1; Green *Georgia Law of Evidence* §325 (2d ed. 1983).

3 *Johnston v. Richmond & Danville R. Co.*, 95 Ga. 685, 687, 22 S.E. 694 (1894) [Plaintiff sought to have the treatise *Ericksen on Concussion of the Spine* entered into evidence.]; *State Highway Dept. v. Willis*, 128 SE2d 351, 106 Ga. App. 821 (1962).

4 *Boswell v. State*, 144 Ga. 40, 43, 39 S.E. 897 (1901) [This action alleged that the Defendant Boswell had poisoned a well with 'bluestone.' The experts based their opinion on the poisonous nature of "bluestone" from their review of medical books. They had no first-hand knowledge.]; *Miller v. Traveler's Insurance Company*, 111 Ga. App. 245, 141 SE2d 223 (1965) appeal after remand 155 SE2d 724, 115 Ga. App. 718 appeal after remand 168 SE2d 791, 119 Ga. App. 768 (1965).

5 *Johnston supra*, 95 Ga. at 687.

6 O.C.G.A. §24-9-64.

7 *Pound v. Medney*, 176 Ga. App. 756, 337 SE2d 772 (1985). See also *Mize v. State*, 240 Ga. 197, 198, 240 SE2d 772 (1985).

8 *Mize supra*, 240 Ga. 197.

9 *Id.*

10 *Pound supra*, 176 Ga. App. 756.

11 *Id.*

12 *Wooten v. Dept. of Human Resources*, 152 Ga. App. 304, 307, 262 SE2d 583 (1979).

13 *Id.*

14 FED. R. EVID. 803(18) *Learned treatises*. 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.

15 *Allen v. Safeco Insurance Company of America*, 782 F. 2d 1517 (11th Cir. 1986).

16 FED. R. EVID. 803(18).

17 *Ellis v. International Playtex, Inc.*, 745 F. 2d 292 (4th Cir. 1984).

18 With regard to the use of learned treatises in the form of safety codes and standards published either by governmental or quasi-governmental agencies (but which do not have the force and effect of law) or by professional societies or organizations, there has been another foundational requirement superimposed by decision over and above the language of F. R. E. 803(18).

In addition to the reliability and relevance requirements, it has been held that such codes or standards are admissible where prepared by organizations formed for the chief purpose of promoting safety. Such a showing establishes that the proffered code or standard is sufficiently "trustworthy" to be considered by the jury. *See Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 609 F. 2d 820 (5th Cir. 1979).

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